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**Security in Transition: The True Meaning of the International Criminal Court**

by

Golnaz Vakili

A Major Paper  
Submitted to the Faculty of Graduate Studies and Research  
through Political Science  
in Partial Fulfillment of the Requirements for  
the Degree of Master of Arts at the  
University of Windsor

Windsor, Ontario, Canada

2006

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ABSTRACT

Since the Second World War, the international community has pursued measures to suppress global crime through treaties and ensure the prevention of such crimes. It was the birth of human rights movements which developed throughout world politics and continues to expand their scope into the formal recognition of human rights. This article is concerned with the evolution of a universal international security perspective which involves a universal phenomenon that is allowing global systems of international relations. One of the main objectives of this paper is to discuss the

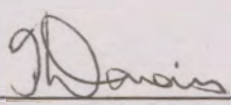
**Security in Transition: The True Meaning of the International Criminal Court**

involved in the current approach to international law and the role of the International Court of Justice. However, it is concluded that the benefits and significance of the global collaboration and cooperation that is needed to ensure a more peaceful world.

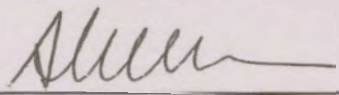
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19 September 2006

## ABSTRACT

Since the Second World War, the international community has pursued measures to safeguard civilians from certain threats and ensure the protection of basic human liberties. It was the birth of human rights movements, which developed throughout several decades and continues to expand, that slowly led to the formal recognition of human security. This shift is recognized, in theoretical terms, as a movement from realist security perspectives to the creation of a universal phenomenon that is altering standard practices of international relations. One of the most significant changes has been the development of the International Criminal Court (ICC), which has created a jurisdiction above that of nations, and independent from any organization. The United States has launched an aggressive opposition campaign and has sought to undermine the Court to protect its power. However, it is overlooking the benefits and significance of the global collaboration and cooperation that is produced within such an unprecedented movement.

## DEDICATION

Thank You,

To My Loving Parents:

For always teaching by example the desire to learn, the determination to persevere, and the will to succeed. Words cannot describe my sincerest gratitude for the most valuable education in life. I love you.

To My Brother:

So different and yet so alike, the trick is to keep learning from each other. It's all the music that got me through, thanks buddy.

To Mehdi:

The never wavering cheers, sometimes from the sidelines, and sometimes along side, but always there believing when I didn't. I learn from your patience, and I learn from your strength, but most of all I learn from your faith that it will all eventually lead to one end.

To Daniela and Azra:

Three is never a crowd with you guys. You made the time and the place all the more pleasant with you friendships and generosity. It's thanks to you two that this education has become a cherished memory and your friendships a valuable part of my life. Late night, fast food and coffee will never feel the same to me!!!

## ACKNOWLEDGEMENTS

I am thankful to a number of people who have, each in their unique way, guided me throughout this research and writing process. First and foremost, the support of my family and my loved ones has been monumental in providing the will, when there was none, to continue writing well into the early morning hours. I would also like thank my supervisor, Dr. Abdul Sidahmed for overseeing my progress and going through countless copies of the same paper – I know it must have been very exciting! The commitment and the patience were instrumental in the completion of the paper. I would also like to extend my gratitude to my second reader, Dr. Timothy Donais, for contributing his time, which is all the more precious now, and for noticing the optimism that I felt in writing this paper.

I am thankful for this opportunity to work on a topic that I feel strongly about, but it could not have happened without the wonderful support network that I am grateful to have. Many of the obstacles I have faced became surmountable because I have special individuals in my life, and for each one of you I thank the powers that be. The experience I gained and the friendships I made will never be forgotten, and will always be looked upon fondly.

*how very close is your soul with mine  
i know for sure everything you think  
goes through my mind*

Rumi

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## Introduction

Security studies cannot be characterized as a stagnant field, and this has become increasingly apparent in the past several decades. The nature of the global atmosphere has been in the midst of what can be described as one of the most important shifts in recent history, affecting political and social interaction at a global level. The days of isolationist policies, those solely conscious of national interests and domestic repercussions, are slowly fading. Thus, there has been a gradual shift in increasing expectations of cooperation as a means of ensuring, at the very least, a reasonably precarious world peace. Certainly the events of the twentieth century shook modern consciousness, calling for an acknowledgment that the individual is the most fundamental element of society and must be protected as such. In other words, it is only through the individual that the state acquires any meaning or legitimacy. Consequently, the international community has recognized that the perpetration of heinous crimes against humanity can no longer be tolerated due to the magnanimity of the repercussions such violence breeds.

Finally, despite numerous interruptions to progress, the result of decades of struggle is coming to fruition as accountability for human rights becomes embedded in the field of international relations. The efforts originally began with an awakening to the fact that states cannot continue to abuse their own citizens just because they have the power; rather, people's basic needs must be treated with respect. Country leaders and political actors were gradually moving away from traditional international relations practices, and were beginning to forge a new path for the future of the world. While attempting to create an atmosphere that would not facilitate another scenario like World



War II, the leading nations of the world had began establishing international organizations. These agencies were created with the intent to share the burden of reconstruction after the war, as well as generate greater tendencies for cooperation. Those nations wielding the most power at the end of the Second World War recognized that a war, of the magnitude that they had witnessed, impacts almost all players in a negative manner. A poor international community is not easily amenable to profitable trades, while a stable global atmosphere allows more liberal spending since the money is not invested in warfare. Throughout the years, international institutions were made all the more effective due to the benefits provided by technology, allowing interaction to a much higher degree than any other time in history. Of importance at this juncture is the fact that globalization has played an instrumental role in aiding the development of human rights. However, absent the interdependence that this 'humanitarian' movement has created, accountability would not be achievable. This paper does not argue that current measures are flawless, but that the significant steps that have been taken in the right direction should not be ignored. The institutions and organizations that have formed since the advent of the United Nations are gradually becoming more refined, and consequently gain more power. It is vital to understand that the world is moving towards uncharted territories, while simultaneously challenging state leaders to alter the boundaries of an ancient and sacred political tenet: sovereignty.

The advent of international rights and notions of cooperation suggest that there is a recent trend away from realism and towards universalism. Institutions like the International Criminal Court (ICC) are certainly making significant headway towards an accountable global society. The aim of this paper is to highlight the importance of an

institution such as the ICC to the achievement of human security in light of the powers granted to this Court. This paper suggests that if threats to human security include the threats posed by governments, as well as non-state actors, and if such threats are universal in nature, then it stands to reason that there is a need for authority to prevent and/or prosecute the perpetration of heinous crimes; and such authority should be universal in nature as well. The International Criminal Court fulfills this very criterion. In fact, the merging of human rights and human security, as well as the importance of these concepts to the global community, is manifested through the inception of the ICC. It is the essence of creating universal standards that are inescapable, fortifying the belief that the safety of individuals trumps all other considerations.

The constant evolution of human rights has prevented the global community from turning a blind eye to the injustices perpetrated throughout the world, and is continuing to enforce basic principles of humanity on the international scene. What began as an attempt from state leaders to ensure stability within borders as a means of securing the nation, turned into a cycle continuously gaining strength. The creation of organizations acting independently of governments signalled the inclusion of civilians into political arenas, coupled with the advancement of technology, facilitated the virtual inclusion of many more people. The populace began gaining strength in numbers, and politicians found themselves having to heed the desires of the masses. As such, the significance of adhering to human rights began manifesting itself in positive forms, and human rights developed into a much more complex and broader theory, that of human security.

While many hail the Court as a much-needed deterrent for heinous crimes, it still remains contested by a few nations including the world's sole remaining superpower. It

is thus imperative to examine the central features of ICC, as well as the effect of American opposition on the efficiency and credibility of the Court as a tool for promoting human security. Issues of sovereignty are preventing the full participation of certain countries, as they are wary of being on the receiving end of international institutions, instead of being at the helm. Among other countries, there is a tendency for the United States to prevent the sharing of power in order to maintain its position as influential actors, often using might when reason fails. The efforts of some political actors to cling to traditional methods are countered by the sweeping effects of globalization that influence economic trade, social values, and technology. The ease with which information can be traded and communication effectuated provides considerable incentive for many nations to enjoy cooperation with their counterparts. However, the United States (US) still insists on operating unilaterally for self-serving interests, fearing that too much cooperation will reduce their dominance on the international stage. It is unfortunate that the American administration has undertaken such a strong campaign to undermine the Court and hurt innocent citizens in its efforts. In doing so, the United States is putting at risk many diplomatic relations and causing anger in the global community, which is increasingly growing weary of abiding by the superpower's demands.

Nonetheless, the face of the global community is changing and the challenges threatening its peace are changing in nature as well. Traditionally, the biggest threats to the peace of a country would come from the leader of another nation, and manifest itself through conflict. Presently, the types of political actors have multiplied, and can come in many shapes and forms. Citizens have gained a more powerful voice through

organizations centered on the advancement of particular causes. On the other hand, citizens have also gained access to deadlier weaponry and the commission of terrorism across continents has been facilitated by technological advancements. It is undeniable that individuals are becoming more assertive in the contemporary era, whether through positive means or negative ones, and the political climate must accommodate such a change.



## Chapter One: Shift in Security Studies

That the world and the people within it are evolving is confirmed by the continuous spectrum of changes that drives humanity forward. Indeed, even in the early stages of the twenty-first century, there is evidence of shifts taking place at the global level that will ultimately shape the future of international relations. A particular concern for state leaders has always been the security of their own nation, considered the essential prerequisite to power and independence. Historically, sovereignty and strong defence systems were recognized as key elements of state security; a view premised on the theory that state autonomy is sacred and must be preserved at all cost. However, developments over the past several decades have resulted in a gradual transfer of attention towards an emerging, and increasingly important, view that human security is essential to establishing national security. The movement can be attributed, in part, to the quick development of transportation and communication technology. This has, in turn, contributed significantly to the movement of people and goods across borders, as well as the creation of a network of interdependent economies. As a result, the security of one nation is increasingly dependent on the security of other nations. Many scholars agree that the shifts in security studies must also account for the changing role of sovereignty, which has created an impediment to the participation of certain states.

Traditional notions of security derive meaning and focus from a realist perspective of international relations that prioritizes the protection and preservation of state sovereignty, often through military might. The realist framework that dominated international relations for centuries viewed the state as the major actor, the referent

object, in the global arena, while placing great significance on territorial borders.<sup>1</sup> There was noticeable reluctance by the global community to bother with the domestic issues of countries, such as the treatment of people within nation-states. In fact, diplomatic alliances generally viewed such intrusion as a clear infringement on autonomy and power.

There is a limitless power struggles ... but what drives it is not an appetite for power in the human animal, but a search for security that is forced by the anarchic structure of the international system.<sup>2</sup>

In this light, the international arena has largely been defined by the absence of overarching leadership, meaning that ultimate power rests with the state and nothing can rise above its supremacy. "If units are sovereign, their system of association must be anarchy, and if the system is anarchic, its members must reject overarching governments."<sup>3</sup> Consequently, one can devise two broadly categorised options for the global community: anarchy or world government. Scholars, however, caution that neither category will necessarily remove the issue of security from the international agenda. Rather, it is suggested that the ultimate decision lies in choosing between these two varied systems of security.<sup>4</sup>

Academics that subscribe to realism, and its subcategories, suggest that the virtues of anarchy are too strong to warrant a change in the system. The reasoning behind their argument is that since "it is only the form, and not the problem", it is not an optimal

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<sup>1</sup> John Garnett, "Strategic Studies and its Assumptions," Contemporary Security Strategy I (1987): 1-12.

<sup>2</sup> Glenn H. Snyder, "Mearsheimer's World – Offensive Realism and the Struggle for Security," International Security 27, no. 1 (2002): 151.

<sup>3</sup> Barry Buzan, "Security and the International Political System," in People, States, and Fear: The National Security Problem in International Relations, ed. Barry Buzan (Boulder: Lynne Rienner, 1991), 146.

<sup>4</sup> *Ibid.*

outcome to alter the existing structure.<sup>5</sup> Moreover, since anarchy has been a successful system for a notable period of time, is already embedded into the fabric of the system, and offers a great deal of diversity, its eradication will not resolve insecurity dilemmas.<sup>6</sup> These scholars further suggest that an anarchic system in the global arena provides the sufficient checks and balances necessary to prevent extreme insecurity from sweeping the entire international arena.<sup>7</sup> Additionally, even an anarchic world order requires the creation of organizations that facilitate cooperation. Such institutions are generally created by stronger states as a means of controlling weaker states, thereby establishing a hierarchic structure in the global community. As such, supporters of this 'self-help' world order consider that the maintenance of such organizations would involve relatively low cost while promoting better relations between member-states.<sup>8</sup>

An anarchic world order is said to be effective in that it provides efficient deterrents for violence through the imposition of military might, while creating an atmosphere of cooperation amongst countries that are continuously attempting to serve their national interests. However, the absence of a central authority also means the absence of an independent administrator to make final decisions and to whom complaints can be made or appealed. As a result, multilateral agreements and international organizations begin to regulate certain areas of state behaviour. The extent of the authority granted to such an organization is largely dependent on the level of power and control its members wish to bestow upon it, notably without a set of mechanisms to enforce compliance. Accordingly, states must partake in negotiations, testing each

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<sup>5</sup> Ibid, 149.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Kenneth Waltz, "Anarchic Orders and Balances of Power," in Theory of International Politics, ed. Kenneth Waltz (New York: McGraw-Hill, 1979), 111.



other's limits and thus shaping the situation as it progresses.<sup>9</sup> Clearly, an exchange of considerations occurs whereby each negotiating party attempts to secure its own interests to the best of its abilities, and will continue to promote such individualistic interests. The assumption within this framework is that defection from an agreement can result in the use of force, which remains unregulated for the most part.<sup>10</sup> In the anarchic scenario, as strictly defined by a lack of central leadership, struggles between the powerful emerge and collectively dominate a system that is comprised of weaker states.<sup>11</sup> The security issues that arise in this setting include the possibility of external intrusion into domestic affairs, which is often met with hostility and contempt. As well, there is the likelihood that increased violence will emanate from citizens that feel demeaned through foreign presence and the local government will be powerless to exert control over its population.<sup>12</sup> Undoubtedly, weaker states become pawns in the games of stronger states, and are often left at a serious bargaining disadvantage due to their lack of military capabilities. As such, the mere possibility of engaging in warfare with a significantly stronger opponent is not a preferred outcome, thereby pressuring less powerful nations to bend to the will of the powerful, and often act against their self-interest. This fact does not raise grave concerns for the scholars of realism, based on the idea that it is natural for the powerful to do as they please and, in turn, for the weak to submit as a means of ensuring their survival. Interestingly, there is very little importance granted to the welfare of individuals, as the importance of citizens is disregarded in favour of the security of borders. Inhabitants of a nation are, in fact, key contributors to the

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid, 113.

