

## **Creating a More ‘Just’ Order – The ICC and the Politics of Judicial Intervention**

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### ***DRAFT – NOT FOR CITATION***

This paper analyses the creation of the International Criminal Court (ICC) as the latest development in the institutionalisation of human rights law enforcement. The theoretical and analytical framework is based on the English School of International Relations and its central conflict between order and justice. The ICC is seen as a form of judicial intervention that exposes this conflict on a concrete level: state sovereignty (as a principle of international order) is compromised to protect universal human rights (as principles of individual justice). The framework for analysis also includes elements of constructivism and the so-called norm life cycle to explain how new norms of justice emerge and are internalised in international society. The norm life cycle is a dynamic process with progress as well as setbacks, but this paper argues that an overall progression has taken place towards increased institutionalisation of justice norms and their enforcement into the rules of international society.

This paper starts with a brief outline of the theoretical framework before embarking on an analysis of the creation of the ICC and the main issues arising from the negotiations. The compromises eventually incorporated into its Statute aim to overcome the conflict between order and justice by combining the two. The paper also looks at the opposition of the US and its concerns regarding the ICC Statute. The opposition can be seen as a pluralist response to the mainly solidarist achievements of

the compromises, based on considerations for national interest and the principle of non-intervention. The overall assessment of this paper is that even though US opposition is difficult for the ICC this opposition is not strong enough to constitute an insurmountable obstacle for the Court's effective functioning. The Court is built on strong foundations that have developed in line with the norm life cycle and it also enjoys widespread support from a large number of states.

### **Theoretical framework for analysis**

The framework for analysis is mainly based in the English School of IR and its pluralist and solidarist approaches. The main focus of the English School is the concept of international society, which exists "when a group of states, conscious of certain common values, form 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."<sup>1</sup> It emphasises the importance of international order principles, such as state sovereignty and non-intervention, but also acknowledges that states are increasingly concerned with protecting other values, such as justice and human rights. The theory recognises that a conflict between the order provided by states and various aspirations for justice exists and is split into two different positions on how to resolve this tension: the pluralist and the solidarist view.

*Pluralists* argue that order is always prior to justice and that there will also be a permanent tension between the two. They focus on the rules of international society that uphold international order among states that share different conceptions of justice. Pluralists argue that because international society cannot agree on what individual justice entails, pursuing it would undermine international order. State sovereignty and the principle of non-intervention are fundamental principles of international order and are enshrined as such in the UN Charter. For pluralists, justice is only possible within the context of order but never at the price of order. Pluralists favour order over justice, because they believe that there is not enough solidarity among humankind to provide for the latter.<sup>2</sup>

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<sup>1</sup>Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke, London: MacMillan, 1995), p. 13.

<sup>2</sup>R. John Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974), p. 308.

*Solidarists*<sup>3</sup>, in contrast, look at the possibility of overcoming this conflict by recognising the mutual interdependence of the two concepts. Their main focus is on individuals as principal holders of rights and duties in international relations and the realisation of individual justice. Justice is a normative phenomenon which entails “the moral rules conferring rights and duties upon individual human beings.”<sup>4</sup> In the context of this paper, ‘justice’ refers to the enforcement of international human rights laws and norms aimed at holding perpetrators accountable and to end the culture of impunity. The ultimate aim for solidarists is to achieve a more *just* international order that can accommodate both order *and* justice which means that human rights norms are perceived as integral parts of international order. Solidarists argue that order and justice are inextricably linked, and that it is important to reconcile the two values, because an unjust world will eventually lead to a breakdown of order.<sup>5</sup>

The creation of the ICC can be seen as a concrete expression of the English School’s central conflict between order and justice: the ICC is an independent institution that has the power to intervene into the internal affairs of a sovereign state in order to enforce human rights laws and to protect principles of justice. This means that one state’s sovereignty (as a fundamental principle of international order) can be compromised to protect human rights (as a principle of individual justice).

The English School is a valuable starting point for the analysis as it focuses on the concept of international society and the values of order and justice, opening up important (ethical) questions about the relationship between the two. The pluralism/solidarism debate highlights a number of issues with regard to judicial interventions that are based on humanitarian motives, questioning whether order and justice can both be realised in international society. However, the approach is often criticised for its lack of a discussion on research methods, which weakens its analytical strength as a tool for analysing movement and change in international society. Shared values and interests are seen as sources of international society and order, but it is not explained *how* they develop to become part of the basis of

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<sup>3</sup>In this analysis, the concepts ‘solidarism’ and ‘solidarity between states’ are used in a very limited sense - as a particular strand of the English School of IR theory.

<sup>4</sup>Hedley Bull, *The Anarchical Society*, p. 79.

<sup>5</sup>Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), p. 301.

international society and how they change. In order to theorise normative change, this analytical framework incorporates elements of constructivism and the norm life cycle model, which allows examining how norms emerge and how they are integrated into the rules of international society.

In line with a constructivist approach, states are seen as existing in a normative structure that enables and constrains their choices of action. The present analysis aims to show how existing human rights laws affect states in their attempts to enforce justice norms in the international order. Norms and rules that have been established over a long period of time increasingly influence the decision making process and provide legitimising reasons for certain actions. In sum, “the interesting question is whether and how human-rights norms are becoming not only regulative injunctions designed to overcome the collective action problems associated with interdependent choice, but also constitutive, a direct reflection of the actors’ identity and self-understanding.”<sup>6</sup>

Finnemore and Sikkink’s<sup>7</sup> norm life cycle model seeks to explain how new norms are generated and disseminated and how they become part of the rules of international society that enable and constrain state action. The model adds to the aspirational dimension set out in the English School’s solidarist approach by providing a dynamic element for the overall analysis. The norm life cycle illustrates how norms emerge and develop and how they are incorporated into the rules of international society. The cycle consists of three stages: it starts with the emergence of a new norm, followed by its diffusion and cascade towards greater acceptance, and completes with the internalisation of a new norm as a fully incorporated rule in international society. Full norm internalisation can be seen as being similar to the solidarists’ ultimate aim of a more *just* order because it means that “norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.”<sup>8</sup> The order and justice conflict is thus overcome; enforcement and compliance with individual justice norms are permanently incorporated into the international order and an integral part of international society.

