

**Sovereign Misconceptions: A Theoretical Analysis of the
Perceived Impact of the International Criminal Court on the
Institution of State Sovereignty**

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(ABSTRACT)

The establishment of the International Criminal Court (ICC) through the signing of the Rome Statute in July, 1998 created the first permanent criminal court under international law. The Court stands in stark contrast to previous international criminal tribunals not simply because of its permanent nature, but also because it places the individual, not states, responsible under international law. It is, however, this independent, permanent nature of the Court which sparked fears within the society of states that the Court may in some manner serve to erode the state sovereignty. The purpose of this work is to address this basic concern.

The aim of the work is to address the concept of sovereignty by first examining standard perceptions of sovereignty and then to move the discussion into an institutionalist construction of the term. Once accomplished, I then apply a set of criteria for evaluating sovereignty to the basic structures of the ICC in order to explore what the potential impact of the ICC may be on the institution of state sovereignty. In the end, I find that the institution of sovereignty is not threatened by the presence of the Court. In fact, the institution of sovereignty may be in some ways bolstered by the Court in that the Court embodies a new set of principals with regards to the appropriate relationship between the state and the individual.

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In July, during the Rome Conference to establish an International Criminal Court, I warned that such a court would be arbitrary and contemptuous of national judicial processes and would trample the sovereignty of democratic nations.¹

Introduction

The proposed International Criminal Court (ICC) will establish an independent judicial body with automatic jurisdiction² in cases dealing with “four core crimes”: crimes of aggression, crimes against humanity, war crimes and genocide.³ The permanency of the Court stands in stark contrast to the preceding Nuremberg and Yugoslavian War Crimes Tribunals that were created and functioned on an ad-hoc basis. And it is precisely the independent, permanent nature of the Court that is both its strength and weakness. Court proponents argue that “there is an emerging consensus that international prosecution is appropriate when three factors converge: the crimes are grave, the international community has a deep interest in seeing them prosecuted and national judicial systems are unable or unwilling to bring criminals to justice” (Qassim, 88). On the other hand, the opposition argues that a Court that has too much independence will have the potential to undermine state sovereignty.⁴

Though both Court supporters and opposition disagree over many of the key structural and functional elements of the Court,⁵ the catalyst for each of these concerns is the potential impact of the ICC on the institution of state sovereignty. In a much broader sense, however, the debate surrounding the ICC mimics the debate that surrounds all international organizations—namely, can and will these organizations chip away at state sovereignty?

¹ Jesse Helms. And After Pinochet? Washington Post Op-Ed A31. December 10, 1998.

² Automatic jurisdiction empowers the Court to pursue any cases that fall within the guidelines of its prescribed jurisdiction.

³ German Working Paper. “German Position.” UN Doc. A/AC.249/1998/DP.2.

⁴ Individuals opposed to the Court use the current Pinochet case as proof positive that “rogue” prosecutors will haphazardly determine who should be held punishable for violations of any of the four core crimes.

⁵ For example, there are two key areas of concern that will be covered in this work: 1) what will be the nature of the Court’s jurisdiction, (and thus what falls under the core crimes of the Court) and 2) what will be the trigger mechanism for Court action?

While there is an extensive amount of commentary on how the ICC will either erode or strengthen state sovereignty, little effort is underway into actually testing the potential impact of the ICC. Perhaps the main reason for this is a lack of consensus as to the actual definition of sovereignty. Scholars with a variety of epistemological positions each maintain different interpretations of what sovereignty refers to and what specifically makes a polity “sovereign.” Consequently, without a clear consensus of what it means to be sovereign, it becomes increasingly difficult to construct a system of criteria for evaluating the institution. Therefore, the aim of the research that follows is twofold: first, to define state sovereignty in such a way as to make it possible to systematically evaluate the concept; and second, to apply this conception of sovereignty to the ICC. Once the first goal is accomplished, I will then be able to address the primary research question—does the International Criminal Court pose any viable threat to the institution of state sovereignty?

To this end, chapter one focuses on the myriad ways in which scholars historically explain the concept of sovereignty. In particular, I discuss the views of Spruyt, Waltz, Wright and Bull as vehicles for discussing the common misperceptions of sovereignty. Chapter two moves away from discussing sovereignty in these conflicting manners and instead argues that we should examine sovereignty as an institution. For this chapter, I rely heavily on the institutionalist literature in international relations, and in particular, the work of Stephen Krasner. Also, within this chapter I present a method for evaluating state sovereignty based upon an institutional definition of the concept.

The second primary aspect of the work deals with the International Criminal Court and is divided into two separate chapters. Chapter three explores the structure and design of the ICC as laid out in the Rome Statute. Chapter four then delves further into the Court by exploring the two major elements of the ICC that are argued to threaten state sovereignty—the trigger mechanism and the core crimes. I will investigate each of these two elements individually and examine the debates surrounding each as they were presented through the six preparatory committees. Finally, I will analyze these two

elements of the Court vis-à-vis my criteria for evaluating a change in the institution of state sovereignty.

In the end, the institution of sovereignty is not under attack by the ICC. In fact, if anything, the institution may be in the process of being strengthened. What I believe that we are seeing with the ICC is an acceptance by states that there are certain means of state coercion which are no longer deemed acceptable by the society of states. Moreover, this type of acceptance is not a non-state entity imposing its will upon states, but a voluntary agreement by states to redefine what actions are legitimate state behavior and which are not. If anything, the fact that states are themselves regulating what actions are appropriate and which are not may serve to bolster the strength and legitimacy of the state.

Chapter One: Historical Conceptions of Sovereignty

1.1: Three Standard Conceptions of Sovereignty

The term *sovereignty* has been defined a myriad ways since it was first introduced as a concept by Jean Bodin in De la Republique (1577). Bodin conceived of sovereignty as “the absolute and perpetual power within a state” (Oppenheim 120). For Bodin, this absolute power was to be vested into a supreme ruler or monarch whose very will would be the law of the land. Today, most political scientists no longer argue for a conception of absolute sovereignty. Instead, theorists ascribe to what Stephen Krasner labels the four major elements of sovereignty: territoriality, autonomy, recognition and effective control (Krasner, 1997:652). For Krasner, these four elements lead to three “alternative meanings” of sovereignty: Westphalian sovereignty, domestic sovereignty and international legal sovereignty. Westphalian sovereignty is “...an institutional arrangement for organizing political life that is based on two principles: territoriality and autonomy” (Krasner, 1997:656). In other words, specific territories demarcate states, and the polity of the state is the sole legitimate actor within the specified territory—or, there is a total exclusion of any external authority. This construction of sovereignty rests on the foundation of non-intervention. Specifically, if a state possesses total autonomy within its borders, then no state should be able to interfere in the domestic affairs of another. In the case of foreign policy, then, there could be no policy of “humanitarian intervention,” peace making, or even economic bailout as these particular acts would ultimately intrude upon the state’s ability to govern and determine every aspect of its internal affairs.

Domestic sovereignty, on the other hand, originates from the philosophy of Bodin and Hobbes who argue that order and control are the foremost issues for the state.⁶ However, the distinction between domestic sovereignty and the Westphalian conception lies in the predominance of order and the lack of a fixed territory. While territorial

concerns are important—and specific territorial boundaries may make governing more effective—the focus is not on the actual territory but on the internal governing hierarchy. The “order” element of domestic sovereignty lies in this notion of hierarchy—what will be the legitimate authority structure of the state. The Hobbesian view also places ultimate power in the seat of the monarch who ultimately embodies the state. The control element, however, is quite different from the notion of order or authority. Control revolves around the “actual exercise of authority” (Krasner, 1997:654). A state with a high degree of control would be one which is capable of actually exercising its authority through mechanisms such as the armed forces and the police. I should point out that authority is more important in this construction than actual control. In the case of Hobbes, he is “concerned above all with justifying absolute sovereignty” (Shelton, 217) in order to ensure that there could be no question as to who the legitimate political actors in the state are. Therefore, the actual degree of state control is less important than ensuring that the legitimate agents of authority are obeyed. In other words, it is less important that the state be able to enforce a particular policy than it is that the state be the sole legitimate maker of that policy.

Finally, international legal sovereignty is concerned with international recognition of the state as a legal entity. In this concept, the state seeks recognition from other states in the hopes of enjoying the fruits of juridical equality and having the internationally recognized legal authority to participate in the creation of international law. Moreover, this particular conceptualization of sovereignty treats the state as an individual would be treated within a liberal domestic realm. Just as individuals in a liberal state are treated as equals with the freedom to make individual decisions, the same is true of states in the international realm (Krasner, 1997:653-657). For international legal sovereignty then, the key element is not the order or authority of the state—as in domestic sovereignty—but the actual recognition of the state by other states within the international community. An example of this type of sovereignty could be the state of Democratic Republic of Congo (DRC). One would be hard pressed to argue that the DRC holds a high degree of

⁶ This also sets up the classic realist assumption that without order there is anarchy—and anarchy yields a self-help system. Therefore, since the state is the highest organized actor in the international system (with no additional level of hierarchy above the state), the system of states must be anarchic.

domestic sovereignty as it is currently in a state of civil war. However, the state is internationally recognized and possesses all the fruits of international recognition such as the ability to enter charters, send out emissaries and vote in the UN General Assembly.

1.2: Quincy Wright

Now that I have established the three general types of sovereignty I would like to discuss some of the major theories of sovereignty in order to demonstrate exactly how scholars view the concept—and what elements of their conceptions seem contradictory. Throughout this survey I will briefly discuss the views of each scholar while at the same time trying to decipher where in the three general categories their theories belong.

To begin with, Quincy Wright does not explicitly discuss international legal sovereignty, but his assumptions about the nature of sovereignty seem to fall into this school of thought. Sovereignty is defined as the “status of an entity subject to international law and superior to municipal law” (Wright, 189). This legalist conception grants the state the legitimate ability to create municipal or domestic law while still arguing that the state is subject to international law. This line of thought, however, should not give the impression that the state is in any way inferior to international law. In fact, quite the contrary: the state itself enters into international agreements and has the ability to influence exactly what the international covenant will be. Wright’s construction of an international legalist notion of sovereignty should not be surprising as his research interests focus on the problems of war. Ultimately for Wright, war becomes a game of international diplomacy where recognition of sovereign status becomes paramount. For example, when creating alliances, forging treaties or negotiating the terms of peace it is essential to know which international actors may legitimately participate in the process.

1.3: Hedley Bull

Hedley Bull also constructs a theory of sovereignty that is primarily rooted in the international legal strain of thought. Bull does not explicitly define sovereignty; however, his conceptions of the term can be inferred from his writings. For Bull, “the starting point of international relations is the existence of *states*, or independent political communities each of which possesses a government and asserts sovereignty in relation to a particular portion of the earth’s surface and a particular segment of the earth’s population” (Bull 8). States themselves have four particular goals. First, the main goal is to preserve the society of states.⁷ Second is to maintain the external sovereignty of all the member states in the society. “The chief price it has to pay for this is recognition of like rights to independence and sovereignty on the part of other states” (Bull 17). The third goal is to achieve or maintain peace. Peace is not necessarily the end of violence or bloodshed; rather, it is the preservation of the Society based on the assumption that the elimination of alternative power structures will create a higher degree of stability within the international system. Finally, the fourth basic goal is the “limitation of violence resulting in death or bodily harm, the keeping of promises and the stabilization of possession by rules of property” (Bull 18). This particular element of sovereignty bases itself in the treatment of foreign nationals, diplomatic status and the honoring of treaty obligations in the hopes of preserving a stable interaction within the Society (Bull 16-18).

All four of these state “goals” seem to imply that Bull has an international legal conception of state sovereignty. For example, as the primary goal of states is to preserve the international system and the Society itself, then states must look at other like units—i.e. other states—as the sole legitimate actors on the international level.⁸ Ultimately, then, other governing structures such as the city states of Italy or the Hanseatic League of what is today Germany must not be recognized as having the same form of “sovereign” power as is bestowed upon states. To this end, only states will be allowed to send out

⁷ Hereafter I refer to the “society of states” as simply the Society.

⁸ For a further discussion of the development of the sovereign state system and the “weeding” out of other non-state political actors, see Hendrik Spruyt’s [The Sovereign State and Its Competitors](#).

diplomats and only the representatives of states will be subject to the privileges of diplomatic immunity. Likewise, great power states must ultimately be the protectors of the international system and attempt to preserve some type of lasting peace.

Beyond his construction of state goals, Bull also hints at an international legal construction of sovereignty when he discusses sovereignty as an “attribute of all states, and the exchange of recognition of sovereignty as a basic rule of coexistence within the state system” (Bull 35). Here again Bull seems to indicate that only states may be sovereign and that the very foundation of sovereignty lies in the “exchange” of recognition of sovereignty within one state by another. Finally, Bull uses the term “society of states” to imply something quite different than the system of states. For Bull “...the difference between a system of states and a society of states [rests in the] latter being the outcome of the recognition of national and popular sovereignty as principles of international legitimacy” (Bartelson 27). Furthermore, Bull is arguing for the preservation and maintenance of a Society; therefore, this society can only be constructed as a byproduct of the mutual recognition of states.

1.4: Kenneth Waltz

Moving beyond international legal sovereignty, Kenneth Waltz popularized a neorealist conception of sovereignty that seems to have roots in the domestic meaning of the term. For Waltz, sovereignty means that a state “decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so limit its freedom by making commitments to them” (Waltz, 96). States are still independent in nature but they will have different capabilities based upon such elements as their natural resources, population, and wealth. The limitations that arise from the unequal distribution of these “building blocks” of states will ultimately impact the state’s decision making processes and the very choices available to states. Some states may willingly give up a certain degree of autonomy in order to enter into

agreements or arrangements that will ultimately serve the best interest of the state.⁹ As mentioned earlier, this view of sovereignty envisions the international system as anarchic in that there is no force above and beyond state interest that governs the actions of states. And, as in any pluralistic system, competing state interests ultimately lead to an “image of nation-states that consider every option available to them and make their choices independently in order to maximize their returns” (Stein, 30).

