

Explaining the Creation of the International Criminal Court:
The Power of the State and Non-State Actors in International Relations

by

Cara Bond Catherine Cameron
B.A.H., Acadia University, 2003

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of
MASTER OF ARTS
in the Department of Political Science

© Cara Cameron, 2005
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by
photocopy or other means, without the permission of the author.

Supervisor: Dr. A. Claire Cutler

ABSTRACT

The creation of the world's first permanent international criminal court, the ICC, was one of the most significant achievements in the twentieth century. Both analytically and theoretically its creation is truly remarkable as it demonstrates that the dominant theories in International Law and International Relations are inadequate in accounting for the establishment of the Court. These theories fail to account adequately for the role of non-state actors in international affairs. This thesis demonstrates that the ICC was not created by state power alone, but also by the activities and leadership of non-state actors, who in cooperation with states and international organizations, were instrumental in bringing the Court into existence.

TABLE OF CONTENTS

Acknowledgements	iv
Dedication	v
Introduction	1
Chapter 1 <u>The Individual and Non-State Actors Under IL</u>	6
Chapter 2 <u>Theoretical Approaches and Working Hypotheses</u>	41
Chapter 3 <u>Actors, Institutions, and Processes</u>	69
Conclusion	116
Bibliography	120

ACKNOWLEDGEMENTS

I would first like to thank Dr. Antonio Franceschet for giving me the inspiration to study the ICC during my undergraduate degree. His interesting insights in this area have stimulated my research and have a great deal to with the reason why I have pursued this particular research project. I would also like to thank my supervisor, Dr. Claire Cutler, for her role in this project. Without her knowledge and expertise, along with her patience, encouragement, and endless guidance this project would not have been possible. Furthermore, Dr. Michael Webb's contributions to this project should not go unrecognized. His assistance with this project has greatly added to the final product. I am indebted to you all.

DEDICATION

To Greg

my very best friend

for encouraging and supporting me with this project

INTRODUCTION

Make no mistake about it, this is international lawmaking of historic proportions
- The Times of India¹

The International Criminal Court (ICC) is one of the most significant achievements of the twentieth century because it is the world's first permanent court for adjudicating criminality under international law. It also replaces *ad hoc* tribunals and it represents a renewed commitment by the majority of the international community to put an end to impunity through coordinated efforts of strengthened national judicial systems, and a new international criminal jurisdiction. For the first time in history, international law will be applicable directly to the actions of individuals on a systematic and permanent basis.

The story behind the creation of the ICC is one of 'more than half a decade of frustration and inability, capped with a stunning acceleration of the pace in the twilight years of the twentieth century.'² Accordingly, even in the early 1990s, most observers, conscious of the past difficulties in making the court a reality, believed an international criminal court was still decades away.³ However, when the idea surfaced on the international agenda in 1989 the international community, along with

¹ Anonymous, 'Editorial on the process that produced the Rome Statute,' *Times of India*, 1 August, 1998.

² William A. Schabas, 'International Criminal Court: The Secret of its Success', *Criminal Law Forum*, 12 (2001): 415.

³ The distinction of an international criminal court (icc) and the International Criminal Court (ICC) will be made throughout this thesis. The 'icc' will refer in general to international criminal courts, while the 'ICC' will refer to the permanent International Criminal Court that was created under the Rome Statute.

the Non-Governmental Organization (NGO) Coalition for the ICC (CICC), was able to work together with great speed in consolidating their efforts to establish a permanent court. The addition of civil society to this process was contentious, but throughout the subsequent years, the speed and type of court that was to be achieved stunned the international community.

The establishment of the ICC within the international community is truly revolutionary as it raises interesting questions, developments, and theoretical issues within the disciplines of International Relations (IR) and International Law (IL). Moreover, it provides interesting insights into the constructive interplay between law/rule making and democracy at the international level. While a great deal of legal analysis has been completed on the Court, more political analysis is necessary in order for scholars in both the discipline of IR and IL to gain a greater appreciation for the phenomenon of the ICC.

Thus, the purpose of this thesis is to examine how the ICC was created in light of the dominant theories and approaches of the disciplines of IL and IR, and demonstrate how these theories and approaches for the most part do not adequately account for the activities of non-state actors at the international level. Ultimately, this thesis demonstrates that in creating the ICC the state was not sole actor involved in the process as the contributions of civil society can be seen to have had a major impact on how and why this Court was established.

The approach taken in examining this question is one which will draw upon an interdisciplinary body of analysis from the disciplines of International Relations, International Law, and International Organizations (IO). Given this analysis the

thesis will be able to posit several hypotheses. These hypotheses will emerge from an examination of the dominant theories of International Relations: realism, neoliberal institutionalism, and social constructivism. Realism points to the interests and preferences of a hegemonic state around IOs. Relatedly, realism provides that IOs will be unsuccessful to the extent that they interfere with the direction of states. Neoliberal institutionalism on the other hand, offers more confidence for the potential of international organizations, like the ICC, to function independently of member states. Finally, constructivism provides a more hospitable theoretical and analytical terrain for the ICC since constructivism is the product of a progression in international norm building. It is through this approach that the reader will be able to comprehend the limits of the theories in light of the relevant factors significant in the Court's creation.

Chapter One of the thesis is concerned with highlighting the inability of international law to account for the individual and non-state actors. This purpose of this chapter is to demonstrate that the state is the main subject under international law and this is particularly problematic given that entities other than the state are able to give rise to customary international law. Moreover, this chapter maps the evolution of individual criminal responsibility and addresses the place of the individual and the importance of non-state actors under international law today.

The focus of Chapter Two is to frame the theoretical approaches and working hypotheses of the thesis. This chapter examines the dominant theories and approaches of IR: realism, neoliberalism, and constructivism, and assesses both their analytical and theoretical adequacy. More specifically, it analyzes their ability to account conceptually and theoretically for the creation and operation of the ICC.

Furthermore, the chapter will demonstrate how the theories explain the creation of the ICC and set forward a series of hypotheses that will be used to assess the Court's creation.

Chapter Three will address the key actors, institutions, and processes involved in creating the Court. It will begin by introducing the contentious issues surrounding the Court and then speak to how the key actors and institutions dealt with these issues by explaining their membership, how they made decisions, and their specific contribution to the Court's creation. Thus, the final section of this chapter will formulate the hypotheses more specifically and illustrate which theories of IR can explain the phenomenon of the ICC most adequately. Essentially, Chapter Three links the arguments generated in the previous chapters and demonstrates their relevance to the creation of the ICC. It is hoped that the reader will have acquired a broader understanding that the dominant theories and approaches in IR and IL do not adequately account for the contributions of civil society, and that the reader will be able to gain an appreciation of why these theories need to be rethought to incorporate the current realities of international politics.

Finally, the conclusion of this thesis posits that the idea of non-state actors participating at the international level may not be an emerging trend, but a well established one. Since this is the case, the conclusion asserts that this development raises the importance in discovering new theories or new approaches to old theories to better account for the realities within international politics. Ultimately, the creation of the ICC draws attention to the fact that new trends are always emerging on the

international stage and that the theories in both the disciplines of International Law and International Relations need to be able to account for these changes.

CHAPTER ONE

THE INDIVIDUAL AND NON-STATE ACTORS UNDER INTERNATIONAL LAW

*The worth of a state, in the long run,
is the worth of the individuals composing it.*

- John Stuart Mill

One of the fundamental features of modern international law is that it has been organized around the primacy of the sovereign nation state. However, at the beginning of the twenty-first century, the international community has been witness to an increasingly globalized, integrated, but fragmented world. While the sovereign nation state continues to be the central subject under international law, many other actors have also become important: international organizations, non-governmental organizations (NGOs), corporations, ad hoc transnational groups, and individuals.⁴ Thus, international law can be argued to inhabit a much more complicated world than the one that existed several decades earlier.

One of the main tensions facing international law is its placement of the individual as an object as opposed to a subject.⁵ This is important for the purposes of this thesis because it demonstrates that the foundations of international law pose a barrier to holding individuals responsible for violations committed during inter-state and intra-state conflicts. The silence of international law in neglecting to recognize

⁴ Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', *American Journal of International Law*, 96 (2002): 798.

⁵ *Subjects* under international law is the term used to describe those elements bearing rights and responsibilities. *Objects* are like boundaries, rivers, territory, etc. See Rosalyn Higgins. 1985. 'Conceptual Thinking about the Individual Under International Law', in *International Law: A Contemporary Perspective*, eds. Richard Falk, Friedrich Kratochwil, and Saul H. Medlovitz (Boulder: Westview Press).

the individual as an entity with legal personality has created a culture of impunity in which governments, heads of states, government officials, and individuals acting on the states' behalf have been able to hide behind the veil of the state for the responsibility of their crimes. Nonetheless, after World War I and even more so after World War II, a move to hold individuals accountable for their crimes began to emerge and the principle of individual accountability was created with the establishment of the International Military Tribunals at Nuremberg (IMT) and Tokyo. While international law still does not grant individuals recognition as legal subjects, since the Nuremberg and Tokyo tribunals there has been a paradigmatic shift within the international community from that of culture of impunity to that of a culture of accountability.

Another tension facing international law, with regards to subjects and sources doctrine, has to do with the fact that it limits the creation of law to states and does not recognize the activities of non-state actors, such as the UN General Assembly and NGOs. Again, the analytical foundations of international law can be argued to pose a barrier because they only recognize the state as their subject and thus recognize only sources that emanate from the state. This is problematic, particularly given the focus of this thesis on the significance of the NGO, the Coalition for the Creation of the International Criminal Court (CICC) in establishing the principles of the Rome Treaty that would eventually become law. Since international law does not recognize non-state actors within its subject and sources doctrine the activities of non-state actors simply go unanalyzed and under theorized. However, in the case of the ICC their work was exceptionally significant.

This chapter proceeds as follows. The first section is concerned with identifying the state as the main subject of international law and discusses the various subject and object doctrines under international law. It also discusses the placement of the individual and non-state actors within this dichotomy. Moreover, this section examines the doctrine of state responsibility with respect to international crimes and how the individual is conceptualized through the state. The second section is devoted to mapping the evolution of individual responsibility from the Nuremberg and Tokyo tribunals to the ad hoc tribunals for the former Yugoslavia and Rwanda. The final section delineates how the establishment of the ICC changes the traditional conception of the individual under international law in that its statute constitutionalizes the principle of individual responsibility. Furthermore, this section will address the place of the individual and the importance of non-state actors under international law today, and the way in which these entities have fundamentally altered the subject/object dichotomy of international law.

I. THEORETICAL FOUNDATIONS OF INTERNATIONAL LAW

The origins of modern international law are disputable. The prevailing view asserts that international law materialized in the context of the emerging European states systems.⁶ It is worth mentioning though that before the growth of European notions of sovereignty the Middle Ages in Europe were characterized by the authority

⁶ Peter Malanczuk, *Akehurst's Modern Introduction to International Law: Seventh Revised Edition* (London: Routledge, 1991), 9.

of the Church and the comprehensive structure of power it commanded.⁷ During this time all of Europe had one religion, and divine law applied to all. Not surprisingly, much of this period was plagued by struggles between the religious authorities and the rulers of the Holy Roman Empire.

Hugo Grotius, who is considered by some as the ‘father of international law’ was one such noted scholar who emphasized the irrelevance of the concept of divine law. He opined that the law of nature would be valid even if there was no God. Thus, in his *De Jure Belli ac Pacis*⁸ he attempted to create a theory of law in which he hoped would assist in bringing order to the chaos of early seventeenth century Europe.⁹ Moreover, in light of the rise of various nation-states in Europe, England, Spain, France, the Netherlands, and Sweden claiming unrestricted sovereign authority over their respective territories, Grotius saw a need to regulate states activities in a generally acceptable fashion. Thus, his reasoning for creating this theory of law is evident in the prologue to his book:

I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarian races should be ashamed of; I observed that men rush to arms for slight causes or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly let loose for the committing of all crimes.¹⁰

⁷ Malcolm N. Shaw, 2003. ‘The Nature and Development of International Law’, in *International Law*, ed. Malcolm N. Shaw (Cambridge: Cambridge University Press, 2003), 18.

⁸ Hugo Grotius, *The Law of War and Peace*, translated by F. W. Kelsey (New York, 1925).

⁹ Other important naturalist writers at the time were Vitoria, Suarez, Gentili, and Zouche.

¹⁰ A. Claire Cutler, ‘The Grotian tradition in international relations’, *Review of International Studies*, 17 (1991): 44.

Grotius argued that the basic principles of all law, both national and international were derived not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason. Ultimately, law was to be found, not made. The principles of law that are found in Grotius's writings fall under the category of *natural law*. Thus for Grotius, natural law was 'the automatic consequence of the fact that men lived together in a society and were capable of understanding that certain rules were necessary for the preservation of society.'¹¹ The theory of natural law served a very useful purpose during the sixteenth and seventeenth centuries as it encouraged a respect for justice when the collapse of the feudal system and the division of Europe between Catholics and Protestants might have led to complete anarchy. While the theory of natural law is still the official philosophy of law accepted by the Roman Catholic Church, after Grotius' death the intellectual climate became more skeptical surrounding the body of natural law and a new thinking about law began to materialize.

The doctrine of legal positivism can be said to have developed in reaction to the rejection of the natural law theories in the 1700's and also as a result of the emergence of the modern nation-states system. Furthermore, it can be said to coincide with the theories of sovereignty such as those posited by Bodin and Hobbes, which underlined the supreme power of the sovereign and led to notions of the

¹¹ Malanczuk, *Akehurst's Introduction to International Law*, 16.

sovereignty of states.¹² Legal positivism asserts that ‘the law is largely positive or man-made, and that the law might vary from time to time and place to place, according to the whim of the legislator.’¹³ For instance, legal positivists would argue that there is no higher authority above the sovereign state. They would also assert that under the states system states dealt more and more with each other vis-à-vis ambassadors, trade, war, etc. It was through these interactions that the positivist argument is evident as states began making treaties and agreements with one another. Accordingly, positivists would state that these treaties did have a kind of legal and moral authority which ultimately constituted the primary source of international law. Thus, according to positivist thinking, international law can only be applied to sovereign states. Only states were the subjects of international law; individuals and non-state actors could only be objects of international law given this rationale.

The development of legal positivism is important in understanding international law because it places the state at the centre of its theory. Moreover, the state under international law is viewed as the primary subject and recognizes only positive acts of law creation by states as legitimate sources. In sum, the theory of legal positivism provides the underpinnings for the analytical foundations of international law, as the following discussion will clarify.

¹² Malanczuk, *Akehurst's Introduction to International Law*, 25.

¹³ Malanczuk, *Akehurst's Introduction to International Law*, 16.

SUBJECTS AND SOURCES OF INTERNATIONAL LAW

The theory of legal positivism is very significant in identifying the analytical foundations of international law because it informs both subject and sources doctrine. As will become apparent, the state is *the* subject of international law and it only makes sense that sources doctrine recognizes *only* sources that emanate from states.

Subjects

In any legal system there exists only objects and subjects.¹⁴ A *subject* under international law means that it has the capacity to enter into legal relations and that it bears certain rights and responsibilities. Seeing that international law evolved as a system of rules regulating inter-state behaviour, the state is considered *the* subject of international law. Accordingly, in order to be recognized as a state under this body of law, a state must satisfy three conditions:

- (1) A state must have territory
- (2) A state must have a population
- (3) A state must have a government capable of maintaining effective control over its territory.¹⁵

An *object* on the other hand is the term used to describe something that is devoid of rights and responsibilities and an example of an object under international law would be boundaries or even rivers. It should be noted though that objects may be granted rights and responsibilities by states. However, under modern international

¹⁴ Rosalyn Higgins, 'Conceptual Thinking About the Individual Under International law', in *International Law: A Contemporary Perspective*, eds. Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz (Boulder: Westview Press, 1985), 478.

¹⁵ Higgins, 'Conceptual Thinking About the Individual,' 53. For a more detailed explanation of these conditions see Akehurst's chapter on 'States and Governments', p. 53-69. Also note that these attributes are given in the Montevideo Convention of 1933.

law there are a plethora of entities which also constitute objects. Such entities include: international organizations, NGOs, transnational corporations, and individuals. While it can be argued that these entities do have a degree of legal personality, that personality can only be vested in them by the state.¹⁶ This is true particularly with international organizations as the state would only allow them enough personality as necessary to carry out their activities within the international community. The situation for transnational corporations mirrors that of individuals; however, there are some exceptions.¹⁷ With regards to individuals, there has been much debate over the status of the individual under international law in the past few decades as the individual has increasingly been granted more rights and responsibilities vis-à-vis various treaties, and has also been able to access certain courts without the state acting on its behalf. Higgins argues that although ‘the individual may benefit indirectly under international law, in a few isolated areas international law is beginning to acknowledge that the individual does have certain direct rights and duties.’¹⁸

Before the destruction and mass human carnage brought about in WWI and WWII the laws of war and even international law were mostly silent as to the consequences for individuals who violated them. However, that would all begin to change in the aftermath of the wars because the laws and customs of war began to recognize certain limitations on the conduct of war and also place some constraints on

¹⁶ A. Claire Cutler. ‘Law in the global polity’, in *Towards a Global Polity*, eds. Morten Ougaard and Richard Higgott (London: Routledge, 2002), 64.

¹⁷ Cutler, ‘Law in the Global Polity,’ 64.

¹⁸ Higgins, ‘Conceptual Thinking about the Individual,’ 477.

methods of warfare. This recognition would indirectly promote some rights for individuals during wartime and this is evident in the Nuremberg Principles in which the UN General Assembly affirmed that the state along with the individual is under international law and is subject to duties concerning the waging of wars of aggression, crimes against humanity, and war crimes. Also, various treaties including the two UN Covenants on human rights¹⁹, along with the Optional Protocols represent a significant improvement in the status of the individual under international law. While the state continues to dominate the discourse of international law, in recent decades it can be argued that various inroads have been made.

Sources

A *source* under international law refers to ‘the criteria under which a rule is accepted in the given legal system.’²⁰ For centuries the most important source of international law was customary law, which evolved from the practice of states. While this source is still important today it is also worth noting that customary international law is no longer solely evolving from the practice of states, but also from the activities of non-state actors, international organizations, and transnational corporations.

¹⁹ One is the Covenant on Economic, Social and Cultural Rights and the other is the Covenant on Civil and Political Rights. The Covenant on Economic, Social and Cultural Rights confirms that self-determination is a legal right. The Covenant on Civil and Political Rights asserts a prohibition against the arbitrary deprivation of life, torture, cruel, inhuman or degrading treatment or punishment, slavery and forced labour, arbitrary arrest and detention.

²⁰ Malanczuk, *Akehurst's Introduction to International Law*, 35.

The provision which is usually accepted as constituting a list of the sources of international law is Article 38(1) of the Statute of the International Court of Justice (ICJ).²¹ This provision states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

With respect to *international conventions*, it is important to note that conventions are synonymous with treaties, and that the primary source of guidance for their interpretation is the Vienna Convention on the Law of Treaties.²² In general, treaties are to be interpreted in accordance with the ordinary meaning given to their terms in the context and in light of the treaty's object and purpose. Accordingly, when the treaty is unclear or leads to an unreasonable result, decision makers may resort to certain supplementary means of interpretation.²³

Customary international law is evidence of a general practice that has been accepted as law. The ICJ stipulates that custom is constituted by two basic

²¹ M. Mendelson, *The International Court of Justice and the Sources of International Law*, in *Fifty Years of the International Court of Justice*, eds. V. Lowe and M. Fitzmaurice (Cambridge: Cambridge University Press, 1996), 63-89.

²² Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), 16.

²³ See, May 23, 1969, 1155 UNTS 331 [Vienna Convention], article 32 at 340.

requirements: (1) that the norm be reflected in consistent state practice, and (2) that the practice be adhered to out of a sense of legal obligation, or what is known as *opinio juris*.²⁴ Evidence of customary practice is found again in the general practice of states and in order to discover an actual state's practice it is necessary to examine newspaper reports of actions taken by states, government statements, state laws, judicial decisions, etc. Documents published by the United Nations (UN) are also evidence of customary international law, along with the writings of international lawyers and judgments rendered in international tribunals.²⁵

The third source of international law, *general principles of law*, refers to the method of using existing sources of law. For instance, if for some reason a gap is found in international law, it can be bridged by borrowing principles that are common to all or most systems of law.²⁶ This source of law was included in the ICJ's list of sources for the purposes of ensuring a solution in cases where treaties and custom provided no guidance. Thus, the general principles of law have proved most useful in emerging areas of international law.

The final source, *judicial decisions*, allows the Court to use previous decisions as a 'subsidiary means for the determination of the rules of law.'²⁷ Although under international law international courts are not obliged to follow previous decisions,

²⁴ Ratner and Abrams, *Accountability for Human Rights Atrocities*, 17.

²⁵ Malanczuk, *Akehurst's Introduction to International Law*, 39.

²⁶ Malanczuk, *Akehurst's Introduction to International Law*, 49. It should be noted that all states do not have the same rules or laws, however, despite the variances from state to state, the basic conceptions and principles are often quite similar.