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<sup>6</sup>Emanuel Adler, *Seizing the Middle Ground: Constructivism and World Politics* (1997), p. 332.

<sup>7</sup>Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change* (1998),

<sup>8</sup>*Ibid.* p. 895.

The establishment of the ICC is used as a case study to illustrate this third and final stage of the cycle. It is based on existing and universally agreed upon international norms that are already part of the international order through international legal provisions (such as the Genocide Convention) but have no effective enforcement mechanisms attached to them. The ICC can be seen as an attempt to incorporate norms and their enforcement more fully into provisions of the international order through an independent supranational institution. The creation of the ICC ties in with a solidarist understanding of international society that aims to build a more 'just' order in which norms are fully internalised and are seen as an integral part.

### **Background to the ICC's Creation**

Developments towards a permanent international criminal court already started in the 1950s, but concrete attempts to establish such a court were not made until after the end of the Cold War. The project of establishing a permanent court gained renewed momentum after the creation of *ad hoc* courts (such as the ICTY and ICTR) by the Security Council, which had indicated both that a permanent court was needed, and that states might be willing to support its creation. The UN established a number of Committees to prepare a text that could be used as a basis for negotiations towards a final compromise on the establishment of a permanent international criminal court. Numerous proposals were submitted by states during meetings that were held between 1995 and 1998. The range and complexity of the submissions made the creation of a consolidated text very difficult, but in the end, a draft statute was created that formed the basis for the final negotiations that were to take place in Rome. The text comprised 173 pages, included 116 articles and 1400 words in brackets, i.e. points of disagreement between states.

The "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" (Rome Conference) took place in Rome from 15 June to 17 July 1998. Nearly 160 states met to negotiate a 'Final Act' for the proposed ICC. The negotiations were very complex and by the end of the Conference, some of the key issues were still not resolved to everyone's satisfaction. However, a 'package deal' was put to the vote on 17 July 1998 with 120 states voting in favour, seven

against and 21 abstaining.<sup>9</sup> The ICC eventually came into being on 1 July 2002, six months after the 60<sup>th</sup> state ratified the Court's Statute into their national laws.<sup>10</sup>

### **Main Issues Arising from the Negotiations**

The main issues of debate related to states' concerns about the ICC's effect on state sovereignty as one of the fundamental principles of international order. In general, states were very supportive of the Court in terms of its potential to enforce the most fundamental human rights but argued that this needed to be done with respect for other provisions of the existing international order. The tension between fundamental principles of sovereignty and non-intervention on the one hand and considerations for enforcing individual justice values already established in that order on the other, were evident during the whole negotiation processes.

Numerous compromises integrated into the Statute demonstrate that the ICC aims to combine both values, which could be achieved (among other things) through changes in states' understanding of the principle of sovereignty. Some states pointed out that the principle of state sovereignty had transformed over the years to incorporate new norms and that its value therefore needed to be considered in this changed light. Croatia, for example, argued that conditions for "just and equal treatment of all individuals and states" needed to be met and "to a certain extent that meant abandoning the traditional concept of sovereignty of states (...)." <sup>11</sup>

One of the key objectives at the Rome Conference was to reconcile states' concerns to preserve sovereignty with the aim of creating a functioning institution that would enforce existing justice norms effectively. This was achieved in the Statute, which "proposed (at least) three important ways in which State sovereignty was buttressed within the regime established: complementarity, content and consent." <sup>12</sup>

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<sup>9</sup>Although the voting records have never been made public, it is widely believed that the states voting against the statute were: the USA, China, Israel, Libya, Iraq, Yemen, and Qatar. Among those abstaining were believed to be India, Japan and Mexico Alistair D. Edgar, *Peace, justice, and politics: The International Criminal Court, "new diplomacy", and the UN system* (Tokyo; New York; Paris: United Nations University Press, 2002), Note 3..

<sup>10</sup>As of February 2007, the ICC has 139 signatories and 104 states parties, i.e. states that have ratified the Statute into their national laws.

<sup>11</sup>*Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Vol. II* (Rome: United Nations, 1998), p. 94.

<sup>12</sup>Gerry Simpson, *Politics, Sovereignty, Remembrance* (Oxford; Portland: Hart Publishing, 2004), p. 55.

### *The Principle of Complementarity*

The principle of complementarity reflects the jurisdictional relationship between the ICC and national courts. The Court complements national jurisdiction and can only act if the state in question is genuinely unable or unwilling to investigate or prosecute itself. This places the primary responsibility for investigation and prosecution on national authorities. The principle of complementarity aims to strengthen rather than replace national courts in matters of enforcing international laws by reinforcing states' existing obligations. Yet, it also fills a gap when states either cannot or will not act to ensure the global enforcement of human rights. The principle thereby preserves state sovereignty in two respects: states can be sure of non-interference in their internal affairs if they act in accordance with their obligations, and they also continue to have the primary responsibility towards their own people to enforce existing international legal obligations themselves.