1.5: Hendrick Spruyt

One final example of how sovereignty may be conceived comes from Hendrik Spruyt who seems to base his conceptions in the Westphalian sovereignty camp. Spruyt attempts to explore why sovereign states have grown to dominate the international system in lieu of alternative governing structures. In particular, Spruyt looks at the development of the sovereign state of France, the Italian city-states and the Hanseatic League. What Spruyt argues is that the clear distinction between a sovereign state and these other forms of political organization lies in territorial exclusivity. “The concept of sovereignty...altered the structure of the international system by basing political authority on the principle of territorial exclusivity” (Spruyt 3). Unlike the Holy Roman Empire or feudal society, the sovereign state “is an organization that is territorially defined. Authority is administrative control over a fixed territorial space. It is delimited in an external sense, vis-à-vis other actors, by its formal borders” (Spruyt 36). Therefore, the key distinction between the sovereign state and other forms of political organization lies in the territoriality of the state, and the notion that the state “advances no superiority over other rulers” (Spruyt 36). This is the key element differentiating Westphalian sovereignty and domestic sovereignty. For Spruyt, his notion of sovereignty based on fixed territory with a definite political authority structure could very easily fit into the mold of domestic sovereignty. However, the key element here is not the authority structure *within* the state but the exclusion of external actors claiming any degree of authority *over* the state.

⁹ The European Union is a perfect example in which states voluntarily give up a certain level of autonomy in their economic policies in order to reap the reward of greater economic prosperity.

1.6: Difficulties with Standard Conceptions of Sovereignty

While these are just a few examples of the vast literature on what sovereignty is, they do serve to demonstrate some key elements of the concept. First, the neorealist argument demonstrates that a state need not possess “absolute sovereignty” in order to be considered sovereign. In other words, circumstances may limit the full range of state action vis-à-vis other states. Absolute sovereignty, if it ever did truly exist, was applicable to those “bygone days when the greatest part of economic life, as well as cultural issues, was confined to a single state and there was relatively little movement of people, goods, capital and even technology between sovereign states” (Brown 273). In today’s international system, however, forces of globalization, technological advancement and environmental concerns make total state autonomy a relatively useless concept.

If absolute sovereignty is no longer a useful concept, neither is the tenet of international legal sovereignty, which argues for juridical equality among states. With the defeat of Napoleon, Europe lived in a “wondrous world where all states were in law perfectly equal” (Klein 10). However, this equality, at least in principle, would change indefinitely with the Congress of Vienna 1814. Through the Congress, for the first time the notion of great power politics became legitimized and internationally agreed upon. When the smaller European powers came to the Congress, they were unaware that the great powers had already made most of the important decisions by themselves, simply having the meeting to serve as a legitimizing agent. However, at the time, it seemed practical for the great powers to make the major decisions as to the new makeup of Europe since they were the ones who had presented a united force and defeated Napoleon (Klein 10-12).

Moreover, the realist notion of group power (measured in terms of military strength) came into play for the first time. The four great powers (Russia, Prussia, Britain and Austria) aligned to create the Concert of Europe (which later included France), which became the international system for European politics and offered structure and stability.

Within this system, though, the great powers, not the smaller, had the authority to decide policy (Klein 13-38).

The precedent created by the Concert of Europe has been a legacy of continual great power dominance in the international system and the constant subordination of small powers and small power interests. In fact, great power prominence is institutionalized in the present day international system through the Charter of the United Nations of 1945. The Charter reads:

Article 23 - The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.

Article 27 - Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members....

The Charter does two things. First, it gives permanence to the status of the great powers (note that three of the perm-five are the same powers as those from the Concert of Europe). The five great powers are known as the “perm-five” because they will perpetually maintain power through the Security Council over any major decision made by the United Nations with specific regard to security. Second, it provides the perm-five with an unequal voting status by giving them right of veto. The Security Council must make decisions from security matters to membership into the United Nations.¹⁰ Moreover, these decisions must have unanimous approval (or at least an abstention) by the perm-five in order to be approved. In other words, while the United Nations may be filled with “equal states,” five specific states have greater equality over the others—and the collective decisions of all the other states cannot override the disapproval of one

¹⁰ Article 4, section 2 - “The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

member of the perm-five. This form of institutionalized inequality serves to disqualify the tenet of sovereign equality (Meisels, 199-204).

Hedley Bull also discusses the role of sovereign inequality within the Society. As discussed earlier, one of the primary concerns of states is to preserve the Society and the state system produced by this society. Within this system there is an unequal distribution of power and capabilities among states. Therefore, there are some powers that can arguably be labeled as “great powers”¹¹ and all other states within the international system are “lesser states.” The great powers are more concerned with preserving the system than they are with protecting and securing the independence of small states. Small states may need to be absorbed or their territories and military forces divided through treaty or the like in order to preserve the state system (Bull 17).

1.7: Conclusion

Sovereignty has been conceptualized in myriad ways. However, most of these conceptions can be grouped within one of three categories: domestic sovereignty, Westphalian sovereignty, and international legal sovereignty. Domestic sovereignty deals mostly with issues of authority and control. In particular, domestic sovereignty focuses on the authority structure within a state and the securing of an established legitimate pattern of control. Some examples of domestic sovereignty lie in the writings of Hobbes, Bodin and Waltz. Westphalian sovereignty on the other hand deals less with internal control than with the exclusion of external authority. Hendrik Spruyt constructs a Westphalian definition when he argues that the basis of sovereignty is rooted in territoriality in which there is an exclusion of all other political powers within certain geographic boundaries. Finally, Bull and Wright both construct international legal definitions of sovereignty in which they base the key element of sovereignty in the principle of shared recognition among states.

¹¹ Any of the Perm-Five could be considered a “great power” but also could Japan or Germany who are both economic powerhouses. I should note here that economic resources do not necessarily guarantee a state the title of “great” any more than an abundance of raw military power alone would garner such a title.

While each of these constructions of sovereignty seems to embrace key elements of the term, each of them is contradictory in its own way. For example, international legal sovereignty rests on the importance of international recognition that a state is indeed a sovereign state. Therefore, sovereignty is a “power” granted by membership in the Society. Only when a state is a member of the Society can that state be sovereign. However, this particular construction runs into major problems when looking at “states” such as Taiwan that lack international recognition.¹² While Taiwan certainly maintains a high degree of authority and control, it does lack international recognition as a state—therefore, Taiwan cannot be considered sovereign. Westphalian sovereignty is also problematic in its attempt to base sovereignty in the concept of excluding external actors from influencing domestic policy. With the exclusion of Waltz, most Westphalian theorist tend to hold to an absolute construction of sovereignty in that any influence that an outside power can have on the domestic policy of a state would violate the sovereignty of that state. However, this is highly problematic when one considers even the slightest degree of economic interdependence. With merging markets and multinational corporations—not to mention universal demands for finite resources such as oil, states are becoming at least economically dependent on one another, and this ultimately impacts the state’s ability to completely separate itself from the influence of others. Finally, for many of these same reasons, domestic sovereignty is often undermined without a change in individual perceptions as to which states are sovereign and which are not. For example, the peace enforcement effort in Somalia is a direct violation of domestic sovereignty in that it creates alternative power structures within the state. Another more explicit example is the occupation of Japan and Germany after the Second World War that also served as a vehicle to create alternative power structures within the territory of each state.

However, “great” states are generally deemed such because they are recognized to be great by other members of the Society.

¹² Only Israel currently recognizes Taiwan as an independent state.

Chapter Two: The Institution of State Sovereignty

2.1: Institutional Theory

If we know what sovereignty is not, then can we begin to speculate as to what sovereignty may be? Thus far, I have offered an account of the variety of ways in which sovereignty has traditionally been conceptualized. Furthermore, I provided an explanation as to why each of these conceptualizations is limited in that none of them adequately describe the full scope of the term. The defects of these views lie not in the distribution of power among various agents, but in the static nature of the term's construction. "In structural or realist theories of international politics, behavior is analyzed as a function of the distribution of power among states and the relative position of a given state.... For realists, international politics is a self-help system in which individual states autonomously determine their own actions" (Krasner, 1989:70). Within this perspective, institutional change is totally absent from any analysis of state sovereignty. In other words, environmental changes (such as changes in technology, natural resources, or the population) are not taken into account. Unfortunately, this leaves sovereignty a static term that is unable to tap the very real potential of environmental change.

In order to remedy this defect in standard conceptions of sovereignty one must reconstruct the term from an institutionalist perspective. Institutional approaches look at existing structures as the building blocks of social and political life. Kenneth Waltz's definition of sovereignty comes closest to being institutionalist in that it acknowledges that "sovereign states have seldom led free and easy lives" (Waltz 96). In fact, Waltz admits that what makes a state sovereign is not its ability to be utterly free from outside influence or control. Rather, the sovereign state is one which possess the ability to choose for itself whether it will accept offers of assistance (whether they be military or economic). Ultimately, the acceptance or rejection of any form of assistance may limit the range of possible actions the state may take in the future (Waltz 96).

Institutions are defined as “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations.¹³” To this end, institutional approaches are defined by two basic characteristics: first, the nature and behavior of actors may only be understood within the larger institutional framework; and, second, options available at any given point in time are limited by institutional capabilities. Moreover, these particular capabilities are themselves a byproduct of previous choices (Krasner, 1989:74-76). Therefore, institutional approaches acknowledge that institutions develop in a path dependent process in which the very bases of the institutions and the choices of actors within the institutions are governed by the rules of the institutions, choices previously made by the actors within the institution and by environmental forces.

While their historical development and environmental factors may limit institutions, institutionalization depends on two dimensions of development: vertical depth and horizontal linkages. If the role of institutions is to establish rules and constrain or govern behavior, then the effectiveness of these endeavors ultimately lie in the depth and the scope of their linkages. Vertical depth refers to the “extent to which the institutional structure defines the individual actors” (Krasner 1989:77). Intertwined with the notion of depth is the concept of institutional breadth—or horizontal linkages. Institutional breadth “refers to the number of links an institution has [and] the number of other changes that would have to be made if that institution were to change” (Krasner 1989: 79).

In terms of the institution of state sovereignty, institutional depth lies in such concepts as citizenship. The states grants citizenship to certain groups of people based upon the criteria of the state. Furthermore, those who are citizens will be guaranteed certain rights and privileges within the state that non-citizens may not be offered. This notion of citizenship, however, is intimately related to the degree of depth that the institution of sovereignty has with a particular population. In other words, the degree to

¹³ This definition of institutions is taken from Robert Keohane’s “The Demand for International Regimes” and is cited in Andreas Hasenclever, et al’s, Theories of International Regimes.

which citizenship plays a crucial role in the identity and the daily life of the population will vary across time and location as different states will possess differing degree of institutional depth. The greater the degree of depth, the more pervasive the institution of sovereignty will be. Looking again at the example of citizenship, one would expect that a state with a high degree of institutional depth would also possess a population with a nationalistic fervor (Krasner 1989:78-79).

Along with institutional depth lies institutional breadth. Institutional breadth is a product of the number of linkages between one activity to another. Therefore, the greater the number of links, the higher the degree of institutional breadth. For example, the European Union provides a high degree of institutional breadth in the economic realm of member states. A state that is not a member of the EU can raise tariffs on its agricultural goods by simply passing some sort of national legislation. However, a member of the EU must first get such an approval by the EU as a whole. Therefore, legislation must first be proposed within the EU General Assembly or through the President of the EU and then finally must make its way through the Council of Ministers. In other words, the EU as an institution possesses a high degree of breadth in that a change in the activities of one of the member states must also yield a change in the institution as a whole.

Looking more specifically at the institution of state sovereignty, there are two relevant networks of links. The first set of links deals with “national arrangements related to the scope and nature of authoritative control [which] are tied to other arrangements within the same country” (Krasner, 1989:78). In other words, this first set of links determines the authoritative structure of the state and the nature of control that the state may have. The Constitution of the United States, for instance, limits the ability of the U.S. government to interfere with the right of citizens to practice any religion they choose. The second network of links is more international: “the authority claims of a particular state are also linked to international regimes and the practices of other states” (Krasner, 1989:79). In the case of sovereignty, state practices may be regulated or at least “harmonized” through the use of international treaties. For example, the Geneva Accords following World War II outlawed the use of torture on military or civilian

populations in times of war. One of the purposes of the Accords was to limit the actions of states during war. States voluntarily agreed to limit the range of their potential actions in order to maintain membership within the Society. Another example would be the assumption of nuclear non-proliferation. States that have signed the Nuclear Non-Proliferation Treaty have agreed not to develop or test nuclear weapons for military purposes. In exchange, the international community—particularly the nuclear possessing states—agree to share technology and resources with signatory countries for the development of peaceful uses of nuclear energy. When India detonated a nuclear weapon in 1998 it met harsh criticism from the international community and the threat of retaliatory actions because India had violated one of the linkages it had strayed from the norm within the international community to suspend all nuclear testing. In this particular instance, India chose to halt any further testing. With this in mind, it could be argued that the breadth of the linkage was so strong that India felt compelled to curtail any further action in order to maintain and preserve the rules of nuclear non-proliferation already established within the international system.

I previously argued that standard conceptions of sovereignty were inadequate, primarily, because they did not allow for any flexibility in the concept. Now that I have discussed what institutions are, and the elements that create and define institutions, I want to discuss how applying the concept of institutions to that of sovereignty will provide the fluidity that standard conceptions lack. Applying the definition of sovereignty as an institution will provide three essential benefits. First, one can begin to discuss the horizontal links of the institution and how they create an element of sovereignty that is impacted by the international system. Second, one can discuss the national elements of sovereignty in terms of domestic state behavior. In particular, one can focus on how changes in the depth of sovereignty domestically may impact the overall institution. Finally, and perhaps most importantly, one can begin to discuss in what ways the institution of sovereignty can evolve and in what ways it can become institutionally isomorphic.¹⁴

¹⁴ A definition and discussion on institutional isomorphism will be provided later in this chapter.