²⁷ Malanczuk, *Akehurst's Introduction to International Law*, 51.

they are often taken into account in an attempt to create a consistent body of international case law. Furthermore, under this source of international law, a court can turn to scholarly work done by leading authorities in the legal field in rendering a decision as well. It should be noted however, that these two sources are ancillary to and of less value than treaties, customary, and general principles of law.²⁸ It is worth noting that Article 38(1) in the Statute of the ICJ is not a comprehensive list of all the sources of international law, but it is the list of sources that has won general approval.²⁹

It is quite evident that given the above list that only *states* can create international law. The argument can be made that within the international community institutions do to some extent possess many government-like capacities; however, one must bear in mind that these institutions do not function as a supranational government. Cutler asserts:

‘The UN General Assembly, while broadly inclusive of states, has only limited law-making capacities. The General Assembly, with rare exception, can only make recommendations and cannot issue resolutions that are binding on states. Only the UN Security Council...can issue binding resolutions. The European Parliament probably comes closest to a truly supranational legislature that can legally bind member states; however, its authority is limited regionally.’³⁰

Furthermore, Higgins explains that while the UN General Assembly is not listed as a source of international law under Article 38, many regard its resolutions, although not

²⁸ Ratner and Abrams, *Accountability for Human Rights Atrocities*, 19.

²⁹ Malanczuk, *Akehurst's Introduction to International Law*, 36.

³⁰ Cutler, ‘Law in the Global Polity,’ 64.

formally binding, as evidence of customary international law.³¹ Ultimately, this development demonstrates that other entities besides the state can and do have the capacity to create law.

That being said, it can also be argued that to some degree the activities of NGOs can create law. An example of this is the work done by the CICC. The CICC is a broad-based network of over 1,000 NGOs, international law experts, and other civil society groups that advocate the creation of an effective, just, and independent ICC.³² Its work is of great significance to the establishment of the ICC because it considerably contributed to the process of the Court's creation from the early discussions at the UN, through the Rome Statute, the ratification campaign, and beyond. Accordingly, the positive role that NGOs played in the creation of the ICC was likened to that of 'a major government...as NGOs were seen as an important contributing force.'³³ Although states played an integral role in the negotiating process for the Rome Treaty, the work of the CICC and other human rights and international justice NGOs cannot go unrecognized.

Finally, individuals under international law are not recognized as subjects or sources. However, it is worth mentioning that international law has conferred rights

³¹ Rosalyn Higgins, *Problems and Process: International Law and We Use It* (Oxford: Clarendon Press, 1994).

³² Also, their website is the primary NGO provider of online information from around the world about the ICC.

³³ Human Rights Watch, 'The Role of NGO's and the ICC,' <http://www.hwr.org/worldreport99/special/icc.html>. (February 22, 2005).

and duties upon them. Accordingly, since WWII there has been growing recognition that individuals should be held responsible and accountable under international law.

Although arguments can be made that actors other than the state can create international law³⁴, the state remains very much at the centre of the sources of law doctrine. This goes back to the notion of legal positivism that was discussed earlier and how it has greatly influenced the analytical foundations of international law with its thinking on the primacy of the nation-state in international law making. The above discussions have demonstrated that the state is *the* subject and that the sources of international law originate directly from the state and state practice. The understanding of the centrality of the state in international law is very problematic given the fact that as of late the activities of institutions, NGOs, and transnational corporations have given rise to customary international law. Accordingly, this development within the international community is a decisive illustration that the subject and sources doctrines of international law are inadequate and need modification to take into account the reality of what entities are the subjects of international law and where the sources of international law are actually being derived from.

³⁴ The most notable are UN General Assembly Resolutions and evidence of customary international law. Higgins, 'Problems and Process'.

THE NATURE OF RESPONSIBILITY UNDER INTERNATIONAL LAW

In all areas of social relations, it is a fundamentally recognized principle that violating a legally binding obligation creates legal responsibility.³⁵ Under the system of international law, responsibility arises whenever a state fails to comply with a rule of customary international law or ignores an obligation of a treaty. Thus, state responsibility is concerned with 'the determination of whether there is a wrongful act for which the wrongdoing state is to be held responsible, what the legal consequences are, and how such international responsibility may be implemented.'³⁶ The International Law Commission (ILC) asserted, in Draft article 2 on their work on state responsibility for internationally wrongful acts, that what constitutes an internationally wrongful act of a state is the following:

- (a) conduct consisting of an action or omission is attributable to the State under international law; and
- (b) that conduct constitutes a breach of international law.³⁷

The above definitions illustrate that the notion of *responsibility* under international law is directly attributable to the state as there is no mention of the individual. Traditionally, the classic rules of the international responsibility of states ignored the individual who committed a crime on behalf of the state because it was believed that the individual did not exist independently of the state to which he/she

³⁵ Iain Brownlie, *Principles of Public International Law*, 4th Edition (Oxford: Clarendon Press, 1992), 432.

³⁶ Malanczuk, *Akehurst's Introduction to International Law*, 254.

³⁷ Malanczuk, *Akehurst's Introduction to International Law*, 255. It should be noted that this Draft article is part of eight reports that were presented to the ILC after 1969. Moreover, in 1980 the ILC adopted a comprehensive set of thirty-five draft articles dealing with the origin of state responsibility.

was attached by the bond of nationality.³⁸ Moreover, it was perceived that the individual was not just a national of the state but one of its organs as well. For the sake of clarification, an individual is considered an organ of the state given their position vis-à-vis the state. For instance, a head of state, a government official, a general, etc. would all be considered organs of the state. An individual acting on his own behalf would not be considered an organ of the state under this logic. Therefore, if an individual had committed an act of murder on behalf of the state they would be protected under the veil of state responsibility as long as their position vis-à-vis the state was legitimate at the moment the offence was committed.³⁹

In its early stages the law of state responsibility held the state completely responsible for its actions. However, as a result of gross violations of the laws of war and human rights atrocities that were committed and condoned by the sovereign nation state during WWI and WWII, along with the intangibility of the state apparatus, it gave rise to the question of criminal responsibility of the individuals representing the state and acting on behalf of it.⁴⁰ What has sometimes been referred to as the 'Nuremberg Revolution' strips individuals, who traditionally would be considered organs of the state, of their rights to hide behind the state for responsibility

³⁸ Pierre-Marie Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in *The Rome Statute of the International Criminal Court: A Commentary*, VII, eds. Antonio Cassese, Paola Gaeta, and John R.D.W. Jones (Oxford: Oxford University Press, 2002), 1086.

³⁹ Dupuy, 'Criminal Responsibility of the Individual and the State,' 1086 & 1087.

⁴⁰ Dupuy, 'Criminal Responsibility of the Individual and the State,' 1086.

of their actions.⁴¹ This is evident in both the trials at Nuremberg and in Tokyo as the state criminals were not solely judged in the place of the state. Instead they were first and foremost judged for acts for which they were being held personally and individually responsible. Accordingly, the German State and Japan were both declared liable under international law for war damages. While it is difficult to distinguish the links between individuals acting on behalf of the state and the state itself it is important to remember that 'crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provision of international law be enforced.'⁴²

Thus, the military tribunals at Nuremberg and in the Far East after WWII were a defining moment in the evolution of international law as individual criminal responsibility for acts of state became a well established principle while state criminal responsibility, although a key issue, was increasingly viewed as an unworkable concept, and consequently took a back seat. This revelation under the corpus of international law was extremely significant because it demonstrated that heads of state, government officials, and those acting on behalf of the state could not hide behind the concept of state responsibility. In addition it assigned individual responsibility to those individuals who planned, ordered, aided, and executed the order.

⁴¹ This notion had also already been contemplated in Article 227 of the Treaty of Versailles, which provided that a head of state could be held individually responsible.

⁴² Dupuy, 'Criminal Responsibility of the Individual and the State,' 1085.

Codification of Responsibility

In order to understand how individual criminal responsibility evolved, it is first necessary to discuss briefly the codification of state responsibility. The area of state responsibility, particularly surrounding the issue area of international crimes, has become a thorny topic under international law, as it has been one of the most difficult areas in which the ILC has tried to codify. On December 7, 1953, the UN General Assembly adopted Resolution 799 requesting the ILC to undertake the codification of the principles of international law governing state responsibility.⁴³ Accordingly, in attempting to embark on this monumental task, the ILC felt that the expression ‘state responsibility’ could not be ‘literally and narrowly construed.’⁴⁴ That said, the ILC asserted that in codifying the rules of state responsibility it must also take into account the problems that have arisen in connection with recent developments such as the question of criminal responsibility of states as well as that of individuals acting on behalf of the state.

The first Special Rapporteur on state responsibility in 1956, Mr. Garcia-Amador, considered the extent to which criminal responsibility under international law was segregated and distinct from civil responsibility.⁴⁵ He was of the opinion that since WWII the idea of international criminal responsibility had become so well defined that it must be admitted as one of the consequences of the breach or non

⁴³ Nina H.B. Jorgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000), 46.

⁴⁴ Jorgensen, *The Responsibility of State for International Crimes*, 47.

⁴⁵ Jorgensen, *The Responsibility of State for International Crimes*, 47.
Also see Report on International Responsibility by F.V. Garcia Amador. 1956, *ILC Yearbook*, 2.

observance of certain international obligations and that it should not be ignored in the codification process.

Furthermore, Garcia-Amador believed that the current body of international law with regards to state responsibility simply distinguished 'wrongful acts from punishable acts.'⁴⁶ Wrongful acts are defined as acts of the state that arise from the state breaching its treaty obligations or obligations under customary international law. Punishable acts on the other hand refer to crimes under international law, committed by individuals who are organs of the state and acting as such, rather than international crimes committed by the state themselves.⁴⁷ In making this distinction, Garcia-Amador discovered an association between the punishment of the individual and a form of responsibility of the state of which the individual was an organ. While, Garcia-Amador's efforts did not go unrecognized, when his draft was submitted to the delegations of other member countries for comment the resounding criticism was that in codifying the rules of state responsibility for the violations of the fundamental principles of international law, these rules should primarily focus on the obligations in connection with the maintenance of international peace and security, aggression, and other infringements of territorial integrity.⁴⁸ Thus, these countries were of the opinion that the notion that the individual may somehow be attached to the state and

⁴⁶ Jorgensen, *The Responsibility of State for International Crimes*, 47.

⁴⁷ Jorgensen, *The Responsibility of State for International Crimes*, 47.

⁴⁸ For a greater understanding of the criticisms of the member countries see J.H.H. Weiler, A. Cassese, and M.Spinedi (eds), *Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, 1989.

that the state should hold some responsibility for its actions was not of prime importance at this time.

In response to the outcome of Garcia-Amador's draft, the ILC set up a sub-committee on the codification of responsibility where it was agreed that the codification should only concern the rules defining the conditions for the existence of an internationally wrongful act and its consequences. It should be noted however, that one of the points to be considered by the sub-committee was the 'possible distinction between international wrongful acts involving merely a duty to make a reparation and those involving the application of sanctions.'⁴⁹ In 1973, Roberto Ago was appointed as Special Rapporteur on state responsibility and began to prepare the Draft Articles on State Responsibility. These articles were designed to set clearly forward all possible cases in which a wrongful act on behalf of the state would entail the international responsibility of that state. It should be noted that in drafting these articles Ago did consider a more serious category of internationally wrongful acts or international crimes that a state could entail a degree of responsibility. He asserted: 'since WWII...a special regime of responsibility needed to be attached in order to safeguard the fundamental interests of the international community as a whole.'⁵⁰ In sum, Ago proposed a set of draft articles in which the state would be held to a higher degree of responsibility in that he believed that states should entail some degree of criminal responsibility for certain international crimes. These ideas, while

⁴⁹ Jorgensen, *The Responsibility of State for International Crimes*, 48.

⁵⁰ Jorgensen, *The Responsibility of State for International Crimes*, 49.

controversial, were unanimously agreed to by the drafting committee and were subsequently crystallized with some changes in Draft Article 19⁵¹.

This article was and still is quite controversial as it defines what crimes can be characterized as international crimes, thus bearing some degree of state responsibility if violated. In designating what acts would be deemed criminal the ILC decided that it was not in its best interest to draw up an exhaustive list of crimes because it would not have permitted the definition of international crimes to be progressively adapted to the future evolution of international law.⁵² Nonetheless, Draft Article 19 today is generally recognized by states as an ‘exercise of development rather than codification’ as the ILC is still working to further clarify what exactly entails an international crime.

The codification process of state responsibility was significant for the evolution of the individual under international law because it demonstrated how the state was moving further and further away from taking any responsibility for certain violations of international law. While at the beginning of the codification process there was some promise that the individual acting on behalf of the state would be held accountable under the realm of state responsibility, it was quickly forgotten as the maintenance of international peace and security became the focal point for codification. Accordingly, the fact that the ILC has yet to establish a definitive list of international crimes entailing state responsibility is telling. Thus, given the quandary

⁵¹ Draft Article 19 states ‘this chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other state. See *Official Records of the General Assembly*, 56th Session, Supplement No. 10 (A/56/10).

⁵² Jorgensen, *The Responsibility of State for International Crimes*, 50.

the issue of state responsibility with regards to international crimes has found itself in, it seems only fitting that the area of individual criminal responsibility has evolved extensively since the end of WWII. The next section will map the evolution of individual criminal responsibility and demonstrate how the individual under international law is gaining more and more attention, if not some degree of subjectivity.

II. THE EVOLUTION OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The evolution of individual criminal responsibility under international law took place in three distinct stages: the idea's emergence after WWI and WWII and the subsequent creation of the IMT at Nuremberg and at Tokyo; the creation of the two ad hoc tribunals by the UN Security Council in light of the ethnic cleansing and genocide that occurred in the former Yugoslavia and Rwanda in the 1990s; and 1998 Rome Statute establishing the ICC. The process from its initial stages was lengthy and not without obstacle; however, the notion of individual criminal responsibility would not be an established principle of international law today had it not evolved in the way it did. Ultimately, the establishment of this principle within the corpus of contemporary international law ensures that in the twenty-first century individuals who commit international crimes may be held accountable in a court of law regardless of their status.

Nuremberg and Tokyo Trials

The notion of individual criminal responsibility first began to take shape after the First World War when the Allied powers established the right to try and punish individuals for the violations of laws and customs of war under Article 228 and 229 of the 1919 Treaty of Versailles.⁵³ However, it was not until after the horrific crimes committed by the Nazis and the Japanese during the Second World War that the Allied Powers decided to prosecute the serious violations of the laws of war, with regard both to the traditional responsibility of states and to the personal responsibility of individuals. The IMT at Nuremberg was established by an international agreement, known as the London Accord, and signed by all four Allied Powers on August 8, 1945.⁵⁴ This agreement stated the Allied Powers intention to try ‘war criminals whose offenses have no particular geographical location, whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.’⁵⁵

The London Accord or what thereafter was referred to the Charter of the IMT contained thirty articles which addressed the tribunal’s composition, rules of procedure and jurisdiction, and the law that was to be applied under these circumstances. Pursuant to article 6 of the Charter, the defendants before the tribunal

⁵³ Text of the Treaties of Peace 1919-1923, vol. 1, Carnegie Endowment for International Peace (New York, 1924), 121.

⁵⁴ The London Accord was signed by the United States, the Provisional Government of the French Republic, the United Kingdom, and the Union of Soviet Socialist Republics. Nineteen other nations signed this Accord as well.

⁵⁵ The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Military Tribunal, August 8, 1945. *American Journal of International Law*, 39, 257.

were arraigned on three charges: crimes against the peace, war crimes, and crimes against humanity.⁵⁶ What is particularly significant about the crimes defined under article 6 is that they establish the basis for trying an individual as opposed to a state. It also provided that the defendants were individually responsible for the commission of such crimes, notwithstanding their position as a Head of a State, or the fact that the defendant might have acted according to an order on behalf of the government or of a superior.⁵⁷

The judgment at the IMT at Nuremberg after nine months of trial was a turning point for international law in that it demonstrated that individuals can be held responsible for their crimes.⁵⁸ One of the major objections on behalf of the defendants was that the Charter for the IMT rejected the argument based on state sovereignty that heads of state and those acting on behalf of the state or government were immune from prosecution. In response to this objection, the tribunal stated in an infamous phrase:

‘crimes against international law are committed by men, not by abstract entities, and only by punishing the individuals who commit such crimes can the provisions of international law be enforced.’⁵⁹

Although the IMT at Nuremberg overshadowed the trials of the Far East both sets of trials were considered flawed in that the vanquished were tried by judges from

⁵⁶ Ibid. see article 6 for definitions of the crimes.

⁵⁷ Ibid. see articles 6 and 8.

⁵⁸ Of the twenty-two individual defendants tried at the IMT, nineteen were found guilty and three were acquitted. See the Judgment of October 1, 1946, International Military Tribunal, Judgment and Sentences, *American Journal of International Law*, 41(1947), 172.

⁵⁹ Ibid, 172 and 221.

the victor's states, a classic illustration of victor's justice.⁶⁰ The trials of the major war criminals during the Second World War did establish a monumental precedent in the international legal realm that no matter what an individuals' status and/or position with the state, they can be held accountable for their crimes and be brought before an international tribunal. As a result of the judgment at Nuremberg being so groundbreaking the UN General Assembly in their first session endorsed the principles of the judgment and set forward the principles in positive law by mandating the ILC to codify these new developments in international law. Accordingly, the Nuremberg judgment can be seen as one of the first major steps in the evolution of the principle of individual criminal responsibility. While the principle still in its infancy had its weaknesses, the events over the next few decades would demonstrate the principle's importance and the areas in which it needed to be strengthened.

Post-War Period – Ad Hoc Tribunals in the 1990s

During the period immediately following World War II, the international community began revising the Geneva Conventions in order to better protect non-combatants during armed conflict. It should be noted however that the Geneva Conventions were significant in the post-war period because they regulated the conduct of warfare. Moreover, their revisions in 1949 were significant because the

⁶⁰ See, Richard Falk, 'Keeping Nuremberg Alive', in *International Law: A Contemporary Perspective*, eds. Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz (Boulder: Westview Press, 1985), 494, 495. Also see M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, Second Edition (Kluwer Law International, 1999), 4, 12-13.

traditional law of war was gradually transformed into a human-rights oriented law.⁶¹

The revision of the Geneva Conventions led to the creation of four new conventions, each of which was devoted to a particular class of war victims, and each incorporating the principle of individual criminal responsibility.⁶² Without going into exhaustive detail with regards to what is contained in the four conventions, the one aspect that is essential to bear in mind with these developments is that they focused primarily on the regulation of the conduct of the laws of war during *inter-state* armed conflicts. Thus, for nearly half a century following the Second World War, the principle of individual criminal responsibility was severely limited in that it was only applicable to the violations of the laws of war committed during state-versus-state conflicts.

However, this would all change in the post-Cold War era when the international community was witness to an increase in civil wars, ethnic conflicts, and intra-state conflicts, all reminding the world of the horrific nature of war.

Specifically, the international community was pressured to respond to the increasing human carnage as Yugoslavia disintegrated. Pursuant to its peace authority under Chapter VII of the UN Charter, the UN Security Council passed Resolution 827 (8) creating the first international war crimes tribunal since Nuremberg: the International

⁶¹ Note that the Geneva Conventions have attained virtual universal recognition. They have also been ratified by more states than any other convention (188), with the exception of the Convention on the Rights of the Child (191), and a great number of their rules have become recognized as customary rules and as constituting *jus cogens*.

⁶² The four Geneva Conventions deal with the following: (1) the wounded and the sick; (2) the wounded and sick and shipwrecked members at sea; (3) the treatment of prisoners of war; and (4) the protection of civilian persons in time of war.

Criminal Tribunal for the former Yugoslavia (ICTY).⁶³ This tribunal was situated at The Hague and given the jurisdiction over war crimes committed in the former Yugoslavia since January 1, 1991. The establishment of the ICTY was remarkable and then UN Secretary General, Boutros Boutros Ghali proclaimed: 'this first truly international war crimes court in modern history is a breakthrough. For the first time a tribunal was created by the international community and not by the country that won the war.'⁶⁴ Although the creation of the ad hoc tribunal was a watershed in international law, the first individual to be tried before the court would leave an even greater mark on the corpus of international law, and more specifically on the evolving nature of the concept of individual criminal responsibility.

Dusan Tadic, a low-level member of the Bosnian Serb militia, was the first individual tried before the ICTY and his case involved a multitude of international legal issues.⁶⁵ The major issues of this case included: which rules apply to civil wars and the determination of whether individuals who violate these rules are subject to criminal responsibility under international law.⁶⁶ Tadic's lawyers argued before the ICTY that the laws of war did not provide for the prosecution of an individual for

⁶³ Michael P. Shaft, *The Story Behind the First International Criminal War Crimes Trial Since Nuremberg* (Durham: Carolina Academic Press, 1997).

⁶⁴ Shaft, *The Story Behind the First International War Crimes Trial*.

⁶⁵ The International Criminal Tribunal for the Former Yugoslavia website, 'The Prosecutor of the Tribunal Against Dusan Tadic, Indictment, para. 5.1, <http://www.un.org/icty/indictment/english/tadicint.htm>. (November 2, 2004). For a detailed account of the nature of his offenses also see the indictment.

⁶⁶ Geoffrey S. Corn, 'New options for prosecuting war criminals in internal conflicts,' *Parameters* (2002).

misconduct committed during a civil war. Furthermore, they argued that because ‘the law of war treaty provisions providing for the prosecution of offenders applied only during inter-state conflict, applying such responsibility to a civil war was illegal.’⁶⁷

The argument upon which Tadic’s lawyers premised their case, was the proposition that the prosecution of laws of war violations committed during intra-state conflicts was under the jurisdiction of domestic law and not under that of an international criminal tribunal.

