"Our system of global governance without global government can only work if there is an acceptance of a multilateralism. Unfortunately, the past year has seen an increase in unilateralism by the government of the world's richest and most powerful country. If globalization is to work, this too much change."[1]

INTRODUCTION

0.1 Overview of problem

At the heart of the debate over the International Criminal Court lies the amorphous notion of globalization. Calling into question the normative assumptions driving international humanitarian efforts, the evolving conception of the sovereign state, strategic interactions among countries, and the ability of the international community to work multilaterally toward a common vision of justice, the debate spans a broad range of issue concerning global governance. By engaging questions of international law with the problem of state sovereignty, the debate includes both legal and political dimensions. The United States' rocky relationship with the International Criminal Court is a particularly revealing entry point. Is the United States' opposition simply an expression of unilateralist arrogance and refusal to concede to an increasingly important system of global governance that much of the international community accepts? In fact, American non-support runs much deeper. Both a strategic approach to American foreign policy objectives and an examination of the ideological incompatibilities between the United States' Constitution and participation in the Court reveal the centrality of sovereignty in the debate. In a strategic sense, it is not in the interest of the United States to concede judicial autonomy to the International Criminal Court. In an ideological sense, the tensions are seemingly irresolvable. Both point to *why* the United States has become a global hegemonic power and *how* this hegemony[2] is realized. Further, both reveal just how deeply the

[1] Joseph Stiglitz, *Globalization and its Discontents*, (New York: W.W. Norton & Company, 2003), 258.
[2] I draw on the international law tradition and use 'hegemon' to mean the dominant actor whose preferences define and shape the interactions that occur within the international economic or political

International Criminal Court renegotiates state sovereignty by shifting the standards of international human rights law.

By contextualizing the International Criminal Court in the network of international organizations and legal institutions that exist today, one can better understand the theoretical challenge it poses to state sovereignty. Because international law evolves with the emergence of new precedents, the International Criminal Court has the capacity to create lasting changes in the way the often-competing claims of human rights and national autonomy are negotiated. The primary objective of this thesis is to evaluate the International Criminal Court's capacity to set a new precedent in the balance between international human rights law and state sovereignty by examining the United States' case for non-participation. The secondary objective is to explore the possibility of reconciliation between the United States' concerns about sovereignty and the operation of an effective Court.

This thesis proceeds in three stages. First, it explores the position the International Criminal Court occupies in relation to established international human rights law. Second, it evaluates the argument against American participation in the Court by considering the alleged dissonance with constitutional democracy and foreign policy objectives. Third, it places the debate in the context of larger theoretical questions concerning sovereignty. Does the Court create an upheaval in the global order of sovereign nations *in general*? Or, does the claim of a universal threat to sovereignty thinly veil the United States' ultimately particular concerns about the maintenance of hegemony within a changing global order? The thesis ends by exploring potential alternatives for reconciling the ideological concerns underpinning United States foreign policy with the changing demands of the international political

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system. Notice that this is different than Antonio Gramsci's notion of hegemony which considers the ideological systems that create the conditions for their own ideological reproduction.

environment, while questioning the efficacy of international criminal adjudication in achieving human rights goals.

0.2 Scope of project and literature

This thesis develops both the legal and political dimensions of the debate over the International Criminal Court. By doing so, it attempts to create continuity between two bodies of literature. The inspiration to put into dialogue law and politics came to me when, as a student of political theory, I attended my first class on international human rights law. I could not help but notice the reverence with which legal scholars and students approach the law. From a legal perspective, studying the International Criminal Court involves navigating a network of precedents and procedures while constructing one's own interpretation. Political theorists might dismiss these formal procedures as an opaque body of technicalities. Instead of asking *how* one might operate within the bounds of the legal, political theorists and scientists question *why* law and jurisprudence exists as it does. The following discussion of the International Criminal Court draws on both approaches in accordance with my belief that neither is sufficient in understanding the impact a single international organization can have on the global order. My hope is that a dialogue between legal and political studies may help to deconstruct the sacredness of law while demonstrating why legal proceduralism cannot be dismissed as politically meaningless. By dissecting the existing body of law and considering its relation to political power and theories of government, this thesis attempts to create a constructive dialogue between two disciplines.

However, there are limits to this project's treatment of legal and political problems. In focusing on the legal debate over the International Criminal Court, this thesis sets aside two critical areas of the political discussion. First, the problem of

hegemony in international politics, is only examined briefly in Chapter 3. While there exists an extensive literature developing theories of hegemony, particularly with respect to the United States' role in international organizations, this thesis deals primarily with the intersection of international law and state sovereignty. The second issue acknowledged but not explored in the body of the thesis is Carl Schmitt's approach to sovereignty. Though Schmitt's theories of law and state are relevant to the International Criminal Court, I set them aside in favor of a competing framework of liberalism (in its various manifestations). The political theorists analyzed in Chapter 4's historical account of sovereignty are drawn from the liberal tradition. The motivation for choosing liberalism over other political traditions is twofold. First, it resonates with the United States' position on the International Criminal Court. Second, contemporary international human rights law draws heavily on liberal theory. This thesis therefore leaves open the possibility of future evaluations of the International Criminal Court that seriously engage with theories of hegemony or Schmitt's conception of sovereignty.

There is a rich body of literature that examines the legal dimensions of the International Criminal Court and the broad question of sovereignty in international jurisprudence. However, the relevant political science literature is limited. The political scientists and theorists used in this thesis were chosen for their conduciveness to dialogue with legal studies. While they do not directly engage with one another's writings, they represent three important dimensions of our exploration of the International Criminal Court: the ethical/philosophical, the international relations and the American-constitutional. In order to develop a linkage between these political scientists' and theorists' analyses and the international legal critique, several concepts problematized in political theory literature had to be set aside. First, international law literature conflates the concepts of *legality* and *legitimacy* by operating within a legal

universe in which the lawfulness of an action is the complete measure of its legitimacy. The normative doctrines motivating human rights law touch on the dilemma between legality and legitimacy without completely severing the two concepts, as political scientists do. Secondly, in accordance with the dominant doctrine of international human rights law that is reified through the network of contemporary international organizations, this thesis adopts a Western-centric approach. The terms 'international community'[3] and 'human rights'[4] in particular, take on a Western-centric meaning. The manner in which a politically hegemonic state actively transforms the meaning of such terms and garners international consent is a critical question that is beyond the scope of this thesis. The case presented here is only one of many in which the United States' relationship to an international organization might be analyzed through the lens of political hegemony. For the purposes of this project, the aforementioned limitations were necessary. With these caveats in mind we now consider the International Criminal Court from a jointly legal–political perspective.

[3] 'International community' is treated, in international law, as that body of capitalist liberal democracies that engage as discrete, independent nation-states in international affairs. See definition of *statehood* in section 2.3.5.

[4] Human rights encompass, in the international legal tradition, both individual and collective/community rights. The tension between the two persists in several key instruments of human rights law including the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights. The former emphasizes the body of collective rights while the latter emphasizes individual ones; the United States is party to the second treaty only.

CHAPTER 1: THE INTERNATIONAL CRIMINAL COURT – OVERVIEW

1.1 Origins and purpose

The International Criminal Court (ICC) is the first permanent, treaty-based, international tribunal established to promote the rule of law and ensure that the most dramatic and systematic crimes do not go unpunished. It offers a formal enforcement mechanism for international human rights law. Established as an entity independent from the United Nations (UN), it will be able to act regarding crimes within its jurisdiction without a special mandate from the UN Security Council. The crimes it addresses are limited to genocide, war crimes and crimes against humanity as defined explicitly in Articles 6 through 9 of its founding document, the Rome Statute. The Court is not formally part of the UN but works in cooperation with it in the interest of the common goals of establishing international peace, justice and security. Distinct from the International Court of Justice which adjudicates conflict between nations or international organizations, the ICC has the authority to bring *individuals* to trial without needing permission from any individual or government.[5]

Although the ICC was officially established by the Rome Statute of the International Criminal Court on July 17th 1998, the idea of the court emerged from the aftermath of the Second World War. The UN General Assembly first recognized the need for a permanent court in 1948, following the Nuremberg and Tokyo tribunals that dealt with the atrocities of the war. Locating criminal accountability in individual persons who supervised systematic and often-state-sanctioned violations of human rights was a central component of the Allies' post-war agenda. More recently, the UN Security Council organized two case-specific criminal tribunals to adjudicate the massacres in the former Yugoslavia and the genocide in Rwanda. These two tribunals,

[5] Linda Fasulo, *An Insider's Guide to the UN,* (New Haven: Yale University Press 2004), 101.

in conjunction with a post-cold war political climate, precipitated the first drafting of the ICC Statute in 1994 by the International Law Commission. Thus, the ICC was created when a change in international political dynamics and the successful examples of Yugoslavia and Rwanda tribunals brought a longstanding need and dormant idea to reality. The United State's (US) support for UN-organized tribunals during this period was substantial, especially when quantified in terms of donations – for example, in 2000 its contributions amounted to $53 million[6] out of $202.5 million[7].

1.2 Mechanics and functions

The ICC is organized around the voluntary participation and membership of signatory states. The Statute was opened for ratification from July 1998 to December 2000, and did not take effect until July 1st, 2002[8]. 139 nation-states, including the US, originally signed the document. As of November 2005, 100 countries have ratified the treaty securing its binding force through incorporation into their domestic legislation. Signing and ratifying expands the Court's jurisdiction to the signatory country under the explicitly limited conditions articulated in the Rome Statute. According the UN, "the entire premise of the Court is based on the principle of complementarity, which means that the Court can only exercise its jurisdiction when a national court is unable or unwilling to genuinely do so itself."[9] That is, the ICC is designed to take effect only when a signatory state's court system collapses due to tumultuous events such as civil war. Similarly, if a government condones or participates in the sort of atrocities articulated in the Statute, it may be impossible for that state's officials to prosecute the

[6] Ibid., 103.
[7] This is calculated from the $108.48 million budgeted for the Yugoslavia tribunal and $93.97 million budgeted for the Rwanda tribunal. 55th General Assembly , 89th meeting 23 December 2000. Available www.un.org/News/Press/docs/2000/ga9850.doc.htm
[8] Rome Statute, Part 13, Article 125.
[9] "About the Court," The International Criminal Court. Accessed 10 March 2005. Available http://www.icc-cpi.int/home.html&l=en

perpetrators. In such cases, either a state party or the UN Security Council may refer a "situation" to the ICC's Prosecutor, or the Prosecutor may initiate an investigation on his/her own authority. While the ICC does not replace the authority of national courts, it is institutionally entitled to step in and exercise its jurisdiction.

While the ICC is structured around signatory states' participation and UN cooperation, it has its own internal organization. Overseen by the Assembly of State Parties[10], it is composed of four organs: the Presidency, the Chambers (consisting of Appeals, Trial and Pre-trial divisions), the Office of the Prosecutor, and the Registry.[11] These organs themselves are comprised of representatives of the member states with judges "chosen from among persons of high moral character, impartiality and integrity", according to Article 36 on the composition and administration of the Court. Importantly, great emphasis is placed upon selecting judges and officials who can uphold the values of the ICC and pursue the objective of ending international impunity to violators of human rights. While the Rome Statute is replete with detailed provisions for what act constitutes a human rights abuse within its jurisdiction, the application of the law ultimately hinges upon evaluations made by the Court's judges.

1.3 Activating the Court's Jurisdiction

The International Criminal Court's jurisdiction can be divided into substantive and territorial criteria. Four categories of serious crimes that generally concern the international community as a whole compose its substantive jurisdiction: "the crime of genocide, crimes against humanity, war crimes and the crime of aggression" (as

[10] The Assembly of State Parties is the group of states that have signed and ratified the Rome Treaty. Each state is represented by a single vote when making decisions about the operation of the Court or the election of officials. The Assembly of State Parties is responsible for selecting the Court's judges.
[11] "The Rome Statute", The International Criminal Court. Accessed 10 March 2005. Available http://www.icc-cpi.int/home.html, Preamble.

described in Articles 5 through 9 of the Statute). Each crime is defined in a manner consistent with other fundamental international instruments including the Universal Declaration of Human Rights and the Genocide Convention. The definitions are detailed and specific, prohibiting acts ranging from "the crime of apartheid…inhumane acts…committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other and committed with the intention of maintaining that regime" to "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided fro under the Geneva Conventions"(Articles 7.2.2(i) and 8.2.b(xxv), respectively)[12]. Additionally, the substantive criteria carry a temporal limitation – jurisdiction ratione temporis – in that the Court has jurisdiction only with respect to crimes committed after the Statute entered into force. The territorial criteria are somewhat more complicated and are linked to the provisions under which a body may refer a case to the Court.

The referral procedure can take two tracks. On the first track, the United Nations Security Council may refer a situation to the Court, requesting the Prosecutor undertake an investigation of the crimes. Such situations can involve crimes committed in any territory – in these cases the Statute's scope is unbounded by geography. Referrals from the Security Council would be founded on the UN's concern for international peace and security as outlined in Article 39 of the UN Charter. "Article 25 of the UN Charter requires all member states to accept and execute the decision of the Security Council. Article 49 of the UN Charter also requires its members to provide 'assistance in carrying out the measures decided upon

[12] Rome Statute

by the Security Council"[13]. Therefore, in certain circumstances, the jurisdiction of the ICC could be applied to non-state party nationals in a way such that any attempt to limit this particular power of the Court would be inconsistent with the UN Charter.

On the second track, a matter may be referred to the Court by a state party, or an investigation may be initiated by the Prosecutor. Either way, the Court's jurisdiction is more restrictive than it is with respect to the first track. The Prosecutor may initiate investigations of alleged crimes committed in the territory of any member state. A state party may refer a situation in which the crime occurred within its own territory *or* when that state party's own national committed the crime in the territory of another state (Article 12.2). Therefore, *nationals* of non- state parties are, in limited situations, subject to the Court's jurisdiction. It is this dimension of the Court's jurisdiction the United States has consistently condemned arguing that "possible investigation and prosecution of its nationals without its consent is tantamount to the imposition of treaty obligations on a third state—something expressly disallowed by the Vienna Convention on the Law of Treaties."[14] If a state party wishes to refer a case involving non-state party nationals or territories, beyond the provisions of Article 12.2, the explicit consent of the non-state party is required. Article 12.3 explains that the consenting state must, 'by declaration lodged with the Registrar, accept the exercise of the jurisdiction by the Court with respect to the crime in question'. While explicit consent is a component of the conditions of the Court's jurisdiction over non-state party nationals, this consent clause only applies to the situations in which a state party seeks to exercise universal jurisdiction through the ICC's mechanisms (as will be clarified in ensuing discussion). Ultimately, the substantive and territorial

[13] Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome,* (Ardsley, New York: Transnational Publishers, 2003), 241.
[14] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law,* (Oxford, Oxford University Press: 2003), p164.

jurisdiction criteria are key focal points in the struggle over the Court's infringement on sovereign rights.

1.4 Relationship with the United States

Throughout its founding negotiations, drafting, approval and implementation, the ICC's relationship with the US has been dynamic. The US played an instrumental role during the Court's formative years, acting as the motivating force behind the Nuremburg trials and as a strong supporter of the Yugoslav and Rwandan tribunals in the 1990's.[15] During negotiations over the Court, US negotiators from the Clinton and Bush administrations pushed relentlessly for clauses and components of the Rome Statute that would decrease the Court's jurisdiction and expand the avenues through which the American government could oversee or veto its actions. During the final weeks of the Rome Statute's signatory phase, the Clinton Administration signed the Statute indicating its intention to act multilaterally in regard to the serious crimes covered by the ICC . However, ratification by the US Congress was stalled by debate over the strategic rationale for ICC participation/nonparticipation and the whether the Statute dangerously conflicted with the Constitution. President Clinton publicly announced that the US signatory act was a gesture of affirmation for the ICC's vision of human rights; however, significant changes to the existing Statute and/or a lengthy observation period to confirm the Court's efficacy were necessary before the US could ratify. Clinton explained,

> "In signing, however, we are not abandoning our concerns about significant flaws in the treaty….The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these

[15] The US support for such an objective – formally locating criminal accountability for international crimes - can be traced back to the "Guilt Clause" of the Treaty of Versailles, 1919.

> concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."[16]

Clinton's successor, George W. Bush, did more than adopt Clinton's misgivings. As president, he transformed the US's tentative and reserved affirmation of the ICC into formal opposition. Objecting to the institution's infringement on the sovereign powers of the state, in May 2002 the Bush administration "removed the US signature from the treaty, to the delight of congressional conservatives."[17] Withdrawing from the Court is permitted under Article 127 of the Rome Statute.

The focus on sovereignty and the US resistance to multilateralism has shifted the discourse away from the Court's original objective – to create an effective mechanism to deter and punish the most atrocious violations of human rights. Proponents of the ICC argue this shift has been destructive to both US diplomacy in the eyes of the world and to the Court's original mission. "The US action sets a precedent for other nations who have signed but not ratified treaties to renounce any inclination to abide by the provisions of such treaties or refrain from undermining their provisions when it suits their interests."[18] Indeed, three months after the US withdrew its signature, Israel followed suit voicing specific concerns about how the ICC might apply international law to the Palestinian conflict[19]. With such a long incubation, careful construction, widespread approval and crucial mission, the proponents of the International Criminal Court argue that much is lost if the sovereignty debate overshadows the strengths of the institution. A strong international judicial system

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[16] Associated Press, *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6 (reprinting the text of President Clinton's statement authorizing U.S. signature of the ICC Treaty).
[17] Fasulo, 103.
[18] Daniel Smith, "Dropping Out - American Style," *CDI Weekly Defense Monitor* Vol.6, Iss.14, (2002).
[19] Thus far, only the US and Israel have withdrawn signatures in May 2002, and August 2002, respectively. However, 41 states have signed and not ratified the Statute indicating superficial and marginal as opposed to definitive and committed support.

may provide the necessary complement to the UN by enhancing and offering an enforcement mechanism for the joint objective of promoting international peace.

Despite these arguments, the debate over sovereignty is more than a mere distraction. Examined through the lens of substantive and strategic foreign policy interests as well as through that of ideological underpinnings of the US Constitution, it reveals much more. Sovereignty is at the center of the debate over a changing international order and the US efforts to maintain a hegemonic role in that order. It further reveals what is at stake, if the US is to move towards reconciliation of international law and its founding constitutional ideals. Therefore, insofar as the ICC incited and continues to enflame contentious discourse over the nature of sovereignty and the US position in the world order, it plays a hugely important role in elucidating just which forces are at work in this struggle for international peace.