The vertical depth of sovereignty lies primarily in the authoritative structure of the state. Specifically, the state creates what Michael Walzer labels “spheres of justice.” These “spheres” define what individuals within the state view as just—in particular, the procedures, rules and rights of the citizenry vis-à-vis the state.¹⁵ Therefore, state sovereignty reflects which actions are appropriate for the state to undertake, and which rights and guarantees citizens should come to expect from their state. In this way, state sovereignty is embodied in the legitimate procedures and actions of the state apparatus itself. To this end, state sovereignty—in terms of institutional depth—reflects a “rightness” of the patterns of state action. The more “right” the policies of the state are, the more “sovereign” the state becomes. Likewise, the “rightness” of state actions are determined (at least in terms of domestic or vertical depth) by the population of the state. I define this level of sovereignty as “domestic” in that it is rooted to a large degree in the Hobbesian notion of sovereignty and mainly focuses on the internal or structural elements of state sovereignty.

Horizontal linkages of sovereignty, on the other hand, deal with a more systemic notion of the concept. Recall that horizontal linkages refer to the density of links between two sets of relationships. Furthermore, only states possess legal personality in the international system. Therefore, the horizontal linkages of the institution of state sovereignty must revolve around the relationship—or interaction—between one state and the Society. This interaction addresses some of the fallacies of Westphalian sovereignty in that the notion of horizontal linkages implies that a change in the behavior of one actor state will have an impact on the Society. Hence, if the number of horizontal linkages is high, then the actor state will be less likely to behave in a manner that would deviate from the behavior normalized within the Society. For example, state-sponsored terrorism is no longer considered acceptable within the Society. And, those states that participate in state-sponsored terrorism are often considered “rogue” states and are alienated from the Society. Likewise, those states with a higher number of linkages within the international community (whether the ties are economic, military or political) are less likely to

¹⁵ For further information on Michael Walzer’s concept of “spheres of justice,” see [Spheres of Justice: A Defense of Pluralism and Equality](#).

participate in state-sponsored terrorism. In this way, the horizontal linkages of sovereignty serve to harmonize state behavior through systemic pressures brought to bear by the Society.

The point I want to make clear is that I see an interactive relationship between the depth and the breadth of sovereignty—so much so that the impact of one aspect of state sovereignty cannot be empirically separated from the other. For example, one could not fully understand a state’s policy without first exploring the international system and the systemic pressures that may have guided the state to act in such a manner. Likewise, systemic pressures alone cannot adequately explain why two states, faced with a similar range of choices and the same systemic pressures, will not always make identical choices. Sovereignty, then, may only be understood as an interplay between *both* vertical depth and horizontal linkages.

But what happens when these linkages become too strong? Can institutions (or the actors within them) change once they have become reified through organizational inertia? Institutional isomorphism produces a situation “in which [the] density of links among organizations is high, implying that structural change will be difficult” (Krasner 88). In the case of sovereignty, states only recognize other states as possessing sovereign power. This is structurally beneficial to states in that it preserves the notion of the central state as the highest organizing unit. Furthermore, it establishes which actors will be deemed “legitimate,” or possess international legal personality, and which will not. Those organizations which do maintain international legal status will be able to join treaties, wage war and send diplomats abroad. In this way, sovereignty becomes an identification card to determine who is a member of the society of states and who is not. This being the case, it becomes increasingly less likely that political structures other than the state will ever be granted sovereign status as such organizations would ultimately undermine the state’s absolute hold on the institution.

Within the domestic realm, sovereignty serves a similar purpose in terms of serving to legitimate institutional structures. The depth notion of sovereignty relates to

the connection between civil society and the state—and the degree of “rightness” this connection possesses. State procedures become legitimated in many ways—principally through institutional structures, systematic behavior, cultural expectations and habit. Once these patterns are in place, state interests are served in the preservation of these legitimizing agents. To this end, states will be unwilling to relinquish even the perception of sovereignty to another actor within their territorial boundaries for fear that such a shift in power would ultimately erode the legitimate position of the state.

If my assumptions about the nature of state sovereignty hold true for both the domestic and systemic aspects of sovereignty, then the likelihood for institutional change is highly unlikely without some major environmental changes occurring. For good or bad, institutions often are characterized by inertia. In terms of state sovereignty, inertia lies not so much in the regimentation of state policies—for state policies can change over time without altering the institution of sovereignty—instead, inertia lies in the unwillingness of states to allow for sovereign power to be vested in an institution other than itself. Therefore, any change in the institution of sovereignty will not come in redefining the “legitimate” activities of the state, rather, change will occur by allowing the recognition of sovereign power to be vested in actors other than states.

DiMaggio and Powell argue that institutional isomorphic change can occur through any one of three mechanisms. First, pressure either from other non-state political organizations or from opposing notions of legitimate modes of action. Second, institutional isomorphic change can occur when other organizations imitate existing institutions and thus alter the distribution of power. A final mechanism is normative pressures from within the institution (Krasner, 1989: 87). In terms of state sovereignty, isomorphic change may occur when political organizations other than the state begin to threaten the legitimacy of state sovereignty. In other words, empires, leagues or neo-feudal society may threaten the territorial state’s status as the sole actor capable of possessing sovereign power. Furthermore, these political organizations may also attempt to copy the diplomatic patterns of states, which may ultimately undermine the ability of the Society to restrict international legal personality to states alone. Finally, states may

succumb to the normative pressures of the international system—one constituted by actors other than states, which may force states to change the distribution of power and open themselves to the potential loss of dominance in the international realm. In any of these scenarios, the institution of sovereignty is transformed because of a shift in the actors that may possess sovereignty, and the implications that this can have on the Society.

The potential challenge of institutional isomorphic change lies at the very heart of the current study. If, as Hedley Bull argues, peace can only come through a society of states, then a threat to the Society is ultimately a threat to peace itself. Bull is not alone in his efforts to preserve the state system. Many officials within the government of the United States are ardent defenders of the state system, and argue that one should avoid any action that threatens the state's sovereignty.¹⁶ The question that then arises is: can we predict if other actors have the potential to erode the sovereign status of states?

2.2: The Institution of State Sovereignty

As I attempted to introduce in chapter one, sovereignty is a concept with an at least numerous variety of definitions. This being the case, we must first define what state sovereignty is. For, if state sovereignty only rests on international recognition, as international legal sovereignty argues, then it is highly unlikely that states would willingly bequeath sovereign status on other political forms. However, if sovereignty rests in power alone, as domestic sovereignty would argue, then sovereign power is not only a guaranteed right of the state, but also of any organizing agent that secures final authority over a particular people. In order to address these concerns, I have argued for an institutional construction of state sovereignty, which address both the domestic power concerns and the concern of international recognition. However, simply creating a definition of sovereignty is not enough; we must now begin to apply that definition in

¹⁶ Jesse Helms is one of many members of Congress who ardently disapproves of entering any agreement which may undermine the perceived sovereignty of the United States.

such a manner as to address the second key concern—can we predict if an institution is capable of eroding the sovereignty of a state?

Janice Thomson provides a foundation to begin addressing this second question. Thomson constructs what she calls a “measure of sovereignty.” While I disagree that Thomson created an actual measure of sovereignty, I do believe that she created a set of criteria for sovereignty, which proves useful in speculating if an organization may be capable of eroding the sovereignty of a state.¹⁷ However, before I begin to discuss Thomson’s criteria for sovereignty, I want to first dissect her definition of sovereignty.

Thomson defines sovereignty as “the recognition by internal and external actors that the state has the exclusive authority to intervene coercively in the activities within its territory” (Thomson, 1995:219). This particular definition seems to touch upon the key elements of Westphalian, international legalist and domestic definitions of sovereignty. In particular, the key elements within Thomson’s definition are recognition, the state, authority, coercion, and territory. And through these elements of sovereignty, Thomson begins to forge a set of criteria with which to evaluate sovereignty. This particular set of criteria for sovereignty becomes important to the current study in that it provides a foundation on which to evaluate the potential impact of international organizations on the institution of state sovereignty.

However, before we can begin to discuss these criteria, I want to first deconstruct Thomson’s definition. Recognition is the first element of sovereignty. For Thomson, recognition is not simply “an attribute of the state but is attributed to the state by other state rulers” (Thomson, 1995:219). This element of sovereignty falls in line with the international legalist construction in that one element of sovereignty is the bequeathing of sovereignty from one political organization to another. In the modern state system, states view other states as juridically equal entities with international legal personality. Furthermore, those entities without this recognition cannot be appropriately considered states or sovereign. As I mentioned earlier, Taiwan is not recognized as a state by any

¹⁷ Thomson’s “measure of sovereignty” can be found in figure 1 within the appendix.

nation other than Israel. This being the case, Taiwan falls short of being labeled “sovereign” as it lacks international recognition of statehood—and only states can possess sovereignty in the current construction of the international system.

The recognition aspect of sovereignty introduces two empirical questions: which actor’s recognition is required for sovereignty, and what are the specific criteria for being recognized as sovereign (Thomson, 1995:219)? In addressing the former question, recognition by one state alone is not adequate for sovereign status (the Taiwan example again). The recognition that appears necessary is that of a broad consensus within the international community *including* the great powers. Again returning to Taiwan, or even Tibet, when one of the great powers refuses to allow for international recognition of a particular polity, it can sometimes be very successful in quelling any efforts at international recognition.

The second empirical concern deals with the particular criteria that must be satisfied for an entity to be recognized as sovereign. Power must surely be one of the key elements of international recognition. One would assume that an entity have at least some degree of power in order to be recognized as possessing the final authority to use coercion within its borders. However, one cannot confuse *control* (enforcement and raw power capabilities) with *authority* (the right to use force and make laws). Brute power alone does not qualify a state. After their ouster from power, the Khmer Rouge hid in the northwestern section of Cambodia and created a political organization complete with a massive military arsenal and a highly structured of political organization. However, they lacked international recognition as both a sovereign polity and a state. In other words, terrorists, militia movements and the like may possess a high degree of power—but power alone is not enough to be recognized as sovereign.

If raw power is not enough for sovereign recognition, then there must be some other set of criteria. I argued earlier that the Society is comprised of sovereign states. In fact, in order to preserve the integrity of the Society only like units may be offered membership. Therefore, only states may join the Society, and only members of the

Society may reap the rewards of membership—sovereignty. It would appear, then, that the criterion for being recognized as sovereign is that a polity is a state.

In fact, statehood is the second element of sovereignty within Thomson's definition. For Thomson, the "state" is defined as a "bureaucratic apparatus separate from and potentially in conflict with society.... The state [then] is the central bureaucratic apparatus claiming a monopoly on organized coercive forces" (Thomson, 1995:220-221). Thomson's construction of the state follows the hierarchical elements present in the conception of domestic sovereignty. However, Thomson advances a much more Lockean notion of the state than what both Hobbes and Bodin argue. For Thomson, the state exchanges certain social liberties and rights for the ability to legitimately control the means of coercion in society (Thomson, 1995:221).

Authority is arguably the most complicated element of this alternative definition of sovereignty. For Thomson, "with sovereignty, states claim and are recognized as having the authority to define the political, the political being that which is subject to state coercion" (Thomson, 1995:222). In other words, states possess the meta-political power to determine what issues or relations are "political" and thus within the interests of the state.

I want to stress one key distinction between control and authority. Control mainly deals with a state's ability to enforce the rule of law. However, authority deals more with the state's legitimate ability to make law. There is some assumption of legitimacy implicit within this definition of authority. Empirically, however, this distinction becomes increasingly important in discussing the inequality of sovereign states. If researchers define sovereignty in terms of state control, then very few states will possess sovereignty. However, by defining sovereignty in terms of authority, the focus becomes the state's ability to make or generate legitimate rules regardless of how effective the state is in enforcing those policies.

For a moment, I want to relate the meta-political power of the state back to state authority and the notion of recognition. All states possess the same degree of authority to institute their meta-political power over their specific populations. However, one criterion for recognition may be the harmonization of meta-political issues for members within the Society specifically because the determination of one state as to what is political may have powerful implications on other states within the Society. Thomson introduces the example of drugs for the US. Tobacco is considered a “private” matter and not a matter of state concern.¹⁸ However, the U.S. government determined that other drugs are illegal (Thomson, 1995:222-223). In fact, the government itself defines what substances are drugs and which are not (e.g., cocaine versus caffeine). Furthermore, the determination by the U.S. that some drugs are “bad” forces other states within the Society to control drugs within their societies. Specifically, countries that wish to maintain good relations with the U.S. must enact policies that temper the flow of drugs out of their countries into the United States. When countries are successful in doing this, the U.S. will grant them the status of “partner” in the war on drugs and offer economic incentives to the state to continue such policies.¹⁹

An additional element of sovereignty is coercion. Coercion is the monopolization of force above and beyond other internal and external actors. Moreover, state coercion is strengthened by each state controlling its interests vis-à-vis other states. So long as states create an international systemic structure which facilitates and recognizes only like states, then one has a self-serving relationship that preserves states and state power (Thomson, 1995:225-226). In other words, state coercion relates to the state’s monopolization over the legitimate use of force within its borders. As such, it is in the best interest of states to establish an international system which supports the continued domination of states over all legitimate forms of the use of force or violence. “The international system lends domestic autonomy to the state through institutions such as international law and diplomacy, which empower the state to overcome societal resistance to its policing

¹⁸ Of course, there are certain regulations with tobacco such as the age at which individuals may purchase tobacco products, but this is regulation by individual states and not by the U.S. government.

¹⁹ A good example is the recent announcement by the U.S. that Mexico improved its efforts to curtail the illicit drug supply and in exchange would receive monies from the U.S. to continue the fight.

practices” (Thomson, 1995:226). States then use international institutions (whose membership consists solely of states) as legitimating agents of state policing efforts. This being the case, when the Society is in consensus that certain state actions are no longer “acceptable,” then they may outlaw those actions through international institutions.²⁰

One aspect of state coercion that deserves elaboration is what exactly is meant by “monopolization” of state authority over all other actors. The definition seems to imply that no other actor may legitimately use force within the territory of a state. States may, however, delegate certain policing powers to non-state parties without losing their monopolization of coercive power. For example, local governments may choose to privatize parking ticket (and parking meter) duties in order to cut costs and reduce the burden of such activities on the state. In fact, these private agencies may even be granted the power to issue tickets or even impound vehicles. In this particular example, the state is not relinquishing the right to use force to a non-state entity, but the state is allowing these private corporations to use the *threat* of state force in order to police the state’s population. Mercenaries, however, present a case in which states are bestowing policing capabilities—in the sense of force and violence—to private actors. In either instance, while the state may devolve certain powers to private agents, the state itself is still the sole legitimate actor employing the use of coercion.