<sup>11</sup> Buzan, "Security and the International Political System," 148.

<sup>12</sup> Ibid.

maintenance of security, however realists view the actions of governments as the only point of interest.

The alternative to an anarchic system would be the establishment of a world government. Though it can be created with various levels of control, and be structured in a variety of forms, it would still inherently provide a forum to treat global issues in a similar manner as domestic problems. The concerns under this school of thought revolve around the distribution and concentration of power, as well as the amount of control exercised with this power.<sup>13</sup> The concept of world authority must necessarily negate the supremacy of governments, and focus on domestic affairs that may affect the welfare of large groups of individuals. This global authority is granted greater powers as a means of regulating matters in the administration of a country, in the event that abuse or improper control is exercised. This type of universal leadership has yet to be implemented, and thus there is a significant lack of empirical evidence available for data gathering. However, the negative backlash of an anarchic system has made itself increasingly apparent through the manifestation of uncontrolled violence, brought to international attention through the advent of technology. It is this technology that has facilitated the emancipation of many rights, made possible through the grouping of people with a commonly identifiable problem. It is the ease with which people throughout the world can garner support for a cause that empowers the needs of the citizenry as well as strengthens their voice.

Absolute security is impossible to guarantee due to the possibility that one actor may defect from convention and act inappropriately. As a result, anarchy does not necessarily provide the best forum to address the complex issues of the twenty-first

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<sup>13</sup> Ibid, 148.

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century.<sup>14</sup> Traditionally, governments were aware of the nature of their enemies and, since tensions were largely at the state level, it was only necessary to be wary of other state leaders. Contemporarily, the nature of political participation has altered dramatically, as groups of individuals have access to many of the same forums as governments do. Consequently, individuals present increasingly pronounced threats when their political opinions are manifested in the form of terrorism, especially so when such terrorists can gain access to weapons of mass destruction. Historic and current conflicts clearly indicate that anarchy does not provide the desired measure of security, as threats have changed since the advent of technology and the spread of globalization. In recent decades, the plight of the underprivileged has been gaining increased attention in political fields, including that of security. The inclusion of many non-government actors has helped to push human security towards the forefront of the international agenda, as a serious threat to the development and stability of the global community. In fact, the development of human rights must be simultaneous with the development of human security, as they are most complete when treated as mutually inclusive.<sup>15</sup>

Certain academics suggest that the notion that ‘there cannot be security in the absence of authority’ is very telling in the contemporary era.<sup>16</sup> Threats to human security include threats posed by governments, as well as non-state actors. As such, these threats are universal in nature, which means that there is a need to prevent the perpetration of these crimes through an authority that should be universal in nature. Indeed, international security institutions have been an integral part of the global community in helping to

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<sup>14</sup> Ibid, 149.

<sup>15</sup> Commission on Human Security, Human Security Now (New York: Commission on Human Security, 2003), 1-3.

<sup>16</sup> Keith Krause and Michael Williams, “Broadening the Agenda of Security Studies,” Mearshon International Studies Review 40 (1996): 232.

maintain at least a minimal level of cooperation amongst countries, and in calming situations that may otherwise result in hostilities. It cannot be taken for granted that such institutions are generally formed on the basis of promoting similar interests, usually matters of significant importance to national interest. As such, cooperation is usually undertaken in order to minimize loss or ensure a beneficial partnership, often because the alternative would be more costly.<sup>17</sup> Though it is not possible to judge the extent of the effectiveness of international security institutions as independent entities, namely since they can only be as effective as their members wish them to be, these institutions have undoubtedly contributed to shaping modern international relations. These organizations are generally administered by the same member-states that create them, and as a result they tend to reflect the behaviour of these states.<sup>18</sup> Thus, “institutions are both a product and a cause.”<sup>19</sup> One of the most notable characteristics of these security institutions is the sphere of relative predictability, which is coveted presumably due to the influence they intended to have on the behaviour of member. This can be attributed to the gradual creation of conventional customs and practices that have been shaped by the behaviour of member-states, and which in turn will provide a blue print for acceptable future behaviour.<sup>20</sup> Consequently, international security institutions still operate under the guidance of member-states, obviously influenced by biases favouring the interests of the more powerful nations. The success of such institutions should not be demeaned, but its flaws cannot be ignored either. As long as the member states are the sole decision makers in security issues, emphasis will be placed on economic and military interests.

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<sup>17</sup> David A. Lake, “Beyond Anarchy: The Important of Security Institutions,” *International Security* 26, no. 1 (2001): 131 and 157.

<sup>18</sup> *Ibid.*, 130.

<sup>19</sup> *Ibid.*, 136.

<sup>20</sup> *Ibid.*



However, greater influence exerted by non-governmental actors can create a balance between the needs of society and those of governments. The necessity for accountability beyond the national level has been emerging since the Second World War, but there is an increased emphasis on institutions to be removed from the reach of governmental manipulations. This desire to be free of the powerful mechanisms of governments was a result of the development of human rights, and the necessity to establish security for individuals.

One of the most formal acknowledgements of human security, at the outset, came through a 1994 annual report from the United Nations Development Program (UNDP), providing a broad definition of the concept. Even in its ambiguity, this Human Development Report addresses the main features of human security as being:

First, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs or in communities.<sup>21</sup>

More specifically, the report provides seven categories of elements that constitute human security, spanning from environmental threats to ensuring the basic necessities of life, which include personal, community, and political security. Each of these elements is related to the political climate of states and the strength of governments to safeguard their citizens against heinous crimes.<sup>22</sup> Essentially, the core of the concept of human security is the lack of threat to the fundamental values of humankind, which include the most fundamental element of humanity, namely the “physical safety of the individual.”<sup>23</sup>

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<sup>21</sup> Roland Paris, “Human Security: Paradigm Shift or Hot Air,” *International Security* 26, no. 2 (2000): 89.

<sup>22</sup> *Ibid.*, 90.

<sup>23</sup> Fen Osler Hampson, “The Many Meanings of Human Security,” in *Madness in the Multitude: Human Security and World Disorder*, ed. Fen Osler Hampson (Don Mills: Oxford University Press, 2001), 4.

Scholars generally approach the debate of human security from three different perspectives, each of which outlines the extent to which the global community is responsible for the well being of the world's citizenry. The first concept suggests that there are certain "natural rights/rule of law" elements that should ensure an individual's fundamental right to "life, liberty and the pursuit of happiness." According to this theory, the burden of protecting these rights must rest on the international community.<sup>24</sup> The second view furthers the definition of human security, suggesting that international endeavours should increase efforts by strengthening and deepening the tenets of international law, especially as it pertains to war crimes and genocide. This school of thought focuses on the repercussions of war on the citizenry of a country, emphasizing the importance of minimizing the effects of warfare on the most vulnerable sectors of society. The caveat within this approach is that external involvement must be kept at an absolute minimum. It is from this humanitarian perspective that most interventions are born with the intent to protect the basic human rights of individuals who have had to flee their homes as a consequence of heavy fighting. The third view is an even broader conceptualization of the elements that must fall under the umbrella of human security. Such elements include environmental threats as well as social and economic stability, essentially encompassing all matters that may prove detrimental to the "livelihood and well-being of the individuals."<sup>25</sup>

According to this third view ... the state of the global economy, the forces of 'globalization', and the health of the environment, including the world's atmosphere and oceans, all are legitimate subjects of concern in terms of how they impact the 'security' of the individual.<sup>26</sup>

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<sup>24</sup> Ibid, 5.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

The common denominator amongst these categories of human security is the need to protect individuals from governments and state actors that take advantage of their positions vested with power. The purpose of shifting the security focus onto human beings is to forcefully proclaim to the international community that the people of a nation cannot be sacrificed in favour of national interests, because without its citizens a country cannot exist. The fundamental driving force behind scholars in this field is the ultimate centrality of human security to the establishment of any level of security on a global scale. Academics thus suggest that international events must be judged on the basis of possible repercussions to the well being of individuals, as opposed to viewing international changes solely on the basis of how states are affected.<sup>27</sup> If a state is unable to maintain the welfare of its citizens, it essentially becomes a 'weak' state, and is thus more vulnerable to both internal and external threats. The weakness of the state relates to the weakness of the individual, meaning that there is the assumption that a direct relationship exists between the security of the state and the security of the individual. It was well over two centuries ago that German philosopher Immanuel Kant wrote about the benefits of securing common interests through a global mechanism of cooperation. He suggested that it would be advantageous to all members of the international community to act together in the prevention excessive aggression, with the added benefit that smaller states would also gain from this protection.<sup>28</sup> As a result, Kantian logic follows that the state should only be conceived of as a means to an end of security, while

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<sup>27</sup> Ibid, 6.

<sup>28</sup> Goldstein, 111.



recognizing that this 'end' is composed of individuals since they are the fundamental element of society.<sup>29</sup>

The realist perspective served the international community well when it came to theorizing about war in the global context. However, international relations are changing concurrently with the evolution of societies throughout the world. The inclusion of certain rights that were previously unattainable have become expected as natural rights, such as the recognition of women's rights, minority rights, and the development of universal norms. Topics deemed worthy of attention suddenly transgressed through borders and became issues that garnered global awareness. Part of the reason for this increase in attention is the fact that the twentieth century was marred by significant death and bloodshed of citizens at the hands of their governments for various ethnic, political and religious reasons.<sup>30</sup>

Several factors are responsible for bringing the issue of human security to the foreground of the international community's attention. In the first instance, international organizations that fortify the significance of human rights have been created in the hope of reinforcing legal and customary standards to which all countries are supposed to be held accountable. A second contributing factor has been the spread of democracy throughout the world. This becomes especially evident since the end of the Cold War, an event that was instrumental in promoting the welfare of human beings through the democratization process. Thirdly, much of the pressure to adhere to human rights has come from the increase in non-government organizations (NGOs) that focus on improving human security by pushing such issues to the forefront of global attention.

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<sup>29</sup> Ken Booth, "Security and Emancipation," *Review of International Studies* 17, no. 4 (1991): 319.

<sup>30</sup> *Ibid.*, 323.

Moreover, a fourth factor can be attributed to the increased availability of the media and the internet, whereby the direct and real-time effects of armed conflict are brought into people's homes on a daily basis.<sup>31</sup> A fifth element can be found in the higher numbers of emerging middle powers that are concerned with the protection of human security and, thus, the most vulnerable sector of society. A sixth influential factor has been the spread and effects of globalization on the world, as interdependence increased simultaneously with the movement of people, goods, ideas, and information across porous borders. A final contributor to the advancement of human security can be accredited to a global awakening in the post-Cold War era that international relations is changing, as is the nature and constitution of conflicts. The world was no longer involved in "proxy wars" fought on either one of the two ideological lines, predetermined by alliances with one of the two superpowers. Rather, wars were being fought in various regions due to state failure, perhaps fuelled by a need to establish a distinct and legitimate identity.<sup>32</sup>

It is important to note that human security and human rights are inextricably linked, so that one cannot be justly addressed, while the other is ignored. Through the implementation of human rights measures, individuals are relieved from certain debilitating pressures that influence their daily lives. When such threats are removed, a society gains a certain level of stability, and its inhabitants can focus on improving their quality of life. Higher population participation in every sector of a society will generally create a more stable and accountable government, thus improving the country's situation all around. It no longer becomes an issue of human rights alone, but must necessarily include human security, since the purpose of this social progress is to protect the people

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<sup>31</sup> Hampson, 8.

<sup>32</sup> Ibid, 9-10.

at its core. As such, while human rights are designed to address a limited amount of issues regarding to the safety of humankind; human security broadens the number of elements that need to be addressed. In fact, human security looks at the factors that can cause hostility, tensions, spur aggression, and generally cause marked dissatisfaction; and the purpose is to remove these barriers to stability and create an environment where the citizen that wants to can flourish.

Human interaction plays an important role in shaping the expectations of a society, and this is equally true at the international level. Technological advancements have aided the spread of capitalism by easing the integration of goods and services from all parts of the world, often linking nations that would otherwise not be exposed to each other.<sup>33</sup> The constant influence of cultural commodities infiltrating other societies induces a rapprochement of people, thereby allowing the formation of groups through commonly identifiable grounds. Much of these groupings have provided a voice to those individuals who have been affected by the negative consequences of human insecurity. This has empowered them to advance their concerns in the global arena, and have thus been able to stress the importance of regulating violations of human rights and restoring dignity to the many who have been viciously stripped of it.