CHAPTER 2: INTERNATIONAL LAW OF HUMAN RIGHTS

2.0 International Law of Human Rights – where the ICC fits in.

The International Criminal Court represents an incremental but still potentially significant contribution to a broader system of international human rights law. In order to evaluate the United States' relations to the ICC, we must first contextualize the organization within the international legal tradition. Like the other institutions that precede it, the Court plays both a reflective role, observing portions of established traditions in international law, and a dynamic role by altering those accepted standards. Specifically, it renegotiates the relationship between universal human rights doctrine and the legal doctrine which governs nations' interactions. Like any international institution[20], the ICC has the potential to set new precedents through its actions. But in order to do so, it must derive broad acceptance in the international community through compliance with the established standards of international law. A

[20] We will adopt the following definitions: an *international organization* is a formal network of states or non-state parties established through treaty with explicitly articulated functions and procedures to which member states or parties comply, granting it legal recognition. An *international institution* is an informal, custom or norm-based network of conducts, values or representative activities with which parties identify or subscribe. As Evans puts it, "Institutions can be thought of as expressions of prized social values found in shared moral convictions about some aspect of the 'good life'. They assign actors recognizable roles that describe rules or conventions which govern relations between role occupants…Organizations, on the other hand, are physical entities possessing offices, personnel, equipment and budgets. They are bureaucratic entities designed to achieve specific, well, defined goals or objective needs…. It follows that if international regimes are understood as institutions…then they cannot be found in the practices and bureaucratic arrangements of international organizations alone" Tony Evans, *US Hegemony and the Project of Universal Human Rights,* (New York: Saint Martin's Press, 1996), 33. The ICC is a regime that is at once an international organization and a legal institution – an organization in its bureaucratic physicality; an institution in its capacity to represent and shape legal norms through its basis in moral conviction.
The definitions adopted here differ from those articulated by Robert Keohane and accepted by international relations studies where the definitions of "institution" and "regime" are approximately exchanged with one another, compared to those described above (see: Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory,* (Boulder: Westview Press, 1989), 4). Setting the particular terminology aside both agree that the union of organizations performing bureaucratic functions and informal networks of rules that constrain activity or shape expectations make up the international institutions/regimes that impose governance in an otherwise anarchic global environment.

deeper exploration of international law will reveal why this is so.[21] The purpose of the ensuing discussion is twofold. First, it will establish a working definition of and vocabulary for dissecting international human rights law. Second, it will reveal, in a legal respect, the extent to which the ICC *challenges* the status quo and likewise the extent to which it respects a well-ingrained set of conducts and behaviors that guide the global political sphere.

2.1. Customary and Treaty-based International Law

Less rigid than its domestic counterpart, international law emerges from a deep-rooted tradition of common behaviors among nation-states. Compared to domestic law, it is inherently loose and decentralized. While nation-states employ coercive mechanisms to enforce domestic laws, modern international law finds its authority solely through the acquiescence and support of constituent states. International law can be divided into two types: *customary* international law (CIL) and treaty-based, or *conventional*[22] international law. The former, CIL, is the set of norms, behaviors or conducts widely subscribed to and consistently supported by the international community of states. It is founded upon the convergence of consistent state practice and the presence of *opinio juris*, the conviction of those states that the practice is obligatory. Thus customary international law is distinguished from acts of consensus (comity) by the perception that the act is not only habitual and standard but necessary; the state is compelled by obligation to comply. "A practice initially

[21] Unlike domestic politics in which the reformist v. revolutionist debate carries substantial weight, the system of international law and governance originates with consensus among parties.
[22] In international legal studies, the term *convention* is used to capture formal and explicit agreements. This is quite the opposite of the use of the term in social and political theory where the *convention* refers to informal or implicit rules and understandings or norms. In international legal terminology *custom* is used to capture this latter concept.

followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it"[23].

The related concept of a peremptory norm or *jus cogens* is critical for customary international law. These rules are widely recognized by the international community as prevailing over and potentially invalidating any other agreements of international law that contradict them. The sorts of norms categorized as *jus cogens* include the prohibition of genocide, war crimes, torture, aggressive war, etc. – the main crimes covered under the Rome Statute. Evidence that suggests the emergence of a rule of *jus cogens* is approximately the same as that indicating the creation of new customary international law. Both the peremptory norm of *jus cogens* and norm or custom-based international law point to the importance of obligation (or perception of) in checking the actions of individual nations. Additionally, and perhaps more importantly, both rely upon consensus-formation. Broad acceptance of a belief *and* a sense of obligation endow a law with legitimacy.

The second source of international law mentioned above is treaty-based law – agreements which, once signed by state parties, possess a binding force. Covenants, conventions, and protocols are all forms of international treaty law and are equally binding given consent to their terms. Some such agreements – particularly charters of international organizations such as the UN Charter – confer power on the organization created to "impose binding obligations on their members by resolution, usually by qualified majorities. Such obligations derive their authority from the international agreement constituting the organization, and the resolutions so adopted by the organization can be seen as 'secondary sources' of international law for its members."[24] Thus they specifically articulate commitment to some conduct that the

[23] Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher, and David W. Leebron, eds., *Human Rights*, (New York: Foundation Press, 1999), 300.
[24] Henkin, et. al., 301.

member nations are required to follow. Traditionally possessing a limited jurisdiction that reaches into only signatory parties, treaty-law is not automatically universal in its authority in the same way customary international law is. While custom is assumed to automatically apply to a nation (unless that nation has a well-documented history of noncompliance and public denunciation of that custom), treaty law requires positive subscription through signature and ratification to take effect. And, the substantive provisions are enforceable to the extent and by the means that the treaty explicitly indicates. This differs from customary law which is enforceable only through informal channels *or* through limited and inconsistently applied formal channels (for example, the International Court of Justice). Thus the treaties that establish international organizations create enforcement mechanisms for themselves while other treaties (such as the Torture Convention) look to pre-established organizations for clout.

Despite the evident distinctions there is a subtly reciprocity between these two sources of international law. Quite evidently, treaties reflect the prevailing customs in international law by codifying them and articulating them through the formality of written agreements. International law scholar Louis Henkins explains, "until recently, international law was essentially customary law: agreements made particular arrangement between particular parties, but were not ordinarily used for general law-making for states. In our day, treaties have become the principle vehicle for making law for the international system; more and more of established customary law is being codified by general agreements."[25] The norms that have driven customary practice throughout history are given additional binding force when nations sign treaty documents and establish enacting legislation in their own domestic legal systems. This ratification process approves and incorporates international law into the internal

[25] Henkin, et. al., 297.

workings of the sovereign state. Ratification serves as an internal enforcement mechanism, as a violation of the treaty renders the state party in violation of its *own* legislation. Thus treaties reinforce the *opinio juris* of customary law by codifying the State's own sense of legal obligation.

Conversely, and more interestingly, treaty-based international law can give rise to customary law. This is primarily the case with respect to human rights. "Unlike international law generally, the international law of human rights did not begin with a deeply-rooted basis in customary law; it has been established primarily by treaty. But human rights treaties—and the Universal Declaration [of Human Rights]—have also contributed to the growth and acceptance of a core of important customary human rights norms."[26] This latter relationship, where the covenants signed by a discrete set of nations articulating their subscription to some essential concepts/aspirations for international governance precipitate a change in the customs broadly accepted by the larger international community, is harder to identify. Perhaps the treaties are simply correlating established principles of *jus cogens* with actions or conduct in the international legal sphere? As international organizations and institutions promote treaty-based human rights agendas, it becomes clear that the state parties' beliefs are spreading more effectively to nations that historically have opposed such beliefs than they ever could through custom and norms alone[27].

The reciprocal nature of conventional and customary law makes international law in general all the more dependent upon the evolving ideas and behaviors of the constituent international community. The two categories of international law are, in this respect, co-original. It makes enforcement more difficult, as deviance from the

[26] Henkin, et. al., 295.
[27] A potentially more contentious formulation of this observation would go: as Western nations codify the principles of human rights they see as universal and primary, and their institutions dominate the international political sphere, these ideas become ingrained in the national conscience of non-Westerners.

code of conduct a nation has consented to may comprise violation of international law on one hand, but may, on the other, set a new precedent. Political scientist Tony Evans looks at the question of enforcement, noting that while domestic law is backed by coercive authority of a disinterested party, international law requires self- and co-enforcement. "Domestic law is coercive in the sense that its operation relies upon enforcement procedures that ensure compliance despite the immediate social and political environment in which it is applied. International law, on the other hand, relies upon reciprocity and can be identified only though constantly checking its validity against the actual practices and behaviors of states….sanctions for non-compliance, such as they exist, are not administered by a disinterested third party, but by those whose political and social interest may have been violated."[28] Thus there is a parallel between the reciprocity of international law formation (treaty and custom giving rise to one another) and the reciprocity of enforcement – the international community demanding compliance of itself and its deviant members.

International law derives its power through participating states' acceptance of obligations and adherence to rules. "Modern international law is rooted in acceptance by states which constitute the system…Particular agreements create binding obligations for the particular parties but general law depends on general acceptance…There has been a growing practice in international organizations at law-making conferences of seeking agreement by 'consensus' (rather than by vote), a practice that also discourages dissent and puts pressure on dissidents to acquiesce."[29] With general acceptance at the root of legitimacy-formation, the entire body of international legal doctrine is particularly dependent upon the political forces at play. What is the motive for state cooperation and acceptance of the international law as

[28] Tony Evans, *US Hegemony and the Project of Universal Human Rights*, (New York: St. Martin's Press, Inc., 1996), p 26.
[29] Henkin, et. al., 297.

regulation on sovereign autonomy? How do the procedures adopted transform the rational calculations state parties perform when choosing whether to participate in an institution or organization? We will keep these fundamental questions of international relations in mind throughout our examination of the International Criminal Court. In particular, these questions will guide the later discussion of hegemony as it relates to US involvement in this international legal institution.

2.2 Violation and Evolution of International Law

As is evident, international law relies heavily upon broad consensus and acceptance by the international community. Dramatic deviations from the status quo are easily construed as a violation of international customary law. Treaties that overtly contradict the customs in place generally do take precedence over customary international law. However, they are trumped by *jus cogens*, itself a consensus-based source of international law. One particularly illustrative example is the US-led NATO intervention on the behalf of human rights in Kosovo.[30] The countries conducting the intervention intentionally bypassed the well-established and treaty-sanctioned procedure set forth in the United Nations' Charter Article 2(7) which restricts legitimate use of force in an intervention in a sovereign state to cases where a Security Council mandate approves and orchestrates the action. NATO saw this bypass of procedure and consequently violation of treaty as necessary because two key Security Council members – China and Russia – would use their veto power to prevent intervention. While questions of political hegemony and sovereignty are also at stake here, this example illustrates a situation where broad consensus by the international community superceded treaty-based provisions of the UN Charter in the interest of

[30] Rosemary Foot, S.Neil MacFarlane, and Michael Mastanduno, eds., *US Hegemony and International Organizations: The United States and Multilateral Institutions,* (New York: Oxford University Press, 2003), 16; Henkin, et. al., 733.

preventing the dramatic international crime of genocide. The legitimacy of the act (in the context of international law) depends on whether two conditions are jointly satisfied: first, if the act is seen to uphold a peremptory norm (*jus cogens* – forbidding genocide) that the treaty-based institutions were unable to respond to in a timely manner; and second, if broad approval and perception of obligation to act constitute a new precedent in customary international law.

If precedent-setting, the new custom would go something like this: legitimate use of force to intervene in the internal affairs of sovereign states is reserved for the UN (via the procedures it observes) at all times except when dramatic violations of human rights compel immediate action that the UN is unable to provide. How would the required time-frame be determined? What caliber intervention would satisfy the 'ability' criteria? A hazy proposition at best, this case demonstrates precisely how ambiguous consensus- and acceptance-based law can become. One conclusion and one speculation follow. First, it is unclear when state action crosses the fine line from violation of international law (as a rogue state) to initiating a legitimate transformation of international law[31]. Second, incremental expansion of some category of international law may be the best way to assure one remains within the bounds of legality. The International Criminal Court, as a treaty-based but notably different institution also occupies an ambiguous position. Demanding broad support from and validation by the international community, it also sets a precedent for expanded infringement on state sovereignty which is problematic for the international legal and political sphere in which it acts.

[31] This sort of ambiguity is what permits the continual evolution of international law.

2.3 Legal Definitions Important to the ICC

Human rights law, in its international context, tends to declare for itself broader and more inclusive jurisdiction than other forms of international law. Consistent with this trend, the International Criminal Court has several ambitious provisions written into its statute, one of which effectively extends its jurisdiction to non-party states. Three concepts require further elaboration, in order to place the ICC's provisions in context of what is common in international human rights law. They include: *complementarity* (through the exhaustion of local remedies), *universal jurisdiction* and *self-execution (or implementation)*. Each serves to formally strengthen the Court, and similarly create provisions to which the United States has objected. On the other hand, each concept is not new to international human rights law in the egregious way the Court's opponents would like to think. That the provisions are not novel, nor representative of a drastically new incursion on states authority, suggests that the ICC is creating the very incremental changes in international law that slowly nudge the boundary between illegitimate action and legitimate legal institutions.

2.3.1 Complementarity

Complementarity, in theory, refers to the ability of an international organization or law to function cooperatively with its domestic counterpart. By prioritizing domestic jurisdiction, an international organization can step in and intervene only when the domestic system has clearly failed and those local remedies are completely exhausted. That is, a plaintiff must sincerely use all the legal resources available to him/her in his own state before an international court is willing to even hear his/her case. He or she must demonstrate that the rulings arrived at on the domestic level fail to deliver justice or fair resolution to the case in question. Or,

he/she must demonstrate that domestic courts are categorically ineffective at adjudicating this type of case – for example with respect to investigating and prosecuting state-sponsored 'disappearances' of political dissidents. The practice of complementarity is widely employed throughout international law, embraced by the regional system (European Court, American Court, African Court) as well as the international system (International Court of Justice). More than an idealistic provision humoring the sovereign states that subject themselves to regional or international courts, complementarity also serves a pragmatic role. It ensures international procedures and mechanisms are not overwhelmed by a number of cases easily resolved by the states in which they originate. The problem arises in defining "failure" on the domestic level. While neglecting to acknowledge, investigate or prosecute massive violations of human rights is an unambiguous failure of a domestic legal system, sham trials and reduced sentences for convicted crimes present more difficult cases. The complementarity provision is therefore both highly necessary and highly problematic in the operation of any international court.

The ICC's Rome Statute articulates specific criteria for activating its complementary jurisdiction. The criteria include '*unwillingness* or *inability* of the State to *genuinely* prosecute," "*unjustified* delays" and cases where "the proceedings were not or are not being conducted *independently* or *impartially*, and…in a manner which is inconsistent with an *intent* to bring the person concerned to justice" (Article 17, Rome Statute, emphasis added). In the provisions for complementary jurisdiction, the language of the Rome Statute creates much room for interpretation on a case-by-case basis. Consequently, in Articles 18 and 19 the Statute details a system by which the admissibility of the cases in question are determined and subsequently challenged. Contrasted to the already well-accepted regional court systems, the ICC's criteria for complementarity are more explicit. For example, the European Court's founding

document only provides for complementarity in so far as "domestic remedies have been exhausted, according to the *generally recognized rules of international law*" (Article 26 European Human Rights Convention, emphasis added). While the European system has no explicit provisions detailing what these generally recognized rules are, the Rome Statute articulates the procedures by which jurisdiction or admissibility would be established. Thus, the International Criminal Court follows a preexisting international legal standard in its adoption of the complementarity principle. But instead of vaguely referencing the status quo, it makes clear the (albeit subjective) criteria comprising these rules. This dimension of the Statute, in conjunction with its explicit provisions for jurisdictional appeals, represents a significant modification to existing standards of international law. In this respect, the International Criminal Court, recognizing the inherent ambiguities of complementarity, sets a new precedent by narrowing and strengthening its jurisdiction.

2.3.2 Universal Jurisdiction

The International Criminal Court employs the idea of universal jurisdiction in defining the scope and bounds of its activity. Universal jurisdiction derives from a deeply rooted custom in international law that allows the crimes that properly fall under the category of *jus cogens* – for example, the most atrocious violations of human rights – to be the proper business of any nation. Crimes of this nature have an impact that so widely and deeply offends the international community that they constitute a threat to international peace[32]. As such, they transcend national boundaries and the formal provisions of treaties to achieve a universal character. The idea is that these practical limitations should not pose a legal barrier that allows

[32] These are known as the 'core crimes' of international criminal law that were first formally recognized after the Second World War. Bruce Broomhall, *International Justice and the International Criminal Court,* (New York: Oxford University Press, 2003), 112.

impunity for those who commit the most heinous crimes to persist. "With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad. Impunity may still be the norm in many domestic courts but international justice is an increasingly viable option".[33] Through universal jurisdiction, one nation may prosecute a foreign national for crimes committed abroad, if those crimes meet the substantive criteria. For such prosecution to occur, the nation taking action must explicitly provide its domestic courts with the authority to hear cases of a universal nature. The meaning of universal jurisdiction is captured in a 1961 statement concerning Israel's prosecution of Nazi official Adolf Eichmann:

> "These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself…Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal."[34]

Thus the customary international law of universal jurisdiction enables nations to take action on crimes that would otherwise go un-adjudicated or unfairly tried. In another historic instance, Spain exercised universal jurisdiction in trying Chile's Pinochet; Belgium frequently attempts to make use of it as well.

Adapting a principle that historically has only been captured by custom and exercised by discrete national entities or temporary alliances (ICTY, ICTR), the International Criminal Court applies universal jurisdiction in a new way. First, the Rome Statute incorporates into a *treaty* this customary law. Within the limitations that

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[33] Kenneth Roth, "The Case for Universal Jurisdiction," in *The International Criminal Court: Global Politics and the Quest for Justice,* eds.,William Driscoll, Joseph Zompetti and Suzette Zompetti, (New York: International Debate Education Association, 2004), 104.
[34] Attorney General of Israel v. Eichmann, reprinted in 36 ILR 18, 26 (Israel Dist. Ct.—Jerusalem 1961). Henkin, et. al., 658.

we will address in the ensuing discussion, the ICC may deal with crimes committed by nationals of and in territories of states that are *not* signatory parties. The transcendence of the traditional division between customary and treaty-based international law is a significant and novel characteristic of the Court. It at once codifies custom into treaty and yet requires the broad, inclusive jurisdiction characteristic of custom that is applied without regard to explicit state consent.

The position the ICC occupies at the interface between treaty-based and customary law, with respect to universal jurisdiction, was highly troubling to the United States throughout the Rome negotiations. When the United States proposed an Amendment to Article 12 of the Statute that would exempt the nationals of a non-party state from the jurisdiction of the ICC in cases arising from the official actions of the non-party states, the motion was quickly defeated. The reason for the quick dismissal is clear. Such an amendment would have effectively *reduced* the scope of jurisdiction that states could already exercise under the customary international law of universal jurisdiction. It would have transformed the Statute into a document that increased the possibility of impunity for international crimes by limiting a well-established tradition that has worked to counteract such situations.

Secondly, the Statute links universal jurisdiction to a permanent, pre-established extradition requirement. While national exercise of universal jurisdiction has always required the more difficult-to-procure extradition treaty component, the ICC blends the two into one. That is, states wishing to try non-nationals for crime committed abroad must often create a treaty with the state in which the accused person is residing in order to acquire him/her for trial. The ICC incorporates permanent extradition clauses (with limitations we shall discuss later) which transform the theoretically expansive universal jurisdiction custom into a practical and highly

effective tool for international legal enforcement. The ICC's employment of this concept creates a potentially influential and transformative addition to international law.

2.3.3 Delegation of Universal Jurisdiction

The two ways described above in which the ICC ambitiously applies universal jurisdiction point to a problem of delegation. Proponents of the ICC have argued that if the courts of any state may prosecute the nationals of any other state for certain serious international crimes, on the basis of universal jurisdiction, a group of states may create an international court empowered to do the same. Under this theory, each state, in effect, delegates to the international court its power to exercise universal jurisdiction[35]. Legal scholar Madeline Morris explores the fundamental problems with delegating universal jurisdiction in the context of the ICC.

> "The fundamental problem with reliance on universal jurisdiction as a basis for ICC jurisdiction over non-party nationals turns on the question whether universal jurisdiction may be delegated to an international court…Customary international law evolves as a reflection of the consent or acquiescence of states over time. Because consent of universal jurisdiction exercised by states is not equivalent to consent to delegated universal jurisdiction exercised by an international court, the customary law affirming the universal jurisdiction of states cannot be considered equivalent to customary law affirming the delegability of that jurisdiction to an international court"[36].