This development at the ICTY was extremely significant in that it challenged the tribunal to address a vital issue: how and to what extent did the laws of war regulate conduct during civil wars or intra-state conflicts? Ultimately, the ICTY was able to reject Tadic’s lawyers’ argument by concluding that the treaty provisions which regulated civil wars had evolved over time into customary international law and were therefore properly captured under the umbrella term – ‘the laws and customs of warfare.’⁶⁸ Moreover, the ICTY also concluded that other law of war obligations found in treaties regulating inter-state conflicts had also evolved to become applicable to civil wars by becoming customary international law. This case is profound in the sense that not only did the ICTY place Common Article 3 of the Geneva Conventions and other provisions of the laws of war under the domain of customary international law and within the scope of individual criminal responsibility, it also extended criminal responsibility for such violations beyond

⁶⁷ Corn, ‘New Options for Prosecuting War Criminals.’

⁶⁸ *ICTY*, Tadic Indictment.

domestic law and into the realm of international law. Accordingly, this development was accurately captured in the ICTY's conclusion of the Tadic case:

'A state sovereignty oriented approach has been gradually supplanted by a human being oriented approach. Gradually the maxim of Roman law *homin causa omne jus constitum est* [all law is created for the benefit of human beings] has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between inter-state wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture, or the wanton destruction of hospitals, churches, museums, or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign state? If international law, while of course duly safeguarding the legitimate interests of states, must gradually turn to the protection of human beings, it is only nature that the aforementioned dichotomy should gradually lose its weight.'⁶⁹

It did not take long for the legal developments at the ICTY to be brought to fruition. Thus, in light of the brutal and horrific civil war that occurred in Rwanda, the UN Security Council also established the International Criminal Tribunal for Rwanda (ICTR) under Resolution 955. Knowing full well that this conflict was of internal character, the Security Council empowered the tribunal to have the authority to prosecute individuals whose misconduct occurred during a purely internal conflict. Moreover, in the Security Council's Resolution establishing the tribunal they ensured that the tribunal would have the power to prosecute genocide, crimes against humanity, and violations of Common Article 3 and Protocol II. As a result of the Security Council granting the ICTR the jurisdiction over violations of these Common Article 3 and Protocol II, it is evident that the general consensus under international

⁶⁹ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995), <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>. (November 2, 2004).

law is that individuals can now be held responsible for both violations committed during intra-state and inter-state conflicts.

The establishment of the ICTY and the ICTR were significant developments under international law because they demonstrated that the basic regulatory provisions of the laws of war, which operate to limit the suffering and inject humanity into armed conflict, were also applicable to internal as well as international conflicts.⁷⁰ This development is monumental considering the fact that individuals under the body of the international law do not even have legal personality. The decisions rendered by these two tribunals have greatly contributed to the body of case law surrounding this issue because they have clearly shown that individuals/war criminals regardless of whether it is an inter-state or intra-state conflict can now be brought before a tribunal and tried for their violations. The body of law that was created in light of the ad hoc tribunals has enabled the principle of individual criminal responsibility under international law to become incredibly powerful instrument and one that hopefully war criminals will come to fear.

III. THE ROME STATUTE OF THE ICC

Without any doubt, the most significant development in international law with regards to the principle of individual criminal responsibility is the entry into force of the Rome Statute of the ICC on 1 July 2002.⁷¹ It represents the culmination of work that has been accomplished over the past fifty years with regards to the prosecution of

⁷⁰ Corn, 'Options for prosecuting war criminals,' 55.

⁷¹ William A. Schabas, 'International Criminal Court: The Secret of its Success', *Criminal Law Forum*, 12 (2001), 416.

war criminals, and has been viewed by many as ‘arguably the most complex international instrument ever prepared’ as it eradicates the culture of impunity perpetrators were once accustomed to into a culture of accountability.⁷²

The idea for a permanent international criminal court can be traced back to an early draft of the *Genocide Convention*; however, as the UN General Assembly and the ILC began to prepare the groundwork for the court in the 1950s, it had to suspend its work in light of the sharpening Cold War tensions.⁷³ Despite the idea’s emergence, it sat dormant for decades until 1989 when it was re-introduced to the international agenda.⁷⁴ At this time the UN General Assembly voted to revive this issue and asked the ILC to begin drafting a statute for this court. By 1994, the ILC had submitted their draft statute to the General Assembly and over the next four years, the various committees created by the General Assembly worked and re-worked the draft. Ultimately, the draft statute, a 200-page catalogue of options and alternatives, was presented for adoption at the UN Conference of the Plenipotentiaries in Rome in June 1998. After five weeks of negotiating the provisions of the statute were adopted by general agreement by the state parties in attendance. However, a handful of the core issues including, jurisdiction, the trigger mechanism for prosecutions, and the role of the Security Council remained to be settled. Thus, on

⁷² Schabas, ‘ICC: Secret of its Success,’ 416.

⁷³ The Genocide Convention was prepared by the UN Secretariat and it should be noted that the final version of the text left jurisdiction over genocide within national jurisdiction. Thus, in article VI it alluded to the fact that an ‘international penal tribunal may have jurisdiction.’

⁷⁴ As a result of Trinidad and Tobago being plagued by various narcotics problems and other transnational crime issues, it initiated a resolution to the General Assembly directing the ILC to consider the subject of an international criminal court within the context of its work on the draft code of crimes. See specifically UN General Assembly Resolution 44/89.

the last day of the conference, the chair, Philippe Kirsch, issued a final 128-article draft statute to the state parties to be voted on. In an overwhelming vote of 120 to 7, with 21 abstentions, the Rome Statute establishing the world's first permanent international criminal court was adopted.

The Rome Statute is a truly remarkable achievement not only for the body of international law, but also for the individual. Firstly, it constitutionalizes the principle of individual criminal responsibility under the body of international law.⁷⁵ The preamble to the Statute notes that the purpose of the Court is to end impunity for the perpetrators of 'atrocities that deeply shock the conscience of humanity.'⁷⁶ Taking into account the corpus of case law that has been generated from the Nuremberg trials and the ad hoc tribunals in the 1990s, the Rome Statute now grants individuals access to a court and also grants individuals certain rights and responsibilities when it comes to inter-state and intra-state conflicts. This is an exceedingly significant achievement given the fact that international law has traditionally not recognized the individual as a subject. While the Rome Statute has sought to drastically alter the place of the individual, international law has remained unchanged despite these developments.

Secondly, the Rome Statute not only defines standards to which individuals must conduct themselves, it clearly identifies the state's responsibility to investigate crimes that violate those standards. Before the Rome Statute came into force, international treaties and customs had produced a plethora of rules, laws, and norms

⁷⁵ *Rome Statute*, Article 25.

⁷⁶ *Rome Statute*, preamble.

prohibiting atrocities such as genocide, war crimes, and crimes against humanity. However, the record for the application of enforcement of these laws was not impressive as states have either been unable or unwilling to enforce international law, as the notion of state sovereignty has prevented the international community from acting in the name the justice. This brings up the final point in that if a state is unable or unwilling to prosecute those accused of war crimes, genocide, and crimes against humanity, the Statute has empowered a prosecutor to act when the state fails to meet their responsibility. In short, the ultimate significance of the Rome Statute is that it symbolizes the fact that the international community has shifted away from a culture of impunity and now embraces a culture of accountability.

NGOs and the Evolution of Individual Criminal Responsibility

The evolution of the principle of individual criminal responsibility is extraordinary, particularly now that it is constitutionalized in the statute of the ICC. While there are many reasons why this development in international law is exceptional, one cannot forget that this development does not serve as a testament to the power and political will of a single state or even a handful of influential states. Rather the opposite is true as the contributors to this revolutionary development are innumerable.⁷⁷ One such significant contributor is that of the NGO coalition for the ICC who made substantive contributions to not only the strengthening of the principle

⁷⁷ William R. Pace and Jennifer Schense, 'The Role of Non-Governmental Organizations', in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, John R. W. D. Jones (Oxford: Oxford University Press, 2002), 106.

of individual criminal responsibility, but also played an integral role in the creation of the ICC. Kofi Annan stated:

‘I think it is clear that there is a new diplomacy, where NGOs, peoples from across nations, international organizations, the Red Cross, and governments come together to pursue an objective. When we do – and we are determined, as has been proven in the landmines issues and the ICC – there is nothing we can take on that we cannot succeed in, and this partnership...is a powerful partnership for the future.’⁷⁸

This ‘new diplomacy’ that Annan discusses is noteworthy in the context of this chapter as it demonstrates that there are other actors within the international community whose activities can generate customary international law. Although, subject and sources doctrines of international law do not yet recognize this contemporary development, it is one that will need to be addressed if non-state actors continue to have such a monumental impact on pressing issues facing the international community.

This chapter has illustrated that the analytical foundations of international law pose a barrier to new thinking and developments in the international community. The above discussions have illustrated that this is particularly true in the case of the evolution of the principle of individual criminal responsibility and the creation of the ICC as international law continues to place the state at the centre of its discourse. While the concept of individual criminal responsibility is now generally recognized in the international community, the discipline of international law has yet to recognize that individuals under international law can and do have certain rights and responsibilities. Moreover, international law has not taken into account the fact that actors other than the state, NGOs, international institutions, and transnational

⁷⁸ Pace and Schense, ‘The Participation of NGOs,’ 105.

corporations, can also generate customary international law. Although the centrality of the state remains at the heart of subject and sources doctrines of international law, it cannot be disputed that there are other entities in the international community that deserve recognition of their subjectivity and that their activities should also be considered as one of the possible sources of law. These developments in the international community have demonstrated that the analytical foundations of international law are inadequate as they do not take into account the actual reality international law in the twenty-first century. Ultimately, if international law wishes to retain the 'modern' moniker, it desperately needs to clarify the analytical foundations upon which it is based.

CHAPTER TWO

THEORETICAL APPROACHES AND WORKING HYPOTHESES

*The probability that we may fail in the struggle ought
not deter us from the support of a cause we believe to be just.*
- Abraham Lincoln

Any student of International Relations (IR) can attest to the fact that the realm of international politics is complex and at times difficult to understand. In trying to gain a deeper appreciation for why certain events occur or in this particular case why and how an international institution, such as the ICC, came into being, it is necessary to resort to the body of theory common to the discipline of IR. By definition, a theory is ‘some kind of simplifying device that allows one to decide which facts matter and which do not.’⁷⁹ Moreover, theories also identify who and what actors matter. Thus, a theory can be defined as ‘a set of generalized principles that have descriptive, explanatory, and predictive value.’⁸⁰ IR theory is simply a way of systematizing and understanding world politics.

The use of theoretical frameworks in the discipline of IR is important in the sense that it allows one to see the world through different lenses. The various lenses of IR ‘act as filters in that they direct attention toward certain kinds of actors and

⁷⁹ John Baylis and Steve Smith, *The Globalization of World Politics: An Introduction to International Relations* (New York: Oxford University Press, 1997), 3.

⁸⁰ Andrew Bennett, *International Organizations: Principles and Issues*, 6th Edition (Upper Saddle River, NJ: Prentice Hall, 1995), 15.

focus discussion on certain kinds of questions.’⁸¹ Furthermore, these lenses allow one to see the different explanations regarding which actors should figure most prominently into one’s thinking, they guide one’s analysis, and they also provide divergent vantage points on the nature of world politics, the roles of international institutions, non-state actors, and international law.

For the most part, the dominant theories of IR, realism and neoliberalism, are primarily concerned with the state as the central actor and are materialist in their orientation of international politics. It should be noted however, that as of late another debate has emerged within the discourse that challenges the classic role of theory. This approach, called social constructivism, challenges the dominant focus on states as the key actors, it also challenges the materialist understanding of politics, and argues that theory should go beyond its traditional role by problematizing the identities and interests of actors within the international system to demonstrate how they have been socially constructed. Furthermore, this approach seeks to ‘map the full array of additional ideational factors that shape actors’ outlooks and behaviour, ranging from culture and ideology to aspirations and principled beliefs, and cause-effect knowledge of specific policy problems.’⁸² Accordingly, social constructivism is intended to help scholars ‘tap into and guide their interpretations of the meaning

⁸¹ Kelly-Kate S. Pease, *International Organizations: Perspectives on Governance in the Twenty-First Century* (Upper Saddle River, NJ: Prentice Hall, 2000), 1.

⁸² John Gerard Ruggie, ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge,’ *International Organization*, 52, no. 4 (1998), 879 & 878. Also see Alexander Wendt, ‘Constructing International Politics’, *International Security*, 20, no. 1 (1995), 71-81.

and significance actors ascribe to the collective situation in which they find themselves.’⁸³

The purpose of this chapter is to examine the dominant theories and approaches within the discourse of International Relations and assess their analytical and theoretical adequacy. More specifically the goal of this chapter is to analyze their ability to account conceptually and theoretically for the creation and operation of the ICC. The chapter is composed of two sections. The first section will look primarily at how the dominant theories and approaches in IR today, realism, neo-liberal institutionalism, and social constructivism theorize international institutions, non-state actors, such as NGOs, and international law. It will also discuss the fundamental elements of each theory which are relevant to the examination of the ICC. The next section will then demonstrate how these theories explain the creation of the ICC, deriving a series of hypotheses from them to account for the creation and possible future of the ICC.

I. THEORETICAL FRAMEWORK

It is necessary before moving on to the theoretical section to discuss how international institutions are defined within the discipline of IR. The term ‘international institution’ has been used over the course of the past few decades to refer to a broad range of phenomena. Accordingly, Kratochwil and Ruggie have argued that because the field of international organization is an ever evolving research

⁸³ Ruggie, ‘What Makes the World Hang Together.’

area, it has gone through several analytical shifts.⁸⁴ The first focus began in the early post-war years and it was at this time that the field of international organization had a formal institutional focus. Thus, the term international institutions almost always referred to formal international organizations, like the United Nations.⁸⁵ Moreover, scholars were concerned with examining ‘the formal attributes of international organizations, such as their charters, voting procedures, committee structures, and the like.’⁸⁶

The second analytical focus Kratochwil and Ruggie highlight concerns the actual decision-making processes within international organizations. This perspective originally emerged in the attempt to come to grips with ‘the increasingly obvious discrepancies between constitutional designs and organizational practices.’⁸⁷

However, over time this particular perspective became more generalized, and began to explore overall patterns of influences shaping organizational outcomes. The third shift in the field of international organization was concerned with ‘the actual and potential roles of international organizations in a more broadly conceived process.’⁸⁸

This perspective was divided into three subsets of study: ‘emphasis on the roles of

⁸⁴ Friedrich Kratochwil and John Gerrard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, *International Organization*, 40, no. 4 (1986).

⁸⁵ Beth A. Simmons and Lisa L. Martin, ‘International Organizations and Institutions’, in *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse and Beth A. Simmons (London: Sage, 2002), 192.

⁸⁶ Kratochwil and Ruggie, ‘A State of the Art,’ 755.

⁸⁷ Kratochwil and Ruggie, ‘A State of the Art,’ 755

⁸⁸ Kratochwil and Ruggie, ‘A State of the Art,’ 756.

international organizations in the resolution of substantive international problems; long-term institutional consequences of the failure to solve substantive problems through the available institutional means; and how international institutions reflect and to some extent magnify or modify the characteristic features of the international system.⁸⁹

As the study of international organizations progressed after World War II, the gap between international politics and formal organizational arrangements began to open in ways that were not easy to reconcile. Simmons and Martin assert that the causes of this gap were that 'the Vietnam War raged beyond the formal declarations of the UN, and that the two decades of predictable monetary relations under the purview of the International Monetary Fund (IMF) were shattered by a unilateralist decision of the United States in 1971 to close the gold window and later float the dollar.'⁹⁰ Thus, it became apparent that much of the earlier focus on formal institutions had become irrelevant and this gave rise to an alternative conception in the 1970s: the study of international regimes.⁹¹

The study of international regimes is the final analytical focus Kratochwil and Ruggie identify. The term itself can be defined as 'rules, norms, principles, and procedures that focus expectations regarding international behaviour.'⁹² The regimes

⁸⁹ Kratochwil and Ruggie, 'A State of the Art,' 756-758.

⁹⁰ Simmons and Martin, 'International Organizations and Institutions,' 193.

⁹¹ Simmons and Martin, 'International Organizations and Institutions,' 193.

⁹² See Stephen D. Krasner, *International Regimes*, (Ithaca, NY: Cornell University Press, 1983).

movement represented an effort to theorize about international governance more broadly. Ultimately, it demoted the study of formal institutions and instead focused on rules or even ‘understandings thought to influence governmental behaviour.’⁹³ While the definition of ‘international regimes’ has led to debates questioning its utility, the move within the field of international organization from formal institutions to international regimes has allowed a more unified framework for the analysis of formal and informal institutions.

It can be argued that as the field of international organization developed the definition of what constituted an ‘international institution’ changed along with the changes in analytical focus. That being said, the definition of an ‘institution’ within the discipline of International Relations is contestable as Kratochwil and Ruggie assert that ‘not everyone in the field at any one time works within the same perspective.’⁹⁴ It is for that reason that scholars in the 1990s sought to take the concept of ‘international regimes’ and give it a new label. Currently, the word ‘institution’ has largely replaced the word ‘regime’ in the international relations literature, and scholars have come to regard an international institution as ‘sets of rules meant to govern international behaviour.’⁹⁵ Thus, this thesis understands that institutions refer to the above definition.

⁹³ Simmons and Martin, ‘International Organizations and Institutions,’ 193.

⁹⁴ Kratochwil and Ruggie, ‘A State of the Art,’ 760.

⁹⁵ Simmons and Martin, ‘International Organizations and Institutions,’ 194.

Realist Perspectives on International Institutions

Realism has been the dominant theory of international politics since the beginning of the discipline of IR in 1919. This theory posits that the state is the primary actor and believes that the realm of international politics is characterized by a struggle for power. Also, since there is no higher authority for states to answer to, states adhere to what is known as a self-help system in which survival means that states must look out for themselves to protect their interests and ensure their survival.⁹⁶ Thus, as states seek to maximize their power within the international system they rely on the notion of balance of power to manage this anarchic system, not international institutions.

Within the classical realist literature there is little explicit reference to what are known today as international institutions. For the sake of clarification, the clearest example of what can be deemed as an institution would be what realists see and define as an international organization.⁹⁷ In assessing the realist viewpoint on institutions it can be accurately stated that the majority of realists would argue that state power plays an integral part in influencing the creation and operation of international institutions. For instance, Hans J. Morgenthau has attributed 'rule consistent behaviour either to convergent or prevailing power relations.' He asserts that states 'are always anxious to shake off the restraining influence that international law might have upon their foreign policies, and to use international law instead for

⁹⁶ Graham Evans and Jeffrey Newnham, *The Penguin Dictionary of International Relations*, (London: Penguin Group, 1998), 364.

⁹⁷ Simmons and Martin, 'International Organizations and Institutions,' 194.

the promotion of their national interests.⁹⁸ Ultimately, as will be discussed, traditional realists regard international institutions as ‘epiphenomenal to state power and interests.’⁹⁹

The realist scepticism surrounding international institutions permeated much of the literature on institutions following WWII.¹⁰⁰ However, a more articulated view was brought to the fore by scholar Stephen Krasner in the 1970s and 1980s that discussed a ‘basic force model of international regimes.’¹⁰¹ In so doing, a sub-set of realist scholars found that hegemonic stability theory (HST) would be a way to link power distribution with the creation and stability of international institutions. HST contends that ‘the concentration of power in the hands of a single dominant state is necessary for the successful formation of international institutions.’¹⁰² Moreover, this theory asserts that power cannot be dispersed amongst a few states because it

⁹⁸ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York, 1948).

⁹⁹ Simmons and Martin, ‘International Organizations and Institutions,’ 195. Also see E.H. Carr, *The Twenty Years Crisis: 1919-1939* (New York: Palgrave, 2001), 170-171.

¹⁰⁰ See Claude, 1963 and Hoffman, 1956 on the UN; Gorter, 1954 on the GATT; and Kindleberger, 1951 on the IMF.

¹⁰¹ Simmons and Martin, ‘International Organizations and Institutions,’ 195.

¹⁰² Ifeoma Mary Frances Okwuje, ‘Making Law Without the Hegemon: A Consideration of the United States and International Human Rights Treaties,’ 2002, http://sitemaker.umich.edu/iokwuje/files/making_law.pdf, (December 14, 2004).

drives the transaction costs up which ultimately acts as a barrier to cooperation as it precludes the formation of an agreement.¹⁰³

Also, because the realist perspective posits that states attach such a great importance to the notion of relative gains, states are quite reluctant to enter any type of agreement that might allow another state an advantage or constrain its behaviour in any way, shape, or form.¹⁰⁴ In essence HST overcomes the problem of relative gains because as a result of the hegemon using its own capabilities to create and maintain a public good within the international system, non-hegemonic states will become the net beneficiaries of the system, having to make no contribution. As a result of this they become *free-riders* in the system. Under a hegemon these non-hegemonic states are in fact better off under hegemony than they would otherwise be and in relation to the hegemon. They are, to use the language of political economy, *pareto-superior*. That is to say hegemony creates a situation where no one is worse off than before but the non-hegemonic states are better off than the hegemon allowing them to enjoy a superior state in the international order compared to that of the hegemonic power. While this approach explains quite a bit about the creation of institutions in the international system, critics of HST have encouraged institutionalists to look beyond

¹⁰³ Robert Gilpin, *The Political Economy of International Relations*, Princeton: Princeton University Press, 1987); Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); Duncan Snidal, 'The Limits of Hegemonic Stability Theory', *International Organization*, 39 (1985). Also see Oran Young and Gail Osherenko, 'The formation of international regimes: hypotheses and cases', in *Polar Politics: Creating International Environmental Regimes* (Ithaca: Cornell University Press, 1993).