As a result, it can be readily assumed that, in this evolving era of globalization, security studies is taking on an entirely new challenge by addressing the changing threats to global stability. As argued by analyst Barry Buzan, there has been a change in both the referent object and referent subject, which used to be the state and the military

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<sup>33</sup> Mahmood Monshipoori and Claude Welch, "The Human Search for International Human Rights and Justice: Coming to Terms with the New Global Realities," Human Rights Quarterly 23 (2001): 383.

respectively.<sup>34</sup> It is no longer possible to have human insecurity and hope to maintain safety within and around borders. With focus shifting to the security of the individual, the referent object then becomes the individual and, in terms of addressing one aspect of human security, international institutions aimed at deterring crimes against humanity becomes one of the referent subjects.

Analyst Caroline Fehl explains that a significant obstacle to the proper functioning of international institutions is the 'sovereignty costs':

Sovereignty costs of centralized decision-making across issue areas and among actors – they are highest if an issue touches [upon] the hallmarks of (Westphalian) sovereignty, such as a state's relation to its citizens and territory.<sup>35</sup>

These costs are considered to rise with the power of the state, thus decreasing with weaker states.<sup>36</sup> The root of this conflict can be found in the emergence of a new direction in international relations that is conflicting with traditional norms.

The result has been a paradigm shift in the management of national and international politics. The defining elements of this paradigm shift have been globalization and the liberalization of access to knowledge, both of which have helped the spread of information and education about human rights.<sup>37</sup>

Since the international community has become aware of the consequences of ignoring repeated calls for the prevention of heinous crimes, the issue of human rights has taken on global significance. This promotion has been received with some hostility by the nations that resent the shift of human rights from a regional level, to an international

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<sup>34</sup> Barry Buzan et al., Security: A New Framework for Analysis (Colorado: Lynne Rienner Publishers Inc., 1998): 36-42.

<sup>35</sup> Caroline Fehl, "Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches," European Journal of International Relations 10, no. 3 (2004): 364.

<sup>36</sup> Ibid.

<sup>37</sup> Monshipoori and Welch, 372.



one.<sup>38</sup> However, giving authority to an institution that is to ensure the protection of a global phenomenon would require a degree of power to be vested into that organization. There does not exist an infinite amount of power around the international arena and, as such, power must be shifted from states to this overarching institution.

Consequently, issues of sovereignty are raised by states that are trying to cling to their individual power and might, in accordance with the traditional tenets embodied in global relations. Since sovereignty is headed towards decentralization and dissemination, the fight becomes, as Richard Falk suggests, “emblematic of the fight for the soul of the state.”<sup>39</sup> This is in reference to the shift from using the state as a tool for the protection and promotion of international trade ventures towards creating equilibrium between the success of markets and safeguarding of the people. The fact remains that, as globalization takes hold of the world, scholars and political players face the challenge of redefining power and authority, as well as re-evaluating the role of actors within different levels of international relations. An inevitable consequence of this would be an expansion of the elements involved in the nature of power and authority, namely because there is an obvious need to include certain complexities that have been previously excluded.<sup>40</sup> However, although the role and participation of political leadership may be changing in nature, this does not mean that the power of the state is either declining or weakening. Moreover, as cautioned by academic Christopher May, none of these changes mean that states are becoming obsolete, especially since states themselves have

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid, 373.

<sup>40</sup> Ibid, 374.

been instrumental in facilitating the advancement of globalization.<sup>41</sup> Part of the power that has been 'taken away' from state sovereignty has been redirected towards accountability at the international level, namely in the protection of human rights and human security.

When distance prevents much of the possible interaction between cultures and across borders there is a lessened degree of reliance between countries. As such, there develops a greater respect for sovereignty, as well as less concern for the possibility of 'spill over' of domestic problems into the international arena. Nevertheless, old practices no longer apply in the present era, as the global community has acquired increased awareness that there is a level of dependence between states. Advancements in technology and communications certainly allow people to stay in closer contact, regardless of geographical separation, and thus the 'global village' is becoming a reality.<sup>42</sup>

The world is increasingly tied into a global market of production, trade and finance, whose circulation system is an ever more efficient transportation network... and whose nervous system is a world-wide web of electronic communication and data processing facilities.<sup>43</sup>

One fact that is indisputable is that the fundamental driving force of every society is its work force, namely its citizenry. If they feel threatened or unstable, it only stands to reason that the overall operations of the state will also falter. As such, "the dialectic of

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<sup>41</sup> Christopher May, The Information Society: A Sceptical View, (Cambridge: Blackwell Publishers, 2002), 120 and 126.

<sup>42</sup> Ibid, 125-126.

<sup>43</sup> Buzan, "Security and the International Political System," 151.

threats and vulnerabilities is strongly shaped by the technologies of interaction.”<sup>44</sup> It is shrinking the world as national borders become increasingly permeable and no longer presents the same degree of separation and protection that was traditionally considered fundamental to the well-being of the state.

Though the political arena is the birthplace of many conflicts and wars, it is also a breeding ground through which many safeguards for the less fortunate were put into place. It represents, at the very least, a recognition that the value of humanity should transgress beyond territorial concerns. Isolationist policies are no longer considered the norm, and are often repudiated in favour of cooperation for the promotion of a society’s well-being. The twentieth century gave way to the beginnings of human security, which was permitted to gain popularity and strength through the constant facilitation of communication and transportation technologies. Due to the forced acknowledgement of a higher authority, as well as the possibility that there will inevitably be some loss of both state sovereignty and autonomy, it is unquestionable that not all nations have readily embraced the shift in security studies. However, the fact remains that the structures of negotiations and interactions on a global scale are changing and allowing more players to be involved in shaping today’s international society. This has, in turn, enabled the development of increasingly universal, as opposed to regional, tenets. It has taken more than a few decades to establish conventions capable of garnering significant international support, and the beginning of the twenty-first century continues to be fraught with hostilities surrounding such tenets. Though there is still much that needs to be done to ensure human security, it is vital to recognize the progresses made within the international community particularly since the Second World War.

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<sup>44</sup> Ibid.



## Chapter Two: Universality of Human Rights

The precursor to, and fundamental element of, human security is the development of human rights, which continues to evolve as more needs emerge from various areas of the world. The aftermath of the Second World War was a devastating mixture of massive bloodshed and widespread destruction. It was a bittersweet triumph for the victorious, as both willing and unwilling participants of the war suffered crippling damages to their populations and infrastructures. Born of vicious atrocities against people of all faiths and cultures, the beginning of a new moral consciousness spread throughout the global arena. This new phenomenon spurred numerous changes that would alter the future of international relations for years to come. The far reaching consequences of the blatant disregard for the sanctity of human life, oblivious to territorial boundaries, weakened the economies of entire nations. The global community was not only outraged at the cost and amount of time that would be required in the rebuilding of war-torn societies, but also sought to bring justice to the victims of war by making the perpetrators accountable for their actions. Avoiding conflict is beneficial to most countries, as leaders strive to prevent its occurrence in favour of maintaining an enduring, albeit precarious, peace. As such, the international community chose to cooperate with each other in order to empower their efforts, namely by implementing certain safeguards to avoid the perpetration of large-scale atrocities beyond the 'collateral damage' of armed conflict. The evolution of human rights from a practical framework of universal jurisdiction and protection eventually lead to the creation of treaties and agreements, which can be considered as the precursors to the notion of universality and the creation of the International Criminal Court.

Since the middle of the twentieth century, humankind has progressed significantly in its aim to promote the issues of human rights in the international arena. Accordingly, the creation of the United Nations (UN) and the UN Charter were impressive accomplishments for that period in history, especially given the dynamics of world affairs at the time. Though neither the structure of the organization, nor the treaty on which it is based, are flawless, they nonetheless paved the way for continuous improvement. The Universal Declaration of Human Rights (UDHR), that closely followed the inception of the United Nations, remains a hugely symbolic document in and of itself. Its importance lies in the fact that the signatories, by virtue of signing and agreeing to the document, acknowledged the necessity of providing the global community with blanket values that are believed to transcend cultural, religious, and traditional norms. Moreover, in 1948, the UN's General Assembly (GA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which introduced an added element to these international agreements. This Convention recognizes that states cannot systematically abuse individuals without being held accountable to international laws. As such, it requires all signatories to assist in the prevention and punishment of crimes of genocide, which is understood to be acts perpetrated with the intention of eliminating, to any extent, national, religious, ethnic, or racial groups.<sup>45</sup> The international community, for the first time, thus emphasized the fact that it will no longer accept or tolerate gross violations of human dignity, even under the purview of war. Essentially,

the Genocide Convention of 1948 and the 1949 Geneva Conventions and their Protocols of 1977... in turn developed the scope of genocide as a crime against humanity and extended international

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<sup>45</sup> Philip Gourevitch, We Wish to Inform You That Tomorrow We Will be Killed With Our Families, (New York: Picador, 1998), 149.

responsibility into situations of internal armed conflict.<sup>46</sup>

As such, from the 1960s and onwards, the notion of human rights has followed a constant, if not consistent, path of changes and developments that have gradually led to a previously unimaginable rapprochement of the global community. It is important to recognize that concerns about human rights have led to a more complex and comprehensive theory, that of human security, which addresses the new threats of the contemporary era. Human rights and human security are therefore mutually inclusive, so that the success of one is dependent on the success of the other. Nevertheless, the achievement of progress has not been without its obstacles, as issues of state sovereignty, traditionally embedded into the grain of national leadership, collide with emerging notions of universality and accountability.

At the core of the theory of universal jurisdiction is that it must, to an extent, surpass national sovereignty in order to be an effective mechanism, intolerant of immunity. There are two approaches to the issue of sovereignty, very similar in some elements, but very different in their breadth. Both positions agree that a prerequisite to universality is concurrence of common values and goals shared by the global community. Subsequently, common to both schools of thought is the need for the collective will and the commitment to prosecute any infringement of these shared values. However, underlying these requirements is the obvious need for the belief that collective action, in this case universal jurisdiction, will indeed act as a deterrent to the perpetration of heinous crimes. "Under both positions, the goal is to give each and all sovereignties, as

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<sup>46</sup> Andrew Calpham, "Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trails to the Dawn of the New International Criminal Court," in From Nuremberg to the Hague ed. Philippe Sands (New York: Cambridge University Press, 2003), 42.

well as international organs, the power to individually or collectively enforce certain international proscriptions.”<sup>47</sup> Nonetheless, both positions can be distinguished from one another in that the ‘normative universalist’ approach considers the importance of these common values as justification for the disregard of territorial integrity, should the situation warrant such action. However, the ‘pragmatic policy-oriented’ approach will only concede that there are certain occasions where the overlapping of interests is so strong that there is a need for enforcement mechanisms greater than those available through national jurisdiction.<sup>48</sup> Currently, most nations throughout the world have somewhat grudgingly accepted the latter of the two schools of thought in order to advance the efforts of protecting humanity in the hopes of increasing security.

Although the evolution of traditional security into human security has benefited from the development of human rights, none of the fundamental concepts of human security were initially accepted and digested with ease by the international community. Ideas of cooperation and accountability unavoidably raised concerns of national integrity and autonomy, thereby generating hostility towards the changes taking place within the global arena. From the outset, it was the strength with which the notion of human rights emerged after WWII that spurred the creation of the United Nations, its Charter, and its Declaration of Human Rights.<sup>49</sup> In fact, the United Nations came into being as a result of a series of events that culminated with the end of the Second World War. Certain scholars suggest that the failure of the UN’s predecessor, the League of Nations, is primarily due to two factors. The first notable flaw was the lack of support from the

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<sup>47</sup> Cherif M. Bassiouni, “The History of Universal Jurisdiction and Its Place in International Law,” in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, ed. Stephen Macedo (Pennsylvania Press: University of Pennsylvania Press, 2004), 42

<sup>48</sup> Ibid.

<sup>49</sup> Alan Gewirth, The Community of Rights (Chicago: The University of Chicago Press, 1996), 68.



United States, a nation that continues to retain enormous international power and clout. Thus, without the inclusion of all great powers the League was unable to affirm a united front. The second problem lay in the unwillingness of the member-states to absorb the high costs associated with a collective opposition to violence.<sup>50</sup> Nevertheless, the alliances that won the Second World War had already established a cooperative relationship amongst each other in order to defeat the enemy. Finding this network of support profitable, they sought to maintain their diplomatic ties beyond the responsibilities of conflict, namely with the development of an organization that would have increased international effectiveness and unparalleled universal solidarity. Notably, amidst the worldwide cries of 'Never Again' that followed the humanitarian devastation of WWII, the United States assured its allies of its support for this new and improved organization, and even became a key framer in its creation.<sup>51</sup> As a result of many international and domestic debates about establishing an organization where membership would include friends and foes alike, the United Nations came into being on October 24, 1945.<sup>52</sup> Today, the UN continues to be regarded as an intended focal group, created principally to ensure peace, security, and justice throughout the world as defined under its Charter.

As one of the UN's founding documents, the negotiations and drafting of the UN Charter were represented as a democratic endeavour allowing the participation and influence of all nations in attendance. However, the outcome of the meetings, and therefore the final document, was heavily influenced by the five strongest global powers

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<sup>50</sup> Joshua S. Goldstein, International Relations – Third Edition (Washington D.C.: Longman Inc., 1999), 111.

<sup>51</sup> Lawrence Ziring et al., The United Nations: International Organization and World Politics (Fort Worth: Harcourt College Publishers, 2000), 19.