The final aspect of sovereignty is territoriality. Territoriality is arguably the key element of sovereignty. Sovereign power is different from heteronomy in that power is delineated by specific geographical boundaries and not by function (Thomson, 1995:227). In particular, states mutually recognize the boundaries of other states and within these particular boundaries the state is the ultimate authority. In other words, states may exercise authority not over a particular population, but over specific geographical boundaries. Therefore, everyone within the territory of the United States is subject to U.S. law regardless of whether they are U.S. citizens.

²⁰ Examples of these harmonizing efforts are the outlawing of chemical and biological weapons, the Geneva Accords following WWII, and the establishment of the Nuclear Non-proliferation regime.

2.3: Evaluating Sovereignty

Now that we have a working definition of sovereignty, and some knowledge of what elements contribute to sovereignty, we can begin to construct a method with which to evaluate sovereignty as an institution. Drawing from Thomson's definition, a transition from state sovereignty to some other political organization would require a change in one of four characteristics of the current institution.

—Insert Figure 1 About Here—

In particular, there must be a change in “the authority empowered to recognize sovereignty; the diffusion of meta-political authority to alternative institutions (e.g., religious organizations, transnational corporations, international institutions) whose membership would be exclusively non-state actors; the loss of its monopoly on coercion; and the deterritorialization of state authority claims” (Thomson 1995:229). Taken individually, one element of sovereignty that may change is the power of the state—or the Society—to recognize sovereignty in other actors. This implies that there would need to be a change in the international legal notion of states recognizing other states as sovereign. In this particular instance, actors other than states would be empowered to recognize what actors are sovereign. Likewise, agents other than states might be recognized as sovereign, which would ultimately change the structure of the international system.

Another aspect of sovereignty which may change would be the diffusion of meta-political power to institutions other than states whose membership would consist totally of non-state actors. This particular change would imply the emergence or empowerment of alternative political structures with the power to determine what would fall under the “political.” Ultimately, this diffusion of power might mean that institutions other than states could determine what actions were legitimate. And those same institutions might at some point attempt to create laws to enforce their meta-political power. However, the key here is that these institutions must be comprised totally of non-state members. In other words, the United Nations cannot be seen as this type of institution because its

voting membership is comprised solely of states. While the U.N. may arguably possess meta-political power, one should be careful not to reify it as an institution. The U.N. may not act absent of the will of its member states and thus does not possess independent meta-political power above and beyond that granted to it through the consensus of some member states.

A third element of sovereignty that may change is the state's loss of its monopolization on coercion. If actors other than states possess the legitimacy to use coercion, then these same actors might use their power to threaten the power of states. Furthermore, states possess the power of coercion within particular boundaries. However, non-state entities may argue that their power is not confined to any particular geographical boundary (such as the Holy Roman Empire). Should these non-state actors claim "universal" dominion, or at the very least authority within the territory of other states, then there could be competing powers within the same territory, leading ultimately to multiple allegiances or neo-heteronomy.

The final element by which to evaluate sovereignty is the deterritorialization of state authority claims. Here again, should the state no longer be the only power to claim final authority within a particular border, then undoubtedly there would develop competing powers for a particular population, territory or realm of power. This would create a true breakdown in the institution of state sovereignty in that states alone would no longer hold the final authoritative power within their territorial boundaries. In terms of international relations, this would radically change the way in which treaties are constructed, which powers may be parties to them, and ultimately even what political organizations may hold legal personality within the international system.

The criteria Thomson establishes for a decrease or change in the institution of sovereignty—and ultimately which actors are sovereign—provide a strong foundation to explore the possible impact that any international organization may have. Thomson, constructs the criteria for sovereignty but then fails to apply them in any systematic manner. The purpose of this work is to continue where Thomson ends. With the creation

of the United Nations, and the League of Nations before it, a good deal of debate arose as to the possibility of international organizations eroding the institution of state sovereignty. However, little effort has heretofore been put into systematically approaching the concept of sovereignty and applying that concept to the practical functions of international organizations.

Over the past two chapters I have discussed the variety of ways in which scholars historically have constructed sovereignty. I then moved into a discussion of sovereignty as an institution. Understanding sovereignty as an institution will allow us to discuss how sovereignty can evolve, and we can begin to speculate on how this evolution may change the current status of the institution. Finally, we can begin to evaluate the institution of sovereignty vis-à-vis international organizations to discover what, if any, impact these organizations are likely to have.

The next two chapters apply the framework of sovereignty that we have already constructed to the International Criminal Court (ICC). My goal is to understand how the ICC is perceived by state policymakers to function and what impact that will have on the institution of state sovereignty. Ultimately, there may only be a limited number of possible outcomes: the ICC will erode the sovereignty of states, the ICC will strengthen state sovereignty, there will be no impact at all, or some combination of the above. For there to be a change in the institution of sovereignty, one or more of the criteria for identifying a change in sovereignty must be met. However, the analysis must not end there. Should the institution of sovereignty be in the process of evolution, then we must return back to our original discussion of sovereignty as an institution in order to understand the institutional explanation for sovereignty's evolution.

Chapter Three: The International Criminal Court

3.1: Basis for the Court

The current International Criminal Court (ICC) is the culmination of six preparatory sessions in which interested party states from across the world deliberated on the initial Court charter drafted by the International Law Commission (ILC). The product of these efforts is the Rome Statute of the International Criminal Court, which was adopted by the United Nations Diplomatic Conferences of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998. The purpose of this chapter is to analyze the Statute in order to understand how the ICC was designed to function, and then to apply this analysis to the debate surrounding the ICC. In particular, I will analyze its potential impact on the institution of state sovereignty.

International courts have a long history. Prior to the First Hague Peace Conference (1899) establishing a Permanent Court of Arbitration (PCA), the first truly international criminal tribunal convened in 1474 to try Baron Peter von Hagenbach for violations of the “laws of God and man” (Peter, 177-179). The PCA was not empowered with compulsory jurisdiction and could only be called into session at the request of *both* interested parties. During the Second Hague Peace Conference (1907) member states again failed to empower the PCA with compulsory jurisdiction, arguing that such a jurisdiction would threaten state sovereignty²¹ (Peter, 180). The notion of creating an international criminal court—a court whose jurisdiction would not be limited to a particular state’s borders, and whose jurisdiction would be over individuals instead of states—dates back to the 1919 Paris Peace Treaty. Within the treaty, the signatory states “envisioned trying the German Emperor for a ‘supreme offense against morality and the sanctity of treaties’” (Pejic, 16). After World War II, the notion of an international criminal court was again revisited after the success of the Nuremberg and Tokyo Tribunals and the Genocide Convention of 1948. In 1951 and 1953, the ILC prepared

²¹ The United States originally argued in support of granting the PCA compulsory jurisdiction, but then submitted a long list of reservations about granting such power to the court.

draft statutes for an international criminal court but the two drafts were placed on hold with the advent of the Cold War. Finally, with the end of the Cold War and the new climate of “cooperation” within the international community, Trinidad and Tobago reasserted the idea of an ICC. Trinidad and Tobago hoped that by creating an international criminal court, small states would then be aided in their efforts to curtail international drug trafficking within their borders (Pejic, 14).

The latest ILC draft of the Statute of the ICC argued that the ICC should be founded on five basic principles.

1. The ICC should be established by treaty and should not be created by an organ of the United Nations or through an amendment to the U.N. Charter.
2. The ICC would not be able to exercise jurisdiction over states, only individuals.
3. The jurisdiction of the ICC should be limited to those international crimes specified in existing treaties.
4. The ICC would serve as a supplemental justice system for national justice systems.
5. The ICC would not operate on a permanent basis, rather it would operate only when necessary.

(Peter, 186)

These five original principles met with mixed reactions. In particular, principles three and four were considered problematic in that there was no clear consensus as to what crimes were extensively “international” and covered under international law.

Furthermore, many states were uneasy with the notion of a “supplemental justice system,” questioning how such a system could be constructed and enacted without invading the perceived aspects of state sovereignty. Finally, the fifth principle—creating a court which would operate on an ad-hoc basis was completely eliminated during the preparatory sessions in favor of establishing a permanent court.

3.2: The Organization of the Court

For the purpose of this study, I want to focus on the final draft of the ICC Statute, and the powers invested in the ICC at the time of the Statute's signing. Over the next few pages I will introduce key elements of the ICC. Essentially, I will provide a brief overview of the Rome Statute and then summarize some of the key elements in order to provide a greater understanding as to how the ICC is intended to operate.²²

Part One of the Statute serves to establish the Court. Articles One through Four authorize a permanent Court, place the seat of the Court at The Hague in the Netherlands and provide the Court with international legal personality. Part Two deals with the jurisdiction of the Court, issues of admissibility and applicable law. Article Five empowers the Court with automatic jurisdiction in only four specific core crimes: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. The Statute fails to define explicitly what is meant by "crimes of aggression," and thus the Court will not have jurisdiction over such crimes until the Assembly of States Parties²³ determines an appropriate definition. However, the Statute clearly defines what is meant by crimes against humanity, war crimes and genocide²⁴. Articles Eleven through Thirteen discuss the jurisdiction of the Court. In particular, they establish the principle of *jurisdiction ratione temporis* or that the Court only has jurisdiction over crimes committed after a state has entered into the Statute. Article Fourteen discusses the trigger mechanisms for the Court. In particular, a case may be brought before the Court by a state party referring the matter to the Prosecutor, the Security Council bringing the case before the Prosecutor, or the Prosecutor initiating the investigation in accordance with Article 15 (which can be found in Appendix B).

Article 17 establishes the admissibility of cases before the Court. Whenever a state has already made a ruling on a particular case, or when the state is in the process of

²² All of the following information is drawn from the Rome Statute of the ICC, that is UN document A/CONF.183/9.

²³ The Assembly of States Parties is comprised of all signatory states to the Statute.

investigating or trying the case, the Court will not be able to investigate or admit the case. However, the Court will be able to admit a case when the national proceedings were held as a shield for the person concerned, when due process has not been met, and when the proceedings were not conducted independently or impartially (as judged by the Court).

Article 19 outlines the procedures by which individuals and states may challenge the jurisdiction of the Court. In particular, an individual who is accused, or who has been issued a warrant of arrest, may challenge the authority of the Court. States may also challenge the authority of the Court if they are actively pursuing, prosecuting or investigating the case in question. Article 20 establishes the principle of *ne bis in idem* within the decisions of the Court. In other words, no person may be tried twice before the Court for the same crime—a prohibition of double jeopardy. Furthermore, another Court may try no person for the same crimes with which they have been convicted or acquitted by the Court. Likewise, no person who has been tried by national courts may face prosecution by the ICC unless the trial was used to shield the accused or was not impartial and independent.

Part IV of the Statute outlines the composition and administration of the Court. In particular, the Court has four principal organs: the Presidency; an Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry. The first two organs of the Court, the Presidency and the courts themselves, will be comprised of judges each of whom will serve on a full-time basis. The number of judges shall remain 18 unless the workload of the Court becomes demanding enough to require an increase in the number of judges. At such a time, the Presidency, after approval by the Assembly of States Parties, may increase the number of the judges. Not only do the States Parties elect the judges, but the Assembly also nominates them. Furthermore, no two judges may be from the same state and the judges should reflect the diversity of states and peoples present within the international system. Finally, the judges are elected for a term of nine years.

²⁴ For a complete description of how these crimes are defined, you will find the entire Rome Statute of the ICC in Appendixes A, B and C.

The Presidency itself is comprised of a President and First and Second Vice-President. All three of these positions are elected from among an absolute majority of the judges for three-year terms and the possibility of one reelection. The Presidency essentially serves as the day-to-day administrative arm of the Court. The Chamber's organ of the Court is comprised of three divisions. The President and four other judges head the Appeals Division. The Trial and Pre-Trial Divisions must consist of not less than six judges. Judges within the Pre-Trial and Trial Divisions serve three year terms and may serve on a temporary basis in the other chamber. However, judges assigned to the Appeals Division may only serve within the Appeals Division and must serve in that chamber throughout their tenure on the Court.

The third organ of the Court is that of the Prosecutor. The Prosecutor is elected through secret ballot by an absolute majority of the judges and serves on a full-time basis. The Prosecutor must act in total impartiality and is assisted by one or more Deputy-Prosecutors. The Prosecutor is responsible for receiving referrals for prosecution, for investigating crimes and for presenting the prosecutions before the Court. At any point that a Prosecutor may feel partial in a case, or when the Assembly of Parties States or the President may perceive a Prosecutor as being partial, the President has the power to remove the Prosecutor from the case. The final organ of the Court is the Registry, the non-judicial arm of the Court. Members of the Registry are elected by absolute majority of the judges and five year terms with one opportunity for reelection. The role of the Registry is to provide counseling for witnesses, set up victim and witness units, establish witness protection programs and aid in all other non-judicial aspects of the Courts administration.

The organs of the Court are to work impartially and independently of any national or political bias. However, should a judge or prosecutor not behave in such a manner, then “a decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor shall be made by the Assembly of States Parties” (Article 46 of the Rome Statute of the ICC). In other words, judges and the Prosecutor are accountable to the

Assembly of Parties States in that they must satisfy a majority of the Assembly or face removal.

Because the power of the Court is such a contentious issue, I would like to return for a moment to the Court's *Jurisdiction Rationae Materiae*. The Court has automatic jurisdiction in the area of core crimes: crimes against humanity, crimes of aggression, war crimes, genocide. The *Jurisdiction Rationae Materiae* for each crime is steeped in a rich history of international law. One example is the crime of genocide, which is considered to be within the "inherent" jurisdiction of the Court; the definition of genocide comes from the 1948 Convention on Genocide. The definition for crimes against humanity comes from Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and from Article 21 of the Draft Code of Crimes Against the Peace and Security of Mankind provisionally adopted by the ILC in 1991. War crimes are defined in Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 22 of the Draft Code of Crimes Against the Peace and Security of Mankind. Finally, crimes of aggression—although not yet clearly defined in the actual Rome Statute—are rooted in Resolution 3314 of the General Assembly (December 14, 1974) and the United Nations Charter, Article 2, Section 4 (Wexler, 687).