The aspect of complementarity that raised most contention was the question of how to determine the trigger which would give the ICC the right to exercise jurisdiction. Article 17(1) negotiated in Rome sets out that the Court can only act if the state in question is "unwilling or unable genuinely to carry out the investigation or prosecution". The Statute also includes provisions as to how the Court should determine a state's 'unwillingness' or 'inability' to investigate cases. It was generally agreed that it was necessary to include the notion of 'unwillingness' in this Article to avoid 'sham trials' and to ensure that crimes were prosecuted properly. However, this provision was at the same time seen as problematic because it would open up the possibility of using the ICC as a form of 'appeals court' that passes judgment on national proceedings.

Furthermore, the term 'genuinely' includes a good faith element that can create ambiguities and therefore lead to inconsistent application. Good faith assumes that the investigation or prosecution is carried out honestly and complies with standards of decency, which is a very subjective assessment of a situation. The Statute's failure to provide unambiguous standards to judge its own terms is arguably a weakness of the complementarity principle. However, even though it is necessary to establishing criteria in international law they are always prone to be either over- or under-

inclusive. This can lead to difficulties in their consistent and universal application, because their exact meaning is always dependent on individual interpretation.<sup>13</sup>

Giving the ICC complementarity with rather than primacy over national courts<sup>14</sup> was seen to be necessary to preserve the most fundamental principles of non-intervention and states' sovereign right to exercise jurisdiction on their own territory. In terms of the underlying order and justice debate, complementarity includes both pluralist as well as solidarist elements: state sovereignty is protected by giving national courts primary responsibility to exercise jurisdiction, international judicial intervention through the ICC can only occur under very specific circumstances. This constitutes a compromise whereby universally agreed upon international norms of justice can still be protected if the state in question fails to do so. Sovereignty is seen as the primary concern (pluralist element), but it does not have primacy over justice principles. If states are not able or willing to enforce these principles themselves, the ICC can intervene (solidarist element).

Complementarity with national courts means that the ICC functions as an *indirect* enforcement mechanism, because the “very knowledge that the ICC may act (...) is intended to prod governments into the more energetic primary enforcement of human rights.”<sup>15</sup> This underlines the ICC's nature as a Court of ‘last resort’; a safety net designed to act in case the commission of ‘core’ crimes is ignored by the state that has the primary responsibility to act. Strengthening national compliance in this way is important in order to create a permanent enforcement mechanism for international norms with the long term effect of internalising those norms into the international order in line with the norm life cycle. It leads to a process of socialisation between states by creating an environment in which states are expected to observe norms or face the possibility of sanctions if they fail to comply.

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<sup>13</sup>Martti Koskenniemi, *‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law* 2002), p. 167.

<sup>14</sup>In contrast, the International Criminal Courts for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) both have primacy over national courts.

<sup>15</sup>Jamie Mayerfeld, *Who Shall be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights* 2003), p. 96.

The ICC thereby does not relieve states of their treaty obligations and responsibilities but on the contrary requires them to act in accordance with them. The ICC's indirect effect is significant and

provoking states to incorporate and apply the Statute's principles in their national courts might even be greater than direct applications of its jurisdiction against indicted persons in The Hague. Ideally, the ICC will be redundant, as war criminals are genuinely prosecuted in national courts in all countries of the world.<sup>16</sup>

#### *Content – The ICC's Subject-matter Jurisdiction*

The second compromise that had to be reached in ICC provisions in order to reconcile sovereignty with universal enforcement of justice norms was related to the subject-matter jurisdiction - or content - of the Statute. Agreement was eventually reached in Rome that the ICC should have jurisdiction over three clearly defined 'core' crimes: genocide, war crimes and crimes against humanity (Articles 6-8). A fourth crime, the crime of aggression, was added to the Statute subject to further negotiations regarding its precise definition. The Court's subject-matter jurisdiction was limited in this way was to include only crimes "whose criminality was thought to be beyond dispute."<sup>17</sup> These crimes were seen to be reflective of customary international law and of universal concern, established in Conventions and other legal instruments. States did not want to create new legal provisions for international crimes, but much rather strengthen the enforcement of already existing international laws and norms. These norms have already cascaded through the first two stages of the norm life cycle - they are universally recognised norms incorporated into international law.

A number of states were dissatisfied with the limited nature of the Court's jurisdiction and there was also disagreement over what the 'most serious' crimes of concern for humanity were. Trinidad and Tobago, for instance, proposed to include drug trafficking as a crime in the Statute, because they regarded it as one of the "most serious crimes of international concern."<sup>18</sup> The majority of states, however, saw too many practical difficulties attached to investigating and prosecuting crimes such as drug trafficking in an international court as to do so would require extensive fieldwork

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<sup>16</sup>Vesselin Popovski, *International Criminal Court: A Necessary Step Towards Global Justice* 2000), p. 405-6.

<sup>17</sup>Simpson, *Politics, Sovereignty, Remembrance* p. 56.