<sup>52</sup> *Ibid*, 24.

that founded the UN, namely those that continue to maintain permanent member status in the organization: the United States, the United Kingdom, France, the Russian Federation, and the People's Republic of China.<sup>53</sup> The UN Charter came to be seen as "a de facto constitution" for the United Nations since it provides guidelines for the creation, administration, and functioning of the organization, as well as the distribution of powers and areas of jurisdiction.<sup>54</sup> Moreover, it clearly states the goals and aims of the organization, as well as the principles on which it rests.<sup>55</sup> In the early years of its inception, its principles would be shared throughout significant regions of the global community; however, today almost all nations participate and adhere to these standards. The agreement of members to ratify the UN Charter was an important step at the time because it represented a widespread concurrence in principles, and when states consent to collective actions they do so under the accepted norms in this Charter. One of the major hurdles facing the international community during the ratification process, however, was the reluctance of UN member-states to apply the Charter to domestic matters. While many countries endorsed this international treaty, a number of others were still tolerating significant violations of basic human rights within their borders, giving rise to concerns over the efficacy of a vague UN Charter.<sup>56</sup> Accordingly, resolutions were adopted by the United Nations that allowed the development of sub-committees with the authority to implement mechanisms equipped to handle complaints of gross human rights violations. Interestingly, these provisions are still active today, and have encouraged a number of other initiatives within the international community that address widespread abuse of

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<sup>53</sup> Ibid, 23.

<sup>54</sup> Ibid, 27.

<sup>55</sup> Goldstein, 293.

<sup>56</sup> Thomas Buergenthal, "The Normative and Institutional Evolution," Human Rights Quarterly 19, no.4 (1997): 709.

human rights.<sup>57</sup> Regardless, the United Nations continues to maintain that its principles have not significantly changed throughout the years, and that it remains dedicated to the promotion of peace and cooperation, adherence to human rights, and development of society. Moreover, coupled with the development of the United Nations Charter, another document was created that would further mark history and continue to represent the importance of universal cooperation well into contemporary times.

Also adopted by the GA in 1948, the Universal Declaration of Human Rights represents the international community's desire to actualize, in writing, the fundamental elements that constitute the rights of individuals.<sup>58</sup> The creation and advancement of human rights following the Second World War developed in response to the realization that states willing to abuse their own citizens can, in turn, produce the damaging consequence of negative 'spill over' into other nations. As such, the major powers at the helm of international relations collectively agreed that the violent treatment of individuals would not be tolerated, and would be seen as an infringement of peace. It was one of the first historical steps that opened domestic borders to international concerns; as the treatment of a country's citizens within its own territory became an issue open to discussion in the international community.<sup>59</sup> Some analysts even denote the Declaration as "the enlightened conscience of mankind."<sup>60</sup> Interestingly, although the international community was heavily involved in cooperation and constructive discussion during the creation of the UDHR, many nations would not veer from the traditional viewpoint that

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<sup>57</sup> Ibid, 710.

<sup>58</sup> Hampson, 20.

<sup>59</sup> David Manasian, "Survey: Human-rights law: The Conscience of Mankind," *The Economist*, Dec. 1998 [magazine online]; accessed 5 June 2006; available from <http://webvoy.uwindsor.ca:2048/login?url=http://proquest.umi.com/pqdweb?did=36633444&Fmt=3&clientId=2241&RQT=309&VName=PQD>.

<sup>60</sup> Johannes Morsink, "The Philosophy of the Universal Declaration," *Human Rights Quarterly* 6, no. 3 (1984): 309.



the sovereignty of states was the ultimate level authority and should not be surpassed. It was generally accepted that since a government is responsible for ensuring the rights of its citizens, it was necessary for the people to have a means for redress should these rights be violated.<sup>61</sup> However, heated debates during negotiations surrounded the merits of this right to petition claims, either at the national and international level. Initially, Cuba proposed the inclusion of the right to solely petition national governments for violations of human rights; but the French proposal wanted petition rights to be permissible at the international level, within the United Nations. It is the nature of the debates surrounding France's controversial proposition that is of most interest. Certain representatives fully supported the inclusion of such an article in the UDHR. They based their arguments on the notion that, if the only concern was simply the enforcement of these rights, this predicament should be alleviated by the fact that the "Declaration 'constituted a general statement of principles and did not entail any legal obligation'."<sup>62</sup> However, most of these delegates also contended that the inclusion of the right to petition at the international level would hint at a jurisdiction created that outstrips the national level, thus violating the principles of state sovereignty. The general view was that "the French proposal was on target in principles, but was nonetheless premature; the time was not ripe to assert such a right realistically."<sup>63</sup>

The seeds of universality had been planted long ago, but traditional cultural, political and legal boundaries remained rather difficult to resolve. Issues arising from the methods of implementation eventually resulted in the omission of certain human rights issues, such as the right to petition or the right to resist oppression, both of which faced

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<sup>61</sup> Ibid, 320-321.

<sup>62</sup> Ibid, 321.

<sup>63</sup> Ibid.

similar objections.<sup>64</sup> In fact, the Declaration was only meant as a preamble to other multilateral treaties that would make the agreements binding between countries. As such, the entire process was extremely slow and arduous, often requiring a couple of decades to bring an idea from inception to fruition.<sup>65</sup> Certain participating nations, such as the United States, also faced objections from within their borders with regards to any kind of binding multilateral treaties that enforce human rights. In the case of the US, disagreements were generally founded on fears that such international agreements may alter or infringe upon American civil rights, which are considered a cornerstone of their society. At that time, there were further concerns that the global elimination of racial discrimination would hinder the common practice of segregation in individual US states.<sup>66</sup> Regardless, though some members of the United Nations initially resisted the infiltration of the UDHR into their own national systems, it was far from being a final attempt at finding an appropriate balance between traditional norms and emerging concepts within the global community. Moreover, academics generally tend to agree that the Universal Declaration of Human Rights was the precursor to a global revolution that would alter the general atmosphere within the international arena, thereby introducing accountability for grave violations of the sanctity of human life.

Following these developments in the United Nations, the four Geneva Conventions of 1949, and their two Additional Protocols of 1977, are considered the principal instruments of humanitarian law.<sup>67</sup> The work of the Diplomatic Conference on

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<sup>64</sup> Ibid, 334.

<sup>65</sup> Ziring et al., 330-331.

<sup>66</sup> Ibid, 334.

<sup>67</sup> James G. Stewart. "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict." *International Review of the Red Cross*. June 2003. [Journal Article] accessed 7 June 2006; available from [http://www.icrc.org/web/eng/siteeng0.nsf/iwplList2/Humanitarian\\_law?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwplList2/Humanitarian_law?OpenDocument).

the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, resulted in the adoption of two Protocols that were added to the Geneva Conventions. Protocol I, applicable in international armed conflicts, protects civilians against the effects of hostilities and extends prisoner-of-war status to guerrilla fighters; while Protocol II gives increased protection to the victims of high-intensity non-international armed conflicts.<sup>68</sup> Article 3 of the Convention, however, is also of extreme importance. It not only outlines the basic rules for the treatment of civilians during conflict, but also details what constitutes a “civilian” during the times of conflict. The description of “persons taking no active part in the hostilities” not only refers to state inhabitants, but also to members of the armed forces who are not actively fighting, such as off-duty, sick, and wounded soldiers.<sup>69</sup> This Article firmly states that this group of people must not come to any physical harm during wartime. They are to be excluded from the conflict and cannot be tortured, mutilated, taken hostage, or murdered. Moreover, they must also be protected from any kind of abuse to their personal dignity, and they may not be judged or be executed without the judgement of a regularly constituted court.<sup>70</sup>

It is undeniable that, in today’s ever shrinking world, the interconnectedness and interdependence of states have affected the development of international law. History shows that, international laws were previously developed through bilateral treaties between autonomous states. However, this has been transformed as bilateral treaties were being increasingly replaced with more multilateral agreements. These treaties have

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<sup>68</sup> Ibid.

<sup>69</sup> R. Guelff and A. Roberts, Documents on the Laws of War, (Clarendon Press, Oxford, England, 1989), 273.

<sup>70</sup> Ibid.

not only given shape to international organizations but have also played a large role in coordinating, facilitating, and influencing international relations theory in the development of international legal principles.

During much of the 1940s and early 1950s, international actors chose to ignore the astounding level of allegations of human rights violations brought to the United Nations. The catalyst came late in the 1950s, however, with a UN resolution explaining that the organization would not involve itself with such allegations and does not have the power to investigate claims. This created a substantial amount of controversy which witnessed the birth of movements to bring about change in the 1960s.<sup>71</sup> One of the changes made was that the UN agreed to investigate claims, although only to a relatively limited extent, and recommendations could be made to the accused country.<sup>72</sup> Despite restrictions, however, this was nevertheless a step in the right direction.

Efforts to continue human rights development also resurfaced during this decade, namely with the establishment of the International Covenant on Civil and Political Rights (ICCPR). The 1960s were marked by a number of advances, such as the Convention on the Elimination of All Forms of Racial Discrimination, as well as the Covenants and the protocol to ICCPR. The era also gave birth to important developments for legislative initiatives that, surprisingly, had a great deal of international support. It was also in the early 1960s that the group Amnesty International was formed, and began to develop into a significantly powerful and effective non-government organization. Another defining aspect of that era is thus reflected in the sudden increase in intellectual and academic contributions to human rights, most notably credited to the collective work of a number

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<sup>71</sup> Roger S. Clark, "Human Rights Strategies of the 1960s Within the United Nations: A Tribute to the Late Kamleshwar Das," Human Rights Quarterly 21, no. 2 (1999): 320.

<sup>72</sup> *Ibid.*, 321.



of NGOs.<sup>73</sup> Much of the era, however, also experienced significant disagreements regarding the manner in which the principles of human rights, founded on the UN Charter, can be actualized into a set of applicable rules. Since the early 1960s saw an increased number of newly independent countries joining the United Nations, it is only logical that the decade was witness to declarations and committees dealing with colonialism and racism. Many of the era's endeavours, therefore, appeared to be a 'follow-up' of efforts undertaken in the 1940s during the development of the UDHR, as well as the struggle to rid certain African countries of their crippling and controversial apartheid. A significant obstacle to these efforts, however, always surfaced when it came to issues of enforcement and, towards the latter part of the decade, the attention and endeavours of the global community thus shifted to "modes of supervision and enforcement."<sup>74</sup> Consequently, much of the discussion in the 1960s centered on the achievement of two fundamental goals: "(i) to complete the drafting of fundamental instruments, and (ii) to devise methods of implementation."<sup>75</sup> These, in turn, helped shape many of the future strategies of the United Nations.

It was in the late 1960s and early 1970s that another important development took place, structured as a draft resolution, which would later become the United Nations High Commissioner for Human Rights. The purpose for the creation of such an institution was to provide an organized framework with the legitimacy to delve into areas that had previously been 'off limits'.<sup>76</sup> The end of the 1960s and two the subsequent decades, thus mark a second highly significant phase of human rights progress, which is evidenced

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<sup>73</sup> Ibid, 310.

<sup>74</sup> Ibid, 315-316.

<sup>75</sup> Ibid, 307-308.

<sup>76</sup> Ibid, 309.

by the building of institutions to address the rising threats to humanity.<sup>77</sup> As the 1970s continued to witness an improvement and evolution of the tenets of human rights, the decade highlighted important steps in the process that led to contemporary notions of protecting human rights from actors that violate the accepted universal standards. It was an era that witnessed “the emergence and consolidation of universal and regional treaty-based institutions for the protection of human rights.”<sup>78</sup> American and European Conventions were creating courts to deal with human rights violations, while different organs of the United Nations were creating policies and agencies to address the rising concerns of the world’s populations. It is the creation of such institutions that led to an increase in the number of NGOs, almost all of which became more active during this period, though some were created much earlier.<sup>79</sup>

The creation of... intergovernmental human rights institutions... provided the nongovernmental organizations with their *raison d'être* for filing human rights complaints and mounting human rights enforcement campaigns on the national and international plane. In earlier times their principal role consisted of the promotion of normative instruments.<sup>80</sup>

There are a few factors that can be attributed to these earlier shifts taking place in the international community, prompting movements that would forever alter the outlook of global relations. The decolonization process opened the door to many newcomers into the United Nations, many of them originating in the African continent, which in turn prompted a growth in the organization, predominantly in the 1950s and 1960s. The newer members maintained a common agenda that was primarily aimed at the eradication

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<sup>77</sup> Buerghenthal, 709.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, 711.

<sup>80</sup> Ibid.

of apartheid; a task that could only be accomplished through the development and solidification of UN instruments that dealt with violations of human rights. The support that the Soviet Union and its collaborators showed for the issue of eradication of apartheid opened the door for Western democracies to further expand the jurisdiction of UN institutions to encompass additional types of atrocious human rights violations.<sup>81</sup> The increased attention given to the subject of human rights by actors in both hemispheres, as well as non-governmental actors, required the global community to focus on the outcome of these measures. In fact, there was a growing anticipation that the United Nations, and other global organizations subsequently created, would be able to address serious violations of human rights standards. As such, many governments throughout the world felt the need to voice their support for such organizations, finding it increasingly difficult to resist regional counterparts that were being created.<sup>82</sup>

The Cold War, however, had a negative impact on the advancement of human rights due to the fact that the primary concern of the political actors involved was the build-up of military might, nuclear arsenal, ideological differences, as well as economic considerations. The fact is that both major players, the United States and the Soviet Union, were willing to support regimes known to be in violation of international protocols, as long as the end result was the political attainment of greater alliances. Nonetheless, an important event in the 1970s marked significant progress for the evolution of human rights. While the United States and the Soviet Union reached “a period of détente”, the creation of the Helsinki Agreements brought to the forefront issues of human rights for the first time during the Cold War. Though these agreements were

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<sup>81</sup> Ibid, 711-712.