¹⁰⁴ Joseph Grieco, 'Anarchy and the limits of cooperation: a realist critique of the newest liberal institutionalism', *International Organization*, 42, no. 3 (1988); John Mearsheimer, 'The False Promise of International Institutions', *International Security*, 19, no. 3 (1994/1995).

the systemic distribution of power to explain the rise and especially the survival of international institutions.¹⁰⁵

A neorealist's perspective on international institutions can be characterized as that of a 'forceful critic'.¹⁰⁶ The basic assumption shared by neorealists is that international anarchy fosters competition and conflict among states and inhibits their willingness to cooperate even when they share common interests.¹⁰⁷ Neorealists argue that because the nature of international politics is anarchic, it places severe constraints on state behaviour. Moreover, they also see that international cooperation is harder to achieve, difficult to maintain, and more dependent on state power. Both Grieco and Mearsheimer argue that relative-gains concerns prevent states from intensive cooperation because the benefits of cooperation can be translated into military advantages. Accordingly, concerns about the distribution of gains impede substantial sustained cooperation.

The neorealist perspective also contends that even if there were rules governing the behaviour of states within the international system, they would be decided by the most powerful states. The general neorealist standpoint is that regimes, institutions and other normative arrangements only come about when they serve the power interests of states, and are then abandoned when they no longer serve

¹⁰⁵ Simmons and Martin, 'International Organizations and Institutions,' 195.

¹⁰⁶ Simmons and Martin, 'International Organizations and Institutions,' 195.

¹⁰⁷ Grieco, 'Anarchy and the limits of cooperation,' 485.

those interests. Krasner posits: 'regimes or other normative arrangements if they can be said to exist at all, have little or no impact...they are merely epiphenomenal.'¹⁰⁸

What is more and very relevant to this thesis is the fact that the realist paradigm peripheralizes the role of non-state actors, such as NGOs and the role of international law within international politics. Similar to the arguments surrounding the reason why international institutions are often marginalized in realist theorizing, realists view both NGOs and the notion of international law as delusional because they are inconsistent with the realities of power and interest that are prevalent in the international system. Realist thinkers would not predict that NGOs would have a hand in creating rules within the international system. Nor would they believe that international law would restrain states given the fact that the international system is characterized as anarchic and survival within this system is all about self-help. In short, for realists, both NGOs and the idea of international law are viewed as oxymorons.¹⁰⁹

It is quite evident that the traditional realists had little to say about international institutions, however, as the theory evolved and fragmented into different approaches over time, more and more was written explicitly as to the creation and survival of institutions in the international system. Most noteworthy is the fact that realists to some extent believe that institutions should be rooted in the interaction of power and national interest. The realist perspective also assumes that

¹⁰⁸ Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36, no. 2 (1982), 185 & 190.

¹⁰⁹ Stephen D. Krasner, 'International Law and International Relations: Together, Apart. Together?', *Chicago Journal of International Law*, 1 (2000), 98.

with the explicit support of the dominant power, an international institution has a higher likelihood of entering into force. Realist scholars essentially believe that 'international institutions are unable to mitigate anarchy's constraining effects on inter-state cooperation' and it is for this reasoning that the realist approaches to International Relations do not see international institutions in a positive light.¹¹⁰ To sum up, realists do not accord any autonomy or independence to international organizations because they regard them as a reflection of state interests. Thus, international organizations for realist scholars depend upon states for their longevity and significance within the international community.

Neoliberal Perspectives on International Institutions

Neoliberal institutionalism is generally understood to be the most comprehensive theoretical challenge to the realist/neorealist orthodoxy in mainstream International Relations theory.¹¹¹ The main challenge leveled against realism is its fascination with the 'war/peace, military/diplomatic dimensions, and its fixation on the state as the key actor within the international system.'¹¹² Although neoliberals do not deny the anarchic character of the international system, neoliberals argue that 'its importance and effect has been exaggerated and moreover that realists/neorealists underestimate the varieties of cooperative behaviour possible within such a

¹¹⁰ Grieco, 'Anarchy and the limits of cooperation,' 485.

¹¹¹ See David A. Baldwin, *Neorealism and Neoliberalism* (New York: Columbia University Press, 1993).

¹¹² Graham Evans and Jeffrey Newnham. *The Penguin Dictionary of International Relations* (London: Penguin Group, 1998), 360-361.

decentralized system.’¹¹³ Accordingly, neoliberals focus on institution building, regime creation, and the search for absolute gains as opposed to relative gains as mitigating strategies in the anarchical system.¹¹⁴

Within the neoliberal school of thought the primary actor also continues to be the state, however, they do believe that states have to some degree declined in their ability to effect outcomes, particularly on the plethora of issues that transcend political boundaries.¹¹⁵ Given this understanding, neoliberals favour what can be termed a ‘mixed-actor model’ which includes: international organizations, transnational organizations, non-governmental organizations (NGOs), multinational corporations (MNCs), and other non-state players such as individuals.¹¹⁶ For neoliberals, the dynamics of international politics arise from multiple sources involving a mix of interactions. Keohane and Nye refer to this process as ‘complex interdependence and argue that the exclusiveness of neorealism fails to capture the complexities of international behaviour and in particular distorts reality by ignoring the institutions, processes, rules, and norms that provide a measure of governance in a formally anarchic environment.’¹¹⁷

¹¹³ Evans and Newnham, ‘Dictionary of International Relations,’ 360-361.

¹¹⁴ Neoliberals search for absolute gains because they believe that any gain will make the state better off.

¹¹⁵ Evans and Newnham, ‘Dictionary of International Relations,’ 361.

¹¹⁶ Generally see Keohane and Nye, 1977. Also see Evans and Newnham, ‘Dictionary of International Relations,’ 361.

¹¹⁷ Robert Keohane and J. Nye, *Power and Interdependence* (Boston: Little Brown and Company Inc., 1977).

Neoliberals believe that international organizations are created by states to deal with situations that may be characterized as ‘market failures.’ Market failures according to neoliberals can be defined as situations in which a specific set of rules need to be created in order for there to be a status quo or certain standard upheld in international relations. An example of a market failure could be the high transaction costs associated with creating ad hoc tribunals. Accordingly, these market failures within international politics are often highlighted by the activities of NGOs. Through creating international organizations and a set of rules, neoliberals believe that these organizations/rules in some cases cause states to alter their conduct and they also allow for some degree of predictability of state behaviour in the international system. Relatedly, the creation of these institutions and organizations can prove incredibly valuable to states in that ‘they can provide information, reduce verification costs, make it easier to punish cheaters, offer opportunities for issue linkage, establish salient solutions or focal points, and increase iterations.’¹¹⁸

It is also evident that the neoliberal perspective has created, to some degree, new theoretical space for international law within the discipline of international relations. Slaughter posits that this paradigm has opened up enough space that realist scholars have been able to facilitate enough discussion to converge upon assumptions, and try to explain why states cooperate with each other in the supposedly anarchic international system.¹¹⁹ In so doing, neoliberal institutionalism has been able to cast a

¹¹⁸ Krasner, ‘International Law and International Relations,’ 96.

¹¹⁹ Anne-Marie Slaughter, Andrew S. Tulumello, and Stephan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, *American Journal of International Law*, 92 (1998), 372.

shadow over the discipline of International Relations' inherent hostility towards international law. Thus, the assumptions made by neoliberals demonstrate that international law can play an integral role in the international system, mainly when it comes to international cooperation via institutions and regimes.

Accordingly, the neoliberal perspective on international institutions basically rejects the gloomy neorealist perspective and argues that while anarchy might constrain the willingness of states to cooperate, states can still work together and this is possible through the assistance of international institutions.¹²⁰ Keohane asserts that 'international institutions enhance the likelihood of cooperation by reducing the costs of transactions that are consistent and by creating conditions for orderly multilateral negotiations.' Moreover, international institutions 'help states realize common interests in world politics...and institutions play a necessary part in states achieving their purposes.'¹²¹

Given that the neoliberal perspective has pushed the boundaries of traditional International Relations thinking, it has provided a better environment for institutions, such as the ICC to have a greater potential of success. Particularly since this perspective makes room for actors such as NGOs and individuals, and also because it has a brighter outlook on the notion of international law.

¹²⁰ Grieco, 'Anarchy and the limits of cooperation,' 486.

¹²¹ Keohane, *After Hegemony*, 244 and 245.

Constructivist Perspectives on International Institutions

The constructivist paradigm emerged largely in response to the proliferation of international institutions and regimes, the increase in transnational relations, and even globalization. Its concentration on the 'increasing power of normative considerations, and the role of norms in the process of consolidating the evolving structures of political order beyond the state were central in increasing its prominence within international relations theory.'¹²² Moreover, Wiener notes that the constructivist framework was 'further developed by the studies of international law and/or interdisciplinary research on evolving legal and social practices, routinization, and institution-building within the environment of international organizations.'¹²³ This research orientation or what some have called 'the constructivist turn'¹²⁴ materialized in the 1980s; however, it has only been explicitly recognized in the field of international relations since the 1990s.

While there are many variants of constructivism, this section will focus primarily on the work of Wendt as it has been enormously influential in developing the social constructivist argument within IR. One of the distinguishing features of the constructivist argument is the fact that they believe that not only is the international system comprised of a 'distribution of material capabilities,' but that it is 'also made

¹²² Antje Wiener, 'Constructivism: The Limits of Bridging Gaps', *Journal of International Relations and Development*, 6, no. 3 (2003), 255.

¹²³ Wiener, 'Constructivism: The Limits of Bridging Gaps,' 255.

¹²⁴ Wiener, 'Constructivism: The Limits of Bridging Gaps,' 255.

up of social relationships.’¹²⁵ Wendt explains that these social structures are composed of three features, the first of which being that a ‘shared understanding, expectation, or knowledge’ can constitute a social structure.¹²⁶ Second he asserts that material resources, such as nuclear weapons or gold, represent a social structure because the power they wield can affect social relations with other states in the international system. Finally, Wendt argues that social structures can exist in state practices.¹²⁷ Ultimately, at the heart of the constructivist paradigm is a genuine interest in norms and a desire to promote social changes by trying to explain how structures are the effects of practice.¹²⁸

In addition, constructivists posit that the interests and identities of states are created and evolve through interaction with the international system. This relationship constructivists describe between the state and the international system appears to be dialectical and mutually constitutive because the international system relies on state’s interactions to constitute the structure of the system and then as a result of this interaction the structure is able to influence states identities and interests.¹²⁹ Relatedly, when states engage in certain institutional arrangements these

¹²⁵ Alexander Wendt, ‘Constructing International Politics’, *International Security*, 20, no.,1 (1995), 72.

¹²⁶ Wendt, ‘Constructing International Politics,’ 73.

¹²⁷ Wendt, ‘Constructing International Politics,’ 74.

¹²⁸ Wendt, ‘Constructing International Politics,’ 74.

¹²⁹ Anthony Arend, ‘Do Legal Rules Matter?: International Law and International Politics,’ *Virginia Journal of International Law*, 38 (1997-1998), 129.

institutions have the capacity to change both the identity and interests of the states involved.

Within the growing body of constructivist theory it is almost impossible to identify a constructivist theory on international institutions, as constructivists look and approach international institutions differently. One approach is concerned with the constitutive effects of institutions on actors, while the second focuses on the constitutive norms and intersubjective structures as explanatory factors for actors' choice of institutional rules.¹³⁰ Under the first approach, theorists such as Finnemore, Sikkink, March and Olsen, and Risse understand institutions as 'sets of norms, a norm being defined as a standard of appropriate behaviour for actors with a given identity.'¹³¹ This definition of institutions clearly indicates the constitutive effects of institutions on actors' identities. The general argument of these theorists is that as a result of some institutions being so widely accepted within the international community they have become constitutive of a state's identity. For that reason, if a state wishes to define itself as a member of the community it must 'act in accordance with the standard of appropriate behaviour in the community.'¹³²

It is also important to bear in mind with this approach the significance of 'norm entrepreneurs.' Norms do not simply appear out of thin air. They are actively built by agents such as transnational networks of NGOs that lobby states to redefine

¹³⁰ Caroline FehI, 'Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches,' *European Journal of International Relations*, 10, no. 3 (2004), 365.

¹³¹ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' *International Organization*, 52, no. 4 (1998), 891.

¹³² Finnemore and Sikkink, 'International Norm Dynamics,' 902.

their interests so as to support the respective norm.¹³³ The entrepreneurs call attention to, create, and frame issues in a way that makes them desirable. Thus, 'they are critical in developing consensus on what may generally be considered appropriate, right, or good policy.'¹³⁴ What is constructivist about 'norm entrepreneurs' is their ability to persuade states to behave with regards to what has been deemed appropriate within the international community. Accordingly, this development in constructivist thought provides ample room for non-state actors to function within the international system instead of being relegated to periphery by the nation-state.

The second constructivist approach to international institutions is not as widely accepted as it examines norm developments that influence states' particular choice of institutions. Theorists adhering to this perspective focus less on the constitutive effects of the institution itself than on the previous normative and conceptual developments that explain the creation and design of the institution.¹³⁵ Recent work by Wendt asserts that 'states may design individual institutions according to a logic of appropriateness, so as to conform with, or not to violate, certain pre-existent norms.'¹³⁶ He also emphasizes 'intersubjective conceptual

¹³³ Finnemore and Sikkink, 'International Norm Dynamics,' 902.

¹³⁴ W. Andy Knight, 'Soft Power, Moral Suasion, and Establishing the International Criminal Court: Canadian Contributions', in *Ethics and Security in Canadian Foreign Policy*, ed. Rosalind Irwin (Vancouver: UBC Press, 2001), 117-118.

¹³⁵ Fehl, 'Explaining the International Criminal Court,' 366.

¹³⁶ Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design', *International Organization*, 55, no. 4 (2001), 1024-1027.

developments in that intersubjective consensus generally presupposes certain communicative and conceptual developments within the international community.¹³⁷

It should also be noted that the constructivist paradigm creates a great deal of substantive space for international law within the discourse of international relations with its analysis on social structures and how they impact on state interests and identities. Moreover, it recognizes the utility of international law and centralizes it in its theorization of international politics. In addition, constructivist scholars have increasingly incorporated international law into their literature. This is due to the fact that the constructivist paradigm resonates with the 'British or English school' of international relations.¹³⁸ The leading proponent of this school, Hedley Bull argues that there is such thing as an 'international society' and that the norms of this society influence and/or determine the behaviour and identity of states. Accordingly, in theorizing the international system, this school of thought visualized a fundamental role for international law in maintaining the order of the international society. Bull posits:

'A society of states (or international society) exists when a group of states conscious of certain common interests and common values, forms a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'¹³⁹

¹³⁷ Wendt, 'Driving with the Rearview Mirror,' 1024-1027.

¹³⁸ This school of thought has always accorded international law and organizations a central place in their research and scholarship.

¹³⁹ Hedley Bull, 'The Concept of Order in World Politics', in *Anarchial Society: A Study of Order of World Politics*, ed. Hedley Bull (New York: Columbia University Press, 1977), 13.

Furthermore, constructivism can also be said to echo some international legal scholarship. For instance, some legal scholars believe the international system can be 'described in terms of a set of shared values or rules that constrain the behaviour of actors.'¹⁴⁰ Evidence of this can be found in international treaties, decisions of international tribunals, resolutions of international organizations, etc.

As a result of the constructivist paradigm emerging onto the international relations scene in the past decade, it is still in the process of ironing out some of its theoretical wrinkles. That said, one of the major criticisms leveled towards this approach questions how strongly it can challenge the other more dominant theories of international politics. Indeed, it has demonstrated that non-state actors, international rules, cooperation, and institutions are very much part of the international system, and that these elements can help mould state interests and identities. The constructivist approach also offers new ontological focus and substantially opens up the discourse of international politics to new terrain. Nonetheless, this paradigm offers a great potential for NGOs, institutions and the role of international law because it has widened the discipline of International Relations' theoretical scope and has gone one step further in theorizing much more thoroughly about the reality of international politics.

IR and IL Theories

The above discussion has demonstrated that the dominant theory of IR, realism, still views the primacy of the state as central in its theorization of international politics. Moreover, the dominant theory within the discourse of IL,

¹⁴⁰ Krasner, 'International Law and International Relations,' 97.

legal positivism, also has a statist focus as it was very evident with the examination of the subject and sources doctrines in the previous chapter, that the state is *the* actor within international politics and that all rules within the international community emanate from the state. The centrality of the state in both bodies of theory illustrates that actors other than the state, NGOs, the UN General Assembly, transnational corporations, and individuals are still marginalized in IR theory, when in fact these actors are playing powerful roles in institution making and law making. One must understand that there is a major gap between theory and practice in IR and IL because in theory NGOs and international organizations are not taken into account, however, in practice they are.¹⁴¹ Ultimately, the adequacy of the dominant theories within the discourses of IR and IL is questionable given the fact that they cannot account for other actors functioning within the international community.

Hurrell has argued that much can be learned by examining the other theories of IR, neoliberalism and constructivism, as they provide a more hospitable terrain for non-state actors and the role of international law.¹⁴² He asserts that as the international community becomes increasingly global, the 'hard shell of the state is increasingly eroded... and the picture changes.'¹⁴³ Hurrell explains that because the notion of cooperation has now come to involve the creation of rules that affect the domestic structure and organization of states (human rights, democratization, the

¹⁴¹ See A. Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy,' *Review of International Studies*, 27, no.2 (2001), 137-150.

¹⁴² Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in *Regime Theory and International Relations*, ed. Volker Rittberger (Oxford: Clarendon Press, 1993), 72.

¹⁴³ Hurrell, 'International Society and the Study of Regimes,' 65.

environment, etc.), other actors have begun to get increasingly involved in this process. Also, another result of cooperation involving the creation of rules is that international law has played a much more prominent role within international politics.

Thus, given the reality that the state is no longer the sole actor and that international law has become accepted by states it only makes sense that the dominant theories of IR and IL expand their boundaries to accommodate this change. The above discussion has demonstrated that neoliberal thinking and even more so the constructivist thinking about international politics and institutions has sought to incorporate this reality into its theorization. While the state remains a central actor, it is no longer *the* actor on the international stage as the activities of NGOs, the UN General Assembly, and transnational corporations have all contributed to the establishment of institutions and law making in the twenty-first century. Accordingly, if realism and legal positivism are to continue to dominate the disciplines of IR and IL they both must take into account the new reality of international politics and seriously consider what neoliberalism and constructivism have to say about actors and international law.

IV. UNDERSTANDING THE CREATION OF THE ICC

Realist Hypotheses and the ICC

If the realist perspective on international institutions were correct, the establishment of the world's first permanent international criminal court would still be an idea decades away from fruition. However, the realist paradigm does provide an opportunity for institutions to be established insofar as they embody and promote

the interests of the dominant state(s) or hegemon. Thus, in understanding the creation of the ICC realists would understand that the idea for the Court had to surface on the international agenda at an optimal time as it had to have served the power and interests of states in the international community. An idea for an institution surfacing at a time when there was not a great deal of support from the dominant states as well as from the majority of other states would be highly unlikely occurrence.

That being said, it leads this discussion to the next point in which realists contend that a hegemon or dominant state would have been necessary to facilitate the ICC's establishment by utilizing its capabilities to get the institution off the ground. In this particular case the United States (US) could be considered the hegemon or international community's most dominant state. Accordingly, if the realist paradigm were correct it would be accurate to assume that the US would be a major player in the preparatory meetings leading up to the negotiation process, as well during the negotiations establishing the rules and treaty for the Court and the Court's institutional design. Realists would argue that the most dominant state would want to have an integral role in shaping the treaty for the Court because it would not want to be bound by any rules that might restrain its behaviour when it comes to foreign policy or have the prospect of diminished sovereignty. However, the dominant state would also not want to lose any of its power for reasons of relative gains. If it gave up some of its power, it would ultimately make itself vulnerable to other states to gain on it. Thus, it would be vital for the dominant state to either maintain its status or gain something. It would also be correct to assume that other states would want to play a key role in the negotiating process as well since they would not want to be

taken advantage of by the hegemon and also to ensure their survival in the anarchic world of international politics.

Furthermore, the realist perspective contends that if the hegemon's or the US's interests are not served by the ICC, it would abandon the Court all together. However, if that were not the case the realist paradigm asserts that the hegemon would be integral in using its power and leadership to influence other states to sign on to the Rome Treaty and become a state-party to the ICC. It would also use its capabilities, power and financial, to maintain the institution over time.

Ultimately, if the realist perspective were correct the ICC would be formed by states to serve their primary interests. The Court would also have a set of rules that would allow states to pursue their interests within the international community without being restrained. Moreover, the Court would not infringe on a state's sovereignty or allow for states to have advantages over one another. Given the above realist arguments it would be accurate to assume that realists could not have imagined that the ICC would become a living and breathing international institution.