<sup>18</sup>*Rome Proceedings* p. 66.

and access to classified information. It was argued that the inclusion of such crimes would lay the Court open to abuse by national courts using it to avoid expensive trials by shifting responsibility to the international level.<sup>19</sup> This could result in the Court being overburdened and unable to work effectively. The majority of states therefore agreed that limiting the subject-matter jurisdiction of the Court was necessary in order to be able to arrive at a consensus in the ‘Final Act’. This compromise also protects the principle of sovereignty because limiting the ICC’s jurisdiction means that a vast array of international crimes remains solely within the national jurisdiction of states.<sup>20</sup>

### *Consent – The Treaty-based Approach and the ICC’s Automatic Jurisdiction*

Another issue related to states’ concerns about sovereignty was the question of whether states needed to consent to the ICC’s powers of jurisdiction or whether such consent could be seen as implied in the Statute. It was agreed that the ICC should be established by treaty to ensure that the Court was not imposed as an external force on states<sup>21</sup> and that it would not be perceived as dramatically eroding state sovereignty.<sup>22</sup> This approach ensured that the Court was based on the principle of reciprocity, which means that “any state that joins the Court, and thereby shapes its direction through the selection of judges and prosecutors, understands that it makes its own citizens and leaders vulnerable to the Court’s prosecution.”<sup>23</sup> However, the treaty-based approach also meant that any state could refuse to ratify the Statute and thereby evade membership. This weakens the impact of the Court because the international prosecution of war crimes is still dependent on states’ willingness to co-operate with the ICC by signing up to it and assisting in its workings by surrendering indicted persons or retrieving documentary evidence.<sup>24</sup>

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<sup>19</sup>Dominic McGoldrick, *Political and Legal Responses to the ICC* (Oxford; Portland: Hart Publishing, 2004), p. 41.

<sup>20</sup>Article 123 of the ICC Statute sets out that seven years after entry into force, a Review Conference shall be convened to consider any amendments to the Statute which may include, but is not limited to, the list of crimes contained in Article 5.

<sup>21</sup>This is different from the ICTY and ICTR which were both established by the UN Security Council and therefore imposed on the states concerned.

<sup>22</sup>Helen Durham, *The International Criminal Court and State Sovereignty* (Aldershot; Burlington; Singapore; Sydney: Ashgate, 2000), p. 184.

<sup>23</sup>Mayerfeld, *Who Shall be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights* p. 124.

<sup>24</sup>Christian Tomuschat, *Human Rights: Between Idealism and Realism* (New York: Oxford University Press, 2003), p. 283.

A treaty-based approach was nevertheless seen as necessary to avoid criticisms which had been made of the Security Council's decisions to create *ad hoc* courts and impose them on states without their consent. Such an approach has often been criticised for being selective and "in a sense, the International Criminal Court was meant to transcend the political. Correspondingly, its trials would resist the appellation, 'political trials'. These trials would be international, impartial, non-selective."<sup>25</sup>

Another key question debated by states was whether the Court should be given inherent jurisdiction over the crimes included in the Statute. 'Inherent' jurisdiction means that states do not have to issue separate declarations that they accept the jurisdiction of the ICC over certain crimes. By ratifying the Statute all states automatically concede to the ICC's jurisdiction over the crimes set out in that Statute.<sup>26</sup>

During the Rome proceedings individual states expressed very different views on the Court's powers to exercise jurisdiction. Some argued in favour of universal jurisdiction covering all states, others were in favour of letting states opt in and out of the ICC's provisions. In the end a compromise was adopted into Article 12 of the Statute, which gives the ICC jurisdiction over crimes committed on a state party's territory or by one of its nationals. The ICC has automatic jurisdiction for states parties over crimes against humanity and genocide,<sup>27</sup> but with regard to non-states parties (i.e. states that have not ratified the Statute) consent from either the territorial state or the state of nationality of the accused is required. This means that if a national of a non-states party were accused of committing a crime covered by the Statute while on the territory of a member state (provided this member state consented to the ICC taking action) the accused could be subjected to the ICC's jurisdiction without a need for the non-state party to give its consent.

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<sup>25</sup>Simpson, *Politics, Sovereignty, Remembrance* p. 51.

<sup>26</sup>This is contrary to the ICJ's Statute, for instance, where states need to 'opt-in' to jurisdiction on specific crimes and jurisdiction is not conferred automatically with a state's ratification of the Statute. Additional declarations to accept jurisdiction are necessary.

<sup>27</sup>An opt-out provision was included for war crimes. Article 124 of the Statute sets out that states that ratify the Statute can opt-out of the Court's jurisdiction for the period of seven years. This compromise was included to secure the support of France and a few other states for the ICC William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 159.

Article 12 has been a major bone of contention for a number of states and has been cited by the US as one of the main reasons for its opposition to the ICC. The US has argued that the Court's powers are too wide and that it should not be able to exercise jurisdiction over non-states parties' nationals without the state's consent.<sup>28</sup> However, Article 12 does not set out new obligations for states that are not party to the Statute, but only provides for jurisdiction over their nationals. These obligations are not 'new' because the crimes included in the ICC are already established as crimes carrying universal jurisdiction provisions in international law, giving every state the right (and also the duty) to act in order to protect them. These norms have developed in line with the norm life cycle; they have become increasingly accepted by states in the international society and institutionalised in international law. The enforcement powers given to the ICC built upon these developments.

States were concerned that by giving the Court inherent jurisdiction, they would lose an element of control over their own sovereign right to exercise national jurisdiction. However, without this inherent jurisdiction, the ICC would essentially be meaningless. Giving states the opportunity to opt in and out of the Court's provisions with regard to their own nationals increases the Court's selectivity in its application and introduces double standards. It would be possible for states to shield their own nationals from jurisdiction but still impose the Court's standards on other states and their nationals. This would also increase the political element in the ICC as a legal institution because decisions on whether or not to agree to parts of its jurisdiction would be based on political and subjective criteria. To overcome at least some of these concerns, states made considerable efforts to define the crimes in the Statute in minute detail so that compromises to state sovereignty were kept to a 'predictable' minimum. Once agreement had been found regarding the exact definition of the crimes, the ICC was given powers to exercise jurisdiction with regard to these crimes on an almost universal basis.