<sup>82</sup> Ibid, 712.

violated on a number of occasions and by a number of nations, they nonetheless produced a common agreement as to the treatment of individuals. The purpose was to provide guidelines for acceptable behaviour, and a set of standards against which to judge each other's actions.<sup>83</sup> Moreover, the 1975 Helsinki Final Act, the common name for the agreement that created the Commission on Security and Cooperation in Europe (CSCE), is hailed as one of the most significant steps towards establishing issues of human rights in Western countries. The Soviet Union instigated talks for the agreement in the 1950s, primarily as a means of establishing its authority within Eastern Europe; and though it was not initially created specifically for the purpose of addressing human rights, it was nevertheless an important factor in shaping the future of East-West relations. It took approximately twenty-five years to reach the required compromises and obtain the necessary amount of signatures, but eventually thirty-five nations signed on to the agreement. Many states felt that they had volunteered important compromises, in essence based on the exchange of "military and economic cooperation" for Soviet acceptance of certain human rights stipulations.<sup>84</sup> The leaders of the Soviet Union initially resisted the insertion of human rights into the Helsinki Final Act, yet were forced to admit that these rights were "a legitimate part of diplomatic relations among the thirty-five states participating in the CSCE."<sup>85</sup> The result of this agreement left the Eastern countries vulnerable to a great deal of criticism, namely due to their continuous violations of human rights.<sup>86</sup>

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<sup>83</sup> Goldstein, 331.

<sup>84</sup> Louise I. Shelley, "Human Rights as an International Issue," Annals of the American Academy of Political and Social Science (1989): 45.

<sup>85</sup> Daniel C. Thomas, "Human Rights Ideas, The Demise of Communism, and the End of the Cold War," Journal of Cold War Studies 7, no. 2 (2005): 117.

<sup>86</sup> Shelley, 45.



However, it was the end of the Cold War that required a complete reevaluation of security threats. During the Cold War, the goal of both the United States and the Soviet Union was to control, and possibly expand, their own spheres of influence, in order to ensure the destruction of their rival's ideologies. In the post-Cold War era, many developing nations, that had previously been 'kept in check' by the bi-polar power structure, lost their 'footing' when this structure crumbled. This upset in balance enabled corrupt and ruthless groups to try to seize power, often using civilians as targets to emphasize their control over territory. The collapse of the Soviet Union, and thus a decrease in tensions between Eastern and Western superpowers, created an atmosphere more conducive to the consideration of cooperation. It was as a result of these changes that states recognized the need to implement appropriate measures that would be able to address direct violations of human rights laws, especially as security threats were being redefined. Concern over the trafficking of drugs and acts of terrorism threatened all countries and economies, and thereby created a common ground on which cooperation proved beneficial.<sup>87</sup> With the strong ideological obstacles of the Cold War no longer influencing the East-West divide, the global community was thus ready to establish the Vienna Declaration on Human Rights in 1993.

The Declaration highlights a significant portion of the more contemporary issues involving human rights. Though it cannot be argued that the document provides the solution to the eradication of violations of human rights, it is effective in emphasizing the message to the international community that these concerns should be held in high regard and violations will not be condoned. Since the document encompasses all aspects of society, be it civil or political, and protects all members of the community without

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<sup>87</sup> Hampson, 68-69.

discrimination, it can be argued that its aim is truly the “protection of *all* human rights” as a justifiable global apprehension.<sup>88</sup> As such, “it would appear that the dividing line between domestic and international human rights issues is no more because its factual and legal basis has disappeared.”<sup>89</sup> The monumental step represented by the Vienna Declaration is indicative of an important factor that had been at the core of international relations for many years, much like traditional notions of security and sovereignty. It used to be that cultural and traditional tendencies provided an excuse for various violations of human rights throughout the world, unstoppable by other countries as any intervention would be considered an infringement on state autonomy. However, changes in global mentality have created the perfect breeding grounds for the creation of accountability beyond national levels. Another important notion that emerged from the end of the Cold War was the fact that it was no longer an acceptable tenet of politics that all types of government structures are capable of ensuring the protection of human rights. For many years, the global community turned a blind eye to serious and gross violations on the basis of states having different political structures. However, the end of the Cold War clearly proved that democracy and human rights are mutually inclusive, thus both must be present for the establishment of a free society.<sup>90</sup>

The absence of democracy in a state is today in itself a violation of human rights of its population and ... the international community has the right for that very reason to concern itself with efforts designed to remove obstacles to its democratization.<sup>91</sup>

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<sup>88</sup> Buergenthal, 713.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, 715.

<sup>91</sup> Ibid.

The new millennium has brought with it even greater challenges to the implementation of human rights and, by extension, efforts to promote human security. Whereas global actors promoting human rights were once concerned primarily with the actions of various governments towards their citizens; today it is understood that, even with the good-will of leaders, it remains impossible to prevent all breaches in established universal standards. The key is to establish the idea that actors who previously enjoyed impunity from persecution due to sovereignty issues are no longer safe, because the international community is taking a stance against the abuse of human rights.<sup>92</sup>

The creation of universal norms has had its critics, claiming that different cultures approach the concept differently, thus eliminating its characteristic universality. Nonetheless, the concept of rights can be found in ancient and modern cultures across the globe, and “the fact that there is often not a specific word for rights does not militate against the further fact that the *concept* of rights can nonetheless be attributed to the ideas and practices of different cultures.”<sup>93</sup> In understanding that the UN’s abilities as a world leader in human rights are limited, mainly by state sovereignty, this in itself provides a more universal role in crosscutting cultures to accommodate all perspectives.<sup>94</sup> The broad range with which the Universal Declaration of Human Rights treats and identifies civil, political, economic, social, and cultural rights, helps to secure the differing values and thus generate more acceptance for its adoption. Furthermore, the UN Charter has done a great deal for a peaceful advancement of the issues of human rights, including

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<sup>92</sup> Ibid, 717.

<sup>93</sup> Gewirth, 68.

<sup>94</sup> Robert E. Riggs, The United Nations: International Organization and World Politics (California: Brooks/Cole Publishing Comp., 1988), 241.

simply providing information and educational seminars for the signatories.<sup>95</sup> Universalism has proven to be an effective tool in the preservation of peace on a global scale. The reason for universality's success would lie in the fact that it encourages the pooling of resources to eliminate common problems reached through a universal consensus of concerns, recognizing that certain issues are similar within various countries. It essentially exercises broader powers over a variety of subjects.<sup>96</sup>

Certain scholars suggest that human rights should be more universal in the language and terms employed in the UN Charter. These terms should be free from reference to any particular values but applicable to all, as opposed to basing the Charter on notions of modern industrial societies and of liberal democracies.<sup>97</sup> In this respect, these analysts argue that the conception of human rights in the UN is no longer universal, as it loses significance for much of the Third World, implying that these nations ought to become liberal, democratic, industrial societies.<sup>98</sup> Moreover, critics suggest that the UN conception of human right has been made to carry more weight than it can bear, and thus issues of human rights have lost the ability to remain universal for all nations. Consequently, the major reasoning behind this is the notion that there has been a failure to understand that human rights must be based on, "general principles which must be implemented in ways appropriate to the particular values and institutions of different communities."<sup>99</sup>

This problem was avoided in the creation of the ICC since all countries were active participants in its development and, as such, it was devised to accommodate

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<sup>95</sup> Ibid, 246.

<sup>96</sup> Ibid, 27.

<sup>97</sup> A.J.M. Milne, "The Idea of Human Rights: A Critical Inquiry," in Human Rights: Problems, Perspectives and Texts, ed. F.E. Dowrick (England: Saxon House, 1979), 33.

<sup>98</sup> Ibid, 34.

<sup>99</sup> Ibid, 36.



different types of governments and legislations representing all countries and their values. Many of the discrepancies in values and customs have been taken into consideration and reflected in the Rome Statute, as negotiations alleviated many concerns. Consequently, the prosecution of criminals previously held unaccountable is a step towards ensuring the sanctity of human security, and that mechanisms are in place to ensure justice for the victims and violators. Although it can act as a deterrent for certain violent criminals, more importantly, the International Criminal Court sends the message to the global community that the significance of human security is tantamount in politics and abuses will not be tolerated. One can almost see, in theory, that the Rome Statute creating the ICC is a codification of some of the abstract notions in human security and humanitarian law.

Since common threats were identified, it became a common problem for which a common solution would be ideal.<sup>100</sup> Thus began the shift from a state-centric approach to a focus on individuals, suggesting that sustainable human development was preferable to the maintenance of significant destructive capabilities.<sup>101</sup> Security and human rights are important concepts in and of themselves, but they are also interconnected in that the success of one depends on the success of the other, especially in an era of globalization, significant technological development, and economic interdependence. Although human rights violations may not be the only cause of civil conflict, they do however, act as a catalyst as it helps to aggravate instability. Consequently, meeting security needs entails respecting human rights because “countries [that] are well governed and respect the

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<sup>100</sup> Steve Smith, “The Contested Concept of Security,” in Critical Security and World Politics, eds. Steve Smith and Ken Booth (Boulder: Lynne Rienner, 2004), 52.

<sup>101</sup> *Ibid.*, 51.

human rights of their citizens are better placed to avoid the horrors of conflict and to overcome obstacles to development.”<sup>102</sup>

Human security essentially ‘stole the spotlight’ when the United Nations Development Programme suggested that the end of the Cold War should be marked with a shift in the study of security, proposing a move from nuclear security to human security.<sup>103</sup> Consequently, the UNDP suggests that notions of human security should outweigh other concerns.

It is a universal concern, relevant to people everywhere because the threats are common to all; its components are interdependent since the threats to human security do not stay within national borders; it is easier to achieve through early rather than later intervention; and it is people-centered, in that it is concerned with how people “live and breath” in society.<sup>104</sup>

Discussions about needs and interests must entail discussion about rights, which has been a fast growing discipline. Politically, the language of rights is one of the only aspects that transcend most borders, barriers, and differences to create a common goal that is universally accepted. Consequently, the rights that are embraced and embedded in political systems are intended to reflect the basic morals common to that society.<sup>105</sup> It is important to note that these values are not absolute and may change as generations and cultures evolve; there are no mechanisms that allow determination of what ‘rights’ and what ‘wrongs’ are acceptable except the will of the society which declares it. Scholars, such as Francis Fukuyama, thus argue that human values cannot be differentiated from

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<sup>102</sup> The United Nations, “In Larger Freedom: Towards Security, Development, and Human Rights for All,” Report of the Secretary General of the United Nations for decision by Heads of State and Government (2005): 6. [report online]; accessed 18 July 2006; available from <http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement>.

<sup>103</sup> Smith, 51.

<sup>104</sup> *Ibid.*, 52.

<sup>105</sup> Francis Fukuyama, Our Posthuman Future: Consequences of the Biotechnology Revolution, (New York: Picador, 2002), 110.

human emotions, each being as complex as the other, and both acting as influential agents in shaping societal norms.<sup>106</sup>

Philosophers such as Kant and Nietzsche, respectively, suggested that human beings are capable of having free will, and that they can also create values just by associating with certain value laden words, such as 'good' or 'bad'. However, Kant suggested that this free will is to be used following practical reasoning, which is not necessarily synonymous with individual wants.<sup>107</sup> Contemporary society has been gradually progressing towards a universalization of certain standards, such as applications to market behaviours and human rights, even if it may be contradictory to the self-interest of political actors. This is in large part due to the realization that the long-term stability of the masses is much more productive than short-term gains that may be followed by destabilizing forces brought about by the dissatisfaction of the people. Unfortunately, the trend in contemporary society has been the pursuit of individual desires and wants, as opposed to needs, often at the expense of the large sectors of society. As a result, decisions that used to reflect moral choices have come to reflect purely interest driven ones.

Theorists suggest that humans are "social animals" who seek out and thrive in common understandings of norms and values, but are, at the same time, competitive and cooperative. To the extent that it is beneficial to cooperate, human beings will engage in accommodating behaviour, but beyond the satisfaction of those needs, people revert to competitiveness. It is thus not illogical to suggest that actors on the global scene find that

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<sup>106</sup> Ibid, 116-117.

<sup>107</sup> Ibid, 123-125.

cooperating to restrict certain major destabilizing forces in the world will create an international arena more conducive to positive competition.<sup>108</sup>

The concept of universal jurisdiction has gained significant attention from the global community as a means to deter certain international criminal acts; and its support is manifested in the number of treaties and organizations that have been created with the aim to establish universal standards. However, if the power of universal jurisdiction was manipulated into a mechanism to achieve political ends, at the detriment of other legitimate members of the international community, “universal jurisdiction could disrupt world order and deprive individuals of their basic rights.”<sup>109</sup> There has been a great deal of debate and initial resistance to implementing notions of universal jurisdiction. That the United Nations endured, unlike its predecessor, was a formidable feat as it provided a forum for global dialogue. In light of the progress of cooperation, it seems out-dated to consider the United Nations as an example of a successful international institution for modern needs, though at the time of its inception it represented an important international cooperative effort. Contemporarily, on the other hand, the fact that it derives its power from the strong states that created it categorizes the UN as a biased institution, thereby weakening its credibility in an era rife with demands for human rights and accountability. Various efforts for the continuous protection of human rights and human security have, therefore, gradually developed into legal norms. Though the process of adding law to universal standards began decades ago, it is only in beginning of the twenty-first century

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<sup>108</sup> Ibid, 124-125.

<sup>109</sup> Bassiouni, 39.



that the leading steps towards legally supported criminal accountability was brought to a global level.

... of international law, human rights and the environment, as well as the field of human security, the stability of justice. It has been criticised by members of the international community a great deal of difficulty to overcome traditional tendencies. However, the global configuration does not yet sufficiently address the acknowledgment of national states, and has not fully accepted the notion that the preservation of sovereignty should take a 'back seat' to that of the security. Recognising that the definition of armed conflicts are being significant security considerations for other countries, states within the international community also based on the potential of legal mechanisms as a result of imposing judicial relations.