Neoliberal Hypotheses and the ICC

The neoliberal approach to international politics would see the creation of the ICC as long it served state interests and had some sort of absolute gain for the state. Thus, unlike the realist paradigm, neoliberals would argue that it was not just states that helped create and establish the Court, but also other actors, such as NGOs, and individuals. Accordingly, it could be assumed that these other actors were involved

in the negotiating process of the Court and also helping the Court in its early and most crucial stages.

Moreover, one could assume that if the neoliberal perspective were correct the ICC was created to solve the problem of prosecuting or lack thereof, individuals accused of international crimes within the international community. This problem could be one of many issues surrounding international criminal justice such as the punishment and deterrence of grave crimes, human rights violations, and the mass atrocities that plagued the twentieth century and continue unabated well into the twenty-first century. It could also have to do with the high transaction costs associated with operating the two ad hoc criminal tribunals set up by the UN Security Council. As a result of the growing number of normative considerations for human rights within the international community, it has increased the demand for states to find a plausible solution to this seemingly endless problem. Nonetheless, while no state is interested in prosecuting foreign nationals for violations of international criminal and humanitarian law, the creation of the ICC could be seen as one answer to this problem.

In addition, the neoliberal perspective argues that states search for absolute gains as a mitigating strategy in the quasi-anarchic arena. In view of that, the ICC could be seen as an absolute gain to states because its rules to some extent might cause states to alter their conduct within the international community when it comes to international crimes. It would also allow for some degree of predictability of state behaviour, it could provide valuable information to states prosecuting individuals accused of committing international crimes within their own domestic judicial

system, it would also reduce verification costs, and encourage more cooperation between states.

Constructivist Hypotheses and the ICC

If the constructivist explanations were correct one could presume that the ICC's creation was the result of the increasing power of normative considerations within international politics. Possible normative considerations could include: human rights concerns, expanding liberal norms of state conduct, and also a wider scope for international criminal responsibility which now includes the individual.

Constructivists would also argue that the ICC did not come about by state power, but because the increase in norms has changed state behaviour to the extent that the ICC would serve a state's interest. Relatedly, constructivism like neoliberalism would assume that the ICC was established by the converging of interests from a number of actors, such as states, NGOs, and individuals.

Moreover, if the constructivist approach were correct it would argue that states that do become a party to the Court would only have done so because their interests and identities had been conditioned vis-à-vis the increase in norms and through interaction in the international system. Constructivists would assert that because the norms surrounding the issue of human rights, etc have become so widely acceptable within the international community, a standard of appropriate behaviour has been created for states. Accordingly, as a result of this constructivists would argue that this is why states have created and signed onto the Rome Treaty establishing the ICC. In sum, constructivists would assert that the creation of the ICC

could be directly attributed to the increase in normative considerations by states within the international community and this in turn has provided greater potential for the ICC to succeed.

Conclusions

This chapter has assessed the theoretical and analytical capacity of the dominant theories of IR. The preceding theoretical analysis has demonstrated that for realists the centrality of the state is still significant. On the other hand, for neoliberals and constructivists other actors are also important. In addition, the latter create more room for international law and norms when it comes to institutions and their creation in international politics. Accordingly, it was posited that the statist focus for realists and legal positivists needs to be changed in order to accommodate the other actors functioning in the international community, as well as to account for the significance of non-material entities such as norms and ideas.

The second section of the chapter was also important as it was able to tease out a set of hypotheses from the theoretical discussion to inform the analysis of the ICC. While the empirical evidence is forthcoming, the dominant theoretical perspectives of IR have provided a rich playing field to measure what actors and factors were crucial in establishing the world's first permanent international criminal court.

CHAPTER THREE

ACTORS, INSTITUTIONS, AND PROCESSES

'Compromise is the art of politics, not of justice'

- M. Cherif Bassiouni

For all its imperfections, the Rome Treaty establishing the world's first permanent International Criminal Court, adopted on July 17, 1998 by the Rome Diplomatic Conference, was a major breakthrough in the effective enforcement of international criminal law.¹⁴⁴ First, it marks the culmination of a process started at Nuremberg and the trials of the Far East and further developed through the establishment of the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Second, the Court's Statute crystallizes the whole body of law that has gradually emerged over the past fifty years in the international community in the particularly problematic area of individual criminal responsibility under international law. Thirdly, insofar as it departs from existing trends and practices of the ad hoc criminal tribunals, the ICC also breaks new ground in that it 'lays down the principles and rules that to a large extent take international criminal law from the stage of a rudimentary corpus of legal standards and judicial decisions to the status of a fully-fledged branch of international law.'¹⁴⁵ Thus, the establishment of such a revolutionary Court in the latter part of the twentieth century points to the path likely

¹⁴⁴ Antonio Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court,' in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (Oxford: Oxford University Press, 2002), 3.

¹⁴⁵ Cassese, 'From Nuremberg to Rome,' 3.

taken by international criminal justice in the current century and hopefully well into the future.¹⁴⁶

The establishment of the ICC was by no means the creation of one single actor, institution, or process. Rather, it was the product of decades of slow and painstaking work by a multitude of entities that dates back to the aftermath of WWI and WWII. Accordingly, the key actors involved in the ICC's creation include the international society of states, particularly the world hegemon, the US, the 'like-minded group of states' (LMG) that emerged in the preparatory meetings leading up to the Rome Conference, countless NGOs and the NGO Coalition for the ICC (CICC), and various international organizations. The institutions that played an integral role were the International Law Commission (ILC), the preparatory committee (PrepCom) of the Rome Conference which is a UN General Assembly body, and the 1998 Rome Conference itself. Thus, given the wide array of actors and institutions involved in creating the ICC one can only begin to imagine the processes of cooperation, conflict, and bargaining that had to occur in order for the Rome Statute to finally become adopted. While the ICC is truly revolutionary for the above reasons, it is also revolutionary because of the processes involved vis-à-vis state delegations, groupings of states, and NGOs that were extremely important in moving the notion of the Court onto the international agenda and then into a living and breathing international institution.

This chapter will focus on the key actors, institutions, and processes involved in the creation of the ICC. Moreover, it will consider their contribution and

¹⁴⁶ Cassese, 'From Nuremberg to Rome,' 4.

importance in light of the hypotheses generated in the previous chapter. First, this chapter will introduce the contentious issues surrounding the creation of the Court: jurisdiction, subject-matter, complementarity, the trigger mechanism, and the role of the Security Council. It will then address how the key actors and institutions dealt with these issues by examining their membership, how they made decisions, and ultimately explain their specific contribution to the Court's creation. Thus, the final section of the chapter will formulate the hypotheses more specifically in light of the contentious issues and the key players, and illustrate which theories of IR can explain the phenomenon of the ICC most adequately.

CONTENTIOUS ISSUES

There were several contentious issues which provided for intense debate, negotiation, and compromise in creating the ICC. The first of which has to do with the jurisdiction of the Court. This was one of the most 'delicate issues' as never before had the international community attempted to create a Court with such general scope and application. Jurisdiction refers to the legal parameters of the Court's operations, in terms of the subject-matter, time, space, as well over individuals subject to the Court.¹⁴⁷ The issue of the jurisdiction of the ICC was particularly contentious because it dealt with matters affecting state sovereignty and the Security Council, both of which touched political nerves.¹⁴⁸

¹⁴⁷ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 55.

¹⁴⁸ Elizabeth Wilmschurst, 'Jurisdiction of the Court', in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer Law International, 1999), 127.

The second contentious issue in creating the ICC has to do with the subject-matter over which the Court would have jurisdiction. Again, this was a particularly sensitive issue as it constituted the crimes which the Court could prosecute. There was general agreement within the international community that the ICC would have jurisdiction over 'core crimes'¹⁴⁹ because they constituted exceptionally serious offences of concern to the international community as a whole.¹⁵⁰ These core crimes included: genocide, war crimes, crimes against humanity, and aggression.¹⁵¹ However, there was an intensive lobby to include a number of so-called 'treaty crimes,' such as terrorism and drug trafficking. The crimes of genocide, war crimes, and crimes against humanity were undisputed, but doubts existed with the crime of aggression as to its 'desirability and feasibility' for the purposes of establishing individual criminal responsibility.¹⁵² Furthermore, the inclusion of the crimes of terrorism and drug trafficking drew a great deal of opposition from a clear majority of states in that 'they were widely regarded as crimes of a different character, for which effective systems of international cooperation were already in place.'¹⁵³

¹⁴⁹ The concept of 'core crimes' emerged under the ILC's Draft Statute for the ICC in which they distinguished between two categories of crimes. In later discussions the first category of crimes became known as 'core crimes' and the second category became known as 'treaty based crimes.'

¹⁵⁰ Genocide, provided for in the 1948 Genocide Conventions; war crimes, provided for in the 1949 Hague Conventions and the 1977 Additional Protocol, as well as in the Hague Conventions of 1899 and 1907; and crimes against humanity, which have not yet been comprehensively codified.

¹⁵¹ Note, the crime of aggression has yet to be defined in the Rome Statute.

¹⁵² Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court', in *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer Law International, 1999), 80-81.

¹⁵³ Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court,' 81.

The third issue was a fundamental one in that it had to do with the role the Court would play in relation to a state's national judicial system. The general view was that the ICC would complement national jurisdictions, rather than usurp them. Hence the term 'complementarity' was used to describe the relationship between these two institutions.¹⁵⁴ This was a particularly contentious issue in creating the Court because some states, while supporting the establishment of an international criminal court, were reluctant to create a body that could impinge on national sovereignty.¹⁵⁵ Also, under existing international law, states had obligations to prosecute many of the crimes contemplated for inclusion in the Court's statute. In their view, these obligations were paramount and should not be pre-empted or challenged by the Court, acting, for example, as an international court of appeal.¹⁵⁶ Rather, the Court should only assume jurisdiction where the national judicial system was unable to investigate or prosecute transgressors. A different view, shared by some states and many NGOs, held that the Court should have the potential for a greater role. Fearing the possibility of inadequate investigations or trials aimed at protecting perpetrators, these States and NGOs argued that the Court should intervene where the proceedings under a national jurisdiction were ineffective and where a national judicial system was unavailable. Accordingly, the juxtaposition of these

¹⁵⁴ Note, defining the precise nature of the relationship between the ICC and national courts was both politically sensitive and legally complex.

¹⁵⁵ John T. Holmes, 'The Principle of Complementarity', in *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer Law International, 1999), 41. Also note that the debates in the Ad Hoc Committee and the PrepCom reveal the different views and approaches favoured by states.

¹⁵⁶ Holmes, 'The Principle of Complementarity,' 41-42.

conflicting views defined the debate over the issue of complementarity in creating the ICC.

The fourth issue surrounding the creation of the ICC is that of how the jurisdiction of the Court could be triggered. In the Draft Statute prepared by the ILC it envisaged only two ways to empower the Court: a complaint of a State Party, or a referral of a matter to the Court by the Security Council acting under Chapter VII of the UN Charter.¹⁵⁷ However, during the ILC's debates on this aspect of the Statute, one member of the Commission suggested that the Prosecutor of the Court should also be authorized to initiate an investigation in the absence of a complaint or a referral from the Security Council, if it appeared that the crime apparently within the jurisdiction of the Court would otherwise not be investigated. This became a contentious issue in establishing the ICC because it meant that states party to the Rome Statute would have to share some of their power to control the initiation of investigations and prosecutions with an independent individual.¹⁵⁸

The final issue that emerged in creating the ICC was the role that the Security Council would play in relation to the Court. Two views were prevalent with regards to the Security Council and the ICC. Firstly, some states and NGOs were of the view that the Security Council is a political organ and its decisions are not necessarily based solely on legal considerations. Moreover, in order to maintain the independence of the Court as a judicial body, it should be free from the political

¹⁵⁷ Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer Law International, 1999), 175.

¹⁵⁸ Fernandez de Gurmendi, 'The Role of the Prosecutor,' 176.

considerations of the Security Council. On the other side of the spectrum was the view that the Security Council is the primary organ responsible for the maintenance of peace and security and as such it should have the power to prevent the Court from acting in specific situations. Ultimately, it was these opposing views on the Security Council that made this another contentious issue in creating the ICC.

KEY PLAYERS

International Law Commission (ILC)

The ILC was created by the United Nations General Assembly in 1947 as an effort to promote the ‘progressive development of international law and its subsequent codification.’¹⁵⁹ The Commission is composed of 34 members who are elected by the General Assembly for a five year term. The individuals who are elected to the ILC serve in their own capacity and not as a representative of their respective government.¹⁶⁰ Thus, the status of the ILC within the realm of international relations can be considered non-governmental. Most of the ILC’s work concentrates on the preparation of drafts on specific topics in international law. These topics are either chosen by the ILC or referred to them by the General Assembly or the Economic and Social Council. Accordingly, when the ILC completes a draft on a topic, the UN usually convenes an international conference of

¹⁵⁹ The International Law Commission. ‘Introduction,’ <http://www.un.org/law/ilc/introfra.htm>, (March 23, 2005).

¹⁶⁰ For a current list of the ILC’s membership for the 2002-2006 quinquennium see the ILC website under ‘Membership.’ <http://www.un.org/law/ilc/membefra.htm>

plenipotentiaries to incorporate the draft articles into a convention, which is then open to states to become parties.¹⁶¹

The work of the ILC in relation to the creation of the ICC merits special attention and dates back to the aftermath of WWII. After having its work on drafting an international criminal court suspended once before, the ILC knew this time around that ‘it was one thing to contemplate the ICC as a possibility and another thing to produce a specific proposal capable of being taken seriously by governments.’¹⁶² Thus, as far as the ILC was concerned it had to put onto the UN agenda a proposal modest enough to gain initial support and not to scare potential and influential states, in particular, the US, thereby allowing a range of pressures for a more ambitious system to have their effect at the diplomatic level.

In ILC’s Draft Statute of 1994 it envisaged a court that reflected six guiding elements which together were thought to satisfy the conflicting demands of political realism and legal principle. The first principle was that the court was to be a permanent body; however, it would only sit as required. It was conceived of in this way so as it would be able to act at any time. The second principle was that the court would be established by a treaty instead of by a UN Resolution, and it would also have a close relationship with the UN and the Security Council. It was the ILC’s belief that in creating an international criminal court that it needed the widest support possible for its success. Ultimately, by establishing the court by a treaty states would

¹⁶¹ See ILC website.

¹⁶² James Crawford, ‘The Work of the International Law Commission’, in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta and John R.W.D Jones (Oxford: Oxford University Press, 2002), 25.

have to come to some sort of consensus in order for the treaty to be adopted. Also, a treaty would mean that states would have to become signatories and then ratify it through their domestic legislative system to become a full party to the court.

The third guiding principle according to the ILC was that the court would have a defined jurisdiction over crimes existing under international law and treaties. The significance of this was that it allowed the Court to not only have jurisdiction over crimes arising under or defined by treaty, but also crimes under general international law. Namely, genocide, aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. The fourth principle also has to do with the court's jurisdiction; however, this principle set forward what could trigger the power of the court. This has become known as the 'trigger mechanism.' According to the ILC, only a complaint or a referral by the Security Council could trigger an investigation. What is significant about this principle is that the ILC did not see a role for an independent prosecutor who could initiate prosecutions in the absence of a complaint or a Security Council referral. The fifth principle was that the Court was meant to complement national judicial systems rather than replace them. In drafting this principle the ILC felt that there should only be certain cases when the Court should act and this relates back to the Court's subject-matter jurisdiction. Finally, the ILC envisaged that the court would offer full guarantees of due process under the body of international law.

It can be argued that given the above guidelines that the ILC set its sights for the court very low. When the ILC began its work on the Court, the level of doubt and skepticism within the international community surrounding the creation of an

international criminal court was far greater than when it finished. The Commission believed that in light of this sentiment that the international community was only ready for a light and flexible structure, 'one with the bare minimum of elements necessary to a court in the proper sense.'¹⁶³

In creating the Draft Statute for an international criminal court, it must be noted that this was for the most part a completely institutional process, as the drafters of the Statute were individuals who had been elected to the ILC. While states were able to submit written comments for consideration through the Working Group, the basis of the Draft Statute was primarily the work done by the members of the ILC. The most contentious issue facing the ILC in creating the Draft Statute was the issue of jurisdiction. When the ILC first began its work on drafting a statute for a permanent international criminal court it made a tentative decision to exclude crimes under general international law from the Court's subject-matter jurisdiction.¹⁶⁴ While it did not deny that crimes existed under this body of international law, the commissioners believed from a pragmatic standpoint that including these crimes would act as a deterrent to the Draft Statute's adoption. Since the list of potential crimes was not definitive under general international law, the ILC thought that states might prove reluctant to accept such jurisdiction in advance.¹⁶⁵ Moreover, it was thought that the inclusion of crimes under general international law would be

¹⁶³ Crawford, 'The Work of the ILC,' 34.

¹⁶⁴ Crawford, 'The Work of the ILC,' 31.

¹⁶⁵ Crawford, 'The Work of the ILC,' 31.

undesirable in light of the certainty demanded by the principle of legality.¹⁶⁶ In the end however, it was suggested to the ILC by the Working Group that these crimes be included. The Working Group felt that ‘it was inconceivable that the international community would move to create an international criminal court without including these crimes.’¹⁶⁷ Thus, this development led the ILC to reconsider the Court’s jurisdiction to only a handful of specific crimes.

Preparatory Committee (PrepCom)

The PrepCom for the establishment of the international criminal court was created by the 1995 Ad Hoc Committee (AHCom).¹⁶⁸ The AHCom was established by the UN General Assembly after the ILC had submitted its Draft Statute for an international criminal court. Its mandate was to review ‘the major substantive and administrative issues arising from the Draft Statute and to consider, in light of that review, arrangements for the convening of a diplomatic conference.’¹⁶⁹ In essence the AHCom made the necessary preparations for the PrepCom to take place. Thus,

¹⁶⁶ Crawford, ‘The Work of the ILC,’ 31. The principle of legality asserts that universal jurisdiction only be exercised over serious international crimes as recognized by treaty or customary international law. While many crimes already meet this test, not all international crimes are subject to universal jurisdiction. Accordingly, if the Court was to have universal jurisdiction over its crimes, it had to ensure that they were recognized by treaty or customary international law.

¹⁶⁷ Crawford, ‘The Work of the ILC,’ 31.

¹⁶⁸ See M. Cherif Bassiouni, ‘Historical Survey 1919-1998’, *The Statute of the ICC: A Documentary History* (Ardsley, NY: Transnational, 1998), 31-32. for more detail on the 1995 Ad Hoc Committee. The purpose of the Ad Hoc Committee was to bridge the gap between theory of the Statute as prepared by the ILC and many of the practical and political problems that governments had with the Statute.

¹⁶⁹ Adriaan Bos, ‘From the International Law Commission to the Rome Conference 1994-1998,’ in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John R. W. D Jones (Oxford: Oxford University Press, 2002), 37.

the transformation from the AHCom into the PrepCom made state delegations aware of the necessity of introducing new proposals, as the focus and mandate of this new series of meetings was to draft the texts for the actual statute establishing a court. Accordingly, the PrepCom was characterized by a sense of urgency in that it was pressing to have the draft text ready for the subsequent 1998 Rome Conference.

The PrepCom sessions from 1997-1998, nine weeks in total, were open to all UN members as well as specialized agencies of the UN, and were given the task of 'preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.'¹⁷⁰ It should be noted however, that NGOs for the most part sat on the periphery of these particular proceedings. Literally, NGOs sat outside the closed door sessions. They also had no voting power and could not participate in the debates or discussion. NGOs were only allowed to sit in during the formal plenary sessions and also during the informal working groups. Nevertheless, their presence was constant and became greatly needed as state delegations began to rely on the expert analysis offered by NGOs. For example, many state delegations did not have international law experts with them. Thus, these delegations would turn to the papers published by NGOs to find out exactly what the law was on a particular subject.¹⁷¹

¹⁷⁰ Leila Nadya Sadat, 'The Evolution of the ICC: From the Hague to Rome and Back Again', in *The United States and the International Criminal Court*, eds. Sarah B. Sewall and Carl Kaysen (Lanham: Rowman and Littlefield Publishers, 2001), 39.

¹⁷¹ Barbara Bedont, 'Negotiating for an International Criminal Court: The Like Minded and the Non-Governmental,' *Peace Magazine*, 14, no. 5 (1998) <http://www.peacemagazine.org/archive/v14n5p.21.htm>, (March 10, 2005). Note that a great deal of the papers published during the PrepCom were by Amnesty International.

The sessions of the PrepCom were organized around a work programme, as set forward by the Chairman of the Committee, Mr. Adriaan Bos of the Netherlands.¹⁷² The discussions during this series of meetings were ‘much more intensive, substantive, and technical’ as a result of the date of the Conference having been set.¹⁷³ Given that added bit of pressure, it was decided that if delegations had agreed with a particular text, there was no need for their position to be repeated in other discussions. Ultimately, the decision making process during the PrepCom was that the ‘silent majority rule would be applied,’¹⁷⁴ making it possible to leave to those who had made proposals, and to those who had comments on these proposals, the task of seeking to bridge their differences.¹⁷⁵

It should also be noted that in the process of compiling and consolidating the texts for the statute, the use of brackets was abundant.¹⁷⁶ This became unavoidable during the PrepCom sessions because state delegations did not want to give up their positions on certain issues. Accordingly, this meant that if state delegations did not agree on a certain text that it had the right to include its proposal on the issue included

¹⁷² Bos, ‘From the ILC to Rome,’ 46.

¹⁷³ Bos, ‘From the ILC to Rome,’ 54.