Some loopholes continue to exist, because the ICC cannot exercise jurisdiction in cases in which no state parties are involved in the alleged offence, as is for instance the case in internal conflicts. This is a pluralist element of the ICC that restricts the

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<sup>28</sup>Article 12 and the controversy surrounding it will be further explored in the following section on US opposition.

exercise of universal jurisdiction in that – when no state party is involved – states still have the sovereign right to decide whether or not to agree to the ICC taking action. This means that order principles of sovereignty and non-intervention can take precedence over universal justice norms. The ICC therefore does not administer universal jurisdiction, but is based on state consent. Once a state accepts the Statute provisions, however, it is bound by them and the Court’s solidarist element takes over whereby justice norms can be given priority over order principles because no further consent is necessary for the ICC to act.

### *The Relationship to the UN and the Role of the Security Council*

During the Rome Conference, states disagreed over the question what role the Security Council should play and whether it should be given powers to instigate and/or to halt ongoing investigations by the ICC. It was argued that giving the Security Council powers to refer a situation to the prosecutor when acting under Chapter VII of the UN Charter would have the advantage of making the establishment of any further *ad hoc* tribunals unnecessary. The Security Council could thereby still intervene judicially in a situation it deemed a threat to international peace and security, but would be able to make use of the ICC as a standing court. It was clear that although states wanted the ICC to be independent from the UN as a political body, the Security Council’s powers under Chapter VII could not be ignored and needed to be incorporated into the Statute’s provisions. Sidelining the Security Council would have meant a major change of the existing international order, a step most states were not prepared to take. It was therefore decided that a compromise needed to be found that would allow the ICC to exist alongside the Security Council: Article 13(b) gives the Security Council the power to instigate investigations, but is not the only body that can do so; states parties and the international prosecutor can refer cases to the Court too.

The main issue of controversy regarding the role of the Security Council, however, was the question of whether the Security Council should be given the power to halt proceedings taking place before the ICC. In the initial draft of the International Law Commission (ILC) it was proposed that the ICC should not be able to act in situations already dealt with by the Security Council unless the Council decided otherwise. A large number of states were concerned about the judicial independence of the Court

and that “the Court could, in effect, be deprived of jurisdiction by the mere placement of a situation on the agenda of the Security Council, where it could remain under consideration for a potentially indefinite period of time.”<sup>29</sup>

During the Rome Conference, the so-called ‘Singapore compromise’<sup>30</sup> became increasingly popular, which in effect reversed the provision of the ILC draft. The ILC Draft Statute had envisaged that an investigation into a situation which the Security Council had identified as falling under Chapter VII would not be able to commence unless the Security Council specifically stated otherwise. This would have meant that because a vote in the Security Council has to be passed unanimously, any one of the permanent members could unilaterally veto any proposal instructing the ICC to act in a particular situation. The ‘Singapore compromise’ on the other hand proposed that the Court should be able to proceed with its actions unless the Security Council took a formal decision to halt the process. This meant that the Council had to adopt a positive declaration to stop proceedings. Such a declaration would require a minimum of nine affirmative votes and would thus prevent the possibility of unilateral veto by any one of the Security Council’s permanent members. This compromise was essentially included in Article 16 of the Statute with the additional provision that the Security Council could only defer (but not terminate) an investigation or prosecution for a period of 12 months (with the possibility of renewal).

Article 16 represented a significant innovation integrated into the Statute because it meant that no one state (including the five permanent members of the Security Council) had more power than any of the others or the authority to act unilaterally to control ICC proceedings. The role of the Security Council in maintaining international peace and security is still integrated in the Statute, but the Council is awarded only limited powers. The Statute only gives the Security Council the power to defer (but not to terminate) ICC proceedings. This compromise makes it possible for the ICC to function independently from the UN as a political body than the initial proposal which would have included the possibility of unilateral veto. This removal of direct Security

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<sup>29</sup>Lionel Yee, *The International Criminal Court and The Security Council: Articles 13(b) and 16* (The Hague; London; Boston: Kluwer Law International, 1999), p. 150.

<sup>30</sup>This compromise derived from a proposal made by Singapore during the August 1996 PrepCom meeting.

Council control over the Court is an “innovative aspect”<sup>31</sup> of the Statute. The compromise was necessary because of the different natures of the two institutions: the UN is a state-centred institution, primarily concerned with protecting the inviolability of state sovereignty, whereas the ICC, in contrast, aims to enforce justice for individuals universally, independent from different states’ national interests. Even though the permanent members of the Security Council continue to have a special role in international relations, Article 16 ensures that the ICC cannot be dominated by one state acting unilaterally by exercising its power of veto in the Security Council and that all states are treated as equals.<sup>32</sup>

### **The Role of the Prosecutor**

By far the most extensive and surprising innovation in the Statute was made by giving the ICC’s prosecutor independent powers to refer a situation to the Court and thereby instigate investigations independently from states parties and the Security Council. This was very controversial during the negotiations and still remains to be so because states fear that the prosecutor could abuse his/her powers and launch politicised investigations - thereby undermining the Court’s impartiality and independence. A number of states “feared an overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations.”<sup>33</sup>

Proponents of a strong prosecutor, however, argued that it would enhance the Court’s credibility as a whole, because the prosecutor would “be able to function on behalf of the international community rather than on behalf of a particular complainant State or the Security Council”<sup>34</sup> They also pointed out that the ICTY’s prosecutor already had such powers and that there was therefore no reason to deny the ICC’s prosecutor the same rights. Some states emphasised the need for victims (as individuals) to be given the possibility of submitting their case to the ICC without having to rely on states parties or a Security Council referral. Giving the prosecutor such far-reaching

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<sup>31</sup>Edgar, *Peace, justice, and politics: The International Criminal Court, "new diplomacy", and the UN system* p. 141.