Several observations substantiate Morris's argument. First, the crimes covered by the International Criminal Court extend beyond those categorized as *jus cogens* to include other non-core crimes. So appealing to universal jurisdiction to validate the ICC's ability to try the nationals of states who have not signed the ICC's founding treaty would be effectively expanding the 'core-crimes' category without going through the

[35] Morris, Madeline. "High crimes and misconceptions: the ICC and Non-Party States," *Law and Contemporary Problems,* Vol.64, (2001), 28.
[36] Morris, 2001:29.

traditional route whereby *opinion juris* is created. To be consistent with international law, the ICC cannot both claim jurisdiction over those who have not explicitly signed its founding treaty and adjudicate crimes not covered under *jus cogens* (non-core crimes)[37].

Second, universal jurisdiction over core crimes and delegated universal jurisdiction will carry distinctly different political implications for acquiescing states. The former would constitute a disagreement between equals – one nation's court passes a guilty verdict for a criminal whose own nation dismissed him from charges. The latter would affix much more significant political repercussions to any case adjudicated. "The political repercussions of such a court's determining that a state's acts or policies were unlawful would be substantial indeed, and categorically different from the repercussion of the same verdict rendered by a national court."[38] If an international court, operating on the basis of delegated universal jurisdiction, pronounces an official act to constitute a crime, it declares the illegality of that nation's law in such a way that it carries the authority of international consensus (i.e., not a disagreement between equals). In that sense, the ICC could become a site for adjudication between conflicting states like the International Court of Justice, but exercised through the prosecution of individual criminals. Therefore in these two respects, universal jurisdiction and delegated universal jurisdiction can not be viewed as interchangeable and on par with one another – when applied to the ICC[39]. Instead,

[37] The crimes covered by the ICC are discussed in chapter 1. Whether or not they are all 'core crimes' is a source of contention, upon which this argument hinges.
[38] Morris, 2001:30.
[39] In the perfect sense where 'core crimes' are those condemned by the entirety of the international community and that same entire community supports/approves of an international court, the application of *opinion juris* in the two cases is equivalent. As a result, national exercise of universal jurisdiction and ICC exercise of delegated universal jurisdiction would carry precisely the same political meaning. Metaphorically, this is the case of zero-friction delegation. In reality, however, institutionalized consensus carries greater authority than informal consensus and therefore is more likely to invoke significant political penalties such as the delegitimation of a particular regime and 'mobilization of shame'.

the act of delegation attaches greater substantive scope and political repercussion to the practice of universal jurisdiction. As Morris argues above, the customary law affirming universal jurisdiction cannot, in practice be considered equivalent to a customary law affirming its delegation due to discrepancy in state interests. While both may be grounded in the same theoretical framework, the incentives for accepting one or the other are not the same. Morris argues that since an international Court could carry so much more clout, it is not in the strategic interest of states to involve a third party in disputes that they may resolve through diplomacy and bargaining. Thus, the ICC's use of delegated universal jurisdiction represents a fundamentally different, questionable, and ambitious application of principles in international law.

2.3.4 Self-executing Law

A third dimension of international law that shapes the Rome Statute's complex relationship with sovereign states and the deep-rooted international standards it builds upon is that of *self-execution*. The creation, enforcement and implementation of international legal obligations depend upon that law's relationship with the domestic government. In the case of the United States, international law and agreements take effect, are incorporated into the domestic legal structure, and are enforceable under US Courts once implementing legislation is in place. If an international treaty or agreement is self-executing, it carries terms that provide automatically for its implementation without the creation of explicit domestic legislation.

On the other hand, a treaty may be non-self-executing, meaning that a state party's signature is a gesture of approval only and enactment through domestic legal procedures are required to put the agreement into force. For the United States, an international agreement is 'non-self-executing' not only when the treaty itself manifests an intention to require the enactment of implementing legislation but also if

the Senate, in consenting to the treaty, requires such legislation. Additionally, implementing legislation for a particular substantive area of international law may be constitutionally required. "In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing…or should await implementation by legislation or appropriate executive or administrative action".[40] Thus there is a well-established standard by which even the adoption of international law prioritizes – indeed hinges upon – the authority of the member state. For the United States, this process entails cooperation between the executive and legislative branches and consequently leaves room for the blockage of international agreements.

Following the well-established conduct in international law, the Rome Statute of the International Criminal Court is a non-self-executing agreement. Two steps are required to bring the Statute's provisions into effect for a state party – a signature that publicly affirms the state's support of the Court and a ratification, acceptance or formal approval instrument that brings the state's intent into action (Article 125). In order for the Rome Statute to even enter into force, the requisite 60 member states must ratify, not just sign the document. While many international treaties pertaining to human rights are vague about the self-executing or non-self-executing status, the ICC formally articulates the role both phases play in the Court's establishment. In this respect, the ICC takes a standard in international treaty law and applies it to the area of human rights in a noteworthy way. While other core instruments of international human rights law – such as the Universal Declaration of Human Rights[41] – regard state participation as simply a formal acknowledgement of preexisting universal

[40] Henkin, et. al., 771.
[41] For the text of the UDHR see: http://www.un.org/Overview/rights.html

obligations, the institutional nature of the Court warrants more than a signature of support. (The same format the ICC employs is also used in the International Covenant on Civil and Political Rights.) The non-self-executing nature of the Rome Statute reveals its formal compliance with the standard of international law that places supreme value on the sovereignty of states involved precisely, one may argue, because of the powerful potential encapsulated in the document.

2.3.5 Defining Statehood

A final legal definition must be explored – statehood. International law incorporates into its definition of the sovereign state the capacity to engage in international treaties, agreements and/or organizations[42]. The 1933 Montevideo Convention on the Rights and Duties of States considers a state a 'person of international law' when it "possesses (a) a permanent population (b) a defined territory (c) a government and (d) the capacity to enter into relations with other states. This definition is largely considered to be customary international [law] insofar as it defines the attributes or pre-requisites of statehood."[43] The Charter of the United Nations is also premised upon these fundamental characteristics defining statehood – particularly that of territorial integrity. Article 4.1 of the Charter states, "membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." Thus there is a partial reciprocity embedded in the membership criteria for the UN. The ability to engage in international agreements and fulfill the obligations set forth by the UN Charter, for example, hinges upon legal

[42] This is one of several definitions of the sovereign state that will be explored in Chapter 4.
[43] http://www.unodc.org/adhoc/palermo/pdf/tan-paper.pdf Hwee, Tan Ken. "International Law and Technology Collide." Presented at Symposium on Rule of Law in the Global Village, 12-14 Dec 2000, Palermo Italy.

personhood. At the same time international legal personhood – a category limited to state actors and international organizations only – depends upon this capacity to enter into relations with other states through formal economic, political and/or legal means.

This partially circular definition involving the capacity of a state to engage in international relations introduces, already, ambiguity in the legal treatment of sovereignty. A sovereign state is defined, paradoxically, by what may potentially constitute an act that relinquishes sovereignty. According to Nijman, state sovereignty is directly linked to the concept of international legal personality. "In classical international law the concepts were intimately connected: the state person was absolutely sovereign and States were only entities endowed with international legal personality. The concepts…were reconciled (forcefully) with one another…sovereign states consented to being subject to the Law of Nations and thus exercising their sovereign power, chose to be international legal persons"[44] Recognition as members of the international legal community involves the consent to regulations on independent actions. Therefore, in the ensuing discussion of the International Criminal Court, we will explore the extent to which the problems the Court poses for sovereignty originate with a deeper, definitional paradox.

2.4 Conclusions

In these respects, the International Criminal Court embodies the ambiguities that overwhelmingly determine international law, while extending the demands of human rights law though an ambitious institutional mechanism. By folding customary international law standards into codified treaty law and basing its authority upon delegated universal jurisdiction, the Rome Statute renegotiates the balance

[44] Janneke Nijman "Sovereignty and Personality: A Process of Inclusion," in *State Sovereignty and International Governance,* eds., Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth De Vos, and John Dugard, (Oxford: Oxford University Press, 2002), 110.

between human rights ideals and the powers encompassed by the sovereign state. Importantly, it reveals precisely how these two theoretical constructs are not independent, competing claims in the context of international law but ultimately linked. The dependence of sovereignty on legality and human rights law on consensus-building suggests that underpinning the debate over the Court are questions confronting political hegemony. With these issues in mind, we return to the relationship between the United States and the International Criminal Court.

CHAPTER 3: THE UNITED STATES AND THE ICC

3.0 The Argument Against the ICC

The precedent-setting potential of the International Criminal Court is what has earned it its contentious status in the eyes of the United States. Unlike the temporary international tribunals that preceded the Court, the ICC's permanent status and expansive jurisdiction give it the prospective ability to create lasting and potent changes in the international legal sphere. If widely supported and effective enough in its operation, the Court could become the institutional articulation or affirmation of changing global power dynamics. Indeed, that the ICC as such has a capacity and still works fluidly within the established international legal norms explains, in part, why the United States is compelled to seriously consider it. The following chapter explores the United States' objections to the Court. It evaluates the arguments posed and considers their larger implications – especially with respect to US hegemony and the concept of state sovereignty.

3.1 National Interest – Strategic Concerns, Structural Objections

Despite the United States' long history of advocacy for an international system of justice and participation in case-specific war crime tribunals, it has created the most staunch opposition to the establishment of the permanent International Criminal Court. The reasoning for US nonparticipation emerges on two levels. First, it is not in the strategic interest of US officials to participate given the objectives that have historically and continue to drive foreign policy and the particular form the Court had taken. Qualms include the Court's expansive ability to infringe upon the power traditionally reserved for the nation-state and the potential for politicization recommend against relinquishing the degree of sovereignty required by the Rome

Statute. These strategic concerns reflect the underlying objective of self-preservation – the United States is driven by its desire to maintain a position of power in the global arena that is, arguably, hegemonic. Second, the ICC, though superficially in harmony with American humanist ideals, clashes ideologically with founding notions of popular democratic sovereignty and constitutionalism[45]. The ideological dissonance between the US constitution and the ICC ultimately revolves around sovereignty and the transfer of power historically reserved for the nation-state. By opposing the Rome Statute on ideological grounds, the US attempts to maintain international immunity and global dominance. Importantly, both the strategic and ideological components of the case against the ICC reveal the motivations underpinning US foreign policy and the role the US is coming to play internationally.

Throughout the drafting of the Rome Statute and subsequent debates in the US Congress, opponents of the Court have argued that the institution's structure has many dangerous provisions. The Rome Statute possesses several substantive problems that create a potential opening for political abuse. Therefore, of central strategic concern is the risk associated with handing over judicial authority to an international body that has no safeguards against politically-motivated[46] abuses. This concern arises out of

[45] This argument, presented by federal constitutional lawyer Lee Casey during United States Congressional hearings, will be explored in section 3.3.

[46] The term 'politically-motivated' arises throughout the United States Congressional Hearings over the ICC. When used to describe a potential ICC investigation, it meant to capture the circumstances in which power-politics among states are carried out through the institutional instruments of the ICC. In other words, it is the situation in which the institutional authority of the ICC is manipulated to serve as a point of leverage in which one state can force its will upon another for reasons that do not sincerely align with the intended functions of the institution. Less abstractly, if one country wants mobilize shame and draw international public attention to the activity of another state, it could target that latter state's nationals through ICC investigation by exaggerating the severity a crime that might otherwise not fall under ICC jurisdiction.

Additionally, the term 'politically-motivated' supposes that there is some form of pure justice outside of politics that the ICC is intended to serve. For the sake of examining the debate over the US role in the ICC, and engaging with the arguments made on their own terms, I adopt the terminology used, with the caveat that political scientists would problematize those terms in a way that politicians or international legal scholars might not.

several structural aspects of the Statute. The four most compelling concerns voiced by opponents are the lack of clarity in the definition of "serious crimes" covered in the Court's jurisdiction, the independence and lack of accountability of the Prosecutor, weakness and potential ineffectiveness of the UN veto clause and the expansive jurisdiction of the "complementarity" principle. Together, they amount to an indeterminacy which, when paired with the alleged ceding of sovereignty, puts the United States in a weakened position. "The US rejection of the Rome Statute can in part be explained by national security concerns related to the use of force and the potential political costs under international law"[47]. The objections to the structure of the Statute are important insofar as they compromise the US's ability to use force and deepen its susceptibility to other states' interference and judgment.

3.1.1 Defining Crimes of Aggression

The "serious crimes" covered in the Court's jurisdiction include genocide, crimes against humanity, war crimes and the crimes of aggression. Articles 6 through 8 explicitly define the first three in a manner consistent with international law while the "crime of aggression" remains undefined. "Current ICC provisions leave the Crime of Aggression for future definition with no guaranteed linkage to a prior Security Council decision"[48]. Since the identification of aggression is very much relative to the position of the observer, the pending definition and application is vulnerable to political manipulations. The former Secretary for Arms Control and International Security, John Bolton, explains how broadly this provision might be applied, "aggression can, at times be something in the eye of the beholder. For example, Israel justifiably feared in Rome that…its initial use of force in the Six Day

[47] Sterling Johnson, *Peace Without Justice,* (Burlington, Ashgate Publishing Limited: 2003), 43.
[48] Daniel Wright, *Strategic Implications of US Non-support for the International Criminal Court,* (Carlisle Barracks, PA, US Army War College: 1999), 10.

War would be perceived as illegitimate preemptive strikes that almost certainly would have provoked proceedings against top Israeli officials"[49]. Similarly, US officials could be accused for war crimes over controversial uses of force. That the US pushed for a provision giving the UN Security Council (SC) the responsibility to define "crime of aggression" amounts to the indirect assurance that the 'eye of the beholder' is at least one-fifth the US-eye (the five permanent members being the ones possessing veto power, as discussed below).

Further, the United States historically has good reason to resist subjecting itself to potential prosecution on the basis of 'crimes of aggression'. The initiation of military intervention in Iraq (2003) was, by most interpretations, outside the permissible bounds articulated in the UN Charter and could therefore constitute unlawful use of force for the UN member states. An unsympathetic reading of the UN provisions for sanctioned military interventions would interpret US activity in Iraq to entail a 'crime of aggression'. This is because the UN Charter considers the conditions under which preemptive force can be used to intercept an imminent threat (Article 39)[50]. Unlike the use of force in self-defense against a direct attack (Article 51)[51], preemptive force must be approved through a Security Council mandate prior to

[49] John R. Bolton, "The United States and the International Criminal Court," remarks at the Aspen Institute, Berlin, Germany, 16 Sept., 2002.

[50] Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[51] Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

action. Though explicit provisions for preemptive action are not detailed, the Charter in its provisions for humanitarian interventions distinguishes among unilateral, collective and multilateral (SC-sanctioned) use of force. Unilateral is never permitted and can be potentially interpreted to amount to an act of aggression. And, collective force is that which is not SC-approved but possesses the broad support of the international community, such as was the case for the US-led NATO intervention in Kosovo. This allowance acknowledges the importance of collective action in forming and human rights in motivating the UN as an institution.

Therefore when the United States uses preemptive force against what it considers an imminent threat without a Security Council mandate, that act can only be definitively un-aggressive if it is backed by the collective support of a large portion of the international community (such that it outweighs the veto vote issued by the few or single Security Council parties who blocked UN approval). If collective support is not garnered, that act could be considered an 'act of aggression'. Indeed, the potential for investigation and prosecution by the ICC on these grounds is clearly a threat to the United States. The threat posed by the 'act of aggression' clause is significant because the US has a strong stake in protecting its ability to use military means to achieve its foreign policy objectives without any international institution oversight.

The act of aggression clause, when defined, could deter intervention by casting doubt on its legality. If the Court's emphasis on retroactive justice impedes the international community's willingness to act preventatively through peacekeeping interventions, it does little to achieve the original humanitarian goals. Political scientist Thomas Smith argues, "the ICC does add another legal layer to the decision to intervene, and a politicized court could conceivably discourage humanitarian missions lest the exercise sour and the interveners find themselves hauled to The Hague. The possibility seems remote. But it is true that ICC jurisdiction over the

crime of aggression encroaches on the Security Council's role in distinguishing humanitarian intervention from old-fashioned belligerence."[52] US Ambassador David Scheffer and others cited this problem throughout the Rome negotiations. Therefore, the ICC's pending jurisdiction over the crime of aggression was not only a strong deterrent to the United States, but also a potential obstruction of the human rights objectives motivating the Court in the first place.

3.1.2 Power of the Prosecutor

The second objection to the ICC's institutional structure relates to the position of the independent Prosecutor who is responsible for conducting investigations and prosecutions before the Court[53]. He or she is a single executive power who is minimally politically accountable. "The supposed independence of the Prosecutor and the Court is more a source of concern for the United States than an element of protection. Indeed, 'independent' bodies of the UN system (such as the UN Human Rights Commission) have often demonstrated themselves to be more highly politicized than some of the explicitly political organs" argues John Bolton[54]. Having a Prosecutor who may *initiate*, *select* and *oversee* criminal cases without being limited by direct accountability to another governing body opens an avenue for unchecked power. In an effort to keep this position free from political influence, such as that by the Security Council, the ICC created a position that is potentially unrestrained.

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[52] Thomas W. Smith, "Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism," *International Politics,* Vol.39, (2002), 187.

[53] While the United States strongly condemned the independence of the ICC's Prosecutor, in domestic courts an independent prosecutor is seen as an assurance of fairness and objectivity. That the US considers an independent prosecutor as trustworthy in a domestic context but suspicious in the international one reveals the problem of political power. US political hegemony is threatened by an international Prosecutor who will not exercise a bias in favor of US interests, whereas on the domestic level, a prosecutor's actions do not threaten state control.

[54] John R. Bolton, "Is a U.N. International Criminal Court in the US National Interest?" *Congressional Record,* 105 Congress, 2nd Sess., 23 July 1998, 63.

Importantly, political accountability must be distinguished from 'politicization'. The former relates to the restrictive forces of balanced power among different branches of government and the larger public. Only though allegedly limited institutional means can the Prosecutor receive negative feedback on his or her decisions, making the position's political accountability low. The latter concerns the susceptibility to political cooptation. In this sense, a single office might be heavily influenced by one party and its vested interests in a manner that is incompatible with impartial execution of the office's duties. While the ICC has little political accountability in the Office of the Prosecutor – once elected, the Prosecutor can only be excused from a particular case by the President or removed completely from office by an absolute majority vote of states parties (Articles 42, 46) – it is open to politicization[55]. During the US Congressional hearings, John Bolton argued,

> "This structure utterly fails…to provide sufficient accountability to warrant vesting the prosecutor with the enormous power of law enforcement that the ICC's supporters have obtained. Political accountability is…different from politicization, which should form no part of the decisions of either the Prosecutor or the Court. At present the ICC has almost no political accountability and enormous risks of politicization."[56]

Once in power, the Prosecutor may potentially pursue a biased agenda that is not in the interest of the international community as a whole, but instead in the interest of one particular subset of the state parties. Such an agenda would be politicized with respect to its alliance with particular interests to the detriment of the impartial pursuit of criminal justice. In forwarding this objection, the US indicates that it wants to protect its highest military officials from prosecution by foreign sources. Additionally, it cites the need to protect against the politically-motivated prosecution

[55] An absolute majority of state parties voting by secret ballot can remove the Prosecutor for any misconduct or inability to exercise the functions intended by the Rome Statute.
[56] John R. Bolton, "Is a U.N. International Criminal Court in the US National Interest?" *Congressional Record,* 105 Congress, 2nd Sess., 23 July 1998, 63.

of, for example, an American marine stationed abroad on a peace-keeping mission.[57] The combination of lack of accountability and extensive power of the Prosecutor in all stages of ICC activity, make for a structure that cannot *guarantee* any signatory nation protection from politically-motivated investigations. These objections forwarded by US opponents of the Court warrant further examination.