¹⁷⁴ The silent majority rule allowed the PrepCom sessions to work through all the issues in a timely fashion. If states did not have difficulty with the text they remained silent during the sessions. However, if they did have problems with it they were asked to make proposals as to what they would like to see and these proposals were bracketed below the text and would be discussed in Rome.

¹⁷⁵ Bos, ‘From the ILC to Rome,’ 54.

¹⁷⁶ Bos, ‘From the ILC to Rome,’ 54.

in brackets within the draft text of the statute. Bos asserts: 'the text became overloaded with bracketed proposals.'¹⁷⁷

The work of the PrepCom is significant to the creation of the ICC for several reasons. First, it was during the early stages of the PrepCom, the 1996 negotiations, that the group of 'like-minded states' (LMG) emerged. This group's efforts were aimed primarily at the early establishment of an effective court. Delegations from several European countries and from Argentina, Australia, Canada, New Zealand, and South Africa were its core members. However, throughout the preparatory sessions this group was increasingly attracting more state delegations: delegations from Africa, the Caribbean states, Latin America, Eastern Europe and the Pacific states.¹⁷⁸ While this group greatly assisted the Chairman of the preparatory meetings in organizing and completing the necessary work that needed to be accomplished during these sessions, its greatest contribution to the establishment of the ICC would come during the Rome Conference.

Another important aspect that emanated from the PrepCom was the role NGOs would play during the Rome Conference. As previously mentioned, NGOs for the most part sat on the margins of most UN proceedings.¹⁷⁹ While, the presence of NGOs during this particular PrepCom was increasingly prominent (as will be

¹⁷⁷ Bos, 'From the ILC to Rome,' 54.

¹⁷⁸ Bos, 'From the ILC to Rome,' 50.

¹⁷⁹ Note: at other UN Conferences, such as the Vienna Conference on Human Rights in 1993 and the Beijing Conference on Women in 1995, NGOs were granted both access and a role at these UN Conferences. See, Fanny Benedetti and John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', *Global Governance*, 5, no. 1 (1999), 10.

discussed later), they still lacked the ability to fully monitor and influence the negotiations. Thus, the realization was made by the UN Secretariat and the Preparatory Committee bureau that NGOs could serve a higher purpose in relation to the negotiations for an international criminal court. In a closed door plenary session both bodies addressed the question of increased participation of NGOs during the upcoming Rome Conference. It was decided, given their activities at the PrepCom, to confirm their right to have more access at the Rome Conference. This now included access to formal working groups, the right to meet with delegates on the floor of the conference room before and after meetings, and the right to distribute NGO materials. The inroads made by NGOs during the PrepCom were significant because they were able to situate themselves in a far better position for influencing the negotiations at the Rome Conference and also becoming a major player/factor in these negotiations as well.

Moreover, during the PrepCom the NGO Coalition created a formal alliance with the LMG. Given the Coalition's increased scope of activities it in some respects almost paralleled that of the LMG. Accordingly, by forming a partnership both the Coalition and the LMG could work together to broaden their realm of support on certain issues. During the PrepCom, both groups met regularly to confer on proposals and to talk strategy for the plenary debates. Since the Coalition did not have access to closed door sessions they were able to use the LMG to obtain information on where certain states stood on key issues and could then lobby them to make compromises if they felt their position weakened the statute. The NGO Coalition also pushed the LMG during their meetings to generate a list of objectives that would guide their

work at the PrepCom and at the Rome Conference. The list of principles includes: 'to ensure the independence of the Prosecutor and to secure the independence of the Court generally and from the Security Council in particular, to extend the inherent jurisdiction of the Court to cover all core crimes, to guarantee the full cooperation of states with the Court, to give the Court final decision about the ability of national judicial systems to proceed with potential cases, and to achieve the successful completion of the Rome Conference.'¹⁸⁰ In this respect, the Coalition was able to contribute to some extent to the effectiveness of the LMG during the PrepCom: had they not created such a strong partnership this probably would not have been possible.

In addition, what is also noteworthy about the PrepCom was that state delegations were not prepared to negotiate on fundamental questions endangering the prerogatives of the Permanent Members of the Security Council or the sovereignty of states. Those kinds of questions were considered as being in need of political solutions. Accordingly, the outcome of the discussions in the PrepCom resulted in a consolidated text of a Draft Statute which contained 116 articles, including 1300 bracketed phrases.¹⁸¹ What this process did was help create a better understanding amongst delegates about the consequences of various options and also give state delegations a taste of where others stood on certain issues. Ultimately, the period of the PrepCom could be qualified as an appetizer to state delegations, as the general

¹⁸⁰ Pace and Schense, 'The Role of NGOs', 119.

¹⁸¹ John L. Washburn., 'The Negotiations of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', *Pace International Law Review*, 11 (1999), 361.

discussions provided for the delegations a taste of the ingredients, without knowing how the main dishes would present themselves.¹⁸²

The most contentious issues that were apparent in the PrepCom were subject-matter jurisdiction pertaining to the definition of serious violations of the laws and customs applicable in armed conflict. Both the US and New Zealand submitted proposals on the definition of war crimes and they were subsequently bracketed in the draft text for discussion at the Rome Conference. The definition with regards to the crime of aggression was also the subject of debate in the PrepCom and three alternative definitions were included for discussion in Rome. Another contentious issue of the PrepCom circled around the jurisdiction of the Court. More specifically, the inherent jurisdiction of all state parties and an opt in/out mechanism, aspects relating to the trigger of the Court's jurisdiction, and the role of the Security Council with regard to referral of complaints to the Court as well as with regard to the deferral of proceedings. The issue of the Court's jurisdiction was so contentious during these meetings because state delegations were not prepared to make any major concessions.¹⁸³ Although NGOs and the LMG tried to lobby state delegations to make compromises on these issues, the majority of the contentious issues surrounding the Court's creation remained unresolved. The work completed in the PrepCom was remarkable in that within a nine-week period, state delegations, international jurists, and to some extent NGOs were able to come together and draft a consolidated text of a Draft Statute, containing 116 articles, including 1300 bracketed phrases. Ultimately,

¹⁸² Bos, 'From the ILC to Rome,' 64.

¹⁸³ Bos, 'From the ILC to Rome,' 57.

the work of the PrepCom was important because the draft text would be the starting point of the negotiations at the Rome Conference.

NGOs and the CICC

In the late 1980s and early 1990s few NGOs had active programs to support the creation of an international criminal court. Moreover, fewer still were monitoring the proceedings at the preliminary UN meetings. As a solution to this problem a group of NGOs met in New York on 25 February, 1995 and formed the NGO Coalition for an International Criminal Court or CICC.¹⁸⁴ The main purpose of the Coalition was to advocate the establishment of an effective and just international criminal court.¹⁸⁵

From the Coalition's inception its goal was to bring together a broad-based network of NGOs and international law experts to develop strategies on substantive legal and political issues relating to the proposed statute for the ICC.¹⁸⁶ Furthermore, it sought to promote awareness and support for the Court among a wide range of civil society organizations, including those focusing on issues from human rights to religion. The Coalition thus played the role as facilitator for civil society involvement

¹⁸⁴ The primary groups involved in the NGOs establishment are as follows: Amnesty International, *Federation Internationale des Ligues des Droits de l'Homme*, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, and the World Federalist Movement (WFM). It should also be noted that the genesis of this NGO was the idea of William Pace of the WFM.

¹⁸⁵ William R. Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations', in *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer Law International, 1999), 391.

¹⁸⁶ Pace and Thieroff, 'Participation of NGOs,' 392.

in the negotiations for the ICC, and also served as ‘the world’s principal source of information on the ICC.’¹⁸⁷

The CICC made significant contributions to the creation of the ICC at all stages of the process. In the PrepCom the Coalition in association with its members around the world engaged in direct dialogue with governments in capitals, encouraging them to participate actively in the ICC process.¹⁸⁸ It also produced expert analyses of various aspects of the Draft Statute for every session of the PrepCom. Its efforts proved important to the process particularly for smaller state delegations, which often did not have sufficient members to cover all aspects of the PrepCom’s meetings. Accordingly, it was very helpful to have the additional sources of information, summarizing relevant international law and practice, clarifying different government positions on issues, and setting forth, in a succinct way, the options from which delegates had to choose.¹⁸⁹ In addition its efforts proved very useful to the bureau of the PrepCom, as bureau members generally came to view NGO representatives as additional resources upon which it could rely on in encouraging cooperation among delegations and international organizations, and in addressing procedural matters at the PrepCom.¹⁹⁰ The dialogue between the bureau and the Coalition not only created a constructive relationship between the two, it also

¹⁸⁷ Pace and Thieroff, ‘Participation of NGOs,’ 392.

¹⁸⁸ Pace and Schense, ‘The Role of NGOs,’ 117.

¹⁸⁹ Pace and Schense, ‘The Role of NGOs,’ 117.

¹⁹⁰ Pace and Schense. ‘The Role of NGOs’, p. 121.

opened the door to a relationship at the Rome Conference with the Committee of the Whole. The CICC thereby provided a vital service to participants and observers participating in the PrepCom and its bureaucracy. It also bears mentioning that during the PrepCom the CICC grew from 46 organizations to over 300 by the final session, and by the commencement of the Rome Conference its membership had exploded to over 800 organizations, with 236 of them accredited to participate in the Conference.¹⁹¹

The CICC's contributions during the Rome Conference were wide-ranging and multi-dimensional. Considering the fact it did not have a vote, the extent to which it went to influence delegates was substantial. Its activities included coordinating the NGOs in attendance at the Conference by convening daily general strategy meetings, meeting weekly with Conference chairs and coordinators, as well as holding regular meetings with governments and government groups, especially the LMG.¹⁹² As previously mentioned, the Coalition and the LMG formed a strong relationship during the PrepCom. Given the contentious issues that remained unresolved in the PrepCom the Coalition, in consultation with the LMG, developed a list of principles in which they were prepared to tackle together at the Conference.¹⁹³ These principles are as follows:

¹⁹¹ Pace and Schense, 'The Role of NGOs,' 115; Pace and Thieroff, 'The Participation of NGOs,' 392. Note, that all of the NGOs within the CICC's membership could not attend the Rome Conference. Only 236 were able to participate and only one or two representatives could attend.

¹⁹² The NGOs in attendance at the Conference were represented by approximately 450 individuals. Also the NGO delegations of Amnesty International and Human Rights Watch surpassed some of the government delegations in size.

¹⁹³ Pace and Schense, 'The Role of NGOs,' 124.

- the broadest possible jurisdiction for the Court, including crimes against humanity and crimes committed in non-international armed conflicts;
- automatic jurisdiction for the Court over genocide, war crimes, and crimes against humanity;
- universal jurisdiction for the Court over these crimes;
- a system of complementarity by which national courts held primary responsibility for prosecutions
- an independent prosecutor
- an independent Court free from the interference of any political body, including the Security Council
- an obligation on the part of states party to the Statute to cooperate with the Court
- the highest international standards for fair trial and due process for accused
- provisions for victims, including women and children and incorporation of gender concerns
- no reservations treaty
- a mechanism for long-term and secure funding for the Court¹⁹⁴

Since the Coalition could not access all points of the debates and discussion on the final text of the Rome Statute, its partnership with the LMG came in very handy as the LMG could put these points forward for the Coalition in the closed door sessions.

In addition, the Coalition created twelve teams to cover the Conference's eighteen formal working groups.¹⁹⁵ These teams focused on 'definitions of the core crimes, state consent, the trigger mechanism and admissibility of cases, general principles, composition of the Court, investigations, the trial, appeal, and review, penalties, cooperation and national security, enforcement, financing, and the Statute's final clauses.'¹⁹⁶ The teams kept notes from the daily working groups and by doing

¹⁹⁴ Pace and Schense, 'The Role of NGOs,' 124. The informal Steering Committee for the CICC drafted this common statement of its position and not a single Coalition member disagreed with it.

¹⁹⁵ Pace and Thieroff, 'Participation of NGOs,' 394.

¹⁹⁶ Pace and Schense, 'The Role of NGOs', 126.

so were able to meet at regular intervals during the day with each other and with the LMG (in the case of the working groups being broken into smaller *ad hoc* groups) to evaluate progress and cross reference data. Pace asserts that in creating teams to cover the Conference proceedings, the Coalition was able to ‘stay abreast on all the relevant developments and further assist them in finding the most constructive way to contribute to the process.’¹⁹⁷

Many of the Coalition’s members were legal experts and brought with them a plethora of knowledge on issues of international humanitarian law and human rights law and practice, as well as the history of the ICTY and ICTR and history of the efforts to establish a permanent international criminal court. These legal experts not only provided their expertise to a number of government delegations, but also contributed to the papers produced by the Coalition.¹⁹⁸ Accordingly, having members with such knowledge on the issues greatly helped to legitimize the presence of NGOs at the Conference. Moreover, the Coalition helped organize three news teams, *Terra Viva*, *On-the-Record*, and the *CICC Monitor*, which provided the conference’s only daily print and electronic new coverage.¹⁹⁹ They also circulated information on the Court by email and fax to interested NGOs and governments. Relatedly, government delegations at the Conference came to rely on this material as their delegations were not large enough to have delegates at all the sessions. The Coalition’s work in this

¹⁹⁷ Pace and Schense, ‘The Role of NGOs’, 128.

¹⁹⁸ No Peace Without Justice set up a judicial assistance program which provided legal experts to delegations from a number of African and developing countries.

¹⁹⁹ Pace and Thieroff, ‘Participation of NGOs’, 394.

respect was crucial and helped ensure that what was achieved in Rome was recognized around world, literally as soon as the work had been completed.

Also, when national delegations needed reinforcement, or when concerns arose that a delegation might be compromising on key principles, the Coalition contacted ministers, parliamentarians in the capital vis-à-vis its national networks.²⁰⁰ This was the most political aspect of the Coalition's work at the Conference because it had to be responsive to the positions of government delegations pertaining to certain issues. As a result of the Coalition working in teams and having countless legal experts within its membership, it enabled the Coalition to respond quickly to these difficulties and to ensure that its position at the Conference would not be compromised.

The Coalition also greatly influenced the outcome of the Rome Conference by helping to narrow the final options from which delegations had to choose from on the issues that remained to be resolved. The issues included: the independence of the Prosecutor, the role of the Security Council, the scope and nature of the Court's jurisdiction, and the specifics of the core crimes.²⁰¹ The above issues were fundamentally inseparable for many delegates and to overcome this deadlock in the negotiations the Coalition tried a number of approaches. They facilitated open discussions of options during meetings between NGOs and governments, such as the inclusion of internal armed conflicts to the Statute.²⁰² They responded directly to new

²⁰⁰ Pace and Thieroff, 'Participation of NGOs,' 395.

²⁰¹ Pace and Schense, 'The Role of NGOs,' 130.

²⁰² Pace and Schense, 'The Role of NGOs,' 133.

proposals from the American delegation, suggesting that an independent Prosecutor would be overwhelmed with demands for investigations and would be unable to resist political pressure to prosecute certain cases. The Coalition did this by working with representatives from the ICTY and ICTR in persuading delegates that there would be minimal risk with this option. Finally, Pace and Schense cites that the most crucial tool for narrowing the options was the team reports.²⁰³ These reports produced charts which clearly reflected the positions of state delegations. Accordingly, this information was very useful for delegations in that it allowed them to assess the variety of options proposed and the degree of support for each.

The above evidence suggests that the work of the Coalition at the Conference was substantial and very effective. Even though it was still operating for the most part informally, it was still able to play a central role in the process given the extent of its activities. The net result of the Coalition's efforts was clear: the Coalition essentially became the largest and one of the most powerful delegations in attendance at the Rome Conference. In short, the work of the Coalition was ubiquitous and without its contributions the Court would not be a reality today.

The LMG and the Rome Conference

On 15 June 1998, delegates from around the world gathered at the Food and Agricultural Organization (FAO) building in Rome for the five-week Diplomatic

²⁰³ Pace and Schense, 'The Role of NGOs,' 134.

Conference on the establishment of an international criminal court.²⁰⁴ More than 160 states sent delegations to the Conference, in addition to the wide range of international organizations, and literally hundreds of NGOs. It should be noted that at the Conference a number of groupings of states emerged: the LMG, the permanent members of the Security Council, and the non-aligned movement (NAM). The LMG emerged as the most prominent.²⁰⁵

The LMG strengthened its leadership role throughout the negotiations for the ICC as it grew from forty-two states during the PrepCom to over sixty states at the Rome Conference.²⁰⁶ The group included states from all regions of the world, with Canada serving as the Chair during the preparatory negotiations and Australia serving as the Chair during the Rome Conference. A major development for the LMG was the decision of the United Kingdom (UK) to formally join the group during the preparatory negotiations.²⁰⁷ It should be noted that the LMG was the only grouping of states with an operational strategy in place before entering the negotiations in Rome.²⁰⁸ For instance, all of its key meetings were carefully prepared, and its issue

²⁰⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998.

²⁰⁵ Philippe Kirsch, QC and Darryl Robinson, 'Reaching Agreement at the Rome Conference', in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John R. W. D Jones (Oxford: Oxford University Press, 2002), 67; M. Cherif Bassiouni, 'The Time has Come for an International Criminal Court', *Indiana International and Comparative Law Review*, 1, no. 1 (1991).

²⁰⁶ The LMG consisted of the following key states: Australia, Canada, Italy, South Africa, Spain, and the United Kingdom. Notably absent: the US, China, France, and Russia.

²⁰⁷ The UK joined the LMG following the election of the Labour Government.

²⁰⁸ Benedetti and Washburn, 'Drafting the ICC Treaty,' 22.

subgroups, meetings, and briefings for smaller delegations were also organized.

Given its organization, the LMG, while operating rather informally, quickly dominated the structure of Conference by taking up key functions, such as the chairs of most of the working groups, and membership in the bureau, which was the executive body that directed the day to day affairs of the Conference. Furthermore, Canadian, Philippe Kirsch, was elected president of the Conference's Committee of the Whole. Accordingly, this strategy would prove to be very useful as the LMG were able to greatly influence delegations at every angle of the negotiating process.

Throughout the LMG's preparatory work for the Conference it had identified several 'cornerstone' objectives for the Court, 'including a court with automatic jurisdiction, a definition of war crimes encompassing internal armed conflicts, the absence of the Security Council filter role, an obligation of states party to the Statute to cooperate with the ICC, an independent prosecutor empowered to initiate proceedings, and a provision that questions of jurisdiction and admissibility be decided by the Court.'²⁰⁹ Although the principle of universal jurisdiction²¹⁰ was not incorporated into its 'cornerstone' principles, most members of the group preferred a Statute that would provide for it.

The LMG at the Rome Conference made several specific contributions to the creation of the ICC. Firstly, in entering the negotiating process it established multiple strategies in order for it to achieve its ultimate goal of creating a permanent and

²⁰⁹ Kirsch and Robinson, 'Reaching Agreement in Rome,' 70-71.

²¹⁰ For the sake of clarification: universal jurisdiction refers to the concept that a state obtaining custody over a person responsible for particularly serious international crimes may exercise jurisdiction over that person regardless of his/her nationality or the place of the crime. Automatic jurisdiction means that states, upon becoming a party to the ICC should automatically accept the Court's competence over all core crimes.

effective court. During the preparatory meetings the LMG realized that both its goals and the NGO Coalition's were similar. By working closely with the Coalition in providing them with information from the closed door/*ad hoc* working groups, the LMG knew its principles would have a better chance of success and that it would be able to broaden its support amongst state delegations. As previously mentioned, both the LMG and Coalition created a list of eleven principles in which they would work together in their respective capacities to achieve in Rome.

At the Conference the text of the Statute was to be agreed on by consensus as is consistent with negotiations at other UN Conferences and in the General Assembly.²¹¹ Prior to the Conference in the LMG's planning sessions it had distinguished between issues that were important and those that were fundamental (cornerstone principles) to the text of the statute. Predicting that it would be difficult for some key issues to be agreed on by consensus, the LMG decided as a group that if it came down to it that it would agree to put the Statute's most fundamental and highly political issues to a vote.²¹² Finally, in achieving success in Rome the LMG knew it had to split the permanent five members (P-5) of the Security Council. The LMG was well aware that the US would probably not become a party to Statute given the sentiment of Senator Jesse Helms.²¹³ Accordingly, the goal then was to get enough of the P-5 members so that the ICC could work. Thus, with the UK

²¹¹ Benedetti and Washburn, 'Drafting the ICC Treaty,' 23.

²¹² David Matas, 'The Hard Realities of Soft Power', *Peace Magazine*, 14, no. 5 (1998), <http://peacemagazine.org/archive/v14n5.htm>, (March 26, 2005).

²¹³ Helms had been quoted as saying 'the US will not be party to any ICC as long as there is breath in my body.' See Bedont, 'The Like-Minded and the Non-Governmental.'

supporting the LMG, it only had to find common ground, through negotiation, with France and Russia.