3.3: The ICC and State Sovereignty

While the Rome Statute creates a highly structured Court empowered with jurisdiction only over specific "core crimes," universal acceptance of the Court has yet to be garnered. In fact, the United States—active in the preparatory sessions of the Court—decided not to sign the Rome Treaty and thus dealt a strong blow to the emerging court. The United States was not original in its reservations about the Court. In fact, the U.S. offered the same list of reservations that states have presented since the notion of international organizations (or international cooperation) was introduced—namely, that the ICC is a threat to state sovereignty. "Senator Jesse Helms has led this charge, arguing

that the country must be ‘wary of turning the sovereignty of the United States in the slightest degree to a world court or any other tribunal by any other name.’”²⁵

The argument that the ICC, just as the United Nations before it, erodes state sovereignty is more a political issue than a legal one. However, this should in no way imply that political arguments could not be every bit as important as legal concerns. In fact, the concept of state sovereignty often serves as a roadblock to international efforts aimed at creating monitoring regimes, economic communities, and even the establishment of human rights accords. However, scholars are exerting little effort into actually separating the myths of sovereignty from the real world limitations of international organizations. There is little doubt that international organizations may be used as a means to place pressure on states to behave in a manner that—absent the pressure—states would choose not to.²⁶ However, as I mentioned when discussing Kenneth Waltz, a state that is sovereign is one that “decides for itself how it will cope with its internal and external problems” (Waltz, 96). In other words, sovereignty does not entail total independence from all outside pressure. Rather, sovereignty is the ability to decide whether or not to give in to the outside pressure.²⁷

The question then is what impact the ICC will have on the institution of state sovereignty. In order to address that question, I have established a definition of what the institution of sovereignty is and a set of criteria for evaluating sovereignty. Now that I have provided a brief overview of the structure of the ICC, I want to examine three specific aspects of the Court that are argued to erode state sovereignty—the automatic jurisdiction of the Court, the trigger mechanism, and what constitutes a core crime. I will

²⁵ Senator Jesse Helms from the 140 Congressional Record S96-01, S101 (daily edition January 26, 1994) quoted in Paul Marquardt’s “Law Without Borders: The Constitutionality of the International Criminal Court,” Columbia Journal of Transnational Law 33:73, 142.

²⁶ The now fulfilled threat by NATO to launch air strikes on Yugoslavia should the Serbian Yugoslav government refuse to halt its offensives on the ethnic Albanian population in Kosovo is a good example of how international organizations may be used to put pressure on states for the purposes of impacting state action.

²⁷ If we apply this definition of sovereignty to the NATO air strikes example, then the sovereignty of by Yugoslavia would not be undermined air strikes so long as the ultimate decision of whether to face air strikes or not (i.e., sign the peace treaty on Kosovo and end hostilities there) is ultimately made by the Yugoslav government.

examine each of these elements independently, evaluate the arguments that states have given for each of their opinions on each, and then apply the criteria of sovereignty in order to evaluate what impact each of these individual aspects of the Court appears to have on state sovereignty. Finally, after examining these aspects of the Court independently, I will then evaluate what the impact of each of these aspects, taken together, may have on the institution of state sovereignty.

Chapter Four: Evaluating the Impact of the ICC on State Sovereignty

While the establishment of a permanent international criminal court may be rooted in centuries of political and legal development, both Court proponents and opponents at times have misconstrued notions as to the impact of the Court on the institution of state sovereignty. Some human rights proponents seem to favor establishing the Court on the basis that the Court may stem the tide of further human rights abuses—or, at the very least, serve as a mechanism for holding responsible those individuals who are egregious human rights abusers. To some degree, these Court supporters seem to possess a potentially over-optimistic view of the potential of the ICC to function in light of the very real political and legal dilemmas of state sovereignty. Conversely, opposition to the Court is often rooted in a similarly grandiose notion that the ICC will be able to somehow erode the institution of state sovereignty and thereby undermine the authority of the state.

The purpose of this chapter is to examine the debate surrounding the two most contentious elements of the Court: the Court's jurisdiction and the trigger mechanism. To this end, I will first provide a brief analysis of the developments within each preparatory session dealing with the two issues at hand.²⁸ Afterwards, I will examine each issue as they were finalized in the Rome Statute. I will then analyze the key arguments made by participating states. Finally, I will be able to apply the criteria for evaluating sovereignty to both the trigger mechanism and the core crimes of the ICC. This final venture will allow me to address the larger research question of what the potential impact of the ICC will be on the institution of state sovereignty.

4.1: Core Crimes

The issue of which crimes will fall under the domain of the Court is ultimately an issue of jurisdiction. And the debate surrounding the jurisdiction of the Court is rooted in

the potential strength and weakness of a Court that is either too broad or narrow in scope. Defenders of traditional notions of state sovereignty argue that a Court empowered with a broad and potentially fluid mandate would create a body that could threaten the national sovereignty of states. Conversely, Court proponents fear that too narrow a jurisdiction would function as a bulwark to any real efforts at securing human rights.

The preliminary draft of the International Law Commission envisioned a Court whose jurisdiction would cover “five categories of offenses: genocide, aggression, serious violations of the law and customs applicable in armed conflict, crimes against humanity, and treaty crimes listed in the annex” (Wexler, 690). Under this latter clause “treaty crimes under annex” there were nine different types of crimes, ranging from torture and hostage taking to unlawful seizure of an aircraft and drug trafficking.²⁹

4.1.1: The Preparatory Sessions

During the First Session of the United Nations Preparatory Committee on the Establishment of the ICC³⁰ the issue of core crimes was first debated by interested states.

There was widespread agreement that [the] core crimes should include genocide, other crimes against humanity, and serious violations of the laws and customs applicable in the armed conflict, although there was a divergence of opinion concerning whether the ICC should have inherent (automatic) jurisdiction over all core crimes or just genocide, as provided in Article 25(1) of the ILC draft statute.

(Hall 1997, 178)

²⁸ Note that while at least either the trigger mechanism or the core crimes of the Court were discussed in each one of the preparatory sessions, not every session discussed both elements. Therefore, I will limit my discussion of the sessions to only those that apply to each element in turn.

²⁹ For a detailed list of all nine treaty crimes, and the treaties they are derived from, see Article 20(e) of the 1994 Draft Statute of the International Criminal Court produced by the International Law Commission.

³⁰ There were six preparatory sessions. However, all official UN documents simply use the term “PrepCom” (followed by the session number) to refer to the United Nations Preparatory Committee on the Establishment of the ICC.

Support was less evident, however, for the inclusion of “treaty crimes” within the jurisdiction of the Court. In fact, the United States pushed for the exclusion of “treaty crimes” from the statute on the basis that such crimes were not adequately defined within international law (Hall 1997, 179).

The ILC draft statute is problematic in that it would create a dichotomous jurisdiction for the Court with elements in both the domestic and international spheres. Should the jurisdiction of the Court include such crimes as that of drug trafficking, then the Court ultimately would enter the realm of domestic state policy. While international customary law may dictate that most states object to drug trafficking and production, there is no true international consensus that drug trafficking itself is a crime at the international level. Crimes of genocide or crimes against humanity are by their very nature international crimes in that the international community has forged a consensus that all individuals, regardless of their citizenry, are to be secured the freedom from these types of egregious human rights violations. Moreover, these international crimes were codified through the 1948 Convention on Genocide, Article V of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind and the Nuremberg Charter. In other words, there is a fine but important distinction between international treaty law and international customary law, and within PrepCom1 the general consensus supported a Court whose jurisdiction was defined under the more developed treaty law.³¹

In PrepCom3 the participatory states more clearly defined what “crimes of genocide” and “crimes against humanity” meant. The majority of states agreed that the crime of genocide would be defined exactly as it is in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Furthermore, it was agreed that acts of genocide could occur either in times of war or peace. However, the United States as well as a handful of other countries wanted to refine crimes of genocide as occurring only when the accused attempted to eradicate a substantial portion of the group’s

³¹ For a more detailed account of the difference between international customary law and international treaty law see “The Proposed International Criminal Court: An Appraisal” by Leila Sadat Wexler, *Cornell International Law Journal*, volume 29:1996, 656-726.

population.³² In the end, the committee adopted a less stringent interpretation of how many people an accused must intend to harm, indicating that merely more than a small number was required (Hall 1998a, 126).

The discussion and inclusion of both crimes of aggression and war crimes indicated a change in the traditional interpretation of international law. Traditionally, war crimes could only be committed in acts of international conflict. However, for the first time, war crimes were defined as “serious violations of humanitarian law in both international and noninternational conflict” (Hall 1998a, 129). In other words, the international community arrived at a consensus that war crimes could be committed in an internal or domestic armed aggression and still be a violation of international rather than solely domestic law. Similarly, during PrepCom3 there was also surprising support for the inclusion of “crimes of aggression” the jurisdiction of the Court. While not clearly defined, the essential concept of “crimes of aggression” marks a turning point in international law in that prior to this point, the international community appeared reluctant to even attempt to define what actions should be deemed as “aggressive.” As such, there is little precedent on which to base any future definition and thus, for the first time, one sees an active movement in forging an international consensus on the definition of aggression. (Hall 1998a, 129)

PrepCom5 served to narrow the definition and scope of war crimes. Within this session the major discussion involved the debate surrounding the inclusion of a threshold for which war crimes—as defined through treaty and customary law—would fall under the jurisdiction of the Court. This threshold would then serve to limit the Court’s jurisdiction to only specific offenses instead of empowering the Court with jurisdiction over all standard definitions of war crimes. The United States, Great Britain and a few smaller states all supported the establishment of a threshold. However, Egypt, New Zealand, Switzerland and the International Committee of the Red Cross (ICRC) argued

³² For a discussion as to how this position by the US is similar to an understanding attached by the Senate of the United States to the Genocide Convention see Christopher Keith Hall’s “The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an ICC,” The American Journal of International Law, volume 92:1998, supra note 10, p. 126.

against such a threshold. In particular, the ICRC delegation argued that “[n]o threshold has ever been required as a definition of war crimes” and that to incorporate such a threshold would add a “new element to the offense” that “clearly does not reflect existing law” and that “would contribute to the confusion between crimes against humanity and war crimes.”³³ In the final stage of the session, the participating states found unanimous support for empowering the Court with jurisdiction over grave violations of the Geneva Conventions and were generally receptive to granting the Court jurisdiction over numerous violations of humanitarian law during periods of armed conflict. Therefore, a general compromise was reached as to the issue of a threshold when dealing with war crimes—the Court will have jurisdiction over all serious violations of the Geneva Conventions and also under certain elements of standard treaty and customary humanitarian law regarding armed conflicts (Hall 1998b, 332).

PrepCom6 was perhaps the most important session for the discussion of war crimes. Within this session the participating states were able to discuss four separate models concerning whether and how states could accept ICC jurisdictional acceptance and the solidification of the four core crimes. In terms of the former, there was great concern among participating states as to the means by which the Court’s jurisdiction would be accepted. The committee essentially considered four different models.

1. Each state party would choose whether or not to accept the ICC’s jurisdiction over some or all of the crimes within its jurisdiction (either an opt-in or opt-out model). (This model received little support).
2. Certain states (whether parties to the statute or not), such as the state with custody of the suspect or accused, the state on whose territory the crime occurred, the state of the accused’s nationality, the state of the victim’s nationality the state requesting extradition or any other interested state, would have to consent before the ICC could exercise its jurisdiction in a particular case (state consent regime). (France

³³ ICRC, Comments on the informal working paper on war crimes of 31 October 1997, at 1 (December 2, 1997). Cited in Christopher Keith Hall’s “The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,” *American Journal of International Law*, volume 92:1998, 332.

supported variants of this model, while the United States “reserved” its position).

3. Each state party would accept the inherent (automatic) concurrent jurisdiction of the ICC by accession or ratification of the statute with respect to all the core crimes and for every case the ICC investigated or prosecuted (supported by the United Kingdom).
4. The ICC would exercise the same universal jurisdiction over any core crimes as each of its state parties have under international law (supported by Germany).

(Petrasek, 549-550)

The final provision for jurisdiction is something of a hybrid between the second and third models. Article 12 of the Rome Statute establishes the preconditions to the exercise of the Court’s jurisdiction. Within this framework, all member states accept the jurisdiction of the Court with respect to the core crimes. However, a non-party state may also accept the jurisdiction of the Court for any core crime simply for the duration of the Court’s investigation and prosecution.

The scope of the core crimes was finalized to include only the four core crimes of genocide, crimes against humanity, war crimes and crimes of aggression. While the United States attempted to hamper the inclusion of crimes of aggression, it was nonetheless included in the final Rome Statute. Furthermore, Germany attempted to establish a definition for crimes of aggression that was to be rooted in the work from the Nuremberg Tribunal. According to the Germans, crimes of aggression are the carrying out of an “armed attack directed by a State against the territorial or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking state.]”³⁴ However, this working definition was never adopted by

³⁴ Excerpt from German Working Paper on the Definition of the Crime of Aggression. UN Doc. A/AC.249/1998/DP.11. Cited in David Petrasek’s “The Sixth Session of the UN Preparatory Committee

the member states, and this ultimately created a major stumbling block for the adoption of the Statute by the United States. By not accepting the German working definition, the interested states left open the question as to what the final definition would be. In other words, the states knew that the Court would have jurisdiction over crimes of aggression but there was no consensus as to what those crimes would be and thus, what areas of individual and state action the Court would have authority over (Petrasek, 550-551).

Most of the Rome Statute was already determined by the time of its signing. As already stated, the jurisdiction of the Court applies to all treaty signatories with regards to any of the core crimes. However, the Court may also apply its jurisdiction over breaches of the core crimes even when the crime is committed by a non-signatory state—so long as the state voluntarily accepts the jurisdiction of the Court. In this regard, there is a mix between universal jurisdiction (at least for the signatory states) and a modified notion of jurisdiction based on state consent (for nonmember states). Furthermore, the core crimes have been limited to four specific crimes which are—with the possible exception of crimes of aggression—rooted in an extensive history of international treaty and customary law. The four core crimes of the Court are crimes against humanity, war crimes, crimes against humanity and crimes of aggression.³⁵

4.1.2: State Positions

The positions of the United States and Germany offer an interesting comparison into the different ways in which states may approach the Court and the “vision” that a state may have for the role of the Court. For this reason, I will limit my focus of state positions to those of these two states.³⁶ Germany served as perhaps the most progressive state within the preparatory sessions. With regards to the issue of core crimes, Germany

on the Establishment of an International Criminal Court,” *American Journal of International Law*, volume 92:1998, 551.