Interestingly, an office potentially subject to politicization also carries an inverse risk. This inverse-case emerges from precisely the conditions that indicate a less powerful and more accountable Office of the Prosecutor. First, contrary to US claims the Prosecutor is not entirely unaccountable. There are procedural mechanisms that may be invoked when any one of the Prosecutor's actions are called into question. In addition to being answerable to the Assembly of State Parties, every step of the Prosecutor's investigation can be formally challenged by the Pre-Trial Chamber; admissibility of the case in question can also be challenged one time by the relevant State (Article 19.4); and the Appeals Chamber may decide on any question regarding the disqualification of the Prosecutor (or Deputy Prosecutor) (Article 42.8). It is precisely marginal accountability that would encourage a Prosecutor to appear fair and egalitarian in his investigations, thereby rendering a somewhat different form of politicization.

In an effort to appear unbiased, the Prosecutor might seek out marginally important cases to use as an example. Journalist Lawrence Weschler cites a conversation he held with a US delegate during the ICC negotiations. In response to the suggestion that the ICC Prosecutor would be unlikely to target American peacekeeping operations as the subject of investigation when larger-scale and more

[57] Due to complementarity, such a scenario would require that 1) the US fails to investigate the crime itself and 2) a regime in control of the state in the territory where a crime is allegedly committed seeks to publicly shame the US by requesting ICC investigation, and 3) the Prosecutor is allied with the aforementioned regime such that it would carry out an unjust/unwarranted investigation in the midst of US resistance.

egregious violations of core human rights were going on internationally, the US delegate (anonymous) responded: "'Not necessarily,'…recalling some recent proceedings at the International Criminal Tribunal for the former Yugoslavia where, 'At a certain point, word came down from the prosecutor that they really had to find more Croats to indict. There were too many Serbs getting indicted, it was too unbalanced. The Prosecutor had to be able to project the appearance of fairness'"[58]. In this respect, when institutional structure does not formally guarantee a high degree of accountability, politicization could also take the form of the selective (and unjust) utilization of power to create the appearance of fairness. Perhaps more likely than the alignment of the many variables that would jointly permit the Prosecutor to carry out an illicitly biased agenda that targets one state's nationals (e.g. corrupt prosecutor *and* majority of state parties that support this agenda), is the case outlined above. Underscoring this entire imagined scenario is the United States' fear that the ICC will single its nationals out as a demonstration of counter-hegemony.

In efforts to inflate the problem of potential politicization in the Office of the Prosecutor, the US opponents of the Court revealed an underlying reason for their hesitancy. Whereas in the previous temporary international criminal tribunals the only potential for politicization would be the sort that favors the United States' political objectives, the ICC makes no guarantee for political favoritism, one way or another. Proponents of the Court would interpret the US objection to the Prosecutor's susceptibility to political influence as its *lack* of susceptibility to singularly American political influence. A similar dynamic can be found in the argument over the Security Council's role in the ICC.

[58] Lawrence Weschler, "The United States and the ICC", in *The United States and the International Criminal Court: National Security and International Law,* eds., Sarah B. Sewall and Carl Kaysen, (New York: Rowman & Littlefield Publishers, 2000), 94.

3.1.3 Security Council Veto

The debate over the expansive power of the Office of the Prosecutor is closely linked to the alleged lack of safeguards allowing the UN to intervene in ICC activity. The UN Security Council is one of three bodies that can initiate an investigation by referring a case to the Prosecutor. However, it has no ability to oversee how the investigation is carried out or to *stop* a case unless the Security Council unanimously voted to prevent the case from proceeding. If a restraining-resolution were proposed and a permanent member of the Council were to veto it, then there would be no way to check ICC actions, leaving the Court 'completely unsupervised.' Once an ICC investigation is activated, a very high threshold of international cooperation is required to deactivate it. Bolton argues that "this marginalization of the Security Council…will have a tangible and highly detrimental impact on the conduct of US foreign policy. The Council now risks having the ICC interfering with its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics and power in settling international disputes"[59]. In other words, this system empowers the ICC to work independently from and potentially against the Security Council.

By operating independently from and unsupervised by the Security Council, the ICC effectively shifts the responsibility for international adjudication away from the UN. It alters the position of consolidated *formal* authority the UN has possessed since its establishment at the end of the Second World War, and in particular, the Security Council's central role within the UN. As outlined in the UN Charter (Articles 33-38), the Security Council is responsible for the pacific settlement of disputes, even when it seeks advisory opinions from the UN judicial organ, the International Court of Justice (ICJ). However, the Charter explicitly denies itself exclusive authority, "Nothing in the present Charter shall prevent Members of the United Nations from

[59] Bolton, 2002.

entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future" (Article 95). Thus, the 'unsupervised' nature of the ICC, while formally permissible under the Charter, is, in practice, a noteworthy (and potentially precedent-setting) break from Security Council oversight of international adjudication.

It is unclear whether this relationship to the Security Council carries any real risk for the United States. Risk to the US, for example, would only arise if the ICC pursued an ill-founded (or politically-motivated) investigation against a US national without any of the internal institutional mechanisms intervening, while, conspiratorially, a permanent Council member used its veto power to halt any UN interference. While seemingly remote, the existence of that possibility threatens US officials' immunity in international affairs. To offset this risk, during negotiations the US insisted, unsuccessfully, that a more permissive clause for Security Council veto be introduced into the Statute (for example, that a single Security Council member could alone deactivate an ICC investigation). Such a clause would clearly favor the United States and other countries holding a permanent or temporary seat in the Security Council. While US opponents interpreted the 'unsupervised' nature of the Court as a reason to suspect its susceptibility to biased investigations, proponents understand 'unsupervised' to mean 'impartial'. Opponents cited the risk of politically-motivated investigations that would be carried out without Security Council oversight; proponents cited the risk of politically-motivated blockage of ICC investigations by an overly-powerful Security Council (rendering the Court utterly ineffective). While the former is far less likely to have occurred than the latter[60], given the respective

[60] Here, 'likelihood' is speculative. It seems far more likely that a single country objecting to an ICC investigation would exercise its positive veto than the ICC's Prosecutor and Assembly of State Parties and one of the permanent Security Council members would conspire to carry out/permit the advance of a biased investigation.

potential roles of the Security Council, only the former posed an explicit threat to US national interests. As such, the US's argument with respect to the Security Council's role in the ICC was an indirect way of reasserting and perpetuating its position of power in a well-established international organization.

3.1.4 Complementarity?

Finally, the ICC purports to provide for the observance of national sovereignty through the principle of complementarity. As discussed above, the Court is meant to complement, not replace national criminal justice systems. The preamble of a draft Statute states, "the Court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective"[61]. Jurisdiction would only occur in cases where national courts do not take responsible legal action to deal with war crimes, genocides, and crimes against humanity committed in their country or by their own nationals. Again, ambiguity arises when one is asked to define "ineffective". In this regard, the ICC is caught between two difficult extremes. If it must respect the legal process within a nation and not supercede national courts, a state that intends to protect war criminals can establish legal loopholes for their acquittal. Cato Institute policy analyst Dempsy argues, "if states can get away with that…the whole point of the ICC is defeated; war crimes will continue to go unpunished"[62]. Conversely, by deciding what constitutes 'effectiveness', the ICC could potentially invalidate national trials, exercising supreme judicial oversight. Then it no longer is working with the national court systems but universally superceding them.

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[61] Gary Dempsy, "Reasonable Doubt: The Case against the Proposed International Criminal Court," *Cato Policy Analysis* No. 311, (1998): 4.
[62] ibid.

While the two extremes appear to exaggerate and misinterpret the Court's intended role, they point to a legitimate concern: while the Statute explicitly articulates the *procedural* criteria by which a case would be ruled admissible under the complementarity principle (Article 17-18) nowhere in the Statute are there specific *substantive* criteria for considering the domestic courts "ineffective". While the ICC sets a precedent in international law by articulating the specific procedures for activating complementary jurisdiction with greater precision than the other existent regional or international courts, it retains the inherent subjectivity involved in assessing substantive cases. If the ICC were to attain broad acceptance in the international legal community, the complementarity aspect of the Statute would indirectly force states (under fear of investigation) to adopt the precedents dictated by the ICC, creating the universal jurisdiction desired by its proponents. In such a case it would shift the source of national lawmaking away from the state and to the ICC creating a dominant and not complementary relationship with a sovereign nation. The absence of substantive criteria leaves the Statute highly subject to interpretation by Court officials, thereby introducing a deeper transfer of sovereignty than is at first evident. This same absence also opens the possibility for uneven justice through inconsistent and highly subjective applications of the Court's authority.

In part, this difficulty arises from the two broad criteria that trigger complementary jurisdiction – the state's *inability* or *unwillingness* to prosecute crimes effectively. While the Rome Statute and other international courts couple these two terms, they carry quite different implications. Professor of Law Madeline Morris argues, "a complexity arises from the fact that, in addition to cases that are purely of the individual-culpability type, the ICC also will hear cases in which official acts—acts that the state in question maintains were lawful, or whose very occurrence the state disputes—form the bases for an indictment. In such cases the lawfulness of the

official acts of states will be adjudicated by the ICC."[63] A state may sincerely intend to prosecute human rights violations and lack the ability – due to political instabilities, low public acceptance of its authority, financial constraints or otherwise. On the other hand, the state may maintain that an act considered a crime under the ICC's substantive criteria is, in fact, a lawful and official act. In this latter case of unwillingness to prosecute, the complexity Morris refers to arises. The case takes on the dimensions not simply of an individual criminal act but the adjudication of the compliance of that state's laws with international ones.

While the complementarity principle opens up the possibility for this sort of profound transfer of the state's sovereign authority, the realization of that possibility depends ultimately on the consensus-building nature of international law. If the International Criminal Court succeeds in carving out a position in which its authority is broadly accepted and perceived as legitimate by the international community, its precedent-setting capacity could materialize. In this situation, the complementarity principle might enable it to function as an indirect meta-judicial system in which, through individual criminal cases, the Court demands the compliance of domestic law with international standards. Conversely, if the ICC is perceived by member states and the broader international community as solely an administrative necessity for adjudicating human rights crimes in war-torn or fallen states[64] and little more, the complementarity principle will pose no intrusion on stable sovereign states. In this respect, the United States' objections to the Court are based upon an assumption of widespread perceived legitimacy that, in practice, could not be attained without US support (the US being one of the most important players in the international effort to

[63] Morris, 2001:25.
[64] One could argue that such states already have lost their status as 'sovereign' since they no longer effectively wield 'legitimate' coercive authority.

create consensus on human rights norms). Instrumental to our understanding of the potential impact of the Court is the idea that international law is consensus-based.

3.2 Implications of Strategic Concerns

3.2.1 Maintaining Status Quo

The potential for political abuse of ICC jurisdiction reveals the US's central underlying concern for its survival as a hegemonic power within and maintenance of immunity to the international arena. Each of the objections to the structure of the Rome Statute point to a general reluctance to transfer sovereign authority to an international body that is not directly accountable to the US government. "Concern over Security Council control of the ICC is based on the perception that international legal hegemony is essential to US national security interests." [65] During the negotiations, the US advocated a central role for the Security Council in defining "crimes of aggression", narrowing the authority of the Prosecutor and creating a more powerful veto clause. In each of these instances the US was only willing to engage in the Statute and make the gesture of sovereignty transfer when it still, functionally, could control the agenda of the ICC. In a sense, it was relying on its already dominant position within the United Nations structure, attempting to extend these same provisions to the newly emerging institution. "The US has a fundamental interest in the UN as an institution because it has an unquestioned stake in international law, order and stability. The US is a status quo power with a strong preference for change through peaceful means, and therefore has a strong interest in the UN, in spite of the institution's many weaknesses and shortcomings."[66] Though one might question the use of 'peaceful' in this quotation, there is no doubt that the US holds a central role in

[65] Johnson, 229.
[66] C. William Maynes and Richard S. Williamson, *United States Foreign Policy and the United Nations System*, (New York: W. W. Norton & Company, 1995), 16.

the conduct of the UN and therefore has reason to extend this relationship to and replicate it in other institutions.

3.2.2 Strength in Flexibility

The strength of the treaty hinges upon its ability to encompass principles of justice and not merely formulaic provisions for punishing serious crimes against humanity. Both its jurisdiction and scope depend upon this ability to assess cases and make principled independent judgments. By objecting to its broad and imprecise definitions as well as absence of specific criteria regarding its complementary operations with national judicial systems the US was, in effect, advocating a formulaic and not principled treaty. An American judge sitting on the Yugoslavia tribunal commented that the ICC treaty "should be one of principle and not of detail…[it should] be a flexible statute based on principles which may be developed by the court as the circumstances require while still providing sufficient guidance to establish an international framework within which the court can work."[67] A flexible treaty that draws upon broad definitions creates an institution that can both evolve with and transform the balance of political power within the international environment. By setting new precedents in international human rights law, and transforming the norms or customs, the Court may change the standards for the demands a multilateral institution may place on member states. Its potential to transform power relations need not be through overtly politicized use of judicial power. Simply put, the *unexercised ability* to conduct investigations in the United States as it would in any other signatory nation puts the US on par with other nations thereby questioning its hegemonic role internationally. In this regard, the transfer of judicial authority from

[67] Gabrielle Kirk McDonald, Speech delivered at the August 11 session of the Preparatory Committee on the Establishment of an International Criminal Court, New York: UN Headquarters, August 4-15, 1998.

nation to the ICC poses a unique threat to the United States in a way that it doesn't, in the same degree, to other nations.

3.2.3 Hegemonic (In)stability

One can see why the formal delegation international human-rights law enforcement[68] to an organization not answerable to the UN threatens US control. The US's unique position within the political international environment means that an institutional shift in power and the transfer of sovereignty are inextricably connected[69]. In this way the emergence of a prominent Court has the potential to not only threaten but actively damage US hegemony. "Threats to hegemonic interests will compel the dominant state to impede the development of the proposed regime and court rendering it sufficiently ineffective to challenge the authority of the dominant state(s) such as the United States"[70]. Indeed, the Rome Statute challenged the authority of the US in the international arena by excluding the UN Security Council from any direct supervisory role in the ICC.

In the interest of defending its hegemonic role, the US, unable to transform the Statute to its liking, was forced to oppose it. "By rejecting the Rome Statute and the ICC, the United States not only undermined the nascent institution, but signaled its preference for the status quo, a system of hegemonic instability"[71]. Nonsupport of the Statute amounts to reluctance to change the international balance of power. Sterling Johnson argues, however, that this balance is unstable. He defines hegemonic

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[68] The practicality of 'enforcement' is still in question, but with the December 2004 cooperative agreement between the ICC Prosecutor and the International Police Organization (Interpol), it is nearer to realization.

[69] I use the term "sovereignty" here as US opponents of the ICC did – to vaguely reference national autonomy in the place of "political hegemony" – which is what they appear to mean. Throughout the Rome Statute negotiations and Congressional debates, the topic of political hegemony was avoided and politically-correct phrases such as national independence and state sovereignty were used in its place.

[70] Johnson, 57.

[71] Ibid.

instability as instability that is caused by an imbalanced system or regime in which the supposed hegemon (the US), finds itself increasingly in conflict with international institutions supported by other major actors and states[72]. The hegemon has a disincentive to participate in institutions while other nations find cooperation to be increasingly in their interest. The instability emerges from this polarizing trend.

This captures the destabilizing trend in the relationship between a hegemon and an international institution that runs precisely counter the "hegemonic stability theory" widely used by international relations scholars. The theory posits that changes in the relative power resources available to major states will explain changes in international regimes. Political scientist Robert Keohane summarizes the theory: "Specifically, it holds that hegemonic structures of power, dominated by a single country, are most conducive to the development of strong international regimes whose rules are relatively precise and well obeyed. According to the theory, the decline of hegemonic structures of power can be expected to presage a decline in the strength of corresponding international economic regimes."[73] Thus hegemonic *in*stability theory inverts such a scenario in which the emergence of multilateral institutions signal a polarizing trend in which the global hegemon is increasingly alienated from the institution's supporters (the international community of states at large). While the hegemonic stability theory posits that strong international regimes reflect the underlying power of a particular nation-state, the *in*stability variant emphases the independent importance of the multilateral institutions themselves. The former sees international institutions or regimes as a symptom of a structure of power whose kernel is the sovereign state. The latter sees embedded in the institution, a

[72] Sterling Johnson's compelling adaptation of hegemonic stability theory has been largely ignored in international relations studies.
[73] Robert Keohane, *International Institutions and State Power: Essays in International Relations Theory,* (Boulder, CO: Westview Press, Inc., 1989).

consolidation of power that destabilizes the hegemonic position of a particular sovereign state. By rejecting a purely state-centric approach, the latter emphasizes the importance of the international institution beyond its efficiency as an administrative body serving independent sovereign states. Applied to the International Criminal Court, the *in*stability thesis illuminates precisely how an institution embracing international law can pose a threat to a well-established hegemonic power, and in doing so, upset a state-centric vision of sovereign order.

Whether the argument for non-participation in the ICC on strategic grounds is actually in the US interest is in some sense unclear. Johnson and others argue that the US's push for uncompromised hegemony and immunity to international intervention sets the ground for a serious backlash by the international community[74]. By attempting to protect itself and its power from dilution in multinational alliances, the US isn't actually serving its primary interests of self-perpetuation. "As the ostensible, if short-term hegemon, the United States' rejection of a collective international criminal law regime invites not only the wrath and disrespect of the international community but also increases the propensity for instability as other states seek unilateral solutions to their threatened interest"[75]. Indeed the hegemonic instability of the status quo has the potential to result in increasing resistance by the international community. This idea is even present in pop-literature: "If we are looking for coalitions of the unwilling, the evidence suggests that many countries don't accept the universality of our values and are becoming increasingly unwilling," former counselor to the Secretary of Commerce under the Reagan Administration Clyde Prestowitz warns in regard to what he sees as a growing American empire[76]. While the

[74] See also: Chalmers Johnson, *Blowback : The Costs and Consequences of American Empire,* (New York: Henry Holt and Company, LLC, 2000).
[75] Johnson, 60.
[76] Clyde Prestowitz, *Rogue Nation American Unilateralism and the Failure of Good Intentions,* (New York: Basic Books, 2003), 44. Prestowitz, a former counselor to the Secretary of Commerce under the

arguments presented caution the US against general attempts to reinforce its immunity from and dominance over international institutions, both the strategic objections and ideological inconsistencies strengthen the case *against* participation in the ICC.

3.3 National Interest: Ideological Concerns and Repercussions

The transfer of national sovereignty to an international institutions points to a deeper prohibitive argument against the ICC – its discord with the ideological base of the Constitution. Opponents of the Court argue that this conflict occurs in two respects. First, they consider the expansive jurisdiction exercised by the ICC an explicit intrusion on the judicial provisions within and power reserved for the Constitution. They cite tangible potential repercussions including the denial to Americans (by the ICC) rights guaranteed under the Bill of Rights, and the risk to top US officials of prosecution by foreign authority. The fundamental notion of separation of power in a system with checks and balances is not adequately represented within the ICC. Secondly, they argue that transferring authority over the adjudication of Americans fundamentally conflicts with the notion of popular sovereignty. Imperfect though it may be, the idea of popular sovereignty is central to the US identity and deferring judicial authority would constitute more than a shift in the political game played by elite actors. Both the constitutional and popular sovereignty arguments have deep historical roots in the American conscience. These ideological elements suggest that ICC participation would represent a significant shift in US ideology[77].