By far, the most significant contribution of the LMG to the creation of the ICC was when the final package for the text of the statute was introduced on the final day of the Conference. Prior to the final day of the Conference, the majority of important issues had been agreed upon by consensus in the working groups and in the two bureau papers that were issued by the Committee of the Whole.²¹⁴ However, the most contentious issues, ‘automatic jurisdiction, the absence of the Security Council to veto potential cases, competence over war crimes in internal conflicts, and an independent Prosecutor with the power to initiate proceedings,’ remained to be settled.²¹⁵ Given this reality, Kirsch believed that the only way for the Conference to achieve its goal in establishing a permanent international criminal court was to employ what is known as the ‘package technique.’ This is relatively rare in negotiations at UN Conferences as it ‘puts an end to all attempts at further compromise and offers a product that is either accepted or rejected by calling a final vote.’²¹⁶ Furthermore, in using this approach Kirsch had to ensure that he had a very strong following of supporters. Thus, the final package reflected the majority of

²¹⁴ The bureau papers were issued after the third week of the Conference. These papers dealt with issues that were not discussed in the working groups and were handled personally by the President of the Committee of the Whole. The point of these papers was to narrow the options delegations could choose from on the major issues of the ICC. These issues included: what crimes the Court would prosecute and when the Court can assume jurisdiction over a case.

²¹⁵ Kirsch and Robinson, ‘Reaching Agreement at Rome,’ 74.

²¹⁶ Benedetti and Washburn, ‘Drafting the ICC Treaty,’ 23.

views which were apparent in the debates and that were also consistent with the views of the LMG and the NGO Coalition.

Despite satisfying the majority of the LMG and NGO principles, several other state delegations expressed their concern over the final proposal of the draft statute.²¹⁷ It was at this point in the Conference proceedings that the LMG's work was crucial, as it had to try to ensure that state delegations would not call for last minute amendments to the final text. Accordingly, the LMG began to try to make compromises with the states that had difficulty accepting the final text of the Statute. On the issue of the role of the Security Council the LMG managed to get the support of Russia as they agreed that an investigation can proceed unless the Security Council adopts a specific resolution that an investigation be deferred.²¹⁸ The LMG also managed to reach agreement with France and Russia on issue of the independence of the Prosecutor by agreeing that the Prosecutor could initiate an investigation without a state or Security Council referral with certain safeguards.²¹⁹ However, other issues, such as whether the Court would have jurisdiction over war crimes in internal conflicts proved more difficult. On this particular issue the LMG decided to accommodate the wishes of France and Russia by setting high thresholds for when a

²¹⁷ Kirsch and Robinson, 'Reaching Agreement at Rome,' 77.

²¹⁸ Bedont, 'The Like Minded and the Non-Governmental,' 22. Note, that France accepted the LMG's proposal early on in the Conference which made it easier for Russia to accept.

²¹⁹ If the independent Prosecutor wishes to commence an investigation he/she must first inform all the states party to the Rome Statute. The state(s) would then have one month to inform the Prosecutor if it is going to investigate. Thus, the case would only be investigated by the ICC if the state is either unwilling or unable to do so, or that the Prosecutor can prove that the domestic proceedings were held in bad faith. It is these safeguards which ultimately will limit prosecutorial excess.

crime was considered massive enough to be prosecuted by the Court.²²⁰ Accordingly, this compromise made by the LMG will make it difficult for the Court to exercise its jurisdiction over crimes, especially those committed internally, where the state wishes to protect the perpetrator. The final issue in which the LMG had to make compromises on was the issue of jurisdiction. While they were looking for universal jurisdiction, a narrower jurisdiction ended up being accepted. Now, the final Statute states that before the Court can take any action, one of two states must be a party to the Statute, or give its consent.²²¹ Thus, the LMG's work paid off as both France and Russia concluded that they were able to support the Court. This was a very important development as these countries support would tip the balance in the Security Council, if anything having to do with the Court came on to its agenda. It should also be noted that the LMG urged supportive and undecided delegations to support the package as a whole in order to preserve the gains that had been made in support of a Court.

While the LMG's goals were lofty, its activities throughout the Rome Conference allowed it to play a very influential role. Centralizing its group around a comprehensive set of the strategies and not making compromises until the absolute end with key states, the LMG's strategy enabled them to dominate the structure of the Conference and successfully negotiate all but a few of the Statute's key provision.

²²⁰ 'The ICC has jurisdiction regarding war crimes in particular when committed as part of a plan or policy or as part of the large scale commission of such crimes.' For further clarification on this see Bartram Brown, 'The Statute of the ICC: Past, Present, and Future,' in *The United States and the International Criminal Court: National Security and International Law*, eds. Sarah B. Sewall and Carl Kaysen (Lanham: Rowman and Littlefield, 2000), 69.

²²¹ Brown, 'The Statute of the ICC,' 69. Namely, the territorial state and the state of the nationality of the accused.

Also by working with the NGO Coalition the LMG was able to use their influence at the Conference to broaden their base of support substantially. Ultimately, the LMG's experience at the Rome Conference demonstrates that states converging around specific view points on a particular issue can have an impact on the international community and can trump the wishes of the world hegemon.

The United States

Leading up to the Rome Conference the US, under the Clinton administration, had 'a compelling interest' in the establishment of a permanent ICC.²²² While the administration wanted several major objectives met, a significant role for the Security Council in the referral of cases, specific and proper definition for war crimes, exclusion of drug trafficking and aggression from the Court's core crimes, and further research into the crimes of international terrorism, the US entered the preparatory negotiations in good faith and remained optimistic.²²³

During the PrepCom American negotiators worked diligently to advance the American position on the Court. Although they were concerned with the above objectives, early in 1998 they also became concerned with the issue of complementarity.²²⁴ US negotiators actively pursued this particular idea because it was thought that necessary protection for American interests could be pursued

²²² David J. Scheffer, 'Developments in International Criminal Law: The United States and the International Criminal Court,' *The American Journal of International Law*, 93 (1999), 12.

²²³ Scheffer, 'Developments in International Criminal Law,' 13.

²²⁴ Christopher C. Joyner and Christopher C. Posteraro, 'The United States and the International Criminal Court: Rethinking the Struggle between National Interests and International Justice,' *Criminal Law Forum*, 10 (1999), 371.

through this aspect. Thus, the US worked diligently to strengthen this regime in its favour and was successful in broadening it to include a 'deferral to national jurisdictions at the outset of a referral of an overall situation to the ICC rather than only at a preliminary stage of the work on a particular case.'²²⁵ In addition, at the final session of the PrepCom, the US worked with other Security Council members to shape an acceptable language on the crime of aggression, and took the lead on whether or not crimes against humanity would include crimes committed during an internal armed conflict and crimes occurring outside any armed conflict. Even though the American delegation in attendance at the PrepCom did not achieve everything it had set out to accomplish, the US made a huge contribution to the overall strength of the text in the draft statute.

In entering the negotiations in Rome, the American delegation, led by US Ambassador for War Crimes at Large, David Scheffer, was 'forty members strong and easily the best prepared and most disciplined at the Conference.'²²⁶ Throughout the five-week conference the US delegation offered itself as the voice of 'realism,' as it insisted that 'good intentions could only take the ICC so far.'²²⁷ Given this sentiment, the US saw a number of hidden perils in the draft text of the Statute in which it believed would restrict its behaviour and unique position within the international community. For instance, 'fearing that the Court might unfairly charge

²²⁵ Scheffer, 'Developments in International Criminal Law,' 16.

²²⁶ Lawrence Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for the ICC', in *The United States and the International Criminal Court*, eds. Sarah B. Sewall and Carl Kaysen (Landham: Rowman and Littlefield, 2000), 91.

²²⁷ Brown, 'The Statute of the ICC,' 63.

US military personnel, the US believed that an independent Prosecutor would be dangerous.²²⁸ It also believed that states should be able to choose from among a short list of crimes when accepting the jurisdiction of the Court, and that the Court's jurisdiction should be based on state consent instead of on notions of universal or automatic jurisdiction. Another concern expressed by the US delegation was that the definition of war crimes was too broad and might be misinterpreted to include acts committed by US troops during peacekeeping missions abroad. Finally, it wanted the Security Council to authorize every prosecution by the Court, and wanted all of the P-5 members to have the power to veto investigations.²²⁹

Given the uneasy feeling about the Court, the American delegation in Rome decided to pursue two strategies. First, it wanted to work toward a successful Conference that resulted in a statute. Second, throughout the negotiations and working groups the delegation had to factor into the unique responsibilities of the US for international peace and security into the functioning of the Court.²³⁰ However, in pursuing these strategies, it is important to understand that the American delegation at the Conference was under very restrictive instructions from Washington. In making decisions on certain key issues the delegation had to take into account the fact that Senator Jesse Helms, the Republican head of the Foreign Relations Committee, had declared that 'any treaty emerging from Rome that left open even the slightest possibility of any American, under any circumstance, being subjected to judgment or

²²⁸ Brown, 'The Statute of the ICC,' 63.

²²⁹ Brown, 'The Statute of the ICC,' 63.

²³⁰ Scheffer, 'Developments in International Criminal Law,' 14.

even oversight by the Court would be dead on arrival.²³¹ This development would make it very difficult for the delegation to show ‘flexibility or to accept compromise’ on key issues.²³² Accordingly, while most state delegations positioned themselves within a particular grouping of states at the Conference, the US delegation found itself and its position on its own. Thus, it had to build support for its position through time consuming negotiation with other delegations.

Despite the American delegation’s position and unwillingness to compromise on key issues, it did make several noteworthy contributions to the creation of the ICC. One such contribution had to do with the protection of national security information. The US found in its experience with the ICTY that ‘some sensitive information collected by the US government could be made available as lead evidence to the prosecutor.’²³³ The US challenged this provision in Rome arguing that a national government must have the right of final refusal if the request pertains to its national security. On this particular issue the US view prevailed. The US also helped lead the successful effort to ensure that ‘the Court’s jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of armed conflict.’²³⁴ Furthermore, the US had sought a high threshold for the Court’s jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that themselves should not automatically trigger the machinery of the ICC. The definition that was

²³¹ Scheffer, ‘Developments in International Criminal Law,’ 14.

²³² Brown, ‘The Statute of the ICC,’ 63.

²³³ Scheffer, ‘Developments in International Criminal Law,’ 15.

²³⁴ Scheffer, ‘Developments in International Criminal Law,’ 15.

arrived at in Rome served the American purposes well: 'The Court shall have jurisdiction in respect to war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'²³⁵

The US also made significant contributions in Rome with regards to the inclusion of the 'Elements of Crimes' into the final text of the Statute.²³⁶ Moreover, due process protections occupied an enormous amount of the American delegation's time because they had to ensure that US constitutional requirements would be met with respect to the rights of defendants before the Court.²³⁷ In addition, the US delegation made major contributions to the structure of the Court which included the expenses of the Court and of the Assembly of States Parties be provided through assessed contributions made by states party to the Court's Statute.

The most contentious issue for the US delegation to negotiate and find compromise in Rome was the issue of jurisdiction. The ICC was designed as a treaty-based Court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. One of the fundamental principles of international treaty law is that fact that only states that are party to a treaty should be bound by its terms. However, within the final text of the Statute the ICC would reduce the need for ratification of the treaty by national governments by providing the Court with jurisdiction over the nationals of a non-

²³⁵ Scheffer, 'Developments in International Criminal Law,' 15 & 16.

²³⁶ Note, the US was the first and only state delegation to submit a draft of elements of crimes.

²³⁷ Scheffer, 'Developments in International Criminal Law,' 16.

party state.²³⁸ Thus, the ICC may exercise its jurisdiction over anyone, anywhere in the world, even in the absence of a referral by the Security Council. This presented a major problem for the US in the final weeks of the Conference because it knew this provision would be completely unacceptable to Washington. Accordingly, the US delegation proposed a structure for jurisdiction that would have greatly enhanced the prospects of US support. Within their proposal they wanted to see an 'opt-out- clause for war crimes and crimes against humanity.'²³⁹ Ultimately, the US was prepared to accept automatic jurisdiction over genocide, but wanted to be able to limit its exposure to the Court, unless the Security Council referred a situation to it.

On the final day of the Conference, the issue of jurisdiction had yet to find a solution acceptable by the American delegation. Although, they had submitted proposals to the Committee of the Whole on this particular aspect of the text, they were not incorporated into Kirsch's final package deal. However, a number of key issues in which the US opposed were: jurisdiction, an independent prosecutor, and the crime of aggression within the crimes under the Court's jurisdiction.²⁴⁰

Given this development the US delegation spent the final day designing an amendment in which they would propose at the final session and also trying to find

²³⁸ Scheffer, 'Developments in International Criminal Law,' 16.

²³⁹ Scheffer, 'Developments in International Criminal Law,' 17 & 18. For further detail on this see Scheffer generally.

²⁴⁰ Brown, 'The Statute of the ICC,' 65.

support for it.²⁴¹ While this amendment raised new issues, there was very little time for negotiation between other state delegations. Thus, in the final session of the Conference the US presented its proposed amendment to the plenary in hopes that it might undo the package deal and create more time for negotiating the final text of the Statute. However, despite its efforts a ‘no action’ motion was passed. The US delegation was then forced to call for an unrecorded vote on the final package because it could not guarantee in full that American military personnel or political figures would not come before the Court.²⁴² Nonetheless, despite the American efforts in Rome to shape the Statute of the world’s first permanent criminal court around American interests the final text of the Statute was overwhelmingly accepted in a vote of 120 states for, and 7 states against.

Although the American delegation voted against the Rome Statute its contributions to the process in creating the ICC are significant. It can be argued that the Rome Statute is a document with ‘American fingerprints all over it with just a few exceptions.’²⁴³ Ultimately, the American contribution to the creation of the ICC was nothing short of substantial as it was able to achieve a number of key provisions both during the PrepCom and during the negotiations in Rome that would strengthen the Statute as a whole.

²⁴¹ ‘The amendment would have offered non-party states limited protection from the jurisdiction of the ICC by requiring their consent to jurisdiction over acts committed on their territory or committed by their officials or agents in the course of official duties and acknowledged by the State as such.’ This amendment by the American delegation was designed to alleviate the concern that US political leaders and military personnel could be tried for carrying out American foreign policy. Brown, ‘The Statute of the ICC,’ 81.

²⁴² An unrecorded vote means that the states names who voted were not officially recorded.

²⁴³ Weschler, ‘Exceptional Cases in Rome,’ 109.

ASSESSMENT OF HYPOTHESES

Realism

The realist hypotheses generated in the previous chapter asserted that the idea for the ICC had to come onto the international agenda at an optimal time.

Accordingly, the idea emerged in the post-Cold War era when the animosity that had dominated the international community for almost half a century had dissipated. In light of this development, the atmosphere was ripe and at this time the General Assembly asked the ILC to create a draft statute for a permanent international criminal court. Given that the General Assembly of the UN constitutes for the most part the majority of states within the international community, their referral of this idea could be taken to mean that states were behind the idea of creating such a court.

In addition, it was hypothesized that the hegemon would be necessary for the Court's creation and that it would play a major role in this process. This hypothesis is somewhat accurate because the above evidence has demonstrated that the US became a major player in both the preparatory sessions and at the Rome Conference. The American delegation was integral in negotiating key aspects of the Court and without its work the Statute establishing the ICC would not be as strong. While the American delegation was not the sole actor involved in this process, it did still play a crucial role in shaping the Statute to ensure that its behaviour would not be restricted within the international community. However, the American effort to ensure that the Court would not infringe on its sovereignty did not succeed.

With regards to the hypothesis made concerning relative gains, this hypothesis proved to be precise. The empirical evidence has shown that as a result of the US delegation not being able to guarantee that its nationals would come before the Court, or that despite the exceptional role the US has as the world's only remaining superpower that it could not negotiate a set of rules for itself and a set of rules for the rest of states who would be party to the Statute. The US delegation had no choice but to vote against the Statute because if not it would have shifted the pre-existing balance of power in the international system and the US might have lost some of its power.

The realist hypotheses also stated that other states would want to play a key role in the negotiating process. The contributions of the LMG in establishing a Statute for the Court would support this hypothesis. Throughout the negotiation process the LMG worked with other state delegations to gain support for the eleven principles they had wanted to see incorporated into the final text of the Statute. Although the LMG was well aware that these principles went against the American position on the Court, the LMG knew that if the final text did not include these principles that it could very easily be taken advantage of by the US. Furthermore, it is quite evident that not only did other states and groupings of states play a key role in the negotiating process, but the contribution of the NGO's, namely the NGO Coalition was significant. Thus, this particular hypothesis is only partially correct in that it was both states and non-state actors, something that realist thought does not take into consideration, which played a key role in the negotiating process, aside from the US.

Finally, the realist hypotheses asserted that the dominant state would abandon the Court if its interests were not served. This hypothesis is true because when the American delegation in Rome were no longer able to negotiate its objectives with other states and the draft statute seemed to be going against the US position, it called for an unrecorded vote in which it thought a great majority of states would vote against the statute. This was not the case and the Americans found themselves in close company with China, Libya, Iraq, Yemen, Qatar, and Israel. Moreover, the US under the Bush administration has started an all out war to undermine the Court's success. The reintroduction of the American Servicemen's Protection Act (ASPA), the unsigning of the Rome Statute, and creation of impunity agreements or Article 98 agreements,²⁴⁴ are all efforts on the part of the US to protect itself from the Court as well as its nationals. It could be argued that instead of the hegemon using its power and leadership to influence other states to sign and ratify the Rome Statute, it is doing the opposite: using its power and leadership to influence states not to sign and ratify.

In assessing the realist hypotheses in light of the empirical evidence it is correct to assume that the ICC was formed by states, for the most part, but it will not serve their primary interests in the anarchic realm of international relations. This Court will ultimately place restrictions on a state's behaviour and on their national's behaviour when it comes to the crimes that fall within the Court's jurisdiction. The Court will also diminish a state's sovereignty given that states which sign and ratify the Statute will have to alter their domestic legislation so that the crimes under the

²⁴⁴ In an effort to shield American nationals from prosecution by the ICC, the Bush administration are seeking to sign bilateral immunity agreements, or so called 'Article 98' agreements that would provide that neither state would bring the other's current or former government officials before the jurisdiction of the Court.

Court's jurisdiction will also fall under a state's national jurisdiction. In sum, the hypotheses derived from realist thinking can account for the behaviour of the hegemon, the US, during the process to establish the ICC. However, the series of realist hypotheses made do not adequately account for the fact that actors, other than states, would play such an integral role in the process.

Neoliberal Institutionalism

According to the neoliberal hypotheses the ICC would be created as long as it served state interests and that it had some sort of absolute gain for the state. Thus, in creating the ICC, states would recognize this as an absolute gain because states would be better off with one centralized institution for prosecuting individuals accused of international crimes than several decentralized institutions, such as was the case with the *ad hoc* tribunals. The neoliberal hypotheses also posit that not only were states vital in creating the ICC, but other actors were as well. This hypothesis is correct because it takes into consideration the role played by the NGO Coalition throughout the entire process. The empirical evidence has shown that the activities of the NGO Coalition were very important in the process establishing the Statute for the Court. What makes their contribution so significant is the fact that even though they did not have a formal role or the power to vote during the PrepCom and the Rome Conference that they were still able to influence state delegations the way they did. Accordingly, the power behind their influence could be attributed to a number of factors which include the plethora of activities they took on in Rome, and their relationship with the LMG. It is important to note the significance of the relationship

between the Coalition and the LMG because without each other as allies both groups would not have had the same amount of power and influence over states delegations at the Rome Conference. Thus, it can be assumed that without this partnership the outcome of the Conference might have been different.

In addition, the neoliberal hypotheses contend that the ICC was created to solve a problem in the international community. Indeed, it could be argued that the ICC was created to solve the enforcement problems arising with prosecutions in national courts and because of the high transaction costs associated with the system of *ad hoc* tribunals. For instance, the creation of the ICC solves the problem of the worldwide punishment and deterrence of international crimes as it will centralize the prosecutions that have exclusively been decentralized by national courts. The problem with the decentralization of prosecutions is that if a state is faced with the opportunity to prosecute a high-level perpetrator on the basis of universal jurisdiction, an individual state has incentives not to proceed with the investigation. These disincentives include: the diplomatic costs that such an investigation can entail, the state of the nationality of the perpetrator may protest the prosecution, etc. Ultimately, the creation of the ICC can be said to address this problem.

The high transaction and information costs associated with the *ad hoc* tribunals and international criminal prosecution also demonstrate that the ICC was created to address a market failure within the international community. By the end of the 1990s, with the ICTY and the ICTR in place and new tribunals under consideration for Cambodia and East Timor, it was felt among member's of the Security Council that the negotiation of new *ad hoc* tribunals and their increasing

frequency would soon exceed the Council's financial and time resources.²⁴⁵ The creation of the ICC was meant to reduce the high transaction and information costs of international criminal justice because with the establishment of a permanent institution there would be no need for the Security Council to create more *ad hoc* tribunals. Additionally, given the knowledge and expertise of the NGO Coalition on international criminal and humanitarian law, human rights, etc, it can be argued that their sophisticated activities could help alleviate the problem of 'tribunal fatigue.'²⁴⁶ In sum, this hypothesis is correct because the ICC was established with the expectation that it would save costs and increase the likelihood and deterrence of international prosecutions.

Overall, the neoliberal hypotheses did demonstrate that international cooperation is possible through institutions. The empirical evidence illustrates that in creating the ICC states were able to cooperate with each other to find solutions to the enforcement problems arising out of national judicial systems and the high transaction and information costs associated with the *ad hoc* tribunal system of the Security Council. Moreover, the empirical evidence demonstrates that it was not only states that played key roles in creating the Court, but other non-state actors as well. Thus, the neoliberal hypotheses can be argued to better account for the creation of the Court than the realist hypotheses because they create room for the activities of NGOs.