<sup>32</sup>At the time of writing, the UK and France, as two of the permanent Security Council members have ratified the ICC Statute. Russia has signed it, but has not ratified its provisions into its national laws. China and the US stand opposed to the ICC and have no immediate plans to sign the Statute.

<sup>33</sup>Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor* (The Hague; London; Boston: Kluwer Law International, 1999), p. 181.

<sup>34</sup>*Ibid.* p. 178.

independent powers is a fundamental aspect of the ICC's aim to achieve greater respect for individual justice, independent from states and their national interests.

This decision of far-reaching consequences, both from the legal and political perspective, surprised many of the participants of the Conference. Even some of the firm proponents for an independent Prosecutor had doubted that States would be willing to share their power to control the initiation of investigations and prosecutions with an independent individual.<sup>35</sup>

The disagreement surrounding the role of the prosecutor highlights the reluctance of states to subject themselves to the control of an individual rather than a state. In the context of a society comprised of states and an international order that incorporate state sovereignty as one of its fundamental principles, it is indeed surprising that states agreed to give an individual person powers to instigate investigations or prosecutions concerning states. This can be seen as a strong solidarist expression of the aspiration to build an independent institution primarily dominated by considerations of established norms of individual justice rather than order principles between states. Giving the prosecutor independent powers means that he/she has the ability to act to protect individual justice, regardless of states' national interests.

Ultimately, this decision also gives individual citizens the chance to utilise the ICC even when the state in question (or any other state) or the Security Council would not be willing to act on their behalf. States attempted to build enough safeguards into the Statute so that the prosecutor cannot abuse these powers, but it remains to be seen whether this will lead to politicised investigations. This is an unprecedented and important compromise of sovereignty states agreed to when signing the Rome Statute, which has opened up "international justice to a society beyond that dominated by powerful states."<sup>36</sup>

### **US Opposition to the ICC**

Even though the ICC enjoys broad support from a large number of states<sup>37</sup>, the US stands actively opposed to it. This opposition is problematic because the ICC ultimately depends on state co-operation and would benefit from great power support.

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<sup>35</sup>Ibid. p. 176.

<sup>36</sup>Jason Ralph, *Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court* 2003), p. 206.

<sup>37</sup>At the time of writing, 139 states have signed the ICC Statute and 104 states have ratified it into their national laws.

The US took a number of actions to undermine the Court which can be seen as a pluralist response that emphasises state sovereignty to the predominantly solidarist achievements incorporated into the Statute. The US opposition demonstrates resistance to changes in the international order and also to developments in the norm life cycle's third stage of norm internalisation.

The US stance towards the ICC shifted with different governments. The Clinton administration was generally more supportive of international law and multilateralism than its successor and engaged cautiously, but nevertheless constructively, in negotiations regarding the ICC. The administration was restrained in its overall support for international treaties particularly because of concerns over the potential effect on the US and its national interests. Domestic constituencies on the federal and state level, and a strong Republican Senate, posed further constraints on the US' multilateral engagements. The Bush administration that took over in 2001 was hostile to multilateralism from the start and set out a foreign policy agenda that places primary importance on national interests and US security, best achieved through unilateral action. The previous constructive engagement with the ICC gave way to active opposition aimed at undermining the Court.<sup>38</sup>

US opposition to the ICC focused on two main areas: firstly the Court's jurisdiction as set out in Article 12, and secondly criticisms about the role afforded to the US in the ICC's provisions. The US criticised that the ICC did not recognise the 'special' role the US played as major superpower in international relations which was demonstrated by the fact that the US could not constrain the ICC through its power of veto in the Security Council. The US position therefore constituted a pluralist response aimed at strengthening order principles of sovereignty and non-intervention at the expense of establishing universal enforcement of justice norms.

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<sup>38</sup> Among other things, the Bush administration sought to exclude peacekeeping forces from the ICC's jurisdiction through Security Council resolutions (Resolution 1422); made a large number of bilateral agreements with individual states to secure that US citizens would not be extradited to the ICC; and adopted the American Servicemembers' Protection Act (ASPA) (dubbed 'The Hague Invasion' Act) into its domestic laws.

### *Article 12 and the ICC's Jurisdiction*

The US opposes Article 12 of the Statute which gives the ICC jurisdiction over alleged criminals if the offence is committed on a state party's territory or if the accused is a national of an ICC member state. This means that – at least in theory – the ICC could exercise jurisdiction over US nationals if they were accused of committing an ICC crime on a state party's territory, without the need for US consent.<sup>39</sup> The US claims that Article 12 provisions mean that the ICC is effectively exercising universal jurisdiction which the US does not see as customary international law. Article 12, however, does not give the ICC universal jurisdiction, it sets out the preconditions under which the ICC can act. The Court's jurisdiction is based on the principles of nationality and territory which are well established in customary international law. Complete universal jurisdiction would mean that the ICC could act regardless of whether any of the states involved are party to the Statute or not.

The ICC is based on the precedents set by Conventions and *ad hoc* courts such as the ICTY that similarly do not require express state consent and that enjoy US support. The *ad hoc* courts are organs of the UN over which the US can exert influence through its position in the Security Council and because they enjoy US backing, it is clear “that there is no objection in principle to the idea of international courts.”<sup>40</sup> The objection is only related to an international court exercising criminal jurisdiction over Americans. The crimes in the ICC's Statute are already established in treaties and conventions and carry universal jurisdiction provisions which means that they are not new crimes, but are recognised as being of universal concern to all states in international society. It also means that “the failure of the US to become a party to the ICC does not exempt its citizens from the universality already established.”<sup>41</sup> The essence of the doctrine of universality lies in the fact that it can be applied by any state over any national of any other state without the requirement of having to obtain additional express consent from the latter. The Rome Statute creates a new collective enforcement mechanism which builds on normative developments in the norm life

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<sup>39</sup>Such action would only be possible in accordance with the complementarity principle which means that the US was itself unwilling or unable to launch an investigation.