Regan Administration, is founder and President of the Economic Strategy Institute and now a vocal critic of the Republican Party.

[77] It is important to note that US foreign policy has *never* been democratically controlled in any significant sense. By appealing to the connection between popular sovereignty and US international relations, opponents of the Court fail to acknowledge this fact.

3.3.1 Constitutional Barriers and Separation of Powers

Constitutional barriers recommend against US participation in the ICC. Ratifying the treaty would effectively negate the judicial provisions of the Constitution. First, the US reserves judicial power over all cases mentioned in the Article III, section 2. "With respect to the constitutional objections, by joining the ICC Treaty, the US would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States"[78]. Subjecting Americans to judgments made in courts beyond those overseen by the US Supreme Court is unconstitutional, unless explicitly permitted by treaty. Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. However, the principle of complementarity instrumental in the ICC's jurisdiction explicitly demands the provision for double jeopardy – if a ruling in a national court does not suit the ICC's criteria for an 'effective' trial, an acquittal is then overturned (in the eyes of the ICC) and the defendant re-tried on the international level. In sum, ratifying the ICC would subordinate the constitutional protection for those already acquitted on the domestic level to a foreign prosecutor's definition and assessment of "effective/ineffective".

Superceding the power reserved for the US Supreme Court by the Constitution and the protections for defendants tried under that system is complicated by the fundamental notion of separation of powers. The US Constitution provides its own court system with judicial supremacy, in part, because that branch of government is already balanced by the others. The structure of the domestic state already has apparatus in place to check the authority of the court; any international institutional

[78] Lee Casey, "Should the United States Ratify the Treaty Establishing the International Criminal Court?," *International Debate Series* No.1, (2001): 19.

mechanism superceding it would upset this system. Federal constitutional lawyer Lee Casey argued before the Senate, "the ICC will act as policeman, prosecutor, judge, jury and jailor – all of these functions will be performed by its personnel with nothing but bureaucratic divisions of authority and no division of interest…If the ICC abuses its power there will be no recourse. From first to last, the ICC will be the judge of its own case"[79]. The Court is, in a limited, institutional sense, answerable to no one but itself. Indeed, the Rome Statute declares in Article 119.1: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." In terms of external checks, the institution is only minimally accountable to the UN Security Council. (Recall that only unanimous action by the Security Council or an absolute majority vote by signatory states may interfere with a Court investigation and prosecution.) In this respect, the separation of powers between branches of government that permits judicial supremacy in the American system is absent in the ICC. Therefore, the concentration of power within the particular office of the Prosecutor can be understood as replicated on the level of the institution as a whole, a violation of an ideological notion central to American governance.

While the Court's judicial functions are only overseen by the Court itself, there does exist a series of embedded checks within the structure of the ICC. As argued earlier, the Prosecutor is accountable to the other offices within the Court only when a question of case admissibility or the Prosecutor's conduct is actively questioned. But none of those provisions is designed to impede the process of an investigation – all institutional mechanisms point to the continuing of investigation as opposed to blockage of one. For example, Article 18.4 of the Rome Statute details the avenues for an appeal to the Pre-Trial Chambers determination of a case's admissibility. "The state concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling

[79] Ibid., 20.

of the Pre-Trial Chamber in accordance with article 82, paragraph2. The appeal may be heard on an expedited basis." As mentioned above, Article 19 in its entirety deals with challenges to the jurisdiction of the Court or the admissibility of the case. Interestingly, there is a clause in Article 19.10 that nevertheless empowers the Prosecutor to pursue investigations further: "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17." This effectively deals with the logistical (and often political) obstacles involved in gathering sufficient information on major atrocities such as genocide and war crimes – and ensures that a regime or state's blockage of the Prosecutor's investigations will not preserve criminal impunity. Nevertheless, the extensive avenues enabling investigation and reinvestigation demonstrate another procedural mechanism by which the Prosecutor can exercise extensive powers. US opponents evidently inflate the possibility of a Court that is coordinated in its political bias and the absence of the separation of powers. However, their criticisms are founded upon legitimate concerns about an institutional tendency towards investigation. While the embedded system of institutional checks may more compatible with the separation-of-powers theory than US opponents may like to admit, the mechanisms of the Court tend toward empowering the Prosecutor to proceed with investigations.

While the United States' concern over Constitutional supremacy with respect to judicial matters is a well-founded one, the subsequent connection to the separation of powers doctrine is not as clear. This is because the Court as an international governance organization relies upon constituent states for its support. In practice the Court's efficacy hinges upon the broad perception of its legitimacy in the international community and the actual compliance of member states. If the member states choose

not to physically carry out the requests of the Court – i.e. handing over nationals – the enforcement mechanism must come from the international community itself. Without coercive force to back its authority, the checks/balances derive from the voluntary compliance of the constituent member states as well as the network of international institutions and non-state actors. Thus, while the ICC itself does not possess as extensive a formal separation of powers within its structure as the United States would like, its power is mediated by the multilateral nature of its founding treaty.

If the Rome Statute were a typical treaty capturing traditional bounds of conventional international law the debate would end here: despite the ideological dissonance with the system of checks and balances that the United States strongly favors, the ICC is balanced by the constituent states, due to its very nature as a multilateral, treaty-based institution. Instead, precisely because the ICC is novel in its synthesis of delegated universal jurisdiction and customs/norms with treaty law, its internal power structure is of particular concern to both member and non-member states. Because the ICC's substantive jurisdiction reaches into the terrain of CIL, the intrusion into the domain of the sovereign state is potentially more significant and consequently the power structures within the institution are more autonomous; less susceptible to the member states. For this reason, the principles of internal governance represented in the ICC are particularly relevant and consequential.

3.3.2 Popular Sovereignty

The form of sovereignty compromised by signing the ICC is, for the US, of a particular sort. Separation of powers, in the Constitution, is reinforced by the provision that the branches of government are also accountable to the public. Further, the American court system requires criminal trial by jury (of peers) whereas under the Rome Statute, professional judges are the sole deciding force (Constitution Article III,

Section 2). Empowering an institution that is not answerable to the American public conflicts with the crucial notion of popular sovereignty[80]. Participation in the ICC and customary international law in general is in tension with a fundamental normative justification of the US constitutional system: as a self-governing people, Americans should only be subject to laws of their own making[81]. Indeed, the ideal of popular sovereignty is reflected in the federal court system. "Even when the Supreme Court has resolved a constitutional question, the American people, through their representatives in the Congress and the States, are free to amend the Constitution in order to reverse the Court's determination. By contrast, there would be no appeal from decisions of the ICC. This lack of accountability is fundamentally at odds with the principle of popular sovereignty and self-government upon which the American Republic is founded."[82] In the most formalistic reading of popular sovereignty, the ICC is at odds with American ideals by exercising judicial power unchecked by and unanswerable to the people over which it presides.

The US's objection to the principled as opposed to formulaic nature of the Statute points, as well, to the deeply rooted hesitance to invest too much power in the judgment of a few individuals. "Indeed, if there is one particular American contribution to the art of statecraft, it is the principle – incorporated into the very fabric of our Constitution – that the security of our rights cannot be trusted to the integrity of our leaders. By its nature, power is capable of abuse and people are, by nature, flawed."[83] Casey draws upon James Madison's observation that the second

[80] Throughout the negotiations of the Rome Statute, US opponents of the Court emphasized American exceptionalism with respect to popular sovereignty, when they might have appealed to other democratic states for support. As such, the constitutionally-based arguments against the Court are probably more compelling with respect to a uniquely American hurdle for ICC participation.
[81] T. Alexander Aleinikoff, "International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate," *The American Journal of International Law,* Vol. 98:91 (2004): 101.
[82] Casey, 69.
[83] Ibid., 71.

greatest difficulty of framing a government is obliging that government to control itself (The Federalist No. 51). An institution not accountable to the public is one in which trust is placed in the ability of leaders to make purely principled decisions consistent with that institution's explicit purposes. Therefore both the Office of the Prosecutor and broad, territorially universal nature of the ICC's jurisdiction are in conflict with the ideal of popular sovereignty.

Several objections to this argument are at once apparent. The first and most obvious is that while popular sovereignty may endow, in some indirect sense, the US Supreme Court with its legitimacy, the American public is far removed from the selection-process. Instead, the Supreme Court justices are appointed by the President who, him/herself is elected to office by the electoral college system. If the US opponents of the Court object to ICC officials' dissociation from the global public whose human rights they seek to uphold, they will find the same problem in the domestic system. At the highest level of the judicial branch in the United States there are elite individual people in whom the application of justice is entrusted. The American system does invest its trust in the integrity of its leaders, and selects its highest court under the authority of the head of the executive branch. The allowance for congressional checks on the selection of judges and court rulings, while ultimately grounded in popular sovereignty, is a very far removed and indirect exercise of power. The same distance can be found between the public and those officials who determine US foreign policy. Thus the US objection to the ICC on the basis of popular sovereignty is an objection to its own Supreme Court, which, by rejecting the ICC it seeks to protect.

If instead, opponents of the ICC suggest that popular sovereignty is embraced by the American legal system in its use of trial by jury of the defendants' peers, one must consider what that would look like in an international court. This second

objection is that the 'jury of peers' criticism of the Court is even more unrealistic. Defining one's 'international peers,' even in this globalized era is a difficult task. Logistical barriers set aside, cultural differences render vastly broad variation in concepts of justice. And it is entirely unlikely any American on trial before the ICC would prefer a verdict delivered by peers from Afghanistan, Albania, Cambodia or even France (to name a few) than a verdict delivered by persons who have made their careers negotiating the complex systems of human rights law and international organizations. Given the well-founded American acceptance of elite, appointed, specialized Supreme Court justices and the fantastic possibility of a jury of international 'peers', it seems the United States certainly would *not* prefer an ICC founded upon the notion of popular sovereignty.

3.3.3 Historical Roots and American Identity

The ideological debate over popular sovereignty finds a deep history in American foreign policy. "Identification of long-term national security with the establishment and success of liberty…has had powerful resonance in US foreign policy"[84] The freedom to govern oneself and apply self-given laws through democratic process has been a driving force behind US international relations. At times, the US has undergone comparatively isolationist periods in which popular sovereignty was, arguably, protected by immunity from international entanglements. "This view that the US acts authentically only when it acts independently is recurrent and follows the historic pendulum swinging the US between periods of isolationism and internationalism. From Thomas Jefferson's warning against 'entangling alliances' through the Monroe Doctrine, manifest destiny and rejection of the league of

[84] Cathal Nolan, *Principled Diplomacy: Security and Rights in US Foreign Policy,* (Westport: Greenwood Press, 1993), 2.

nations"[85]. Historical roots point to how entrenched the idea of popular sovereignty is as part of the American political identity. "In the American constitutional frame, popular sovereignty and the rule of law are a single phenomenon constitutive of the national political identity"[86]. Indeed, going back to the American Revolution, there is the notion that living freely means governance only through a popularly supported state and the laws it produces, without having to answer to a sovereign or political entity abroad. "There is little support of the idea that American political decisions can or should be subject to legal evaluation by non-citizens. There is no support because the idea conflicts with the vibrant character of belief in a rule of law that is a function of popular sovereignty"[87]. Though a wide and complex debate worthy of far more attention than we can allot here, the deeply ingrained and historical notion of self-governance helps explain the US's resistance to the ICC.

While opponents of the Court use an amorphous and malleable notion of American identity to reinforce a case for the conflict between the Court and popular sovereignty, they carefully omit another critical tenet. First codified in the Treaty of Versaille, and the driving force behind Wilsonian internationalism, the American popular identity incorporates equally central notions of universal justice and (criminal) accountability. It is precisely the ideas of fundamental, inviolable human rights and autonomy of persons that underpin – indeed, make possible – a concept of popular sovereignty. Evaluated in this respect, the ethical positions embodied by international human rights law are the same ones that give popular sovereignty its value. Without liberty, physical integrity and the ability to enjoy or suffer the consequences of one's own decisions, popular sovereignty would exist in form only and possess no

[85] Johnson, 60.
[86] Paul Kahn, "The International Criminal Court: An End to Impunity? Why the United States is so Opposed," *Crimes of War Project Magazine* (Dec. 2003), 3.
[87] Ibid., 6.

substance. Advocates of international human rights law argue that the universal protection of these primary goods through institutional means is what gives value to the notion of self-governance. Importantly, they see justice and enforcement of criminal accountability as key measures in the promotion of human rights (an idea we will revisit). Deeply etched in the American conscience (in its various forms) is the reverence for a notion of justice and that responsibility for one's actions is an indispensable building block for a prosperous society[88]. What one can draw from this is that attributing US opposition to the ICC to the American identity at the least oversimplifies and more likely completely misinterprets a complex relationship between self-governance and justice. Instead, in an ideological respect, the ICC is the product of not only US diplomacy but also deeply (although not uniquely) American ideas.

3.3.4 Implications

In this sense, the ICC represents a more significant political and symbolic shift than its proponents suggest. By changing an inconsistent but still prevalent historical pattern in US foreign policy and interfering with both the foundational and popular ideological notions of popular sovereignty and rule of law, ICC ratification carries great weight. It would amount to the US partly conceding its hegemonic role in the international arena—and in a more dramatic interpretation, loosening its grip on the world. By acknowledging exceptions to the sovereignty secured by the Constitution and rooted historically in American political thought, the US places itself on the same political level as other nations in the global community. Doing so fundamentally

[88] Further elaboration of the myth is unnecessary here. It should suffice to say that the many variants of the American Dream share a common faith in individual responsibility, self-reliance, that one receives what one deserves and, importantly, that these traits are the best way to promote widespread prosperity in a community that is solely an amalgamation of prosperous individuals.

disrupts the status quo of US as hegemon. This reading sheds light on the action the US subsequently took to weaken and limit the Rome Statute. Susan Strange makes a diagnostic remark that reveals the dissonance between the ICC's vision for the judicial component of global governance and the US's Constitution.

> "What is lacking in the system of global governance…and which in the past was the measure of making the liberal state democratically accountable, is an opposition. To make authority acceptable, effective and respected, there has to be some combination of forces to check the arbitrary or self-serving use of power…The checks may be built in constitutionally as in the United States, where the power of the executive branch is balanced by those of the legislature and the judiciary"[89].

Strange argues that an important consequence of the retreat of the state and the diffusion of state authority is the lack of accountability within in non-state institutions that have taken on the responsibility for governance. Without a global system that has mechanisms to check power and make authority accountable to the larger public (whatever 'public' may be – a problematic term itself), the ICC remains, to some extent, in conflict with the US Constitutional provisions for and ideology of popular sovereignty. This conflict, when paired with the serious threat to hegemony explains US non-participation in the ICC.

3.3.5 Conclusions

While the ideological arguments presented thus far – Constitutional incompatibility and dissonance with popular democratic rule – touch superficially on the broader concept of state sovereignty, neither confront it directly. The underlying question at stake is whether, and how, state sovereignty is challenged by the International Criminal Court in a novel manner that sets it apart from other broadly-

[89] Susan Strange, *The Retreat of the State,* (Cambridge: Cambridge University Press, 1996), 198.

recognized international organizations. The aforementioned objections to the Court exemplify the general argument for national isolationism but fail to accommodate a more nuanced reading of sovereignty that enables one to contextualize the ICC in an extensive network of international organizations and legal institutions that exist today. The following chapter confronts the complex and often contradictory doctrine of sovereignty and elaborates on the theoretical issues at stake.

CHAPTER 4: THEORIES OF STATE SOVEREIGNTY

"One of the current ways of explaining the present situation in regard to sovereignty is to point to the fact that most, if not indeed all, sovereign governments nowadays have very seriously limited choices in the exercise of their supposedly sovereign competence, because their theoretically important areas for decisions are much restricted and hemmed in by treaties, by customary international law, and by the consequences, and especially the economic consequences of the sheer interdependence of all sovereign states of today. So, it is plausibly urged, sovereignty is at least to a large extent a mere idea, even a myth, which has much to do sometimes with emotion, but little or nothing to do with the reality in the day-to-day life of the typical, present-day government."[90]

4.0 Overview

As we saw in chapter 2, the International Criminal Court negotiates the boundary between customary and treaty-based law while setting the standards for a more expansive human rights regime. In assuming that the authority to try and convict criminals – a power historically reserved for the domestic state – is transferable through not only *explicit consent* but also by virtue of *universal principles*, the Court poses a new challenge. That challenge – the fundamental objection underpinning the debate – is that the ICC threatens the very concept of sovereign order. It not only affects the national sovereignty of member states but supposes that the characteristic itself can be negotiated, partitioned and transferred. The contest over the concept of sovereign order originates in the manner in which contractual obligations are transformed to achieve the scope and universality of custom.

This section attempts to dissect the complex notion of sovereignty while revealing the extent to which the aforementioned claim is substantive. Reconciling the varied and competing doctrines of sovereignty is an unwieldy task. The very

[90]Sir Robert Jennings, "Sovereignty and International Law," in *State Sovereignty and International Governance,* Eds., Gerard Kreijen, et. al., (Oxford: Oxford University Press, 2002), 31.

incompatibility of these doctrines points to an opening for contemporary reevaluation. In this sense, the contentious nature of sovereignty may precisely allow the ICC to occupy a productive and non-threatening position in today's international political environment. The discussion will proceed in three stages: the first outlines several key historical theories of sovereignty, the second examines contemporary conceptualizations and associated problems and the third considers where one might find reconciliation between the Court and the doctrine of sovereignty espoused by the United States and other nations.

Defining sovereignty proves difficult precisely because it is a political concept that has evolved with changing political and social circumstance. Robert Jennings asserts, "doctrines of sovereignty down the ages have differed from time to time for the very reason that they reflected the needs and problems of their own particular times and were designed to do so."[91] This instrumentalist approach sheds light on the evolution of the sovereignty doctrine. For example, the concept has metamorphosed from being embodied by a single sovereign – a king, divinely authorized to rule – to being a characteristic held by a democratically-elected body. Such a democratically-elected body, in theory, derives its legitimate power through a contractual transfer of authority from the people themselves. Similarly, theories reflect variations in political context or ideology that may coexist at a given time. Steven Krasner observes in Sovereignty: Organized Hypocrisy,

> "some analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization, and others that it is being sustained, even in states whose governments have only the most limited resources, by another aspect of the system, the mutual recognition and shared expectations generated by international society."[92]

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[91] Jennings, 29.
[92] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy,* (Princeton: Princeton University Press, 1999), 3.

Krasner highlights the precarious position sovereignty occupies in contemporary international politics. On one hand it may be perceived as a characteristic that dissolves as international institutions secure more influential roles in the global order. On the other, sovereignty may be seen as a characteristic reinforced through the international legal 'system' (to loosely use the term) since such a system derives its efficacy by building upon the authority and compliance of constituent state bodies. Over time, sovereignty has come to be conceptualized in somewhat different ways.