²⁴⁵ Caroline Fehl, 'Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches,' *European Journal of International Relations*, 10, no. 3 (2004), 370.

²⁴⁶ Fehl, 'Explaining the ICC,' 370.

Constructivism

The constructivist hypotheses contend that the ICC was created in light of the increasing power of normative considerations within international politics. This hypothesis is accurate because in looking at the normative developments preceding the ICC's establishment one can see how states came to identify that the creation of the Court was within their interests. The proliferation and increasing worldwide acceptance of human rights norms can account for this shift in identity and interest. Since the 1970s, more and more human rights conventions have been adopted by states. Risse and Ropp assert that 'in the course of this process human rights norms reached prescriptive status, that is to say a state of almost universal acceptance.'²⁴⁷ A constructivist would understand that the universal acceptance of human rights norms are more than just rules in the international community. Thus, they would argue that these norms have come to define the identity of the community of states and of its members.²⁴⁸ Given this evidence it can be argued that the growing normative consensus on human rights norms has changed states interests and identities to the point where they were able to acknowledge the larger problem of enforcing these norms.

The constructivist hypotheses also discussed that the ICC would be established by the converging of interests by a number of actors, such as states and NGOs. This hypothesis is accurate when one considers the role of norm

²⁴⁷ Thomas Risse and Stephen C. Ropp, 'International Human Rights Norms and Domestic Change: Conclusions', in *The Power of Human Rights: International Norms and Domestic Change*, eds. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 265.

²⁴⁸ Fehl, 'Explaining the ICC,' 372.

entrepreneurs. Norm entrepreneurs as previously mentioned call attention to, create, and frame issues around a particular issue that makes them desirable to states. In this particular case the NGO Coalition did just that. For instance their activities included: coordination of their participants, a CICC monitoring team, services to government delegations, discussions with the LMG and other state delegations, keeping the media and global civil society informed, and coordinating the over 800 NGOs in its membership between Rome and national networks. The empirical evidence demonstrates that the activities of the Coalition during the PrepCom and even more so during the Rome Conference in lobbying states to find support for their position was extremely successful.

However, it would not have been possible for the Coalition to convince the majority of state delegations of its position if it had not been for its partnership with the LMG. By aligning themselves with the LMG, the NGO Coalition was able to diffuse their normative commitment to the ICC amongst the other delegations. Since the Coalition could only sit in on open working groups and the plenary sessions, this partnership proved to be very worthwhile as the LMG could put forward the Coalition's position in the closed door sessions and influence state delegations of their position from every angle. Davenport asserts that the NGO Coalition with their realm of influence literally 'hijacked the process.'²⁴⁹

The hypotheses resulting from the constructivist approach to international relations are quite accurate because they take into account the enormous contributions made by the NGO Coalition and the normative considerations within the international community. While the constructivist hypotheses cannot account for all the actors and

²⁴⁹ David Davenport, 'The New Diplomacy', *Policy Review*, 116 (2002), 23.

processes involved, namely the actions of the US, the hypotheses can explain why the majority of state delegations voted for the establishment of the ICC.

CONCLUSIONS

The process in establishing the ICC is revolutionary given the dynamics involved. Driving the dynamism that characterized this process were two new bodies: the LMG and the NGO Coalition. In particular, the contribution of the NGO Coalition is significant because never before in international politics have NGOs made such a huge impact on UN Conference proceedings. Although their impact would not have been as significant if they had not forged a relationship with the LMG, the increasing power of NGOs within the international community has provided interesting insights. This 'new diplomacy' as it is being called by scholars views the involvement of NGOs in the negotiation process at the international level as central, as well as states' openness to this involvement.²⁵⁰ As demonstrated by the case of the ICC this new dynamic has proved very successful.

However, from a theoretical standpoint the significance of the contributions of non-state actors causes some difficulty because when the dominant theories of International Relations were established their focus was primarily on the state. Thus according to the preceding assessment of the hypotheses, it can be argued that all three approaches can explain the creation of the ICC to a certain extent. For example, the analysis of the realist hypotheses have demonstrated that they are able to account for the contributions of the hegemon, the US, in creating the Court. This analysis also confirmed that it does not have the capacity to incorporate non-state actors into its

²⁵⁰ Davenport, 'The New Diplomacy,' 23-25.

theorization of international politics and international institution making. On the other hand, the examination of the neoliberal hypotheses illustrated that they are able to account for why the Court was created and even more so for the actors involved, namely states and NGOs. This assessment established that the neoliberal framework is better situated to account for the phenomenon of the ICC. Finally, the analysis of the constructivist hypotheses has revealed that they are able to account for the normative considerations involved in creating the Court, as well as the considerable contributions made by civil society.

It is quite evident that all three theoretical approaches, each in their own unique way, can help explain the creation of the ICC. While the theories are able to complement each other in different ways making up for their deficiencies, no single theory examined in this thesis can adequately account for all of the factors involved in establishing the Court. This inability to account for the Court's creation most likely can be attributed to the role played by NGOs and that of the LMG. Even though the contributions of like-minded groups of states are not uncommon at UN Conferences as well as that of NGOs; what is uncommon in this particular case is that fact that these two groups formed a partnership and through that were able to largely direct the process in creating the ICC. Nevertheless, this new dynamic provides interesting insights that the dominant theories of International Relations have yet to capture.

CONCLUSION

'Nothing can stop an idea whose time has come'

- Victor Hugo

The purpose of this thesis was to examine of the creation of the ICC in light of the dominant theories and approaches of the disciplines of International Law and International Relations, and demonstrate how the theories, for the most part, are inadequate in accounting for the activities of non-state actors, namely NGOs, in the development of international law and international institutions. In short, this thesis has explained that the process to establish the ICC can be attributed, in large part, to the contributions of civil society.

Chapter One has illustrated how the theoretical foundations of international law posed a barrier to holding individuals accountable for their crimes within the international community. The discussion about the doctrine of legal positivism has thus shown that it largely influenced the discipline's analytical foundations in that it was of the belief that international law could only be applied to sovereign states. Accordingly, as was demonstrated with the analysis of the subject and sources doctrines of international law, the centrality of the state is readily apparent.

Nevertheless, it was argued that the understanding of the state under international law today is problematic given the fact that non-state actors have been able to give rise to customary international law. Furthermore, through the discussion of the evolution of individual criminal responsibility this chapter asserted that the

analytical foundations of international law were inadequate because they did not take into account the actual reality of the actors involved in creating law in the twenty-first century.

The examination of the dominant theories of the discipline of International Relations in Chapter Two illustrated how well realism, neoliberal institutionalism, and constructivism were able to theorize international institutions, non-state actors, and international law. This discussion highlighted that for realists the centrality of the state is still key, and thinking about non-state actors does not figure into their analysis of the international system. Moreover, it demonstrated that neoliberal and constructivist thinking about international relations create more room for actors other than the state, and also provide a more hospitable terrain for international law and normative considerations. Ultimately, in assessing the dominant theories this chapter was able to put forward a set of hypotheses derived from the theories as to what factors would be most important in explaining the ICC.

Thus, the discussion that followed in Chapter Three was most telling as it outlined the contentious issues and key players involved in creating the ICC, and assessed the hypotheses from Chapter Two. In assessing the empirical evidence in light of the hypotheses, this Chapter demonstrated that the world hegemon, the US was integral in creating the Court. From the PrepCom to the final stages of the Conference, it remained a key player. However, when its wishes were not accommodated on the final evening of the Conference, the US was forced to vote against the Court. The analysis also illustrated the monumental impact the NGO Coalition had in creating the Court. The empirical evidence showed that the NGO

Coalition made significant contributions in support of the ICC at literally every stage of the process. Moreover, their partnership with the like-minded group of states proved to be very beneficial to their cause as they were able to substantially widen their realm of influence. Accordingly, Chapter Three argued that given the empirical evidence and the assessment of the hypotheses that no single theory by itself was able to completely account for the Court's creation.

The evidence presented in this thesis indicates that the notion of non-state actors participating at the international level may not be an emerging trend anymore, but a well-established one. If the case of the ICC is any sign of the power and impact that civil society can have in the realm of international law making and international politics, both the disciplines of International Law and International Relations need to take steps to rethink their theorizing about the international system and make the necessary adjustments.

As the preparatory phase of the ICC is coming to a close it is now just entering its most telling and crucial phase: the judicial phase. Although the Court's first investigations have been launched and it will most likely begin the trial process in these situations later this year, there is no question that this will be the most serious test of the capacity of the Court to function as an international institution on the international stage. Thus, now more than ever Badinter appropriately states:

‘It is up to the NGO Coalition's dedication to humanitarian actions, which have already played as important part in the creation of the Court, and public opinion, so important in contemporary democracies, to see to it that the promise of this new judicial dawn comes to fruition.’²⁵¹

²⁵¹ Robert Badinter, ‘International Criminal Justice: From Darkness to Light’, in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (Oxford: Oxford University Press, 2002), 1935.

In sum, this thesis has confirmed that none of the theories assessed taken alone have the capacity to completely explain the phenomenon of the creation of the ICC. This ultimately raises the importance in discovering new theories, or new approaches to old theories to better account for the realities within international politics. Therefore, the case of the ICC has drawn attention to the fact that new trends are always emerging on the international stage and the theories in both the disciplines of International Law and International Relations need to become more hospitable to this reality.

BIBLIOGRAPHY

Anonymous. 'Editorial on the process that produced the Rome Statute,' *Times of India*, 1 August, 1998.

Arend, Anthony. 'Do Legal Rules Matter?: International Law and International Politics,' *Virginia Journal of International Law*, 38, no. 1 (1998): 107-154.

Badinter, Robert. 'International Criminal Justice: From Darkness to Light', in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones. Oxford: Oxford University Press, 2002, 1931-1936.

Baldwin, David A. *Neorealism and Neoliberalism*. New York: Columbia University Press, 1993.

Bassiouni, M. Cherif. 'The Time has Come for an International Criminal Court', *Indiana International and Comparative Law Review*, 1, no. 1 (1991).

Bassiouni, M. Cherif. 'Historical Survey 1919-1998', in *The Statute of the ICC: A Documentary History*, edited by M. Cherif Bassiouni. Ardsley, NY: Transnational, 1998.

Bassiouni, M. Cherif. *Crimes Against Humanity in International Law: Second Edition*, The Hague: Kluwer Law International, 1999.

Baylis John and Steve Smith. *The Globalization of World Politics: An Introduction to International Relations*, New York: Oxford University Press, 1997.

Bedont, Barbara. 'Negotiating for an International Criminal Court: The Like Minded and the Non-Governmental,' *Peace Magazine*, 14, no. 5 (1998).

- Benedetti, Fanny and John L. Washburn. 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', *Global Governance*, 5, no. 1 (1999).
- Bennett, Andrew. *International Organizations: Principles and Issues – Sixth Edition*, Upper Saddle River, NJ: Prentice Hall, 1995.
- Bos, Adriaan. 'From the International Law Commission to the Rome Conference 1994-1998,' in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones. Oxford: Oxford University Press, 2002, 35-66.
- Brown, Bartram. 'The Statute of the ICC: Past, Present, and Future,' in *The United States and the International Criminal Court: National Security and International Law*, edited by Sarah B. Sewall and Carl Kaysen. Lanham: Rowman and Littlefield, 2000, 61-84..
- Brownlie, Iain. *Principles of Public International Law: Fourth Edition*, Oxford: Oxford University Press, 1990.
- Bull, Hedley. 'The Concept of Order in World Politics,' in *Anarchial Society: A Study of Order of World Politics*, edited by Hedley Bull. New York: Columbia University Press, 1977, 3-21.
- Cassese, Antonio. 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court,' in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and R.D.W. Jones. Oxford: Oxford University Press, 2002, 3-22.
- Corn, Geoffrey S. and Jan. E. Aldykiewicz. 'New options for prosecuting war criminals in internal conflicts,' *Parameters*(2002): 30-44.
- Crawford, James. 'The Work of the International Law Commission,' in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and R.D.W. Jones. Oxford: Oxford University Press, 2002, 23-34.

- Cutler, A. Claire. 'The Grotian tradition in international relations,' *Review of International Studies*, 17, no. 1 (1991): 41-65.
- Cutler, A. Claire. 'Law in the Global Polity,' in *Towards a Global Polity*, edited by Morten Ougaard and Richard, London: Routledge, 2002.
- Davenport, David. 'The New Diplomacy', *Policy Review*, 116 (2002).
- Evans, Graham and Jeffrey Newnham. *The Penguin Dictionary of International Relations*, London: The Penguin Group.
- Falk, Richard. 'Keeping Nuremberg Alive,' in *International Law: A Contemporary Perspective*, edited by Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz, Boulder: Westview Press, 1985, 494-500.
- Fehl, Caroline. 'Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches,' *European Journal of International Relations*, 10, no. 3 (2004): 357-394.
- Fernandez de Gurmendi, Silvia. 'The Role of the International Prosecutor,' *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, 175-188.
- Finnemore, Martha and Kathryn Sikkink. 'International Norm Dynamics and Political Change,' *International Organization*, 52, no. 4 (1998): 887-917.
- Gilpin, Robert. *The Political Economy of International Relations*. Princeton: Princeton University Press, 1987.
- Grieco, Joseph. 'Anarchy and the limits of cooperation: a realist critique of the newest liberal institutionalism,' *International Organization*, 42, no. 3 (1988): 485-507.

Grotius, Hugo. *The Law of War and Peace*, translated by F.W. Kelsey, New York: Palgrave, 2001.

Higgins, Rosalyn. 'Conceptual Thinking About the Individual Under International Law,' in *International Law: A Contemporary Perspective*, edited by Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz. Boulder: Westview Press, 1985, 476-493.

Higgins, Rosalyn. *Problems and Process: International Law and How we Use It*, Oxford: Oxford University Press, 1994.

Holmes, John T. 'The Principle of Complementarity,' in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, 41-78.

Hurrell, Andrew. 'International Society and the Study of Regimes: A Reflective Approach,' in *Regime Theory and International Relations*, edited by Volker Rittberger. Oxford: Oxford University Press, 1993, 49-72.

Jorgensen, Nina H.B. *The Responsibility of States for International Crimes*. Oxford: Oxford University Press.

Joyner, Christopher C. and Christopher C. Posteraro. 'The United States and the International Criminal Court: Rethinking the Struggle between National Interests and International Justice,' *Criminal Law Forum*, 10 (1999).

Judicial Decisions. 'International Military Tribunal (Nuremberg), Judgment and Sentences', *American Journal of International Law*, 41, no. 1 (1947): 172-333.

Keohane, Robert and J. Nye. *Power and Independence*. Boston: Little Brown and Company Inc., 1977.

Keohane, Robert. *After Hegemony: Cooperation and Discord in the World of Political Economy*. Princeton: Princeton University Press, 1984.

- Kirsch, Philippe and Darryl Robinson. 'Reaching Agreement at the Rome Conference', in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and John R. W. D Jones. Oxford: Oxford University Press, 2002, 67-92.
- Knight. W. Andy. 'Soft Power, Moral Suasion, and Establishing the International Criminal Court: Canadian Contributions', in *Ethics and Security in Canadian Foreign Policy*, edited by Rosalind Irwin. Vancouver: UBC Press, 2001, 113-137.
- Krasner, Stephen D. 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36, no. 2 (1982): 185-205.
- Krasner, Stephen D. *International Regimes*. Ithaca, NY: Cornell University Press, 1983.
- Krasner, Stephen D. 'International Law and International Relations: Together, Apart, Together?', *Chicago Journal of International Law*, 1 (1990): 93-100.
- Kratochwil, Friedrich and John Gerard Ruggie. 'International Organization: A State of the Art on an Art of the State', *International Organization*, 40, no. 4 (1986): 743-775.
- Malanczuk, Peter. *Akehurst's Modern Introduction to International Law: Seventh Revised Edition*, London: UK, 1991.
- Matas, David. 'The Hard Realities of Soft Power', *Peace Magazine*, 14, no. 5 (1998).
- Mearsheimer, John J. 'The False Promise of International Institutions', *International Security*, 19, no. 3 (1994): 5-49.
- Mendelson, M. *The International Court of Justice and the Sources of International Law*, in *Fifty Years of the International Court of Justice*, edited by V. Lowe and M. Fitzmaurice. Cambridge: Cambridge University Press, 1996, 63-89.

- Morgenthau, Hans J. *Politics Among Nations: the Struggle for Power and Peace*. New York, 1948.
- Pace, William R. and Mark Thieroff. 'Participation of Non-Governmental Organizations', in *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, 391-398.
- Pace, William R. and Jennifer Schense. 2002. 'The Role of Non-Governmental Organizations', in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and R.D.W. Jones. Oxford: Oxford University Press, 2002, 105-144.
- Pease, Kelly-Kate. *International Organizations: Perspectives on Governance in the Twenty-First Century*, Upper Saddle River, NJ: Prentice Hall, 2000.
- Sadat, Leila Nadya. 'The Evolution of the ICC: From the Hague to Rome and Back Again', in *The United States and the International Criminal Court*, edited by Sarah B. Sewall and Carl Kaysen. Lanham: Rowman and Littlefield Publishers, 2001, 31-50.
- Schabas, William A. 'International Criminal Court: The Secret of its Success', *Criminal Law Forum*, 12 (2001): 415-425.
- Schabas, William A. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 2001.
- Scheffer, David J. 'Developments in International Criminal Law: The United States and the International Criminal Court,' *The American Journal of International Law*, 93 (1999): 12-22.
- Shaft, Michael P. *The Story Behind the First International Criminal War Crimes Trial Since Nuremberg*, Durham: Carolina Academic Press, 1997.
- Shaw, Malcolm N. 'The Nature and Development of International Law,' in , in *International Law*, edited by Malcolm N. Shaw. Cambridge: Cambridge University Press, 2003, 1-25.

- Simmons, Beth A. and Lisa L. Martin. 'International Organizations and Institutions', in *Handbook of International Relations*, edited by Walter Carlsnaes, Thomas Risse and Beth A. Simmons. London: Sage. 2002.
- Slaughter, Anne-Marie, Andrew S. Tulumello, and Stephan Wood. 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', *American Journal of International Law*, 92, no.3(1998):367-397.
- Snidal, Duncan. 'The Limits of Hegemonic Stability Theory', *International Organization*, 39, no. 4 (1985): 579-614.
- Ratner, Steven R. and Jason S. Abrams. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*. Oxford: Oxford University Press, 1997.
- Risse, Thomas and Stephen C. Ropp. 'International Human Rights Norms and Domestic Change: Conclusions', in *The Power of Human Rights: International Norms and Domestic Change*, edited by Thomas Risse, Stephen C. Ropp and Kathryn Sikkink. Cambridge: Cambridge University Press, 1999.
- Ruggie, John Gerard. 'What Makes the World Hang Together? Neo Utilitarianism and the Social Constructivist Challenge', *International Organizations*, 52, no. 4 (1998): 855-885.
- Text of the Treaties of Peace 1919-1923. Carnegie Endowment for International Peace, Vol I (1924), New York.
- Von Hebel, Herman and Darryl Robinson. 'Crimes within the Jurisdiction of the Court,' in *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, 79-126.
- Washburn, John L. 'The Negotiations of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', *Pace International Law Review*, 11 (1999).

- Wendt, Alexander. 'Constructing International Politics', *International Security*, 20, no. 1 (1995): 71-81.
- Wendt, Alexander. 'Driving with the Rearview Mirror: On the Rational Science of International Design', *International Organization*, 55, no. 4 (2001): 1019-1050.
- Weschler, Lawrence. 'Exceptional Cases in Rome: The United States and the Struggle for the ICC', in *The United States and the International Criminal Court*, edited by Sarah B. Sewall and Carl Kaysen. Landham: Rowman and Littlefield, 2000, 85-114.
- Wiener, Antje. 'Constructivism: The Limits of Bridging Gaps', *Journal of International Relations and Development*, 6, no. 3, (2003): 253-276.
- Wilmshurst, Elizabeth. 'Jurisdiction of the Court,' in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, 127-142.
- Wright, Quincy. 'War Criminals', *American Journal of International Law*, 39, no. 2 (1939): 257-285.
- Weiss, Edith Brown. 'Invoking State Responsibility in the Twenty-First Century,' *American Journal of International Law*, 96, no. 4 (2002): 798-816.
- Young, Oran and Gail Osherenko. 'The formation of international regimes: hypotheses and cases', in *Polar Politics: Creating International Environmental Regimes*, edited by Oran Young and Gail Osherenko. Ithaca, NY: Cornell University Press, 1993.

UN Documents

May 23, 1969, 1155 UNTS [Vienna Convention]

Web Sources

Human Rights Watch. 'The Role of NGOs and the ICC,'
<http://www.hwr.org/worldreport99/special/icc.html>.

Ifeoma Mary Frances Okwuje. 'Making Law Without the Hegemon: A
Consideration of the United States and International Human Rights Treaties,'
http://sitemaker.umich.edu/iokwuje/files/making_law.pdf.

International Law Commission. 'Introduction,'
<http://www.un.org/law/ilc/introfra.htm>.

Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October
1995), [http://www.un.org/icty/tadic/appeal/decision
e/51002.htm](http://www.un.org/icty/tadic/appeal/decision_e/51002.htm).

The International Criminal Tribunal for the Former Yugoslavia. 'The Prosecutor of
the Tribunal Against Dusan Tadic, Indictment,'
<http://www.un.org/icty/indictment/english/tadicint.htm>.