³⁵ The treaty definition for the crimes may be found as follows: crimes against humanity (Appendix A), war crimes (Appendix B), crimes against genocide (defined under the Genocide Convention). Note that as of yet there is no definition of the crime of aggression.

³⁶ There are also more practical reasons for limiting the discussion solely to the United States and Germany. Not only are the working papers from these two states easily accessible, but they represent different sides of the principal arguments dealing with the core crimes and trigger mechanism of the ICC.

was a strong proponent of including the four core crimes formally embodied in the Rome Statute. As mentioned earlier, Germany was a strong defender of including the crime of aggression under the jurisdiction of the Court and even provided a working definition for such crimes (a definition which ultimately was rejected).

Beyond this, Germany outlined its support for what is deemed the “main building blocks” of the Court. Among these building blocks are the concepts of complementarity, a rejection of the “opt-in/opt-out” approach to Court jurisdiction, a rejection of allowing reservations among signatory states and an attempt to further refine the definitions of war crimes and crimes of aggression. Article 15 of the ILC draft statute establishes the complementarity of the Court. Complementarity is a legal principle that rests on the idea that the jurisdiction of the ICC should complement the jurisdiction of national courts. To this end, the ICC will investigate and hear cases (involving violations of one of the four core crimes) when national courts are either unwilling or unable to provide fair and impartial trials for violators of these crimes. With regards to the practice of reservations, Germany argued that there should be no ability for states to ratify certain elements of the treaty while reserving the application of other treaty obligations on the basis of “national security” or the like. In other words, the Statute should be ratified in its totality so that all states who are signatories will be similarly responsible under international law. Correspondingly, Germany also rejected the concept of an opt-in/opt-out policy for states with regards to ICC jurisdiction. The whole basis for the state consent regime, in which states would voluntarily choose which particular cases (as opposed to which particular crimes) would be under the jurisdiction of the Court, it was feared, would limit the Court’s effectiveness. Finally, Germany also stressed the need for broadening the definition of war crimes to include internal armed aggression instead of limiting war crimes to only international armed aggressions³⁷ and pushed for the inclusion of crimes of aggression in the jurisdiction of the Court.³⁸

³⁷ For an actual account of the German position on war crimes see the Germany Reference Paper on War Crimes, which is UN Doc A/AC249/1997/WG.1/DP.23/Rev.1.

³⁸ This information is found in the German working paper on the “International Criminal Court: The German Position” UN Doc A/AC249/1998/DP.2.

From the outset, Germany envisioned a Court empowered enough to ensure that it would serve as an effective institution, and with as broad a jurisdictional mandate as conceivable within the current stage of international legal development. Therefore, during PrepCom1 Germany argued strongly for an interpretation of complementarity that would facilitate the Court's efforts at exercising its jurisdiction. When the concept of complementarity was first introduced in the ILC draft statute, there emerged two interpretations as to what the concept implied. The first interpretation, supported by the United Kingdom, envisioned complementarity to imply the "primary *right* [emphasis is that of the author] of states to bring criminals to justice, the integration of the concept of complementarity in all aspects of state cooperation with the ICC, and an exceptional and restricted role for the ICC" (Petrasek, 181). In this view, the concept of complementarity is based on the concept of the state and state action as primary and the role of the Court as a secondary concern. Germany argued an alternative view of complementarity that implied that "the ICC should act when states failed to carry out their *duty* [emphasis is that of the author] to bring people to justice. ...[Germany] argued that the ICC itself had to be able to decide whether to exercise its concurrent jurisdiction when the national proceedings were not impartial or independent, or were designed to shield the accused from international criminal responsibility..." (Petrasek, 181). Within this construction of complementarity, the Court would be empowered with the ability to judge when a state was incapable or unwilling to provide a fair and impartial trial—and thus, the Court would be able to enforce its jurisdiction in these instances (Petrasek, 181).

During PrepCom3 Germany began an intensive effort to expand the Court's jurisdiction to include the crime of aggression. Germany argued that there was sufficient work in treaty and customary law to establish a definition for "aggression." For example, general definitions of the crime could be derived from Article 6(a) of the Nuremberg Charter and also from the UN General Assembly's 1974 definition of crimes of aggression. However, this latter definition was not intended to determine independent criminal responsibility but to aid the Security Council in determining whether a state had actually committed an act of aggression (Hall 1998a, 129).

During PrepCom6, Germany presented an informal working paper to elaborate on the relationship between Court jurisdiction and signatory states. As discussed earlier, Germany argued that states that become a party to the statute should automatically accept the universal jurisdiction of the Court over the four core crimes.

[Essentially], there is no reason why the ICC—established on the basis of a Treaty concluded by the largest possible number of states—should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the very same manner as the Contracting Parties themselves. ... This means that, in the same manner as the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial state or any other state has accepted the jurisdiction of the Court.³⁹

In other words, Germany attempted to secure for the Court the same sort of legal personality as any sovereign state: if a state should maintain universal jurisdiction over any of the core crimes (minus crimes of aggression), then so too should the ICC. Without such universal jurisdiction, the Court (which through the Rome Statute is the appropriate organ to deal with any of these four core crimes) would lack the same type of jurisdictional authority given to any state. Therefore, the absence of such universal jurisdiction would ultimately weaken the development and effectiveness of the Court.

While Germany pushed for broadening the scope and power of the ICC, the United States lobbied for a more downscaled role and mission for the Court. The United States first began to outline its policy for the Court in November 1995. Speaking on behalf of the United States government, Deputy Legal Advisor Jamison Borek outlined the U.S. rationale as to why crimes of aggression should not be included within the mandate of the Court.

³⁹ UN Doc A/AC249/1998/DP.2. Cited in David Petrasek's "The Sixth Session of the UN Preparatory Committee on the Establishment of a ICC," American Journal of International Law, volume 92:1998, 550

We also view the inclusion of the crime of aggression as highly problematic on numerous grounds. This is fundamentally a crime of states, as to which the Security Council would have to play a central role. It thus presents all the risks of politicization in a serious form. It is, moreover, a crime which is still very ill-defined. The Nuremberg Tribunal did not have to confront this problem, as it was dealing after the fact, with a clear and specific case. In the abstract, however, it is not universally established what fits even with the limited concept of “waging a war of aggression.” ...What about controversial concepts such as humanitarian intervention or a war of liberation? Including the crime of aggression would require clear, universally accepted answers to these questions.⁴⁰

In other words, the US argued that until there was a clear and universally accepted definition of which actions constituted “aggressive acts” there should not be an inclusion of the crime of aggression within the jurisdiction of the Court. Even a clear definition of “aggressive acts” or a “war of aggression” can be problematic. For example, once we establish a consensus as to what constitutes a war of aggression, how can we differentiate that from a humanitarian intervention or an act of aggression which does not fulfill the standard notion of war? “The primary historical precedent is not aggression, but rather waging a war of aggression—an arguably clearer and narrower concept. The precedent, moreover, concerns particular situations which did not present some of the difficult issues potentially involved, such as cases of arguable self-defense or humanitarian intervention.”⁴¹ Furthermore, acts of aggression are more likely to be crimes of states rather than individuals and thus potentially allow for a high level of politicization. Moreover, only the individual—not the state—is to be held accountable under the jurisdiction of the ICC, and, as states rather than individuals normally commit crimes of aggression, the inclusion of such crimes under the ICC mandate appears superfluous.

⁴⁰ Statement by Jamison Borek, Deputy Legal Advisor to the United States Department of State on Agenda Item 142: Establishment of an International Criminal Court to the Sixth Committee of the United Nations General Assembly, 50th Session.

⁴¹ Statements from the United States Mission to the United Nations “US Statement on the International Criminal Court,” Sixth Committee of the 51st UN General Assembly, October 31, 1996.

Beyond simply which crimes would fall under the jurisdiction of the Court, the United States also attempted to limit the actual structure of the Court’s jurisdiction. The US argued that for “the Court to have ‘inherent jurisdiction’ over violations of humanitarian law (other than possibly the crime of genocide) is ill-conceived...and will not achieve the broad support necessary for a viable Court.”⁴² The United States feared that to empower the Court with inherent jurisdiction for all core crimes would create too strong of a Court and that would ultimately limit the palatability of the Court to potential signatory states—as was ultimately the case with the United States.

Throughout the Preparatory Committee Sessions, the United States continued to reaffirm its commitment to limiting both the jurisdiction and the core crimes handled by the Court. During PrepCom1 there was a limited effort among participant states to broaden the scope of Court jurisdiction to include a variety of annex crimes (hijacking, hostage taking and drug offenses). However, the United States and a number of other key states opposed such measures and ultimately the concept of including “annex crimes” within the jurisdiction of the Court diminished (Hall 1997, 179).

During PrepCom3, the United States made a number of efforts at refining the proposed definitions of genocide and war crimes. In particular, the US fought to limit the jurisdiction of the Court to crimes of genocide only when “the accused intended to destroy a substantial part of the group” (Hall 1998a, 126). In other words, the United States wanted to establish a “threshold” number of intended victims before a crime of genocide could be considered to have taken place. Along the same lines, the US tried to limit the scope of war crimes to only the most “serious” breaches of humanitarian law. This conception of war crimes was more in line with the 1907 Hague Convention and Regulation than the 1977 Geneva Protocol (Relating to the Protection of Victims of International Conflict December 12, 1977). This latter agreement defined the category of breaches of humanitarian law in a much broader and more encompassing manner (Hall 1998a, 128).

⁴² Ibid.

The debate surrounding war crimes and crimes of genocide is inherently an argument about the state of customary international law. The United States based much of its arguments on the notion that the ILC draft statute proposes definitions of the core crimes which are broader than the definitions generally conceived and harmonized through international customary law. Where sufficient treaty law is absent, the Society must rely on the historical development of customary law. In this latter arena, the US argues that the international community has failed to reach a consensus as to broadening the scope of these core crimes. Thus, any attempt to broaden the scope of the crimes through the jurisdiction of the Court will ultimately impede the Court's ability to become effective and threaten the acceptance of the Court by the majority of states.

However, the debate may reflect a more practical concern as well. The argument could be made that by broadening the mandate of the Court to cover crimes in manners that are not historically rooted in either customary or treaty law, the Court would be granted a degree of power to act in instances and manners that states themselves do not possess. Allowing the Court to have such power may spark fears among state leaders that the Court would be assuming power in areas where even sovereign states are not allowed to act.

4.2: The Trigger Mechanism

A trigger mechanism refers to the method by which a case is brought before the Court (Hall 1997, 181). The concept of a trigger mechanism is inherently a political one. The question becomes—which entities should be empowered to bring incidents before the Court for the possibility of trial? The debate surrounding the trigger mechanism of the Court was as contentious an issue as that relating to what crimes would fall under the Court's jurisdiction. The importance of the trigger mechanism is twofold—it will determine how and even if certain cases will be brought before the Court, and an appropriate trigger mechanism can ensure that Court efforts are not hindered by politicization.

4.2.1: The Preparatory Sessions

The debate around the trigger mechanism of the Court proved to be one of the most contentious issues for PrepCom1. During PrepCom1, “the permanent members of the Security Council and many other states supported the power of the Security Council under Article 23(1) of the ILC draft statute to refer situations to the ICC.... [At the same time] Mexico and some other states argued that the Security Council should have no role in referring matters to the ICC” (Hall 1997, 181). Under the UN Charter, it is the function of the Security Council to determine if a state has committed an act of aggression. Therefore, members of the Security Council argued that it is only the role of the Security Council to first determine whether an act of aggression has occurred and then to refer that case to the ICC. However, a number of participating states argued that allowing a political body such as the Security Council to first determine whether a crime had taken place before a matter could be referred to the ICC would only serve to destroy the independent nature of the Court.

While a good deal of the debate focused on the role of the Security Council, it was not the only proposed trigger mechanism for the Court. The majority of states agreed with Article 25 of the ILC draft statute that states party to the treaty should be able to submit cases to the Court. The debate here is over the ability of the states parties to refer cases before the Court if the Security Council was already debating the cases.⁴³ Along the same lines, the members also had to determine whether states parties could refer specific cases—or only general situations—to the Court (Hall 1997, 181-182).

This issue was further discussed during PrepCom4. Article 23 of the ILC draft statute states that “no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security

⁴³ Of course, this particular issue could not be fully debated until the role of the Security Council was first determined.

Council already decides.”⁴⁴ Should the states parties accept this article then they would by default allow any perm-five member of the Security Council to have veto power over any Security Council resolution authorizing Court prosecution. There was also one final proposal to empower the Security Council with the ability to prevent prosecution for a twelve-month renewable period to allow for the Security Council to further investigate the situation (Hall 1998a, 151).

While the debate within the preparatory sessions mainly focused on the role of the Security Council as a trigger mechanism, other proposed trigger mechanisms were slightly less controversial. In the final Rome Statute, the Assembly of States Parties adopted a three-pronged trigger mechanism in which instances (or cases) can be brought before the Court. Specifically, the Rome Statute empowered the Court to act in three separate instances: first, when a State Party refers a situation to the Prosecutor,⁴⁵ second, when the Security Council (under Chapter VII of the Charter of the United Nations⁴⁶ and Article 16 of the Rome Statute⁴⁷) refers a crime to the Prosecutor; or, finally, when the Prosecutor⁴⁸ initiates a criminal investigation. Within this framework, the Security Council or a states parties could request the Prosecutor to initiate an investigation. However, the actual decision to initiate the investigation, and ultimately to bring the case before the Court, will be left to the discretion of the Prosecutor. Likewise, the Prosecutor, should there be enough evidence to warrant such action, may initiate their own independent investigation and ultimately even bring individuals to trial (thus the notion of the “independent prosecutor”).