4.1 Historical Roots:

4.1.1 Internal Sovereignty

Although I cannot provide an adequate history of the notion of sovereignty in the space here, it will be helpful to outline its modern roots. The first articulation of a theory or doctrine of modern sovereignty is generally attributed to Jean Bodin in his *Six livres de la republique* (1576). Jeremy Rabkin traces out the history of the 'logic' of sovereignty. "The most famous element of Bodin's theory of sovereignty is his insistence that the sovereign power cannot be divided…[his] doctrine of an indivisible sovereignty is aimed…against the ancient notion of a mixed or balanced regime—the notion that ultimate authority can be shared between the nobles, the common people and the monarchy."[93] Sovereignty, closely identified with the command over and use of legitimate force, is an attribute of a singular source of authority. That authority is abstracted from the individual sovereign monarch, pope or emperor.

This abstraction is accompanied by an emphasis on lawful authority – again, a step removed from the divine and unconstrained authority of medieval monarchs. Lawfulness also sits in a position of tension since sovereignty is the authority to both

[93] Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States*, (Princeton: Princeton University Press, 2005), 53. (a)

create and suspend law legitimately. Bodin's doctrine of sovereignty is about "lawful authority and [the] sovereign is constrained by constitutional norms. The central power is the power to…make and unmake laws."[94] While as a matter of authority, Bodin's monarch may set aside customary law "whenever he so wills, as a matter of prudence…he should do so only on the rarest of occasions."[95] Indeed, 'prudence' suggests that too frequent suspension of law undermines the significance of the law itself and consequently the sovereign essence. Thus, this early theory explores the uneasy relationship among sovereign authority, law, and constitutional limitations. There is at once a concentrated unified source of authority and, at the same time, the constraining requirements of lawfulness. These two themes – the indivisibility of sovereignty and the tenuous position of the sovereign body simultaneously above and below the law reappear in subsequent formulations.

The relationship between sovereign authority and law articulated by Bodin was transformed dramatically with the advent of liberal constitutionalism. The universalist doctrine of individual, natural rights envisions a contractually-based state that derives its authority from consent. From this perspective, state authority originates hypothetically, in a contractual procedure. The transfer of authority is from the *individual* who is naturally endowed with the rights and personal autonomy, to the *institution* which serves to protect and uphold these rights in a broader, systematic way. Bodin's notion of sovereignty, as a characteristic embodied by a single monarch representing a state personality independent of and superior to the people living within its boarders, was no longer appropriate. "The work of wrestling sovereignty from the person of the monarch to the state itself and ultimately to the citizenry was prepared by John Locke, whose Two Treatises on Government appeared in 1689 and paved the

[94] ibid., 55.
[95] J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton: Princeton University Press, 1975), 30.

way for the doctrine that the state itself is the original sovereign and that all supreme powers of the government are derived from this sovereignty of the state."[96] The transformation from monarchical to democratic state mandated a transformation of sovereignty from residing in one person to a diffused abstraction embedded in the state institution.

For Locke, the sovereign act of lawmaking had to be secured by institutional structures in a way that would fully capture and respect the transfer of authority represented in the social contract. This meant the legitimate power to make laws hinged upon the separation of the legislative and the executive. In the Second Treatise, Locke describes a prerogative in the executive branch to "act according to discretion for the public good, without the prescription of the law and sometimes even against it," when certain circumstances make such action appropriate.[97] Rabkin uses this passage to argue that for Locke, "the legislative power may retain supremacy insofar as it can remove an executive who abuses this power. But the very fact of prerogative emphasizes that the law itself is not quite supreme."[98] Thus there is a delicate balance between the power of the primary lawmaking body (the legislative) and the lawgiving body (the executive). When the lawgiving body sees fit, it may supercede the law – which, importantly, may constitute a lawmaking act in itself. One may contrast this to Carl Schmitt's formulation: "Sovereignty is the state of exception," or the capacity to, *without constraint*, both create and suspend the law without undermining the lawmaking authority or actual law itself[99]. Schmitt isolates

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[96] Maogoto, 13.

[97] John Locke, *Second Treatise of Government,* Ed., C. B. Macpherson, (Indianapolis: Hackett Publishing Company, 1980), 84.

[98] Rabkin, 2005a: 59.

[99] Carl Schmitt, *Political Theology,* trans. George Schwab, (Chicago: University of Chicago Press, 1922), 3.
Schmitt explains, "Sovereign is he who decides on the exception…This definition of sovereignty must therefore be associated with a boarderline case and not with routine…The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to

the same tension we see in Locke without allowing provisions for its resolution. The exceptional act is simply constitutive.

According to Locke, this exceptional act is legitimate only insofar as it serves the good of the original source of state authority: the public/political community. This can be understood as a democratic adaptation of Bodin's theory, in which the monarch's decision to suspend law is constrained solely by prudence and the desire to maintain legitimate authority. For Bodin, the decision is unaffected by any direct accountability to the democratic public. Whereas sovereignty, for Lockean liberalism, is diffused through the structure of the state and ultimately constrained by the people who give it substance. It is divided among the lawmaking, lawgiving, and law-validating components, where the last component refers to the legitimacy claim underpinning any democratic organization. In a constitutional democracy, a single, founding document *maps* out this separation. Therefore, I believe it would be imprecise to label a constitution itself as sovereign – it serves as the articulation of an institutional scheme in which sovereignty is embedded.

Adaptations of Lockean thought have placed emphasis on constitutional documents as the source and location of sovereignty itself. During America's founding, the relationship between sovereign law and federalism became a central point of debate. For the federal authority of the US Constitution to have any real impact, it must have the status of sovereign law and reach into the states, imposing binding obligations on the citizens. "The ambiguity about whether the Constitution itself is supreme—or the organs it creates or the people who ordain it—may seem a unique complication by which Americans evade the historic logic of sovereignty. But some ambiguity of this kind is finally inseparable from the concept. Sovereignty was

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the existence of the state or the like. But it cannot be circumscribed factually and made to conform to a preformed law."
There is no mention of Carl Schmitt made in any of Rabkin's work used in this thesis.

always a theory that tried to unite legality or legitimacy with command of force."[100] Whether internal sovereignty in constitutional democracy is thought to ultimately reside in the people who contractually authorize a state to create binding law or whether that moment of founding confers independent authority to the state itself carries implications for how sovereignty might be transferred. The Constitution, merging legitimate power with legality, serves as a central instrument for either approach. In the debate over the ICC, the source and location of sovereign authority becomes a relevant concern.

4.1.2 External Sovereignty

In these accounts of internal sovereignty, there is a dimension of cohesive exclusivity to lawmaking authority. With the democratic emphasis on original consent and institutional balance of power, it would seem there is little room for law beyond the boundaries of discrete nation-states. However, sovereignty of a state takes on a somewhat different meaning when challenged on the global scale. This external dimension is the subject of the 'law of nations' or, in other words, the guidelines governing the conduct of these cohesive states. Swiss philosopher and international legal theorist Emer de Vattel, following the liberal tradition, explains, "A nation is free to act as it pleases, so far as its acts do not affect the perfect rights of another nation, and so far as the nation is under merely *internal* obligations without any *perfect external* obligation. If it abuses its liberty it acts wrongfully; but other nations cannot complain since they have no right to dictate to it."[101] A state carries an obligation to uphold the internal terms of its sovereign authority but need not be bound by any

[100] Rabkin, 2005a: 68.
[101] Emer de Vattel, *The Law of Nations,* trans., Joseph Chitty, (Philadelphia: T. & J. W. Johnson & Co., c1852), 7.
Vattel was a Swiss philosopher, diplomat, and legal expert whose theories laid the foundation of modern international law and contributed to just war theory.

external laws. Only internal obligations such as accountability to a democratic public can perfectly constrain a sovereign nation's liberty.

Self-determination and autonomy in the international sphere define the law of nations. Like Lockean rational individual persons, states are perfectly free to act as they will so long as they do not infringe upon the autonomy of the next state. Vattel builds his case around the bounds of treaty-based and customary international law to articulate a general principle of nonintervention. Sovereignty in the international sphere takes on an important additional dimension: the noninterference in one another's territories or affairs. To translate these provisions into less lofty terms, issues that concern the exercise of external sovereignty include: the signing of treaties, participation in international organizations, decision to go to war, the right to be free of unwelcome intervention by other states, etc. In sum, sovereign states are expected to act freely and autonomously beyond their boarders while those boarders are recognized and respected by other states[102]. These are different actions than the sort concerning internal sovereignty – the creation and application of binding, legitimate law within the territory. The link between internal and external dimensions of sovereignty – somewhat substantively different doctrines – is an area of contention that will guide the ensuing discussion.

In his treatise Law of Nations (1757) Vattel offers a theoretical exploration and codification of the laws governing state interactions that arose out of the Peace of Westphalia. The Westphalia treaties, signed in 1648, mark the beginning of a now widely-recognized norm of sovereignty. The Westphalian model of sovereignty supposes that states occupy specific territories, within which domestic political authorities dictate legitimate behavior. Krasner explains that sovereignty has been

[102] This code of conduct is the civility that Schmitt praises as an achievement by the 19th century European international law – that precisely did *not* apply globally. This point was brought to my attention by Professor Susan Buck-Morss in a conversation held on June 6, 2006.

understood, in the Westphalian model, as "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures. Rulers may be constrained…by the external environment, but they are still free to choose the institution and policies they regard as optimal."[103] Therefore, sovereignty is violated if external actors forcefully influence or determine domestic authority structures through coercion or intervention.

The central notion—that recognizing sovereignty means not intervening—is a logical extension of liberal-individualism's idea that personal autonomy is best respected by a minimal, noninvasive state. In the Westphalian model, state autonomy can be compromised as a result of voluntary invitation or treaty; an analogue to the original allegorical social contract that establishes the legitimate limited government. However, those voluntary agreements may not fundamentally undermine the external independence that characterizes the sovereign state. This doctrine clearly develops from the same tradition that informs the concepts of domestic or internal sovereignty.

Two important points must be drawn from the extensive literature developing the notion of Westphalian sovereignty. First, the model hinges upon the ultimately discrete partitioning of the globe into sovereign units and is highly incompatible with any form of interstate governance. Second, it integrates the doctrines of internal (domestic) and external sovereignty. Both aspects point to a significant clash with another important variant on the doctrine of sovereignty – what Krasner terms 'international legal sovereignty'. "International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence."[104] Also growing out of liberal theories of state,

[103] Krasner, 20.
[104] ibid, 4.

this meaning of sovereignty replicates the idea of free and equal individuals on the level of nations.

Unlike the Westphalian treatment of this analogy, international legal sovereignty declares criteria for the formal recognition of governments' juridical autonomy. "The supplementary rules for recognizing specific governments as opposed to states, has never been consistently applied. The decision to recognize or withhold recognition can be a political act that can support or weaken a target government."[105] These supplementary rules can come in many forms: humanitarian, economic or otherwise. The important commonality is that whatever they may be, they constitute international legal constraints on the ultimate independence of a sovereign nation. Recognition hinges upon compliance with whichever set of norms or customary laws that constitute the present body of international law. "The idea that sovereignty does not arise in a vacuum but is *constituted by the recognition of the international community,* which makes its recognition conditional on certain standards, has become increasingly accepted in the fields of international law and international relations."[106] In sum, the international legal model sees the voluntary acceptance of rules as sovereignty-affirming while the Westphalian model sees them as inevitable violations of sovereignty, albeit to varying degrees.

As we saw in the preceding discussion, recognition as an international legal person hinges in part upon the ability to *act* as one – that is, engage in the treaties, institutions and formal arrangements that constitute the substance of international law. In other words, international legal sovereignty relies upon participation in the sorts of

[105] Krasner, 15.
[106] Broomhall, 43. (emphasis added). It is worth noting the Western-centric assumptions implicit in this account of sovereignty. Which states constitute the 'international community' and which standards or norms are being recognized determine how sovereignty is defined. A hegemonic country has the capacity to determine the international community and shape norms in a manner favorable to its own political objectives.

institutions and systems that constrain a state's broad autonomy in an otherwise anarchic global environment. Dissonance with the demands of Westphalian sovereignty follows. In the first respect, Westphalian sovereignty envisions state interaction as contracts between discrete autonomous bodies limited in space and time. International legal sovereignty sees the state as additionally subject to customary law and norms that govern an international community. Recognition of statehood rests upon compliance with the additional informal expectations for international conduct. States are not absolutely discrete actors but dually responsible community members. In the second respect, Westphalian sovereignty sees the internal and external dimensions of sovereignty as meaningfully interdependent. Compromises of external sovereignty result in infringements upon the ultimate independence and authority of the domestic government over its territory and persons. International legal sovereignty, conversely, anticipates international law that constrains or checks the independent action of the nation-state.[107] There is the sense that the recognition of sovereignty hinges upon that state's compliance with international expectations for economic arrangements (i.e. capitalist), social and political rights (i.e. democratic and not totalitarian), human rights, etc. All these expectations indicate that recognition requires compliance and therefore intrusion on the domestic autonomy of a sovereign state.

[107] This holds in general. There are outlier cases such as Taiwan and Cuba. Taiwan was recognized as an international legal person with representatives in the UN separate from China's representatives although it could not formally call a territory its own, separate from China. Conversely, Cuba was not recognized as a legitimate state due to the international community's (US- led, of course) rejection of its communist regime in power. It was thus a nation and a territory with permanent inhabitants but not an internationally-recognized state by, at least, UN standards.

4.2 Relationship between Internal and External

This second point leads us to a core issue in the sovereignty debate that is consequential for any form of international governance. Are international or Westphalian and domestic forms of sovereignty interrelated or disparate concepts? Krasner sees them as quite separate. After defining Westphalian and international legal sovereignty, he continues, "domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the boarders of their own polity….The various kinds of sovereignty do not necessarily co-vary. A state can have one but not the other."[108] If external and internal sovereignty are not necessarily co-determinant a state can choose to engage in international agreements and institutions, if prudence and strategy recommend, without fear of undermining its ultimate authority in domestic affairs. Surely particular variables – public opinion, distribution of limited funds and the like – link the two domains of sovereign power, but only circumstantially and not fundamentally. If the two forms of sovereignty are only loosely linked, a state can delegate critical external functions, typically reserved exclusively for the national government, to international bodies without fear of infringing upon domestic sovereignty. Further, the legitimacy of such an act ultimately depends on *where* sovereignty is located: with the people or the state?

Conversely, if internal and external sovereignty are necessarily and closely interrelated properties of the state, international actions carry substantial domestic implications. Rabkin argues for the inseparability of the two. "Can an [international organization] govern external sovereignty without controlling the internal elements that give rise to a state's sovereignty in the first place? The underlying question is whether any government can really be sovereign—even internally—if in a moment of

[108] Krasner, 4.

crisis it is not also sovereign externally."[109] Depending upon whether the Westphalian or international legal doctrine of external sovereignty is accepted, participation in an international governance organization may or may not be seen to compromise external sovereignty. If the internal and external dimensions are inseparable, then an external violation threatens the domestic authority of the state. Rabkin explores the case for co-originality by examining American sovereignty and the US Constitution.

The founding myth of the social contract endowing the state with democratic legitimacy suggests that domestic sovereignty is a prerequisite for a state to behave as a sovereign externally, in international affairs. The internal transfer of power to a state authorizes that state to protect its citizens against outside infringements such as territorial invasions and engage in treaties that advance their interests, such as trade agreements. As Vattel suggested, this citizen advocacy is limited only insofar as prohibiting a state from directly impeding another's ability to freely do the same for its own population[110]. So, according to this model, the responsibility of the domestic state is both to protect people from themselves in the hostile conditions of anarchy *and* protect them from the intrusions by other states competing for limited resources in a global state of nature. The second function cannot be fulfilled unless the first is performed at some minimum, adequate level. When considering the functions that a sovereign allegedly performs, it is plausible that internal sovereignty is a prerequisite to external sovereignty. Whether the Westphalian or international legal model is adopted, this connection appears to hold.

Does the converse – that external sovereign power is a prerequisite for the exercise of internal sovereignty – also hold? "Sovereignty is necessarily a somewhat

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[109] Rabkin, 2005b: 437.

[110] I set aside the usual objections to this non-interference model – for example, the problem of externalizing costs through 'downstream' effects. See John Dryzek, *Politics of the Earth: Environmental Discourse,* (Oxford: Oxford University Press, 1997).

formal or legalistic concept…" observes Rabkin[111]. As such, the answer to this question is one likely embedded in legal nuances – for our purposes, the location of sovereign authority in the US system. As we saw earlier, two possible explanations exist – the state is an authority *temporarily entrusted* by a democratic public to facilitate and protect its interests; the state is an authority *permanently entrusted* with the public's welfare through a constitutionally organized system of balanced power. Rabkin explores the former explanation in the following passage:

> "Liberal philosophers sought to make sovereign power less prone to abuse by insisting that it must be conceived as a trust from the people—who could only be conceived as delegating power within the constitutional limits. But precisely if sovereignty is viewed as a conditional grant, the idea that it can be re-delegated at will seems deeply threatening. So John Locke…denounced delegation of legislative powers to a foreign government as a just cause for popular rebellion."[112]

Sovereignty, viewed as a temporary delegation of power within the bounds set forth in a constitution, could be revoked through rebellion if those limits were exceeded. According to this perspective revoking delegated power is effectively negating the basis under which a domestic government is legitimate. As such, the delegation of external sovereign authority to a foreign body, for example an international organization, consequently *de-legitimates* that government's internal authority. For example, the United Nations may be interpreted to demand just this sort of delegation in its exclusive reservation of the authority to employ legitimate force in any manner

[111] This is precisely the definition with which Schmitt disagrees: "A valid meaning is here attached to the word sovereignty, just as to the term entity…what always matters is only the possibility of conflict…However one may look at it, in the orientation toward the possible extreme case of an actual battle against a real enemy, the political entity is essential, and it is the decisive entity for the friend-or-enemy grouping; and in this (and not in any kind of absolutist sense), it is sovereign". Sovereignty is far more than a legal concept. It is fundamentally about the possibility of violence in the articulation of the friend/enemy distinction. Carl Schmitt, *The Concept of the Political,* trans. George Schwab, (New Brunswick: Rutgers University Press, YEAR), 39.

[112] Rabkin, 2005a: 238.

except a state's immediate self-defense[113]. Thus the UN requires its member to defer their right to initiate war, a fundamental element of external sovereignty, according to the Westphalian model. If we treat sovereignty as only a conditional grant from the people, a state's acquiescence to particular parts of, for example, the UN Charter can be construed as adequate reason for citizens to question the domestic lawmaking and lawgiving authority of their government. The dependence here of internal upon external is strong.

However, if we adopt the second interpretation of the locus of internal sovereignty, the dependence upon external sovereignty is weak. In this interpretation, the constitution is ultimately the articulation of an institutional system of distributed power. Internal sovereignty resides in this balanced system and, in short-hand, can be said to be held by the document of the constitution itself. As such, the state is ultimately entrusted with sovereignty that it exercises in the external sense in manners consistent with its constitution. For the United States, the Constitution guarantees particular democratic rights to its citizens, but sovereignty is not theirs to revoke. The state may agree to treaties and participate in organizations that compromise its free self-promotion in the global arena without undermining its internal sovereignty – for example, it may waive its right to wage active war (minus cases of immediate self-defense) by deferring that responsibility to a multilateral institution, the UN[114]. In

[113] From the UN Charter Article 44: "When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43." And, from Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[114] I use the example of sovereign violence deliberately. For Carl Schmitt and others, sovereign authority hinges upon the legitimate threat or use of force. The bounds of the sovereign state mark the line of the friend-enemy distinction. Schmitt argues in The Concept of the Political: "to the enemy concept belongs the ever present possibility of combat…The friend, enemy, and combat concepts

other words, the state may agree to any international laws that can be ratified domestically – approved as consistent with and incorporated into domestic law. This is because sovereignty is found in the legislative process itself (as an element of the Constitution) and not the democratic public. Even if these laws are construed as an infringement on external sovereignty, for example, according the Westphalian model, they do not undermine the binding nature of internal laws created by the state's legislation. Importantly, this view of internal/external sovereignty allows for the idea of pooled sovereignty; the ability of separate, independent states to form multilateral alliances to carry out particular external-sovereign activities[115].