<sup>40</sup>Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Penguin; Allen Lane, 2005), p. 51.

<sup>41</sup>Marc Weller, *Undoing the global constitution: UN Security Council action on the International Criminal Court* 2002), p. 700.

cycle with the aim of closing the enforcement gap in existing international law with regard to human rights norms.

Article 12 was seen as necessary by the majority of states to ensure that universal human rights and justice concerns are protected consistently even if that means compromising a state's sovereign right to decide whether or not to exercise jurisdiction or to consent to ICC action. Changing Article 12 to accommodate US concerns would have meant restricting the ICC's jurisdiction and thereby leaving more alleged criminals out of possible prosecutions. Numerous safeguards exist in the Statute that make politicised investigations against any state (not just the US) highly unlikely which suggests that US fears are exaggerated. The principle of complementarity, for instance, means that the US could investigate alleged crimes itself in order to avoid ICC interference.

#### *Great Power Responsibility and the Security Council Veto*

The US claims that it supports the overall aims of the ICC, but is concerned that the ICC could threaten the independence and flexibility of US military forces. The US argues that it should be given special protection, because it "shoulders responsibilities worldwide that no other nation comes even close to undertaking."<sup>42</sup> A number of US ICC opponents argue that the US cannot support a Court that fails to recognise these unique global responsibilities with regard to international peace and security.<sup>43</sup> Others, however, point out that even though the US has unique responsibilities as a great power, "when it claims to act for the common good of international society (...) it also has a democratic duty to be accountable to international society for the way it fulfils those responsibilities."<sup>44</sup> The US is accountable for its actions to international society in whose name it claims to act. These 'special' responsibilities do not mean that the US can impose double standards, exempting its personnel from acting in accordance with universal justice norms others have to adhere to.

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<sup>42</sup>David J. Scheffer, *Staying the Course with the International Criminal Court* 2002), p. 70.

<sup>43</sup>See for instance William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective* 2001), p. 138 Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the "Ithaca Package"* 1999),

<sup>44</sup>Ralph, *Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court* p. 208.

The US, as the only remaining great power, might face special responsibilities and greater risks because its personnel is engaged in a large number of states, but it is not acting in a vacuum. It is not solely responsible for deciding when external intervention in the pursuit of global justice can take place. Decisions on whether or not to intervene are based on political considerations and some argue that the US determines 'humanitarian necessity' for armed interventions "haphazardly (ignoring genocide in Rwanda but not in Serbia) and without clear or objective criteria other than a precondition that it should serve (or at least do not disservice to) US national interests."<sup>45</sup> The Statute of the ICC and its meticulously defined subject-matter jurisdiction aims to provide such 'clear and objective' criteria which can be used to justify external intervention in another state's affairs. Human rights are always going to be vague and subject to interpretation, but some form of codification is necessary to establish at least some criteria to reduce international law's political element.

International law provides minimum standards of acceptable behaviour based on universal norms and it provides an independent measure for judging the legitimacy of international action by *all* states - regardless of their size and power. Granting a permanent exemption to its jurisdiction would undermine the ICC's authority, because a court that focuses primarily on universal enforcement of human rights (rather than power relations between states and national interests) cannot justify an exemption without becoming essentially meaningless. Such an exemption would sacrifice the Court's underlying premise of non-discriminatory and non-selective enforcement of justice. Where would one draw the line if one exemption were to be granted? Other states would then equally be justified in applying for exemptions based on for instance their population size or economic power. The ICC is based on the idea of non-selective enforcement of universal norms which "vexes the United States because all individuals (and, by extension, states) stand before it as equals."<sup>46</sup> The US has not been given a special role in the ICC's provisions, like it has in the UN, which is in line with the ICC's objective of discontinuing the existing hierarchy between states by focussing primarily on individual justice norms.

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<sup>45</sup>Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 2002), p. 530.

<sup>46</sup>Sarah B. Sewall and Carl Kaysen, *The United States and the International Criminal Court: An Overview* (London, Boulder, New York; Oxford: Rowman & Little field, 2000), p. 3.

Even though the ICC was created to work alongside the UN and not to undermine it, it also attempted to do indirectly what could not be done directly; namely to reform the UN and amend its Charter. This challenge to the Security Council can be seen on the one hand as a reason for US opposition, but on the other as a cause for the enthusiasm of such a large number of states that support the idea of equal treatment.<sup>47</sup> By not giving in to US pressure, states supporting the ICC accepted US opposition as a price to be paid for the promise of achieving a move away from existing power hierarchies towards the equal standing of states in international society.

States had to weigh up these considerations against the difficulties the ICC would face if it did not have US support. The very nature of the issues negotiated in Rome reduced the influence of the US, because the “principle of equal justice and accountability for serious international crimes may not be particularly susceptible to compromise.”<sup>48</sup> The decision was eventually made that even though the Court would be weakened by US opposition, further concessions in order to incorporate the US demands would harm the ICC and eventually render the whole institution meaningless.

### **The ICC’s Coming Into Force**

At the time of writing, 104 states have ratified the Rome Statute, they had to adjust their national laws to incorporate the ICC’s provisions and thereby incorporate the enforcement of universal values on the domestic level. Since its coming into force on 1 July 2002, the ICC has already shown notable indirect<sup>49</sup> and direct effects on states in international society through its first investigations into Sudan, Uganda and The Congo.