⁴⁴ Cited in Christopher Keith Hall’s “The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an ICC,” *The American Journal of International Law*, volume 92:1998, 131.

⁴⁵ Article 14 allows a state to refer a “situation” not a case before the Court. Once a situation is referred to the Court then the Prosecutor will investigate the situation to determine if a person (or persons) should be charged with a crime.

⁴⁶ Article 13(b) empowers the Security Council to refer issues which fall under the realm of its mandate under Chapter VII of the United Nations Charter.

⁴⁷ Article 16 applies to the earlier discussion of the Security Council’s ability to delay investigation of certain crimes. Article 16 states: “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

4.2.2: State Positions

The trigger mechanism established by the Rome Statute did not meet with universal praise. In fact, just as in the debate surrounding the core crimes of the Court, the United States and Germany represented opposing sides of a very contentious debate. Germany feared that by not allowing for an Independent Prosecutor to have the ability to initiate investigations one would run the risk of having this “historic project watered down to the lowest common denominator. The result would be a very weak Court, without any authority of its own, which could only become involved when the States concerned or the Security Council made an exception to this effect.”⁴⁹ To this end, Germany argued that the relationship between the Security Council and the Court should be a limited one. Germany supported the Singapore compromise proposal⁵⁰ but “reject[ed] the view that the Security Council should be able to block prosecution only by dint of dealing with specific situations.”⁵¹ Essentially, then, the German fear is not that of a strong Court, but of one too weak to be productive.

Germany did not begin to take an active role in the debate surrounding the establishment of trigger mechanisms until PrepCom3. During PrepCom3 Germany began to indirectly discuss the role of the Security Council as a trigger mechanism. As discussed earlier, during PrepCom3 Germany began an intensive effort to include the crime of aggression as one of the core crimes of the Court. In doing so, Germany re-intensified the debate surrounding the role of the Security Council as ultimately aggression falls under the Security Council’s UN Charter mandate. (Hall 1998a, 120). While Germany did not take an active role in the formulation of the trigger mechanism of the ICC, it did present a compelling argument for limiting the role of the Security Council

⁴⁸ The procedure for the Prosecutor to initiate an investigation is outlined under Article 15 of the Rome Statute.

⁴⁹ This information is found in the German working paper on the “International Criminal Court: The German Position” UN Doc A/AC249/1998/DP.2.

⁵⁰ The Singapore proposal attempted to amend Article 23(3) of the ILC draft statute so that “no investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.” Non-Paper/WG.3/No.16, August 8, 1997.

⁵¹ This information is found in the German working paper on the “International Criminal Court: The German Position” UN Doc A/AC249/1998/DP.2.

as a trigger for ICC action. Germany's efforts, therefore, were aimed at securing and maintaining an independent, apolitical ICC.

The United States on the other hand argued that the Security Council should be the one of the sole trigger mechanism for the exercise of Court jurisdiction. The United States argued that under customary international law (namely Article 24 of the Charter of the United Nations), "the Security Council exercises primary responsibility for the maintenance of international peace and security."⁵² Therefore, it would only be logical that the Security Council would serve as the sole trigger mechanism for the Court.

Moreover, the United States feared that the three-pronged trigger mechanism established by the Rome Statute would add a highly political aspect to the functioning of the Court. Unlike the German argument, the United States maintained that the Security Council is no more political as a body than the individual states or the Prosecutor. Therefore, to argue on these grounds that the Security Council is too political unrealistically assumes that these other bodies are apolitical in nature.

Concern about the Security Council's role also rests—wrongly, in our view—on the premise that the Security Council is a political body, and its actions are therefore wholly suspect, while individual governments, and individual Tribunal staff, are objective, nonpolitical and reliable. Clearly, however, an individual government which could file a complaint against an individual with the Court is not only as political as the Security Council, it can be even more so.

On the other hand, because of its overall composition and responsibilities, the Security Council transcends the individual political views and agendas of each specific member. ...The Security Council can only act collectively and from that collective exercise emerges a more

⁵² From "U.S. Statement on the International Criminal Court at the Sixth Preparatory Committee on the Establishment of the International Criminal Court," 51st Session of the United Nations General Assembly given on October 31, 1996.

representative decision among member states representing all regions of the world.⁵³

Ultimately, a high degree of politicization may undermine the Court's ability to fulfill its mandate. But, beyond simply concern over the politicization of the Court by a trigger mechanism other than the Security Council, the United States (along with a number of other nations) feared that allowing the Prosecutor the ability to initiate investigations independent of states could potentially threaten the institution of state sovereignty. However, the US did argue that the Prosecutor should be independent in that once the Security Council refers a situation, the Prosecutor should be able to determine if a case and formal charges should be filed.

Another key element of the three-pronged trigger mechanism is that of state referral. The United States argued that while it was important to allow states to refer certain situations to the Court, "allowing a state unfettered discretion to launch cases against another state regardless of whether the resulting international prosecution would be necessary or effective, has even greater potential for political misuse."⁵⁴ Again, the US argued that the assumption that the Security Council should not be used as a trigger mechanism on the basis that it is too political of a body erroneously assumes that the two other trigger mechanisms are in some way less political in nature.

The United States, during PrepCom1, spoke in support of the Security Council as one of the trigger mechanisms of the Court. However, the US—as well as the other permanent members of the Security Council—argued that the ICC should not be allowed to investigate or prosecute any situation or case currently under investigation by the Security Council. This is a particularly important point in that it reaffirms the role and power of the Security Council as "the" body charged with securing and maintaining international peace and security. In other words, the Security Council and the ICC cannot

⁵³ Ibid.

⁵⁴ Statement by Jamison Borek, Deputy Legal Advisor to the United States Department of State on Agenda Item 142: Establishment of an International Criminal Court to the Sixth Committee of the United Nations General Assembly, 50th Session.

simultaneously investigate situations without the prior consent of the Security Council. This then potentially empowers the Security Council with actively “investigate” situations that it does not wish the ICC to investigate and thus, for all intents and purposes, the Security Council would be able to take certain situations out of the reach of the Court (Hall 1997, 181-182).

Another major aspect relating to the ICC is whether the trigger mechanisms can refer specific cases or merely certain situations (Hall 1997, 182). While there is potentially a very fine line between a “case” and a “situation,” there is a very important implicit assumption behind each. The concept of referring a particular case implies that some sort of investigation, whether it be limited or in-depth, has already taken place and that there is enough evidence to warrant a case and thus an arrest or indictment. However, should a state refer a “case,” then the state must have been the body initiating the investigation and gathering evidence. The US argued that what would be more effective is for the Security Council and states themselves only to be able to refer particular incidents for investigation by the ICC. The Prosecutor would then determine whether the incident warranted investigation and to ultimately level charges against suspects. In other words, to preserve the independence of the Court, only instances should be brought before the Court for investigation. Should there be enough evidence to bring the case to trial, the Prosecutor, not the Security Council or the states would make that determination.

During PrepCom4 the United States reaffirmed the role of the Security Council to serve as the *only* trigger mechanism for the crime of aggression (as defined under Chapter VII of the United Nations Charter dealing with breaches in international peace and security). The US supported Article 23(2) of the ILC draft statute that a “complaint concerning an act of aggression could not be brought [before the Court] unless the Security Council ‘has first determined that a State has committed the act of aggression which is the subject of the complaint’” (Hall 1998a, 131). However, as I mentioned in the discussion of core crimes, the United States pointed out that one concern with including crimes of aggression under the jurisdiction of the Court is that such crimes tend

to be ones committed by states, not by individuals. And, as the ICC focuses on the individual—not the state, then the Security Council would almost assuredly be the sole trigger mechanism for crimes of aggression.⁵⁵

Perhaps the most interesting effort to protect the role of national prosecution came from the United States during PrepCom6. The US introduced a proposal that would define the powers of national judicial bodies to investigate matters that the ICC had begun to investigate. Specifically, the Court would have an undetermined number of days to notify all interested states that it had begun an investigation. At this point, the individual states could, should they choose, request a deferment of the ICC’s jurisdiction for six months or a year in order to initiate or continue their own investigation. The only requirement would be that the Prosecutor could request periodic updates as to the progress of the state to ensure that an appropriate and timely investigation was underway (Petrasek, 552). This particular proposal would then more concretely identify the ability of the national courts to first attempt to investigate a situation and leave the situation to the ICC only when the national judicial system is either “unwilling or incapable” of instituting its own investigations.

4.3: Evaluating State Sovereignty vis-à-vis the Court

Previous chapters developed a set of criteria for evaluating sovereignty and presented an argument as to why sovereignty should be conceptualized as an institution rather than a fixed concept with no possibility of change. I also provided a brief overview of the basic structures of the ICC and explored two key elements of the Court—the trigger mechanism and the core crimes. Each of these elements is argued to empower the Court in such a manner as to provide it with the potential of eroding the sovereignty of states. The task then is to analyze these two elements of the Court vis-à-vis using the criteria for evaluating sovereignty and what we know about sovereignty as an institution.

⁵⁵ However, the potential dilemma is if crimes of aggression, which are yet defined under the Rome Statute, are defined in such a manner as to make them easily committed by individuals, then the role of the Security Council would be questioned. If an individual can commit crimes of aggression, and if the UN Charter

To this end, I will examine each criterion for evaluating sovereignty independently and analyze the likely impact of trigger mechanisms and core crimes.

The first criterion for evaluating a change in the institution is that there is a change in the authority empowered to recognize sovereignty (Thomson 1995, 229). In order for there to be a change in sovereignty with regards to this criterion, a non-state entity must be legitimately empowered with the ability to recognize sovereign agents. Moreover, the argument could be made that if a non-state actor is empowered to “grant” sovereignty to other actors, then those who are granted the status of a sovereign entity need not necessarily be a state.

In terms of the issue of core crimes, it would be difficult to imagine that defining what crimes the Court can have jurisdiction over would in any way erode the power of the state. However, it could be argued that in some way the state would no longer have jurisdiction or power over these areas. This, of course, is not accurate in that the Court may only act when the state is unwilling or incapable of providing fair, accurate investigations and trials involving these crimes. Moreover, the Court is limited to the specific core crimes and may exercise jurisdiction to no others. But, perhaps most importantly, states themselves voluntarily enter into a treaty to join the Court. The ICC does not possess universal jurisdiction and thus only treaty states would be subject to the jurisdiction of the Court.⁵⁶ Also, only the Assembly of States may determine if (and which) new crimes should be under the jurisdiction of the Court. The member states then have the power to voluntarily change the jurisdiction of the Court, but this in no way empowers the Court to determine which international actors are to be sovereign and which are not.

The trigger mechanism also seems to pose little threat to the institution of state sovereignty with regards to empowering the Court to determine which states are

only privileges the Security Council to determine acts of aggression committed by states, then should the Security Council be the only appropriate trigger for such crimes.

sovereign and which are not. To even assume the Court would have the power to determine or bestow sovereign status on any international actor seems to stand in stark contrast to the facts of the Court. The focus of the Court is not to reprimand and punish individuals for egregious violations of humanitarian law. The focus then is the individual, not the state. As such, it would seem improbable that the Court would possess any ability to judge or determine the “sovereignty” of any actor when the only actors within the international system that are sovereign are states—and states themselves are by definition outside the jurisdiction of the Court. The only time when the jurisdiction of the Court might arguably be applied to the state would be if the Security Council, as a trigger mechanism, determined that a state had committed an act of aggression and thus the Court would have the jurisdiction to investigate the situation. However, even here the aim of the Court is not to punish the state but to hold responsible those particular individuals who committed the crimes.

The second criterion for evaluating a shift in sovereignty would be “the diffusion of meta-political authority to alternative institutions (e.g., religious organizations, transnational corporations, international institutions) whose membership would be exclusively non-state actors” (Thomson 1995, 229). Recall that meta-political power implies the power to determine what is “political” and thus what is under public interest. Generally, the “public interest” is secured and protected through law. Historically the law came through empyreal dogma, the decrees of kings or through the legislative bodies of states. There is no need to assume that states are the only governing structures capable of creating and enforcing law. The question then becomes whether or not the Court could assume this degree of power.

Neither the aspect of core crime nor the trigger mechanisms seem to empower the Court with meta-political power. The Court could arguably possess a limited degree of meta-political power should the core crimes so ambiguously defined that the Court could change at will what actions were deemed to violate what constitutes the core crimes.

⁵⁶ Universal jurisdiction is only possible with the exception of the Security Council referring a situation in which a crime of aggression has occurred. However, the Security Council is not granted with this universal jurisdiction because of the ICC, rather, this power is granted through the Charter of the United Nations.

However, with regard to every crime except for that of aggression, the specific actions that qualify as a crime clearly and explicitly defined under the Rome Statute. Furthermore, the Court does not determine what constitutes an act of aggression; rather the Security Council does. Of the two, then, the Security Council—not the ICC—would be the only body that could possess some limited degree of meta-political power.

For a moment, however, let us assume that the core crimes of the Court were intentionally vague in order to give the Court the ability to determine which actions would fall under its jurisdiction. Even if this were the case, it would not meet the second requirement of this criterion—that the institution’s (the Court) membership be entirely non-state actors. While the judges are to be impartial, they are nominated and selected by the Assembly of States Parties whose membership is entirely state actors. Therefore, states ultimately determine which crimes will fall under the jurisdiction of the Court, how those crimes will be defined and who will serve as the judges and administration of the Court. In every way possible, then, states are the power behind the Court and ultimately control the Court (even through the ability to remove judges). Therefore, even if the Court possessed meta-political authority, that authority would not be vested in an institution that was separate and independent from states themselves.

The third criterion for a change in sovereignty would be the “state’s loss of its monopoly on coercion” (Thomson 1995, 229). The trigger mechanism of the Court cannot offer a real threat to the state’s monopoly on the power of coercion. States may be limited by certain actions through the impact of treaty law—however, these are laws that (presumably) the states have voluntarily signed and ratified. Therefore, the state is not necessarily losing its power of coercion but willingly accepting certain limits to the actions now deemed legitimate. This same idea can be expressed through international customary law in that the Society, through consensus, no longer deems certain actions as appropriate state behavior and thus tries to dissuade states from engaging in such behavior. However, even in this case the state is not forbidden from partaking in certain acts—merely the state will choose not to engage in such activities based on the knowledge that they are deemed unacceptable by the Society.