4.3 Re-conceptualizing Sovereignty as Pooled, Partitioned and Incremental

The possibility of strong international law and, consequently a doctrine of international legal sovereignty, as we have now seen, hinges upon the idea that internal and external sovereignty are only weakly or circumstantially linked. This linkage, in turn, requires an assertion about the location of sovereign authority – that it is imbedded in the institutional structure of the liberal state. Despite the illuminating myth of the social contract, a democratic people can use institutional and extra-legal means to exert leverage over the state but sovereignty is not theirs to revoke[116]. To understand how international law enables the creation of multilateral institutions that

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receive their real meaning precisely because they refer to the real possibility of physical killing…War is the existential negation of the enemy" (p33). With this in mind, the UN Charter's reservation for itself of all legitimate uses of non-defensive force is an absolutely essential illustration of delegating sovereign functions to a multilateral body.

[115] 'Pooled' sovereignty simply refers to the notion that states might unite their sovereign authority over particular matters by investing themselves in international organizations which derive their efficacy from the constituency. This is the 'global managerialism' that constitutes a post-sovereign vision replete with bureaucratic messiness and lack of coercive, binding authority – according to Professor Rabkin.

[116] This is because sovereignty, in the modern sense, is a characteristic that can only be possessed by a state.

effectively 'pool' state sovereignty through the delegation of external state functions, it will be useful to explore how sovereignty might be partitioned.

Recalling the first two themes present in our historic accounts, we can look more carefully at the relation of international law to the domestic nation-state. The first theme was that sovereign authority is largely defined by the capacity to create binding law in a territory despite the tenuous position it occupies both above and below the law; the second was that sovereignty is indivisible. We have seen that the force of international law, as a whole, hinges upon the constituent sovereign bodies that subscribe to it and consent to its authority. Until one can demonstrate international law absolutely supercedes domestic law, instead of deriving force *from* it, the first aspect of sovereignty can be left undisturbed. The second theme is of essential concern to the operation of binding international law and the sort of 'pooling' of sovereignty that enables organizations such as the United Nations to exist. If sovereignty is a divisible attribute a state can maintain its ultimate authority in one sphere but relinquish sole control over another sphere by, for example, deferring that authority to an international institution by way of multilateral treaty. In this treatment, sovereignty itself is an inherently flexible concept, a "basket of attributes which can be redistributed to different governmental levels according to convenience" or political incentives[117]. If there is no essential connection among the attributes of sovereign authority – either in terms of the internal/external division, or with respect to substantive issue (economic, human rights, etc.) – this view becomes much more plausible. Substantive partitioning of sovereignty allows precisely for the political accommodations that might encourage more states to partake in international law. For that reason, divisibility of sovereignty enables international law to be more ambitious in its scope and in the depth of obligation it imposes.

[117] Rabkin, 2005a:264.

More than facilitating international law by lowering the prohibitive costs associated with participation in it or acceptance of its obligations, an incremental notion of sovereignty has a deeper appeal. Henry Shue explains,

> "Sovereignty is not some mystical cloud that either envelops the state entirely or dissipates completely; there are bits and pieces of asserted sovereignty. These assertions can be granted or contested one by one and accepted in this era and rejected in the next, or vise versa. Sovereignty should, I would think, be treated more like a (crazy) quilt that can be left to cover some things but pulled off of others."[118]

A state can retain its sovereign authority with respect to some issues and not others, which international governance institutions are better equipped to handle. For Shue, this distribution may change over time as particular circumstances in global and domestic politics shift the costs and benefits associated with sovereign deferral or retention. This temporality provision supposes, I believe, that once an incremental portion of sovereignty has been transferred to an international governance body, a nation is also free to revoke the waiver. That is, a nation-state may recover its sovereign immunity with respect to that substantive area. Implausible as this seems, this argument requires elaboration with respect to two points. First, does the recovery of partitioned sovereignty suggest that there are some core substantive areas in which ultimate sovereignty resides? That is, a state may designate less essential functions to multilateral organizations without undermining the fundamental site and origin of sovereign authority, such that the ability to un-designate is not compromised. And second, is there good reason to think sovereignty ought to be conceptualized as an incremental characteristic at all, in opposition to the traditional view?

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[118] Henry Shue, "Eroding Sovereignty – The Advance of Principle" in *The Morality of Nationalism,* Eds., Robert McKim & Jeff McMahan, (New York: Oxford University Press, 1997), 340. Shue's description of sovereignty reveals the reason Krasner refers to it as "organized hypocrisy".

Proponents of international human rights law seem to think there is good reason to adopt the incremental view. The standard justification for the purported connection between nationalism and sovereignty is, in sum: in order for a nation to be genuinely self-determining, it needs its own sovereign state; a sovereign nation-state is the best guardian of its own people because it may allot special attention to their interests. International human rights law arises out of two objections to this justification. First, justifying complete internal sovereignty on the basis of a nation's ability to serve its 'own people' has historically, and will likely continue to depend upon a controversial understanding of who the people are. "Thus self-determination for the favored group brings denial of the self-determination of individuals of other groups. Internally, 'special' attention with a nationalistic grounding seems extremely likely to lead, at best, to inequality in the self-determination of individuals based upon which group they belong to, and often…leads to persecution and expulsion of individuals from other groups."[119] The genocides of Rwanda and the former Yugoslavia – the subjects of past international criminal tribunals – testify to the gravity of this first objection.

Second, justifying external sovereignty because of the state's ability to exclusively promote its own nationals overlooks the impact of externalities[120]. There are common goods that may be attained only if mutual restraint is agreed to and practiced. By recognizing the external effects or byproducts of one's actions, one may see how common goods are effectively achieved (pollution-control is one obvious example). Shue makes a crucial distinction concerning sovereign promotion of national interests. "It is one thing to claim…that a sovereign state may promote only

[119] Shue, 341.
[120] I adopt the economic definition of ***externality***: "An effect of one agent's actions on another, such that one agent's decisions make another better or worse off by changing their utility or cost. Beneficial effects are positive externalities; harmful ones are negative externalities." Wikipedia Free Encyclopedia*,* Accessed 24 April 2006, Available http://en.wikipedia.org.

the interest of its own nationals; call this the thesis of *exclusive promotion*. It would be quite another matter to claim that a sovereign state may promote the interest of its own nationals no matter what the effects are on the interest of others; call this the thesis of *unlimited promotion*. It might well be that although a state need never make a point of advancing the interest of non-nationals, it must refrain from harming at least some interests of non-nationals however much harming the non-national's interest would serve to promote nationals' interests."[121] As such, unlimited promotion does not follow from exclusive promotion. In this view, a common global good is achieved when all states commit themselves to minimizing certain harmful externalities. Reminiscent of a Rawlsian theory of justice, this objection highlights the idea that unchecked national sovereignty may not be the most effective means of promoting global goods (i.e. when these global goods are defined in moral terms). The extensive network of war-crime treaties defining a doctrine of just war attests to the fact that external sovereignty has, in practice, been limited by international principles aimed at achieving a global good. States may engage in war that exclusively promotes nationals' interests but may not violate certain minimal standards protecting their enemies. International humanitarian law arises out of the recognition that checking external sovereign action promotes certain common goods.

Both international human rights and humanitarian law are based upon the objections that sovereign-states do not adequately serve their internal populations and may do/justify active harm to the external populations. The first objection suggests that the sovereign state may not effectively deliver the goods it allegedly promises; the second that a system of independent sovereign entities may not achieve—indeed, may at times impede—the attainment of common global goods (or universal goods, if we use the language of international law). Both may be traced to an underlying ethico-

[121] Shue, 347.

political understanding of the good. In these two respects, the traditional view of sovereignty as unified and unchecked is insufficient. They give us good reason to re-conceptualize sovereignty as an attribute that can be partitioned – deferred to an international body or regulated in some respects and reserved for exclusive domestic control in others.

4.4 Implications for the ICC

Reconciling these accounts of sovereignty on purely theoretical terms will be unlikely to illuminate the legitimacy of international institutions such as the ICC. Instead, I consider the theoretical assertions the ICC requires, if it is, in its present form, to operate compatibly with any doctrine of state sovereignty. Rabkin explains, "sovereignty is, to being with, a legal concept. Sovereign power is the right to make binding law in a particular territory."[122] As we have seen, the difficulty with the notion of sovereignty is precisely that it is far more than a legal concept. By asserting particular ethico-political understandings of the good, of the autonomous individual (and economic implications), culturally varying conceptions of legitimacy and the role of power (or violence) in governance, sovereignty complicates the legal understanding of state authority. Further, in an increasingly globalized age, the constraint of definite territory becomes decreasingly useful in understanding what sovereignty entails. For the ICC to effectively achieve its aims in promoting human rights, as a institution deriving its strength from international support, requires broad acceptance of what sovereignty means – on terms conducive to its needs.

First, the International Criminal Court is highly incompatible with Westphalian sovereignty. Instead, it can be understood to support and affirm the international legal

[122] Rabkin, 2005a:38. Again, we can contrast this to Schmitt's account where 'right' refers to the legitimacy of an act and 'law' refers to legality.

account of sovereignty. While both recognize states as juridically independent territorial entities and exclude external authority structures from the territory of the state, the Westphalian account places far stricter limits on what 'exclusion' entails. International legal sovereignty places greater restriction on what 'recognition' of the state involves. Westphalian sovereignty only sees international organizations as acceptable if they function to promote roughly administrative functions – efficiency of exchange through trade agreements, etc. If the ICC functioned solely as an administrative entity to which states could voluntarily outsource their judicial functions when unable or unwilling to prosecute their own nationals domestically, it might be possibly to reconcile the Court with Westphalian sovereignty. A weak proposition at best, such a version of the Court would have quite different jurisdictional provision.

Instead, the Court that has actually come into existence possesses several particular clauses that conflict, fundamentally, with the Westphalian account. The most obvious are the complementarity principle and the idea of universal jurisdiction. Complementarity endows the Court with the authority to determine whether or not the domestic judicial system is effectively and genuinely investigating a case within its substantive jurisdiction. In that respect, the ultimate authority over determining whether a domestic policy pertaining to the core crimes against human rights is legitimate or illegitimate is transferred to the international institution. "Westphalian sovereignty is violated when external actors influence or determine domestic authority structures."[123] A similar problem arises with the institutionalized universal jurisdiction the Court possesses. While Westphalian sovereignty asserts that rulers may be constrained, sometimes severely by the external environment, "they are still

[123] Krasner, 20.

free to choose the institution and policies they regard as optimal."[124] An individual state may declare for itself universal jurisdiction over human rights crimes, but another state may interpret that declaration as a threat or constraint located in its external environment. Actively conceding to a treaty that delegates universal jurisdiction internally alters and constrains policy choice for that state, whether or not that state asserted independent universal jurisdiction in the first place. It is thus incompatible with Westphalian sovereignty.

International legal sovereignty, on the other hand, is effectively captured in the Rome Statute[125]. The Statute forwards minimum human rights standards to which member states (and by universal jurisdiction non-member states) must comply. These standards can be interpreted, with respect to the complementarity clause, to form the basis under which the ICC recognizes a state. According to the ICC, if a state fails, domestically, to uphold these human rights principles through genuine investigation of their violation, it also fails to perform a critical sovereign function. As such, the ICC may enact its jurisdiction and take on the case without violating international legal sovereignty, since, in effect, that country failed to demonstrate a prerequisite function for sovereign immunity. Conversely, by upholding the norms, a state affirms its sovereign authority and the ICC's jurisdiction is not activated. "International legal sovereignty does not guarantee the territorial integrity of any state."[126] The permanent extradition clause of the Rome Statute that formally constrains territorial inviolability of member states is also compatible with the international legal account of sovereignty. It seems to follow, though I can only speculate, that the delegation of universal jurisdiction similarly poses no problem for this version of state sovereignty.

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[124] ibid.
[125] The question arises whether sovereignty can be legitimate today at all without international recognition. The dominance of the international legal framework suggests that it cannot, and for that reason, this thesis favors the international legal definition of sovereignty over the Westphalian one.
[126] Krasner, 19.

If the acceptance of constraints on judicial supremacy for the core-crimes in the Court's jurisdiction is compatible with international legal sovereignty because it earns a state formal recognition by the international community[127], so too, is that of universal jurisdiction.

The second distinction under which the compatibility of the International Criminal Court with state sovereignty might be considered is that of location. As we have seen in the preceding discussion, popular democratic sovereignty cannot be reconciled with the ICC, for some of the same reasons it cannot be entirely reconciled with the United States' Supreme Court. With respect to popular democratic sovereignty, the American people are only subject to self-given law and institutions. One might even extend this concept and argue that, obliged to observe fully their liberty and freedom, the people cannot submit to laws imposed exogenously – not self-given – because that would undermine the essence and perpetuation of popular sovereignty itself. If instead, people invest their individual autonomy in a constitutional state, that constitution can be understood as both the literal location and the institutional representation of sovereign authority. A literal reading of constitutional supremacy puts the ICC at odds with sovereignty; a figurative reading opens the possibility for reconciliation. I consider the particular case of the United States' Constitution, with the understanding that other constitutional democracies are far more accepting of the International Criminal Court.

If the Constitution is seen as the ultimate embodiment of sovereign authority in the United States, any incursion on its terms and any compromise of its totality is a threat to sovereignty. Rabkin articulates this logic when he speaks of the reflexive notion of sovereignty and the US Constitution. "Because the US is fully sovereign, it

[127] As mentioned in the introduction, our discussion sets aside the problem of defining 'international community'. A deeper exploration of hegemony reveals the limitations and biases implicit in the term.

can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure"[128]. Thus, the preservation of popular sovereignty and the state sovereignty inherent in the Constitution work analogously to demand US immunity from international intrusion. Sovereignty is inextricably connected to popular rule through Rousseau's concept of the general will. "As the sovereign is formed entirely of the individuals who compose it, it has not, nor could it have, and interest contrary to theirs…the sovereign by the mere fact that it is, is always all that it ought to be"[129]. Like the Constitution perpetuating the sovereignty of the nation, the people, through the general will, cannot act against their own unified interest. The ideology of popular sovereignty and the founding documents to protect it work together to serve the objective of US self-perpetuation[130]. Thus the ICC's dissonance with constitutional sovereignty emerges precisely because that ideology is aimed at its own preservation through immunity to foreign authority.

While the constitutional supremacy argument considers the ICC a necessary intrusion on state sovereignty, a more figurative understanding of the Constitution opens the possibility for reconciliation. As argued above, a constitution can be understood as a formal point of reference for an institution in which checks and balances are embedded. In this respect, it maps out the diffused institutional embodiment of sovereignty. This reading opens the possibility for a partitioned

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[128] Peter Spiro, "The New Sovereigntists: American Exceptionalism and its False Prophets," *Foreign Affairs,* Vol.76.6, (2000): 9. a quotation from Professor Rabkin.

[129] Jean-Jacques Rousseau, *The Social Contract,* trans. Maurice Cranston, (London: Penguin Books, 1968), 63. Because Rousseau's theory is based on the synthesis of the general will, it assumes the community of individuals can possess or come to realize a shared, collective interest. The constitutional sovereignty argument draws on both liberal individualist and republican democratic traditions.

[130] For the purposes of this discussion, I set aside two critical issues. The first is the tension between constitutionalism and democracy, a dilemma in political thought that we cannot adequately address here. The second is the problem of self-destroying democracies, a possibility ignored in the debate over the ICC. Both warrant future exploration.

understanding of sovereignty – the third dimension we must consider when evaluating the ICC. If sovereignty is understood as a cohesive attribute of the state that cannot be substantively or temporarily divided, the ICC is in violation. Interpreting sovereignty as a partitioned attribute allows a state to participate in international institutions whose criteria address some of the most fundamental functions of the state.

In conclusion, better specification of the varied and often contradictory theories of sovereignty is required if we are to reconcile the International Criminal Court with the sovereign nation-state. The United States' objections to the Court on the grounds of an absolute threat to state integrity and sovereign order is therefore an exaggerated one in that it fails to recognize the specificity and particularity of the account. Instead, as we have seen, the Court can, at least partially, be reconciled with a variant of state sovereignty that comes from a well-established tradition of international law. The incongruity between the United States' account of sovereignty and that widely adopted by the international community (in particular European Union members) underpins the growing disparity in how these states engage in global governance institutions.

CHAPTER 5: UNITED STATES and ADAPTATION TO EXISTING ICC

5.0 Overview

Amidst the United States' opposition to the International Criminal Court and the intricate manner in which the institution confronts a transforming notion of state sovereignty, the inciting objectives – the promotion of human rights and ending of impunity for war criminals and committers of large-scale atrocities – seems somewhat lost. Ultimately, the Court represents an ethical stance and an optimistic position with respect to the efficacy of punishment, as well as the meaningfulness of justice. Until May 2002, when the United States stopped participating in the preparation committee for the Rome Statute, it was a strong supporter of these objectives and advocated their institutionalization through legal means. But as political leverage became a primary concern, this central element was set aside. Gerry Simpson explains,

> "In a sense, the International Criminal Court was meant to transcend the political… These trials would be international, impartial, non-selective…A just and meaningful international criminal order could only, then, be created by cleansing that system of political influence. Of course, there is no evading politics…Treaty making is political – it seeks to secure political ends, it is 'an architecture of compromise' and it involves pooling of political aspirations. Law is politics transformed. In this sense, law can neither be reduced to politics nor can it be incubated from politics. But when commentators and observers criticize the politicization of law…they may mean something less innocuous. Perhaps they are suggesting that law, instead of being the rational implementation of a collective politics is the product of irrational selfish urges attributable to States' national interests."[131]

Is a depoliticized Court that impartially upholds human rights simply a legal fantasy? From this perspective, the lawmaking act is inevitably the creation of a distinction between legitimate and illegitimate violence. Amidst the debates over the Court's

[131] Gerry Simpson, "Politics, Sovereignty, Remembrance" *The Permanent International Criminal Court: Legal and Policy Issues,* eds., Dominic McGoldrich, Peter Rowe and Eric Donnelly, (Portland: Hardt Publishing, 2004) 51.

politicization, the question hovering beneath the surface might very well have been: 'who gets to make this distinction?' For the United States, the possibility of losing the sovereign authority to determine this distinction – for example, when using force to intervene in the violence of genocide abroad – is a political concern. With this in mind, the following section explores first the legal means by which the United States has dealt with the political threat of an ICC that has come into existence without its support. Reflecting on Simpson's comment above, and considering the strong strategic argument the United States forwarded in its rejection of the Court, it would be difficult to attribute politicization to irrationality – but instead a question of *whose* political interest is represented. Secondly, the following section considers alternatives for reconciling the United States' deep affection for an ideology of constitutional sovereignty with a strong international criminal justice system. Finally, it concludes by raising questions for future research including that of whether criminal adjudication is really anything more than a system of retribution that escapes its own declared ends.