While human rights principles predominantly centre on governance during times of peace, especially in terms of law enforcement, Commission for Human Rights has also been that human rights should be maintained in armed conflicts. However, the provisions are not mutually exclusive. Human rights violations can still take place in times of armed conflict, and it is international humanitarian law that is applicable in such cases.<sup>109</sup> This was necessary in order to reinforce the fact that states have the task of guidance that human rights treaties provide with respect to the conduct of hostilities. Yet, humanitarian law treaties do not explicitly deal with external armed conflicts, and hence, it has been a practice to 'borrow' from the humanitarian law of international armed conflicts to fill this void.<sup>111</sup> As one scholar suggests, there are three ways in which this 'borrowing' has taken form:

One method has been to interpret the broad rules provided in Common Article 3 and Protocol II in light of the detailed rules

<sup>109</sup> Kenneth W. Abbott, *Controlling the Use of Force*  
<sup>111</sup> Willem Abrecht, *Armed Conflict*

### Chapter Three: The Creation of the ICC

The creation of universal values regarding human rights and the advancements made in the field of human security are indeed worthy of praise. It has taken numerous members of the international community a great deal of difficulty to overcome traditional tendencies. However, the global community does not yet uniformly observe the acknowledgement of universal values, and has not fully accepted the notion that the preservation of sovereignty should take a 'back seat' to that of the citizenry. Recognizing that the defection of certain members can have significant security repercussions for other members, actors within the international community thus turned to the potential of legal mechanism as a means of deterring violent behaviour.

While human rights principals predominantly centre on governance during times of peace, especially in terms of law enforcement, humanitarian law focuses on situations that concern international or non-international armed conflict. However the two concepts are not mutually exclusive. Human rights violations can still take place in times of armed conflict, and it is international humanitarian law that is applicable in such cases.<sup>110</sup> This was necessary in order to reconcile the two frameworks given the lack of guidance that human rights treaties provide with respect to the conduct of hostilities. Yet, humanitarian law treaties do not explicitly deal with internal armed conflicts, and hence, it has been a practice to 'borrow' from the humanitarian law of international armed conflicts to fill this void.<sup>111</sup> As one scholar suggests, there are three ways in which this 'borrowing' has taken form:

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<sup>110</sup> Kenneth Watkin, *Controlling the Use of Force*

<sup>111</sup> William Abresch, *Armed Conflict*

provided in the Geneva Conventions of 1949 and Protocol I. Another method has been to argue that internal conflicts are governed by customary international law rules paralleling the treaty law rules governing international conflicts. A third method has been to extend the reach of treaties governing international conflicts to apply to internal conflicts.<sup>112</sup>

Drawing a parallel with international political relations, academic scholars argue that the world is currently involved in a shift from the traditional Grotian framework of international legal relations to a new approach that attempts to create a 'community responsibility', Kantian framework. While the former is advocating an international society of independent actors, the latter advocates a universal society of human beings without focusing on the need to preserve state autonomy at all cost. The Grotian school is focused on maintaining and strengthening sovereignty through the promotion of national interests. Understandably, in this framework, priority is not given to the needs of the people within state boundaries but rather to preserving the territorial integrity of that nation.<sup>113</sup> The Kantian school of thought, on the other hand, places greater value on people, not territorial integrity, and is premised on the notion that collectivity is much more conducive to prosperity. Nevertheless, throughout much of recent history, it was the Grotian perspective that formed the foreign policy decisions of many countries. Memories of colonization are still fresh for much of the world, and create an automatic reservation towards most international dictum that imply even minimal interference with domestic matters, especially when influenced by the bias of other nations. Continuous efforts since the middle of the twentieth century, however, have allowed the progression of universal values to an impressive extent. An excellent case study of the theoretical

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<sup>112</sup> William Abresch, *Armed Conflict*

<sup>113</sup> Antonio Cassese, "A Big Step Forward for International Justice," *Crimes of War Magazine* Dec. 2003 [magazine online]; accessed 17 July 2006; available from [http://www.crimesofwar.org/icc\\_magazine/icc-cassese.html](http://www.crimesofwar.org/icc_magazine/icc-cassese.html).

shift occurring both in international relations as well as international legal relations is the inception of the International Criminal Court (ICC). Although the Rome Statute, the founding treaty of the ICC, is not flawless and has a certain degree of ambiguity embedded within it, the Court is nevertheless the first completely independent and binding international organization that takes universal standards to new heights. It was necessary to implement certain compromises into the Rome Statute in order to gain the support of many nations. Since the Treaty had to be sensitive to concerns about creating an imposing and intrusive international organization, it was forced to gain the trust of the participants by ensuring that their rights as sovereign countries would not be affected.

At the root of the Grotian theory, which is predominantly concerned with global conflicts, is the belief that humans are driven by two distinct and basic compulsions. While humans cannot avoid clashes between each other as a result of differing “ideas of the good,”<sup>114</sup> they are also “socially-minded” individuals who desire to live alongside one another.<sup>115</sup> Moreover, legal theorists contend that the seventeenth century Dutch scholar Hugo Grotius suggested that at the core of the human being is an inherent instinct for self-preservation.<sup>116</sup> It is on the Grotian basis of solidarity, from which this school of thought suggests that self-preservation derives, that societies implement mechanisms like “solidarity in the enforcement of the law”; and expect the understanding that war is often

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<sup>114</sup> Ideas of the good refers to the prioritization of interests, such as what a specific state considers as the ultimate interest, as it can relate to any aspect of international relations, including economic and diplomatic.

<sup>115</sup> Franklin I. Gamwell, “The Purpose of Human Rights,” *Mississippi College Law Review* 22 (2003): 240.

<sup>116</sup> Antonio Cassese, “A Big Step Forward for International Justice,” *Crimes of War Magazine* Dec. 2003 [magazine online]; accessed 17 July 2006; available from [http://www.crimesofwar.org/icc\\_magazine/icc-cassese.html](http://www.crimesofwar.org/icc_magazine/icc-cassese.html).



a law enforcement mechanism where legitimacy is dependent on the service it provides to the international community.<sup>117</sup>

Grotian scholars view the law as “a language and mechanism for the systemic application of reason to problems of social order and conflict.”<sup>118</sup> In the Grotian perspective, it is accepted as fact that the more powerful states will assert themselves internationally while weaker countries must simply tolerate these impositions. Moreover, due to the variety of cultures and beliefs, it would be unreasonable to expect the establishment of a truly stable system of universal values that represents every concern.<sup>119</sup> Academics in the Grotian school see reason behind state hierarchy and, in light of this ‘positioning system’, they find it pragmatic that states interact with one another by strengthening their own interests.<sup>120</sup>

Academics have largely interpreted Grotius as arguing that since scepticism is the tool that leads to reason, and since reason is the foundation of law (along with morals), then it follows that scepticism will form laws. Moreover, integrated in this interpretation is the notion that scepticism renders men wise and, thus, it is through scepticism that wise men will formulate laws to preserve the self.<sup>121</sup> It can be argued that this very scepticism is the primary driving force behind interactions between countries. As a result, there is only a minimal level of trust that, through a desire to protect their own individual interests, each party on the international scene will honour their part of the bargain. However, the lack of a stable trust between countries, and the lack of faith that

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<sup>117</sup> Benedict Kingsbury, “A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Scepticism in the Thought of Hedley Bull,” *Bridgeport Law Review/Quinnipiac Law Review* 17 (1997): 3.

<sup>118</sup> *Ibid*, 11.

<sup>119</sup> *Ibid*, 21.

<sup>120</sup> *Ibid*, 20.

<sup>121</sup> *Ibid*, 23.

institutions can be free from motivations to improve their own interests, prevents the submission of independent states to overarching binding mechanisms.

Grotian scholars argue that international relations consists of broader elements than merely conflicts of interest, and that in the dealings of countries there develops an international society that is similar to domestic societies. Protecting individuals within borders does not dominate the interests of this international society, nor is this society specifically concerned with the plight of the less fortunate. Rather, it is largely concerned with ensuring the territorial sovereignty, safety, and promotion of the interests of each of the participant states on the global scale. This is done with the understanding that weaker states can advance their interests in relation to what more powerful states are willing to negotiate. Rising out of necessity for the maintenance of this international community is the formation of a set of understandings with respect to certain functions of society. Such functions include, but are not limited to, diplomatic relations standards, “the exercise of Great Power Management”, regulations to restrict excessive use of force, and the “self-conscious maintenance of an international balance of power.”<sup>122</sup>

For Grotian scholars, conventional regulations, such as unspoken norms and rules, are accepted as important elements of international relations.<sup>123</sup> This society, as envisioned by Grotius, contains a series of actors on the international scene who have certain interests in common and use the preservation of these interests as a basis for social relations. The maintenance of each of the international members’ sovereignty thus becomes important to international concerns, and the territorial integrity of these

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<sup>122</sup> Kai Alderson, “Beyond the Linguistic Analogy: Norm and Action in International Politics,” Institute of International Relations (2000): 3.

<sup>123</sup> Ibid., 5.

countries becomes a protected convention at the global level.<sup>124</sup> Consequently, as events unfolded throughout the twentieth century and into the twenty-first century, nations realized that certain crimes did not recognize borders and only cooperation amongst countries could help prevent the rise of such shocking transgressions.

Contrasting the Grotian perspective, therefore, the Kantian framework suggests that there are certain values for basic human rights that are universal and must be enforced for all the people of this world. This “community responsibility” perspective pushes the individual to the forefront of international concern, and maintains that the preservation of basic human rights transcends any notions of territorial concerns.<sup>125</sup> It is in light of this approach that much of the world is increasingly involving itself in preventing matters that offend basic moral principles, even if the results do not manifest themselves immediately.

Respected theorists, such as David Held, expand on Kant’s liberal theory of international relations to improve the components of individual autonomy in an evolving political environment. The literature for this school suggests that democracy does not inherently reflect notions of popular sovereignty,<sup>126</sup> claiming that democracy must also represent the marginalized groups within society. It is important to provide equal opportunities for all the inhabitants.<sup>127</sup> Such theorists, led by Held, do not claim that territorial sovereignty should not exist, but claim that the state has not been able to

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<sup>124</sup> Kingsbury, 28-30.

<sup>125</sup> Antonio Cassese, “A Big Step Forward for International Justice,” Crimes of War Magazine Dec. 2003 [magazine online]; accessed 17 July 2006; available from [http://www.crimesofwar.org/icc\\_magazine/icc-cassese.html](http://www.crimesofwar.org/icc_magazine/icc-cassese.html).

<sup>126</sup> Popular sovereignty means that the people create the government, which is subject to the will of its nation thereby making the people the foundation of political power of the government.

<sup>127</sup> Antonio Franceschet, “Popular Sovereignty or Cosmopolitan Democracy? Liberalism, Kant and International Reform,” European Journal of International Relations 6, no. 2 (2000): 288-289.

completely ensure the basic rights of all people.<sup>128</sup> As a result, they suggest that there is a need for certain overlapping mechanism at the international level, that are not territorially or politically motivated, which would protect the people and help sustain the boundaries of officially sovereign countries.<sup>129</sup>

Much of this liberal Kantian theory is based on changes that took place following the end of the Cold War. Though academics agree that the number of democratic governments may have increased throughout the world, not a great deal has changed for the individuals that were marginalized prior to democratization. In fact, the focus of these academics is not just the “formal structure of government, but also the material changes introduced into the world by transnational processes that go beyond the limited reach of any particular sovereign state.”<sup>130</sup>

One of the critiques made by Kantian liberals regarding the much lauded benefits of globalization, is that the opening of borders and the spread of democracy have generated little improvement in relations between states. What this means is that countries, most notably the largest democracies, are reluctant to apply the standards of their “model of governance” to their dealings with one another. As a result, since they do not adhere to the same liberal tenets when dealing with other nations, they also refuse to be held accountable for decisions made in foreign affairs or on matters of security.<sup>131</sup>

The strongest argument for the Kantian perspective develops in light of the globalization process in international relations.<sup>132</sup> The opening up of borders and the advances made in technology have certainly created a smaller world, in that all four

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<sup>128</sup> Ibid, 289.

<sup>129</sup> Gamwell, 243.

<sup>130</sup> Ibid, 289.

<sup>131</sup> Franceschet, 288-289.

<sup>132</sup> Ibid, 290.



corners of the globe are now accessible to virtually anyone with the means to travel. Moreover, globalization has in large part created a new 'superpower' entity, that of the economy. Perhaps the greatest benefit of this globalization trend is that many nations and individuals have been able to line their pockets with the financial gains made possible by the virtual removal of borders. In the twenty-first century, most governmental decisions are guided by economic considerations, making this new 'superpower' the decisive element in government. As a result, Kantians argue that state sovereignty has been reduced by the inability of governments to make decisions while remaining uninfluenced by international economic considerations. Consequently, since state autonomy has diminished, so too has states' ability to unilaterally promote equality and freedom for individuals within its borders.<sup>133</sup>

Writers adhering to the Cosmopolitan school of thought take the Kantian theory of "universal society" a little further, arguing that democracy needs to be redefined. Since states are incapable of improving the plight of the minorities within their borders, namely because they cannot rival the power of economic giants, there is a need for international mechanisms to oversee the rights of these individuals.<sup>134</sup> "The essence of ... law, is that morality binds rational beings and can be known, in principle, by the use of reason."<sup>135</sup> The caveat to this school of thought is that there must be guarantees to protect the less powerful from institutions primarily orchestrated by nations with the might to impose their will.

Understanding that in a predominantly anarchic setting, rules may simply not be enough, requests for accountability soon followed the setting of new standards. The

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<sup>133</sup> Ibid, 290.

<sup>134</sup> Ibid, 290-92.