The ICC can be seen as an example of the norm life cycle’s third and final stage of norm internalisation in which norms become an integral part of states’ identities as members of international society and thereby affect behaviour. A number of concessions and compromises with regard to more traditional understandings of the

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<sup>47</sup>William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council* 2004), p. 720.

<sup>48</sup>Bartram S. Brown, *Unilateralism, Multilateralism, and the International Criminal Court* (Boulder: Lynne Rienner, 2002), p. 335.

<sup>49</sup>One of the first examples of the ICC’s *indirect* influence came in July 2005 when three British soldiers faced war crimes charges over incidents that took place in Iraq in September 2003 (*UK soldiers face war crimes trial* 20 July 2005), . These charges were brought under the ‘International Criminal Court Act 2001’, the law with which the ICC Statute was ratified into UK law.

principles of the international order had to be incorporated into the ICC in an attempt to reconcile concerns for sovereignty with demands for universal enforcement of existing justice norms. The ICC has only partially internalised these norms because strong opposition from the US still exists. The US contests the full internalisation of the way the norms are enforced by the ICC which confirms the dynamic of the norm development process. It can only be assessed in the long term whether this seriously hampers the functioning of the ICC. Yet, the initial assumption of ICC opponents that the Court was going to be weak and would not be able to survive without US support has so far proven to be wrong.

Since adoption, the Statute has exceeded the expectations of even its most unconditional supporters and enthusiasts. Faced with an accelerated pace of ratification and entry into force, the United States took several aggressive measures directed against the Court. None have been particularly successful, and while both annoying and humiliating, none pose a serious threat to the success of the institution.<sup>50</sup>

The initial active opposition of the Bush administration has gradually given way to a more pragmatic approach towards the ICC: the US has not opposed ICC action in its first three cases (it could have vetoed the action in Sudan that was referred to the ICC by the Security Council). Admittedly, these actions are against states in Africa and do not involve major US allies, which raises the question of whether the US might be willing to only selectively support the Court. This selectivity is problematic, but a starting point needs to be found for the ICC to take action and to prove that it is not primarily created as an instrument to undermine US hegemony but to enforce justice norms on a universal basis. Philippe Kirsch, president of the Court, is optimistic that the ICC will prove to doubters that it is not a political instrument, but acts “exclusively judicially”. He is sure that opponents of the Court will join at some point, arguing that “To me, it is not a matter of whether: it’s a matter of when.”<sup>51</sup>

### **Conclusion**

The creation of the ICC represents the latest in a number of developments towards increased recognition of justice norms and their enforcement in an increasingly solidarist international society that combines considerations for justice with principles

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<sup>50</sup>Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council* p. 720.

<sup>51</sup>Quoted in the Daily Telegraph: *The court that tries America's patience* 2006, 12 January),

of international order. It builds on precedents set in cases such as the creation of the ad hoc war crimes tribunals, the ICTY and ICTR. The ICC combines two competing values existent in the international order, one based on states and their sovereignty and the other based on individual justice. The long term aim of the ICC is not only to carry out international law by enforcing existing human rights provisions but also to enhance the “international normative framework”<sup>52</sup> by setting norms and standards of acceptable behaviour.

The ICC aims to institutionalise enforcement of already established norms that have been codified in international law and are part of the rules of international society. The fact that the ICC only includes already well established norms means that it starts at a point where agreement on universal values and norms has already been reached and developments in the norm life cycle have taken place. The creation of the ICC is an example of the cycle’s third stage in which norms that have emerged during the first two stages and cascaded into the rules of international society become further internalised. The third stage of the model leads to further changes in the norm’s progression as demonstrated by the creation of the ICC, which

has the potential to change the proscriptive norms against genocide, crimes against humanity, and war crimes into *instrumental* norms; that is, norms that not only reflect social expectations (intrinsic norms) but also encourages compliance through repeated and consistent application.<sup>53</sup>

The US launched a strong pluralist response to the ICC because it was concerned that changes in the international order would lead to an erosion of the existing hierarchy between states, thereby challenging its own unique and powerful position. The ICC aims to overcome the hierarchy that has existed over decades to achieve equality between all its member states. All states are seen as equal in the ICC and no one state (or group of states) is given more powers than any others. This constitutes a problem for the US as a great power that claims to have a unique standing in international relations that it wants to be reflected in the Court’s set-up. The ICC’s main focus, however, is on justice norms rather than power politics and this makes equality between its members necessary.

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<sup>52</sup>Sewall and Kaysen, *The United States and the International Criminal Court: An Overview* p. 2-3.

<sup>53</sup>Philip Nel, *Between counter-hegemony and post-hegemony: The Rome Statute and normative innovation in world politics* (Tokyo; New York; Paris: United Nations University Press, 2002), p. 152.

US opposition is unfortunate for the ICC because its enforcement powers ultimately rely on state co-operation and it would greatly benefit from great power support. The actions taken by the US to undermine the ICC are harmful because other states are also prevented from co-operating and assisting the Court. However, not all states have given in to US pressures and some have expressed disapproval at US actions. These states thereby confirm their resolve to create an effective global enforcement mechanism for justice norms regardless of whether the US participates or not. Such a development has been made possible through changes in human rights and justice norms that are increasingly incorporated in international law. The ICC is the latest step towards the internalisation of these norms to become an integral part of the rules of international society. Even though it is contested by the US, it is at least a starting point from which the international system can develop further. US opposition demonstrates that it takes time to create a universal mechanism but the innovations and compromises included in the ICC have put procedures in place from which the universal enforcement of justice can develop further.