5.1 Opting out: the US and Article 98

In the Rome Statute negotiations, the US insisted upon a protective clause that guarantees the possibility for treaty-based immunity from the ICC. Article 98 of the Rome Statute creates a provision by which bilateral arrangements effectively exempt a nation-state from the jurisdiction of the ICC. The article establishes "cooperation with respect to waiver of immunity and consent to surrender," by prohibiting the Court from superceding or acting inconsistently with nonparty states' international agreements. It basically means that the Court may not proceed with a request for surrender which would require the state to act inconsistently with its obligations under

other international agreements without the states' prior consent.[132] The bilateral immunity agreements (BIA's) articulate one country's intent to not 'turn-over' nationals of the other country to the ICC – that is, a non-extradition agreement. In pushing for this exemption, the US made it clear that it was not only unwilling to comply with, but deeply opposed to the universal jurisdiction hoped for by the ICC's proponents. This action, a defensive move above and beyond blocking ratification by the US Congress and removing the US signature from the Statute, carries its own serious implications in the view of the international community.

The countries willing to take the US's side on Article 98's immunity provisions are largely those with a history of human rights violations. A few examples include Bosnia and Herzegovina, the Democratic Republic of Congo, el Salvador, Sierra Leone and, importantly, Israel. Further, the countries that have signed BIA's with the US have, in many cases, done so in order to insure future economic aid and favorable relations with the US. This is what has been termed "permanent waiver" by the US. On July 1, 2003, President Bush announced a suspension in military aid to 35 state parties to the ICC. "Waivers for the ASPA prohibition on US military assistance are provided to ICC parties that have concluded, or are in the process of concluding, BIA agreements"[133]. That is, the BIA's are a way in which countries can protect themselves from the penalties imposed by the US on signatory parties. It is a penalty insofar as the US is revoking aid it would have otherwise provided, so although penalized countries are not worse-off than they would be without US interaction at all, it still is an avenue for US leverage. Not only does this demonstrate the US

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[132] Dominic McGoldrick, "Political and Legal Responses to the ICC," *The Permanent International Criminal Court: Legal and Policy Issues,* eds., Dominic McGoldrick, Peter Rowe and Eric Donnelly, (Portland: Hardt Publishing, 2004), 423.

[133] "AMICC chronology of US Opposition to the International Criminal Court," The American Non-Governmental Organization Coalition for the International Criminal Court, available www.globalpolicy.org/intljustice/icc/usindex.htm

government's willingness to ally itself with human rights violators against the objective of international justice, it illustrates willingness to use economic influence in a coercive manner. "The general impression left is that the domain of state authority in society and economy is shrinking; and/or what were once domains of authority exclusive to state authority are now being shared with other loci or sources of authority"[134]. As the domain of state authority shrinks – in this case exclusive control over judicial proceedings – the reaction is to attempt to reinforce hegemonic control by other means. The BIA's are, in this reading, an effort by the US to utilize its economic domination to counteract the threat of decreased political authority.

In fact, the US waged a similar threat in relation to peace-keeping operations. This argument points to ICC as a potentially additional risk deterring the US from acting as the 'world's policemen'. "If the ICC attains the respected international status sought by member countries, it is clear it will eventually become a forum for definitive statements on the war crimes status of most international military activities. Will it inhibit the US from accepting calls from the world community to assist in various peacekeeping or humanitarian situations? It probably will if every time US troops rush to the aid of the world community they find themselves called to account before the ICC." [135] By inflating the possibility that American troops will be called to trial for serious war crimes or crimes against humanity points to a between-the-lines message. The message is that the US is willing to withdraw, at least in part, its contributions to important international peacekeeping and humanitarian missions. Withholding funds from the ICC and threatening further international penalties, the US reveals its reluctance to compromise a position of dominance and immunity. This strategy is nothing new. "Testing the hypothesis that foreign aid is an ineffective

[134] Strange, 82.
[135] Wright, 27.

instrument of measuring US international influence…[studies] find evidence that on issues that are of vital importance to America's national interest the US government successfully utilizes foreign aid programs to induce compliance in the United Nations"[136]. The ICC is another arena in which the US may exercise leverage to shape the international political environment according to its interests.

5.2 Alternatives and Reevaluation

Underlying the debate over the ICC is really, then, the question of sovereignty and the United States' resistance to a changing world order. Two pressing questions concerning sovereignty remain to be addressed. First, in a complex globalized world where international agreements are forged and the legitimacy of institutions as prominent as the UN are widely observed, is this formalistic reading of constitutional sovereignty simply too narrow? International treaties pertaining to trade and production, to intellectual property rights, UN allocations of peacekeeping forces, and so on all amount to compromises of authority traditionally reserved for the nation-state. The (capitalist) state has theoretically monopolistic control over the market economy, the legal terms concerning intellectual production and the legitimate use of force – yet participation in the global environment may empirically violate these ideals. Second, how does the image of hegemonic instability cause us to reevaluate customary international law? That is, the threat of instability may be the crucial motivation for considering how the relationship between the US Constitution and CIL might need to change. Whether the traditional notion of sovereignty simply does not reflect the realities of the international political arena or whether hegemonic dominance is on the cusp of breaking apart, the United States may need to renegotiate the relationship between sovereignty, as articulated in the Constitution, and its foreign

[136] Johnson, 107.

policy. That the ICC is neither in the strategic nor ideological interests of the US and yet proceeds without American support is potentially a signal imploring this change.

The arguments in opposition to the ICC all draw upon the importance of both popular and constitutional sovereignty. Yet, they may be calling for a degree of insulation from the international community that never has and never can exist in a globalized world. "There is something in the character of the American system that supports a general liberal strategic orientation…Democracies – particularly big and rich ones such as the U.S – seem to have an inherent sociability. They are biased, by their very makeup, in favor of engagement, enlargement, interdependence and institutionalization and they are biased against containment, separation, balance and exclusion."[137] Despite the sovereigntist rationale, the US as a democracy is inherently inclined to engage in the sort of internationalist foreign policy that compromises the exclusive and comprehensive authority over its markets, legal arrangements and use of force. As such, the strict definition of sovereignty applied in the ICC debate needs to be reevaluated. "Sovereignty has a legal meaning, and only a legal meaning. It denotes constitutional or jurisdictional independence and has nothing to do with a state's actual power to perform specific functions or the ways in which its freedom to act may be constrained by non-legal forces outside its control."[138] Any redefining must begin on the legal level, both domestically and internationally. But, as the ICC debate has thoroughly demonstrated, a purely legal approach without reference to power or legitimacy is entirely insufficient.

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[137]G. John Ikenberry, "Why Export Democracy?: The Hidden Grand Strategy of American Foreign Policy" *The Wilson Quarterly* Vol.23, no.2, (1999): 6.

[138]David Armstrong, "Law, Justice and the Idea of a World Society," *International Affairs* Vol.75, no.3, (1999): 559.

This argument stands in direct opposition to Schmitt's which focuses on the fundamentally political meaning of sovereignty that makes concrete this legal formalism.

The European Union, whose member nations are almost all signatory parties of the Rome Statute, illustrates a different renegotiation of the concept of sovereignty. "The EU exemplifies the emergence of a supranational polity that is not confined to territorial based sovereignty. The critical difference between traditional models of sovereignty and the complex sovereignty of the EU on that political order is that while the former emphasizes government, the latter emphasizes governance."[139] Governance, a broader notion than government, refers to the interaction amongst formal institutions and those in civil society. In contrast to the strict legal interpretation of sovereignty, the emphasis on governance calls for a more abstract and encompassing definition. By employing this complex sovereignty, EU members can reconcile the expansive jurisdiction of the ICC with a system of interactions between state and society. It escapes the conflict by detaching sovereignty from the set of functions and authority traditionally reserved for the government itself and connecting it with governance. Manifest in the EU, "…another strategy would be to develop a different narrative of state sovereignty…with overlapping, nonhierarchical competences addressed to specific issues and audiences."[140] However, "uncertainty about who has the final say on matters of national importance does not generally sit well with the American public…thus a nonhierarchical vision of sovereignty is going to be a hard sell."[141] As is evident in the arguments waged by ICC opponents, this more flexible notion of sovereignty is unlikely to work for the United States.[142]

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[139] Johnson, 53.
[140] Aleinikoff, 105.
[141] ibid, 106.
[142] Perhaps this is because the United States is more apt to echo Carl Schmitt's concept of sovereignty which is inseparable from the political process of defining friends from enemies and the haunting possibility of violence. A non-hierarchical vision of shared sovereignty through multilateral alliances threatens, for Schmitt, the concept of a conflict-driven political. "A people which exists in the sphere of the political cannot in case of need renounce the right to determine by itself the friend-and-enemy distinction…Were this distinction to vanish then political life would vanish altogether…The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form is a specific vehicle of economic imperialism…To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the

Perhaps another path would be to reconcile international law with the US constitutional system by re-conceptualizing sovereignty and popular sovereignty in ways more conducive to growth and development. This would mean drawing upon the fact that domestically, most Americans are not bound to self-made law. "The idea of majoritarianism itself is in significant tension with understanding democracy as being ruled by rules of our making…thus as a matter of domestic law we conceptualize popular sovereignty and the legitimacy it bestows on lawmaking institutions in rather indirect terms"[143]. As such, popular sovereignty constitutes being ruled by those we authorize to act under procedures we approve and whose decisions we can ultimately amend or override[144]. By extending the concept of popular sovereignty to include indirect self-rule through transparent procedures with approved objectives and subject to amendment, one creates a place for international law in the US Constitutional framework. Customary international law that observes norms held and reflects procedures endorsed by the US *and* has established means to check power becomes entirely consistent with popular sovereignty. Recognizing the domestic legitimacy of law made internationally (prior to ratification process) is the first major step to reconciling the US Constitution and the International Criminal Court. Such a process would require broad acceptance of the partitioned or incremental understanding of sovereignty – it is neither absolute nor absent but instead some categories of sovereign authority are pooled through international organizations.

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enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity" Carl Schmitt, *The Concept of the Political,* (New Brunswick: Rutgers University Press, 1976) 51; 54.
By attempting to transcend the friend-enemy distinction between states under the auspices of lofty human rights goals or aspirations for humanity, people cannot escape the antagonistic nature of the political. And the attempt to do so deepens the stakes of war and violence. This is not to say the United States' rejection of the Court is the recognition of this possibility. Rather, it is the reassertion of its investment in determining how the concept of humanity, as an ideological instrument, is used.
[143] Aleinikoff, 106.
[144] ibid.

The enlarged notion of sovereignty, however, only gets us part way to reconciliation. The US may agree to the norms embraced by the ICC – the desire to end impunity for perpetrators of war crimes, genocide and crimes against humanity. Additionally, the procedures, provisions and mechanisms of prosecution and trial in the ICC are largely consistent with those in the American legal system, with the one notable exception being the absence of a jury of peers. But crucially, the absence of balanced power and responsiveness to the American public puts the Court at deep odds with the most fundamental provisions of the Constitution. This is precisely the reason the opponents of the Court argued against the power invested in the Office of the Prosecutor and promoted more comprehensive UN oversight. While popular sovereignty may be adaptable enough to accommodate certain forms of international law, it does not provide an adequate rebuttal to the Constitutional case against the ICC. Consequently, unresolved ideological questions make it difficult to overcome the strategic and structural objections to the Court.

Perhaps this leaves us at an impasse so long as ideologies and institutions remain intact. The fundamental ideological bases of the US calls for preservation of sovereignty (both popular and Constitutional), exclusive jurisdiction over the judicial system and international immunity for the Constitution. The US is designed for self-preservation. As such, it is impelled, necessarily, to struggle to maintain its hegemony so long as preservation involves maintaining the current world order. "Hegemonic interests are those interests which maintain the advantages of geopolitical and economic dominance of stronger states over weaker ones"[145]. Maintenance may be an increasingly difficult task, as hegemonic instability theory points to the building likelihood of backlash from the global community. The often-cited argument made by proponents of the ICC points exactly to the first murmurings of this backlash: "by

[145] Johnson, 11.

failing to sign the Statute, the US will be prevented from participating in the preparatory committee which will draft the Court's Rules of Procedure and further define the elements of the crimes within the Court's jurisdiction"[146]. By failing to concede its hegemony, the US sets itself apart from the international community and leaves itself unable to play an influential role in designing the ICC's procedures and rules. This includes, importantly, defining the 'crime of aggression'. The signatory states will do so on their own, forging stronger alliances to offset the power balance that has most recently favored the US.

5.3 Problems with 'Justice'

Perhaps the real problem for the ICC is that it may – even if it garners strong support from the international community – fail to address the main problem that it identifies. Justice is a retroactive attempt to set things right, after the crime in question has been committed. Does the possibility of adjudication really function as a deterrent for potential violators of human rights? Maogoto argues,

> "Ultimately, life incarceration remains unlikely for the chief perpetrators if historical precedent means anything. The international community appropriately desires the end to crimes against humanity, war crimes, genocide and aggression. The experience of generations has been that punishment, while important, is at best a poor remedy for the victims. The victim's greatest desire is to avoid victimization in the first place. Therefore, the best solutions to today's humanitarian crises lie not in adjudication that is too late for the traumatized victims, but in prevention…perhaps adherence to the tenets of the world's greatest moral and ethical philosophers would provide a better solution to both international crime and punishment."[147]

Indeed, as past experience has indicated, active prevention of human rights violations may be the most effective deterrent. In order to achieve a more engaged

[146]Michael Scharf, "Is a U.N. International Criminal Court in the US National Interest?" *Congressional Record,* 105 Congress, 2nd Sess., 23 July 1998, 74.
[147] Maogoto, 276.

interventionist role for the primary peacekeeping institution to date – the UN – several developments might be required. First, there must be a broader acceptance of post-sovereign vision of global politics by, most importantly, the powerful nations. There is perhaps evidence that this is underway, as the United States has taken up a strong interventionist position to further its political ends in Afghanistan and Iraq. In doing so, it has, at least in rhetoric, demoted principles of sovereignty in favor of democratic freedom, human rights, etc. The unilateral, partial, and violent nature of these interventions deeply contradicts the UN vision of legitimate intervention, but nevertheless a disregard for sovereign impermeability is detectable. Second, there would need to be greater institutional efficiency. Although this assertion lies outside the scope of our discussion, one salient example is the UN's drastically delayed and bureaucratically stifled intervention in Rwanda's genocides. Finally, there might need to be a stronger assertion of ethical positions which would, in all likelihood be a very dangerous development.

With respect to the last point, retroactive criminal tribunals raise the possibility of a rather novel moral hazard. If justice is seen to be the logistically easier but still ethically sound substitute for preventative intervention the ICC may work counterproductively. Smith points out, "If international actors feel confident that human rights criminals will eventually be brought to justice, either in their own countries or before the ICC, they may be less inclined to intervene to stop human rights crimes while they are happening, something international actors are reluctant to do in any case. Interventions and tribunals are not mutually exclusive, of course…[but] by viably and visibly punishing the worst human rights criminals, the ICC may become a virtuous excuse for states to turn a blind eye to atrocities, a moral free ride on the coattails of humanitarian law."[148] If tribunals are ineffective deterrents

[148] Smith, 178.

and an effective way for the international community to cleanse itself of collective guilt, perhaps the existence of a permanent international court will hurt, not help, the objective of minimizing atrocious violations of human rights.

Even after large-scale violations of human rights have been committed, the process of assigning guilt and allotting punishment may have undesirable, destabilizing effects. The South African 'Truth and Reconcilliation' process attests to this[149]. When the system of apartheid was replaced by the Government of the Republic of South Africa in 1990, there was concern that the aggressive pursuit of 'justice' and retribution would destabilize the nascent democratic government. By threatening former apartheid regime leaders with imprisonment or punishment, the new South African government feared those violators of human rights would avoid identification and the details of their violations would never become publicly known. Instead, by offering amnesty in exchange for coming forward with the 'truth' about the events, the South African government sought to publicize the atrocities. "It is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in the future…the Amnesty Committee may grant amnesty if it is satisfied that the applicant committed an act constituting a gross violation of human rights" and made full disclosure of all the relevant facts.[150] The idea was that the knowledge could be used as a tool to deepen the impact of reconciliation and deter future violations. At the

[149] The Truth and Reconciliation Commission was established in 1995 by the African National Congress government through the Promotion of National Unity and Reconciliation Act 34. "It was wisely appreciated by those involved in the…negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realized that much of the unjust consequences of the past could not ever be fully reversed." Constitutional Court of South Africa, Case CCT 17/96, Judgment transcript: Mahomed DP. 25 July 1996.

[150] John Duggard, "Reconciliation and Justice: The South African Experience" *Transnational Law and Contemporary Problems,* Vol.8 (1998) 277.

same time, it would enhance political stability by ensuring former leaders would not remain in outlaw (and potentially subversively powerful) status. If political stability in a democracy is seen as the most effective route to protecting human rights, the ICC's emphasis on guilt and retribution instead of reconciliation may obstruct its declared goals. The ICC cannot help but raise the question of whether or not justice is valuable on its own and whether it is conducive to the achievement of human rights objectives. The South African case, the problem of the moral hazard, and the dubious efficacy of trials as deterrents all suggest that international criminal adjudication may deliver some solace to survivors and families but achieve little more.

5.4 Conclusions: What next?

Institutions – both the ICC as a site for pursuing and applying international justice, and the state structures and arrangements protecting the ideology documented in the Constitution – need to evolve. But their evolution need not take the form of altering customary international law through the setting of norms. This is because the problem is deeper than one of selecting human rights standards or states allotting power to institutions. Instead, the evolution is that of political conceptions of the state and its position in relations to the international sphere. By conceptualizing international institutions solely as facilitators of state interactions may fail to accommodate the substantial effects of globalization. Peter Spiro frames the inevitable necessity of this evolution in the context of the sovereigntist debate:

> "Indeed, the Constitution will have to adapt to global requirements sooner or later, for the New Sovereigntist premise of American impermeability is flawed. During the twentieth century, the US was able to defy various international norms only because other countries were unwilling to bear the costs of sanctioning America for its sins; at the same time, international organizations had little power to wield on

> their own…but economic globalization will inevitably bring the US in line."[151]

That the international community has gone ahead and created an International Criminal Court without the support of – indeed, *in spite of* resistance from the US, highlights the importance of this shift. Notions of sovereignty may need to be transformed, and while Constitutional amendment is certainly a long shot, reinterpretation may permit greater engagement in the process of international law-making and upholding.

For the time being, the ICC poses a clear strategic and ideological threat to the United States and consequently non-participation remains the most viable option. The real task for the US is then to remain independent from ICC participation while meticulously supporting the humanitarian objectives the Court intends to serve. Doing so would likely bypass, or at least offset the polarizing effect of hegemonic instability. Doing so would also epitomize self-governance without global government – that is, without international institutions to oversee and enforce. It is not in the interest of the US to struggle against and undermine nascent and widely supported institutions for international justice, nor is it in the national interest to concede the objectives of independence and self-perpetuation so deeply rooted in the ideology within the Constitution ("if you can't beat 'em, join 'em"[152]). It *is* in the nation's interest to examine just how far the constitutional system needs to be reconceptualized to suit a changing notion of sovereignty that better resonates with international law and the evolving global environment. Aleinikoff proposes a federal incompatibility statute that creates an avenue for

[151] Spiro, 13.
[152]Michael Scharf, "Should the United States Ratify the Treaty Establishing the International Criminal Court?," *International Debate Series* No.1, (2001): 10.

challenging federal statutes and executive branch actions that violate customary international law[153]. Without violating sovereignty concerns, it creates a mechanism by which CIL is self-applied. Perhaps this is exactly what the US needs in order to engage actively, constructively and non-hegemonically in the international political arena. Only then, will the US be able to fully participate in international visions of justice and peace.

[153] Aleinikoff, 101.

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