<sup>135</sup> Terry Nardin, "Reply to Gould," International Legal Theory 5 (1999): 42.

rationalist explanation for the creation of the International Criminal Court can be viewed from two different perspectives: firstly, addressing the enforcement problems inherent in many national courts; and secondly, the high cost associated with the creation of ad hoc tribunals.<sup>136</sup> Scholars argue that the first perspective has not been a predominant concern at the global level and, as a result, this view only attempts to explain the reason for not establishing an international court on the basis of trying individuals in national courts.<sup>137</sup> However, historical trends show that the notion of enforcement was one that the international community had been unwilling to discuss due to the threat it posed to state sovereignty. It was only with the broader acceptance of universal standards, and the benefits of adhering to them, that opened the door to discussions about going one step further and considering enforcement mechanisms. The second explanation appears to classify the ICC as a 'solution' to the high "transaction costs of international criminal justice", premised on the continued existence of ad hoc tribunals as an alternative.<sup>138</sup>

In fact, the International Criminal Court addresses a number of problems that were inherent in past ad hoc tribunals, which were created by the UNSC to respond to allegations of violations of human rights.<sup>139</sup> The ad hoc tribunals were created to address specific issues arising from specific event, which means that there is a preconception of guilt prior to the commencement of the judicial process. "Human rights and the application of humanitarian law are neither partisan nor political; taking the politics out of the ad hoc tribunals is a first and fundamental step to ensuring support for the ICC."<sup>140</sup>

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<sup>136</sup> Fehl, 368.

<sup>137</sup> Ibid, 369.

<sup>138</sup> Ibid, 369-370.

<sup>139</sup> Clapham, 47.

<sup>140</sup> Howard Morrison, "Experimental Justice: Do international Tribunals Work?" International Criminal Tribunals June 2001 [journal article]; accessed on 15 June 2006; available from [www.hri.ca/partners/aiad-icdaa/rapports/Morrison.pdf](http://www.hri.ca/partners/aiad-icdaa/rapports/Morrison.pdf).

Though these tribunals are aimed at persecuting perpetrators of heinous crimes against humanity, a noble goal indeed, they have been subjected to significant criticisms. There are a number of elements inherent in the structure of the ad hoc tribunals that seriously hinder their successful operation. One obstacle is the amount of funding and resources required to operationalize a tribunal. Countries showed reluctance to commit to these tribunals due to the financial demand that would subsequently be placed on them, which in turn caused significant delays in the investigation process, in the prosecutorial endeavours and in the building of detention centers. Moreover, the ad hoc tribunals did not come equipped with the rules of procedure that all domestic courts have implemented since their inception, thus failing to provide clear guidelines for legal actors by which to abide.<sup>141</sup> The legal standards governing the proceedings have been an attempted compromise between civil law and common law. Moreover, the prosecutors and judges came from both common and civil law backgrounds, and with little experience in international tribunals – for the obvious reason that it is a relatively new phenomenon. Since the experiences of neither of these types of law clearly dominate the proceedings, the legal personnel tend to practice according to their own jurisdictional methods. Moreover, since the practices inherent under civil and common law are fundamentally different, there has been a disturbing amount of procedural irregularities during the prosecution of accused villains. When all aspects of these tribunals are considered, one can easily surmise that the fairness of the proceedings is compromised to an alarming degree.<sup>142</sup>

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

As early as 1948, members of the United Nations General Assembly recognized the need for an international court, and asked the International Law Commission (ILC) to consider the prospect of creating a criminal court to deal with violations occurring during armed conflict. The two major players of the Cold War, the United States and the Soviet Union, disagreed on the definition of “aggression”, effectively preventing any further discussions beyond the continued efforts up to 1954.<sup>143</sup>

Efforts reconvened approximately twenty years later. In 1974, and at approximately every several years, members of the General Assembly pushed for the adoption of a definition for the crime of “aggression”, and continued to request that the ILC commence work on the creation of an international Code of Crimes. Beginning in 1992, and every year thereafter, steps were taken towards the creation of an independent judicial body at the international level – the International Criminal Court.<sup>144</sup> The significance of this Court, in comparison to the International Court of Justice, is that the ICC is the first permanent global court that provides a forum in which individuals, rather than nations, are tried for the perpetration of the most heinous crimes committed against humanity as recognized under international law.<sup>145</sup> Though there were discussions about the possibility of including actual states, entire political organizations, or complete companies into the Statute as potential parties subject to prosecution, the negotiators were unable to agree to commonly acceptable wording for an Article.<sup>146</sup>

As previously mentioned, the International Criminal Court is based on the Rome Statute Treaty, which was adopted by 120 countries in Rome on July 17, 1998 after a

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<sup>143</sup> Canada and the International Criminal Court. Foreign Affairs Canada. Accessed June 15, 2006. Available from [www.dfait-maccigc.ca](http://www.dfait-maccigc.ca).

<sup>144</sup> Ibid.

<sup>145</sup> Indira Rosenthal, “International Criminal Court: Making the International Criminal Court Work,” *Human Rights Watch* 4, iss. G (2001): 1.

<sup>146</sup> Clapham, 48-49.



five-week conference.<sup>147</sup> Currently sitting at The Hague, the ICC was established in 2002, reaching completion one year later with the establishment of its judicial body comprised of a presidential team, a team of judges, and the office of the prosecutor. This was an important historical achievement, symbolizing the cooperation of the majority of the global community on the creation of a body that will hold individuals accountable to universal standards of human rights and international humanitarian law.<sup>148</sup> That the Rome Statute incorporates components of civil law and common law demonstrates the fact that it is the compilation of a wealth of nations, each leaving a unique mark reflecting the various legal approaches around the world.<sup>149</sup>

The Court's skeletal structure has been organized in a manner to embed independence and impartiality at the core of the organization. The personnel active in the legal administrative sector, such as the prosecutor and the judges, have all been carefully selected on the basis of their achievements and the backgrounds they represent. They are from vastly diverse cultures and have stood out in their particular field of interest, meaning that they must have years of experience dealing with concepts they will likely encounter at the International Criminal Court. The basic structure of the Court is divided into four organs: the Presidency, the Chambers, the Office of the Prosecutor, and finally, the Registry.<sup>150</sup>

All the members of the Presidency are elected on a full-time basis by a vote of absolute majority from the Court's 18 judges to serve a mandatory three-year terms that can be renewed. The Presidency is comprised of the President, as well as the First and

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<sup>147</sup> Ibid, Foreign Affairs Canada

<sup>148</sup> Rosenthal, 1.

<sup>149</sup> Ibid.

<sup>150</sup> International Criminal Court (2006); accessed 2 August 2006; available from <http://www.icc-cpi.int/home.html&l=en>.

Second Vice-Presidents, and are duty-bound to oversee the proper administration of all facets of the Court with the exception the Office of the Prosecutor. The latter is intended to remain a completely independent from any other organ of the Court, and is charged with the handling of referrals. Moreover, the Office of the Prosecutor is required to examine all information and documentation alleging crimes, which it will prosecute if the evidence is substantial. The Registry is to oversee the administrative aspects of the Court that do not fall under the judicial purview, and will not interfere with the powers of the Prosecutor.<sup>151</sup>

The Chambers can be described as akin to the heart of the Court, where all the judges sit in their various capacities and make precedent setting decisions regarding the cases presented to them. The judges are elected by and national from States Parties, for either three, six, or nine year terms; whereby the former may renew their position in office while the latter cannot, unless where specified by the Rome Statute. The subdivisions under the Chambers provide three different stages of hearings, each with a focus on particular areas of the law. The Pre-Trial Chamber includes the First-Vice President and 6 other judges who must determine whether the alleged violation falls under the jurisdiction of the Rome Statute, thereby affirming or denying the commencement of an investigation. If the Prosecutor's request for the commencement of an investigation is denied, he/she may at a later date make another request with evidence of new facts. Additionally, arrest warrants and other summons are issued from this Chamber at the request of the Prosecutor. When the suspect has been apprehended, it is before the Pre-trial Chamber that he/she accepts or rejects the charges.<sup>152</sup>

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

The Trial Chamber is comprised of, much like the Pre-Trial Chamber, judges with criminal trial backgrounds. The Second-Vice President and five other judges determine the necessary procedures, tailored to each trial, to ensure expediency and fairness for the protection of the victim's rights as well as those of the accused. The Trial Chamber hears the proceedings beyond the duties of the Pre-Trial Chamber, and establishes the guilt or innocence of the alleged offender as well as the sentence for the crime. Finally, the Appeals Chamber is the division that hears appeals from either the Prosecutor or the accused, on both procedural and legal errors. This Chamber includes the President, as well as 4 other judges with experience in applicable fields of international law, humanitarian law, and human rights.<sup>153</sup>

The International Criminal Court has implemented multifaceted jurisdictional rules that have come under attack by its critics. In the first instance, the jurisdiction of the ICC is complementary in that it can only prosecute cases where the country that has jurisdiction is not capable of providing, or is unwilling to provide, a fair and impartial trial. However, the United Nations Security Council (UNSC) can also refer cases to the ICC, as a way of circumventing the requirement that a country be a signatory to the Rome Statute.<sup>154</sup> Understandably, academics consider this an important shortcoming because of the concern that certain countries will prefer to handle the prosecution domestically. For example, while the ICC is able to impose sentences of imprisonment, it cannot impose the death penalty, which certain nations still allow. However, the ICC does not require nations that still carry out the death penalty to refrain from imposing it when individuals who have committed crimes against humanity are tried in national

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<sup>153</sup> Ibid.

<sup>154</sup> Bruce D. Landrum, "The Globalization of Justice: The Rome Statute of the International Criminal Court," Army Law (2002): 11.

courts.<sup>155</sup> It is predominantly industrialized nations that will prefer to resort to their own judicial systems, thereby allowing them to cling to their Grotian notions of sovereignty and state independence.

Since the International Criminal Court is a treaty-based court, it will have jurisdiction over the countries that have ratified the Statute, known as States Parties, and only crimes committed after the inception of the Court will be pursued.<sup>156</sup> The caveat to this rule is that the UN Security Council may refer a case to the ICC, even if the case involves a country that has not ratified the Statute. Once a decision is made by a nation that has jurisdiction to investigate and prosecute, the ICC will not be able to interfere with the proceedings. Moreover, if that country decides not to legally pursue the matter after investigation, the ICC is largely powerless to intervene, and the same rule applies to cases where the nation holding jurisdiction has claimed to have investigated and prosecuted the individual already.<sup>157</sup>

This raises serious concerns because it is often industrialized nations that have strong domestic legal systems, and are capable and willing to prosecute alleged perpetrators. However, these are often the same countries that are heavily involved militarily in conflicts taking place in lesser-developed nations, usually with the aim of protecting their own foreign investments and their own national interests. Consequently, it is the army personnel of the very nations capable of prosecuting that are also involved with crimes against humanity. Perpetrators of industrialized countries would most likely be tried in the ICC, as the domestic structure of lesser-developed countries is generally

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<sup>155</sup> William A. Schabas, "Life, Death and the Crime of Crimes: Supreme Penalties and the ICC", *Punishment and Society*, 2(3) n.d. 269-270

<sup>156</sup> Rosenthal, 14.

<sup>157</sup> Landrum, 13.



not capable of carrying out this judicial function, which would provide a much milder process. However, their less fortunate counterparts would likely face much harsher penalties if tried within a wealthy nation.

Scholars argue that these concessions have narrowed the scope of law significantly, and have created important limitations in the Rome Statute.<sup>158</sup> However, it must be recognized that these limitations were a 'necessary evil' in that lack of compromise could have, and probably would have, prevented the creation of the Court all together. Since each country has its own legal framework and represent distinct traditions, each wanted to have their beliefs reflected in the Statute, while at the same time avoiding becoming entangled in a Treaty that would be contradictory to their national laws and norms.

A historically important jurisdiction shift implemented within the Rome Statute was to reduce the ambiguity of crimes for which an individual can be prosecuted. Importantly, the requirement that a crime would have to occur during armed conflict has been removed, thus widening the Court's jurisdiction.<sup>159</sup>

For the new Court, crimes against humanity are acts committed in a widespread or systematic way with an organizational policy against any civilian population, where the acts are, among other things, murder, enslavement, deportation or forcible transfer of population, imprisonment in violation of international law, torture, persecution, enforced disappearance and the crime of apartheid.... Rather than the terse sentence asserting jurisdiction over violations of the 'laws and customs of war', we now have several pages of war crime listed in a way which renders them quite specific.<sup>160</sup>

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<sup>158</sup> Landrum, 11.

<sup>159</sup> Clapham, 47.

<sup>160</sup> Ibid.

Critics of the International Criminal Court argue that the articles of the Rome Statute are still too vague to accomplish the goals set out by the global community; but it cannot be overlooked that “now at least it is written down in a treaty and accessible to everyone.”<sup>161</sup>

In order to ratify the Treaty, many countries have to make constitutional or legislative changes to their domestic laws, in order to avoid conflict between domestic and international law.<sup>162</sup> However, because nations wanted to avoid any inconsistencies within the Rome Statute, namely since it was the work of many nations, a significant number of compromises was embedded in the document. In fact, one of the aspects of the ICC that is creating hesitation amongst certain nations is the impact of the Rome Statute on domestic law, as ratifying nations fulfill their obligation to ensure that the crimes laid out in the Statute can be tried within their own borders. While this is clearly an indication of Kantian perspectives, in that it attempts to universalize certain legal standards, traditional notions are not entirely lost. As a result, it must be recognized that legislation for the ICC is not retroactive, so it only applies to crimes committed after the court has been created.<sup>163</sup> Scholars argue that this hierarchy of importance significantly limits the power of the ICC and its ability to remain politically unmotivated.