The aspect of core crimes certainly does limit the range of activities that an individual can undertake. In particular, an individual cannot engage in crimes against humanity, aggression, war crimes or genocide. However, these crimes are all illegal under international customary or treaty law and thus it is not the Court or the jurisdiction of the Court which limits individuals from acting in these manners, but international law itself. Furthermore, were the Court not present, the Security Council is empowered to establish ad-hoc criminal tribunals (such as the ones in Rwanda and Yugoslavia) to investigate and prosecute such crimes.

I would like to spend a moment further discussing to critical points. Again, the Court can only prosecute and investigate the actions of individuals, not states and thus only the individual's ability to act in certain manners is really at question when examining the Court. Also, and this is a point which cannot be stressed enough, the state is not losing its monopoly on the power of coercion. The Court lacks any independent coercive capabilities. The Court does not possess a police force, a prison system or any sort of enforcement powers above and beyond the assistance in these matters granted by the states. Should the Court erode the states' monopoly on the power of coercion, then the Court itself would have to fill the vacuum by obtaining an alternative system of coercion which could compete with the state. However, this alternative structure is lacking.

The fourth element for evaluating a change in state sovereignty would be the "deterritorialization of state authority claims" (Thomson 1995, 229). The trigger mechanism of the Court poses no threat to state authority claims. However, the issue of core crimes can present a potential problem. Under international law, states themselves have universal jurisdiction over war crimes, crimes against humanity and genocide (Petrasek, 550). Therefore, it would appear that under international law—at least with regards to these three crimes—state claims have been deterritorialized in that the authority claims of states can go beyond the state's borders. However, the Court is not empowered with the same universal jurisdiction that states possess. Thus, the Court's authority claims are limited to the territory of member states, while the authority of all

states (with regards to all core crimes minus aggression) is universal and borderless. With this in mind, it is inaccurate to assume that the authority of the Court actually deterritorializes state authority claims above and beyond the amount of deterritorialization of authority claims that already exists.

As the core crimes and the trigger mechanism of the Court fail (at least based on this set of criteria) to initiate a change in the institution of state sovereignty, then can we begin to conceptualize what impact the Court will have? We can begin to address this question if we look again at sovereignty not in a static form but as an institution. Recall that institutions create horizontal linkages and possess a degree of vertical depth.⁵⁷ We can conceivably examine the ICC as a horizontal linkage and the core crimes (and the international customary and treaty law behind them) as a representation of vertical depth. The core crimes were forged through international law and serve as a direct relationship between the individual and the state as a certain set of actions that the state (and the individual) will not engage in. Depth would be defined then as a level of commitment of states as to the legitimate set of actions between a state and the citizenry normalized through international humanitarian law. As such, the ICC then functions as a horizontal link among states to symbolize this depth of humanitarian commitment by creating an institution which will preserve the depth that states have already established.

Another aspect of institutions is that they create “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations.”⁵⁸ In essence, then, the ICC functions as an institution created by states in order to harmonize and normalize behavioral roles in the humanitarian realm that have already been established by the Society. The ICC is not a rule making institution but a harmonizing body aimed at constraining activities that states themselves have already deemed unacceptable to be performed by either individuals or states. Therefore, one should not look at the ICC as a threat to state sovereignty but as an organization whose

⁵⁷ The greater the degree of vertical depth and the higher the number of horizontal linkages, the stronger the institution will be.

⁵⁸ This definition of institutions is taken from Robert Keohane’s “The Demand for International Regimes” and is cited in Andreas Hasenclever, et al.’s, Theories of International Regimes.

aim is to preserve the norms and standards manifest in the present development of the institution of state sovereignty.

5: Conclusion

The recent debate surrounding the establishment of the International Criminal Court mimics the debate that surrounds all international organizations—namely, will the organization impede on the national sovereignty of states. “Senator Jesse Helms has led this charge, arguing that the country must be ‘wary of turning the sovereignty of the United States in the slightest degree to a world court or any other tribunal by any other name.’”⁵⁹ While there is a good deal of commentary as to the perceived impact of these types of international organizations, little effort has been made into systematically approaching the relationship between international organizations and the concept of sovereignty. Until more such efforts are made, the veil of sovereignty may be used to hinder any efforts at creating harmonizing institutions that will aid in protecting basic, internationally recognized human rights.

The first obstacle to such a study is coming to terms with the concept of sovereignty and framing the definition in such a manner as to create a set of criteria with which to apply the term. To this end, I borrowed from the work of Krasner and Thomson to create an institutional perspective on sovereignty—one that allows for more flexibility in the concept and more adequately reflects the real world dilemmas associated with the term. The institution of sovereignty then can be defined as “the recognition by internal and external actors that the state has the exclusive authority to intervene coercively in the activities within its territory” (Thomson, 1995:219).

Once an adequate definition of sovereignty is created, the second major obstacle is to somehow apply this abstract notion of sovereignty to the real world dilemmas associated with state cooperation, power and institutions which so often sovereignty is argued either to threaten or preserve. My efforts here were to apply the criteria of sovereignty to the International Criminal Court in order to evaluate the potential impact of the Court on the institution of state sovereignty. In particular, I focused on the two

major aspects of the Court that state leaders and policy makers alike argued would erode the power of state sovereignty—the trigger mechanism of the Court and the core crimes. In the end, I found that, based on the criteria established, the ICC does not pose a viable threat to the institution of state sovereignty.

The Court is not an actor functioning in total independence of states. If anything, the entire basis of the Court is intimately related to states and to the legacy of international legal development that states themselves created. The Assembly of States Parties (whose membership is composed entirely of states) nominates and selects the judges of the Court, establishes crimes under the Court’s jurisdiction, determines the trigger mechanisms of the Court, and created the international humanitarian law regime that is the very foundation of the Court. Furthermore, the Court itself lacks any enforcement or coercive capabilities independent from those obligated by state parties. Thus, while the Court is independent in its judicial process—the assumption that the Court is wholly independent from the will, desire and power of all states stands in contrast to the very nature and structure of the Court.

State sovereignty is a cumbersome subject—more political than it is legal. However, the concept of state sovereignty is often used as a means by which to prevent the establishment or empowerment of any effective international regulating regime. By rationally evaluating what sovereignty can mean, not simply how the term has been historically used, we may be able to assuage some fears as to the impact of organizations such as the ICC.

The present work aimed at fostering a new round of debate as to the impact of international legal regimes on the institution of state sovereignty. However, the analysis should be appropriately expanded to all types of international harmonizing regimes such as the World Trade Organization, the International Atomic Energy Agency and even the European Union. Perhaps the most interesting results from such an investigation would

⁵⁹ Senator Jesse Helms from the 140 Congressional Record S96-01, S101 (daily edition January 26, 1994) quoted in Paul Marquardt’s “Law Without Borders: The Constitutionality of the International Criminal Court,” Columbia Journal of Transnational Law 33:73, 142.

be discovering why these latter organizations have received such a generally high degree of support from states while the ICC has created such contention. It would be intriguing to explore the inherent differences between these organizations and their impact on the institution of sovereignty and compare that to the ICC. Perhaps understanding these differences would help to shed light on our internal perceptions of what sovereignty is and the appropriate role of sovereignty in the international realm. Yet, whatever those perceptions may be, the need to harmonize the human rights policies of states within the Society may prove too important an issue to allow nation-states to plead the defense of national sovereignty.

Bibliography

- Bartelson, Jens. *A Genealogy of Sovereignty* Cambridge: Cambridge, 1995.
- Brown, Robert. "Sovereignty in the Modern Age," *Canada-United States Law Journal* 20:267 (1994) : 273-296.
- Bull, Hedly. *The Anarchical Society: A Study of Order in World Politics* New York: Columbia, 1977.
- Caporaso, James ed. *The Elusive State: International and Comparative Perspectives*. Sage: Newbury Park, 1989.
- Carter, James. "International Criminal Court," *The International Lawyer* 29:2 (1995) 300-304.
- Clark, Roger and Madeleine Sann. *The Prosecution of International Crimes*. New Brunswick: Transaction, 1996.
- Crawford, James. "The ILC Adopts a Statute for an International Criminal Court," *The American Journal of International Law* 89 (1995) : 404-416.
- Fowler, Michael Ross and Julie Marie Bunck. *Law, Power and the Sovereign State: The Evolution of the Concept of Sovereignty* University Park: Penn State Press, 1995.
- Hall, Christopher Keith. "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court," *The American Journal of International Law* 91 (1997) : 177-187.
- Hall, Christopher Keith (a). "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court," *The American Journal of International Law* 92 (1988) 124-133.
- Hall, Christopher Keith (b). "The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court," *The American Journal of International Law* 92 (1998) : 331-339.
- Harf, Barbara. *Genocide and Human Rights: International Legal and Political Issues*. Denver: Graduate School of International Studies, University of Denver Press, 1984.
- Janes, Alan. *Sovereign Statehood: the Basis of International Society*. London: Allen and Unwin, 1986.

- Jamison, Sandra. "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," *Denver Journal of International Law and Policy* 23:2 (1995) 419-457.
- Klein, Robert. *Sovereign Equality Among States: the History of an Idea*. Toronto: Toronto, 1974.
- Krasner, Stephen D. *International Regimes*. Ithica: Cornell, 1983.
- Krasner, Stephen D. *Structural Conflict: The Third World Against Global Liberalism*. Berkeley: University of California Press, 1985.
- Krasner, Stephen D. "Sovereignty: An Institutional Perspective." In *The Elusive State: International And Comparative Perspectives*, edited by James A. Caporaso. Newbury Park, California: Sage, 1989.
- Krasner, Stephen D. "Pervasive Not Perverse: Semi-Sovereigns as the Global Norm," *Cornell International Law Journal* 30 (1997) : 651-680.
- Lugo, Luis, ed. *Sovereignty at the Crossroads?* Lanham: Rowman, 1996.
- Marquardt, Paul. "Law Without Borders: The Constitutionality of an International Criminal Court," *Columbia Journal of Transnational Law* 33:73 (1995) : 73-148.
- Meisels, Adrienne. "Special Agreements in the Post-Cold War Era," *Fordham Law Review* 64 (1995) : 199-245.
- Miller, J.D.B. and R.J. Vincent. *Order and Violence: Hedley Bull and International Relations* Oxford: Clarendon, 1990.
- Oppenheim, L. *International Law: A Treatise, Volume One: Peace*. New York: David McKay Company, 1955.
- Qassim, Ali. "Tyrants on Trial," *New Internationalist* 298 (1998) : 15-17.
- Pejic, Jelena. "What is an International Criminal Court?" *Human Rights Fall* 1996 : 16-17.
- Petrusek, David. "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court," *The American Journal of International Law* 92 (1998) : 548-563.
- Peter, Mathew. "The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction that Threaten the Establishment of an Effective Court," *Syracuse Journal of International Law* 24:177 (1997) : 177-197.

- Rosenau, James and Ernst-Otto Czempiel. *Governance Without Government: Order and Change in World Politics*. Cambridge: Cambridge, 1992.
- Sorell, Tom ed. *The Cambridge Companion to Hobbes* Cambridge: Cambridge, 1996.
- Soroos, Marvin S. *Beyond Sovereignty: the Challenge of Global Policy*. Columbia: University of South Carolina Press, 1986.
- Spruyt, Hendrik. *The Sovereign State and Its Competitors: An Analysis of Systems Change*. Princeton: Princeton, 1994.
- Thomson, Janice. "Sovereignty in Historical Perspective: The Evolution of State Control Over Extraterritorial Violence." In *The Elusive State: International And Comparative Perspectives*, edited by James A. Caporaso. Newbury Park, California: Sage, 1989.
- Thomson, Janice. "State Practices, International Norms, and the Decline of Mercenarism," *International Studies Quarterly* 34 (1990) : 23-47.
- Thomson, Janice. *Mercenaries, Pirates, and Sovereigns* Princeton: Princeton, 1994.
- Thomson, Janice. "State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research," *International Studies Quarterly* 39 (1995) : 213-233.
- Tivey, Leonard. *The Nation-State: the Formation of Modern Politics*. Oxford: Martin Robertson Press, 1981.
- Waltz, Kenneth. *Theory of International Politics*, Reading: Addison-Wesley, 1979.
- Warrick, Thomas. "Organization of the International Criminal Court: Administrative and Financial Issues," *Denver Journal of International Law and Policy* 25:2 (1997) 333-395.
- Wexler, Leila Sadat. "The Proposed Permanent International Criminal Court: An Appraisal," *Cornell International Law Journal* 29 (1996) 665-726.
- Wight, Martin. *Systems of States*. London: Leicester University Press, 1977.
- Wright, Quincy. *A Study of War* Chicago: Chicago, 1942.
- Yee, Sienho. "A Proposal to Reformulate Article 23 of the ILC Draft Statute for an International Criminal Court," *Hastings International and Comparative Law Review* 19 (1996) : 529-537.

Figure 1. Evaluating Sovereignty

1. A change in the authority empowered to recognize sovereignty.
2. The diffusion of meta-political authority to alternative institutions (e.g., religious Organizations, transnational corporations, international institutions) whose Membership would be exclusively non-state actors.
3. The state's loss of its monopoly on coercion.
4. The deterritorialization of state authority claims.

From Janice Thomson's "State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research." *International Studies Quarterly* (1995) **39**, 213-233. Please note that I took the liberty of changing the title from Thomson's original "measuring sovereignty" to "evaluating sovereignty."

Appendix A

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Appendix B

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or

damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human

body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted

court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific

experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Curriculum Vita

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I received my MA in Political Science from Virginia Polytechnic Institute and State University in the Spring of 1999. I graduated with a 3.9 GPA. My focus within the program was international relations theory and international organizations and regimes. During the time at the university I participated in the Midwestern Political Science Association where I presented a paper entitled "Harmonizing Human Rights: International Customary Law, State Sovereignty and the Development of the International Criminal Court."

I received my BA in Political Science from Virginia Commonwealth University in Richmond, Virginia in May, 1997. I graduated Magna Cum Laude with a GPA of 3.8. During my time at Virginia Commonwealth University I minored in International Studies and participated in multiple student research conferences.