Moreover, since the International Criminal Court does not have its own law enforcement body, it must rely on States Parties to comply with the provisions of the ICC in bringing individuals to justice under Article 86 of the Rome Statute.<sup>164</sup> However, the Statute also provides ways around this requirement, in that States Parties may refuse to comply with the request of the ICC if it might involve matters of national security or if

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<sup>161</sup> Ibid.

<sup>162</sup> Rosenthal, 1-4.

<sup>163</sup> Rosenthal, 14.

<sup>164</sup> Elizabeth A. Chadwick, “A Tale of Two Courts: The ‘Creation’ of a Jurisdiction,” Journal of Conflict and Security Law 9, no. 1 (2004): 75.

the request is in contravention to domestic laws.<sup>165</sup> Gone are the days of enforcement through international tribunals; and here is a new era in which properly equipped national judicial structures are involved in the enforcement process. The significance of this shift is that individuals have no guarantee that they can seek the protection of their nation under the umbrella of the sovereign rights of the state. In fact, perpetrators can face accountability for their crimes in their own court, within their own nations, and in front of their own people.<sup>166</sup>

Scholars argue that state cooperation is tantamount to the efficiency of the Court, because only the States Parties are empowered with the proper investigatory and apprehension mechanisms to bring criminals to justice. One view suggests that as a result of the lack of law enforcement mechanisms, the ICC becomes virtually useless. The premise for this argument is that, on the one hand, in situations where the state is willing to cooperate in the apprehension of an individual and ensure adequate law enforcement, the state is also more than likely capable of conducting the trial domestically. This, in turn, devalues the presence of the ICC in the prosecution of a violator. On the other hand, if the state is not willing to cooperate with the ICC's request for help in the prosecution of an alleged criminal, or even in that individual's extradition, then that nation has simply undermined the purpose of the Court. In the event of such a situation occurring, the ICC may find that nation uncooperative and refer the incident to the UN Security Council, especially if it is a matter specifically referred to the Court by the UNSC or the States Parties in any other case.<sup>167</sup>

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<sup>165</sup> AMICC, "Chronology of US Oppositions," AMICC; accessed 20 Apr. 2006; available from [www.amicc.org](http://www.amicc.org).

<sup>166</sup> Clapham, 49.

<sup>167</sup> Popovski, 415.

The UNSC's role in the ICC has generated concern among the States Parties that were involved in this project of Kantian universality, aiming to eradicate the hierarchy amongst nations. The UNSC is given the right to prevent certain persons from facing prosecution by resolution, which is renewable every twelve months. Critics of the ICC argue that the mere fact that the ICC is tied to the United Nations through this clause, and thus under the influence of the United States, (which holds veto power as a member of the UN's Permanent Five), weakens the ICC's credibility.<sup>168</sup>

Certain scholars argue that the ICC is a separate body from the United Nations, and this minimal connection should not be taken out of context. Article 16 of the Rome Statute does not allow members of the Security Council to veto the instigation of any cases undertaken by the ICC, but does allow for those members to veto requests to postpone a trial for 12 months. Moreover, this must be adopted by a resolution, and thus not spurred by the interests of a single nation. Since there is a minimum-voting requirement for the creation of a resolution within the UNSC these actors must vote every year to maintain a resolution that does not incite public support. It is suggested by scholars, that it is unlikely that members of the UNSC will want to jeopardize their international popularity for the sake of postponing a trial that would affect one nation's interests.<sup>169</sup>

The notion of state sovereignty is still a guiding principle in international relations, and a very sensitive issue for many countries, including those in the Middle East, that have been dealing with foreign control and intervention for many years. Consequently, Article 72(1) states in part that, "where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security

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<sup>168</sup> Steven Roach, "Arab States and the Role of Islam in the International Criminal Court," *Political Studies* 53 (2005): 149-150.

<sup>169</sup> Popovski, 410



interests”, states are entitled to withhold information. This principle is further reiterated in Article 93(4).<sup>170</sup> This is based on faith that nations will not hinder investigations with false claims of violations of national security. Nevertheless, history has shown that state leaders and administrations are often unmotivated by honesty and good faith, but act on the economic and power interests of themselves and their nations.

Respected legal writers have noted that restrictions placed on judges in the Rome Statute are symbolic of the world community’s distrust in the ability of the judges to carry out their legal tasks impartially and free of political pressures. Legal scholars argue that the restrictions placed on judges, preventing them from creating their own rules of procedure and evidence, is hindering the natural process of legal development that needs to occur if the law is aiming to address needs as they arise.<sup>171</sup> An argument employed by these academics is the examples of the Yugoslavia and Rwanda Tribunals that provided judges with the flexibility to create laws as unique situations occurred, and thus address needs as they present themselves. However, the judges of the ICC must seek the approval of the States Parties before adopting any new rules of laws.<sup>172</sup> It should be noted that many courts have adopted rules and principles developed by the Tribunals, and the latter have adopted precedents set by domestic courts. Therefore, as noted by academics, if the ICC is based on the body of law created by international judges, then it is counterproductive to adopt a narrow scope for the Rome Statute and prevent further legal development.<sup>173</sup>

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<sup>170</sup> The United Nations, Rome Statute of the International Criminal Court (1998): 40-41 and 51-53. [statute online]; accessed 25 July 2006; available from [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

<sup>171</sup> Hunt, 60.

<sup>172</sup> Hunt, 62.

<sup>173</sup> Hunt, 60-61.

Moreover, other scholars view this perspective from a different and complimentary light, by arguing that since these judges and the prosecutor were elected and represent gender and cultural diversity, the rights of all people will be recognized. Furthermore, the design of the administration was based on the belief that single individuals would be harder to influence than governments. This means that the most pivotal players within the ICC will be out of reach of diplomatic bargaining, since they do not need to be concerned that their decision will impact foreign and/or economic aid to a country.<sup>174</sup> Government representatives must always bargain in order not to disappoint their home country, but the judges and the prosecutor are not representing the needs of one state, therefore, their decisions will be based on the common good of the international community.

International prosecutions of war crimes have been prevented by the prioritization of peace over the need for justice; preferring instead to resort to diplomatic relations as a means of rectifying past actions. Notions of impunity, scholars argue, were at the root of many of the cruelties that took place during WWII, resulting in the international community ultimately addressing the increasing need for personal responsibility for crimes against humanity and/or war crimes.<sup>175</sup> Nonetheless, many scholars were sceptical of the success of establishing universal mechanisms to ensure that violations of international law were not left unaccounted for, and suggested that it may pose a hindrance to maintaining peace.

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<sup>174</sup> Nancy Guffey-Landers, "Establishing an International Criminal Court: Will It Do Justice?", *The Maryland Journal of International Law and Trade*, 20 (1996)

<sup>175</sup> Vesselin Popovski, "International Criminal Court: A Necessary Step Towards Global Justice," *Security Dialogue* 31, no. 4 (2000): 406.

The International Criminal Tribunals of the former Yugoslavia (1993) and Rwanda (1994) helped expand the range of international law to an even greater extent.<sup>176</sup> The ad hoc tribunals for both countries have proven that personal accountability in international matters are now being met with a certain amount of global success, notwithstanding the exorbitant costs and slow progress, without contributing to the rise of related violence.<sup>177</sup> Moreover, it reflects the fact that the international community is not blind to the positive effects of creating this kind of international accountability, in the hope that it will act as a deterrent to future violations of international law. However, so many different countries also embody unique customs and legal standards, thus requiring them to overcome significant ideological obstacles in order to agree on one interpretation.

Writers and theorists tend to agree that the message being conveyed by the inception of the International Criminal Court to be that: no one is above the law and everyone is accountable for his or her actions, regardless of status.

The development of individual accountability for violations of human rights and humanitarian law, in terms of both codification and enforcement, is one of the most significant changes in contemporary world politics.<sup>178</sup>

Many countries do not have the mechanisms in place to bring such perpetrators to justice in their own national courts, so the ICC provides a forum for those countries to prosecute heinous crimes committed during armed conflict.

Some of the central features of the International Criminal Court exemplify the precarious balance between contemporary universal aims and traditional realist notions of global relations. However, these features outline the importance given to the protection

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<sup>176</sup> Clapham, 41.

<sup>177</sup> Popovski, 406.

<sup>178</sup> Ibid, 405.

of individuals, even at the expense of eradicating certain safeguards previously attainable merely through territorial protection. For centuries, global actors have been making decisions with the conscious notion that sovereign borders provide immunity from accountability for actions, even with respect to other states. The Rome Statute does not specifically address “domestic amnesties” since this topic generated significant ideological conflict amongst the states participating in the drafting of the document. However, prominent scholars, such as Ruth Wedgwood, contend that the lack of reference to this concept must be seen in a positive light, as it presents more leeway for prosecutors so they can make the right decisions to address specific cases as they arise.<sup>179</sup>

The jurisdiction of the Court does not extend beyond crimes that occur within the nations of the State Parties, which prevents a universal application of the principles enumerated in the Rome Statute. Some scholars suggest that this will discredit the ICC, since it will be unable to bring certain violators to justice. It is academically accepted that states that have not ratified the Rome Treaty, and that have taken a strong stance against the creation of the Court, fear politically motivated actions against their citizens.<sup>180</sup> These exemplify traditional realist points of view, namely that states must protect their territorial sovereignty. However, the shortcomings of this perspective do not consider that a large number of nations have ratified the Treaty and given the general air of Kantian universality in the global arena, there is likely to be increased pressure for the transparent prosecution of serious legal transgressions.

While it is understandable that, on the surface, these Articles seem to deliver a blow to the legitimacy of the ICC, it must be recognized that, in a global society where

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<sup>179</sup> Matthew R. Brubacher, “Prosecutorial Discretion within the International Criminal Court,” Journal of International Criminal Justice 2 (2004): 75-77.

<sup>180</sup> Landrum, 13-16.



standards of conduct have been codified, international pressure is likely to be an effective tool of influence. In light of the Kantian perspective taking hold of international relations, it will be highly improbable that serious transgressions of law will be left unaccounted for, especially if the majority of nations are subjected to the same standards. The criticisms levelled at the Rome Statute paint the Court in an ineffective light because its structure is relatively weaker than domestic courts in developed countries. However, it is important to acknowledge the Court's accomplishments, especially since it was created by the mutual agreement of a majority of countries throughout the world, and its aim is to protect individuals from matters that were previously considered domestic. The limitations placed on the ICC's jurisdiction and the inclusion of the right for the UNSC to refer cases stems from a compromise to appease concerns of infringement of sovereignty and influence. Nations wanted to ensure that their rights as individual countries were still respected, while the US wanted to make sure that it would have, at least, some controlling measures on the ICC – such as through its powers on the UNSC. Most importantly, the Court is raising certain elements of human security to greater heights by establishing a permanent institution capable of accessing individuals previously out of reach of the global community. If security is to be defined as the absence of threat, then the ICC should theoretically be a means to achieving such an end through deterrence.<sup>181</sup> As a result, it would be counterproductive to consider the ICC as a failure due to its limited rights; but it must be viewed as a success in light of the notion of accountability and respect for humanity that it represents.

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<sup>181</sup> Booth, 319.

## Chapter Four: US Opposition to ICC

The creation of overarching institutions, such as the International Criminal Court, automatically reduces the autonomy of participating states in order to give such organizations a certain degree of power. Nevertheless, the effect of the ICC on diminishing sovereignty, even minimally, has spurred actions by its greatest opponent, the US, that have been globally criticized.<sup>182</sup> Regardless of the lack of support from the United States, the ICC continues to remain one of the most significant international achievements in history, especially as the theoretical shift away from a purely realist perspective of security studies is becoming increasingly evident. Cooperation amongst countries, to promote the needs of their citizens and structure their societies in a manner that will provide as much stability as possible, is an endeavour that has been gaining momentum. Human rights and the respect of human dignity have been gaining increased attention worldwide, and many changes have already been implemented. Human security has become a field of study and a goal for many academics and political actors. As such, it is important to recognize how far the global community has come since the end of the Second World War. Weaker nations abhor the concept of foreign influence that attempts to discredit their history and culture, which is the reason behind much of their animosity towards traditionally powerful states. However, many of them would welcome help in penalizing the perpetrators within their nations, instead of subjecting the entire population to demands by countries with the power to impose their will. Though much of the world had reconciled sovereignty with the need of the citizenry, especially in light of the

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<sup>182</sup> Jason Ralph, "Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court," International Relations 17 no. 2 (2003): 195-196.

inception of the European Union (EU); the United States remains dedicated to its isolationist stance, wanting to cling to their status as world leader for as long as possible.

The global community recognized the benefits of cooperation for the creation of the first International Criminal Court, formed independently of any nation or global organization. The United States maintains that their dedication to the universal values that bind nations together has not weakened, but that its objections to the ICC derive from its own endeavours to protect American values and the personnel that conduct missions on its behalf. The position adopted by the United States is further proof that while the world is moving forward, towards a universal standard, the world's leading hegemon is choosing to preserve increasingly isolationist policies. Its support is restricted to the development of democratic states, meaning that an international society is merely a "society of states", whereby America can still maintain power through the international institutions that grant it greater discretion, such as the United Nations Security Council.<sup>183</sup>

Consequently, American objections to the ICC are based on four principle arguments:

1. The Rome Statute does not provide a check against the powers of the prosecutor;
2. The ICC's jurisdiction extends beyond the countries that have ratified the Statute, to include non-signatories, which is a threat to American sovereignty;
3. Prosecution may be politically motivated; and,
4. The ICC weakens the UNSC's role of protecting international peace and security.

Initially, however, the US participated in the drafting of the Rome Statute, and even signed it, showing some support for the Court under former President William Clinton's administration. Nevertheless, as presidential power changed hands, that same administration suggested that it would be beneficial for George W. Bush's incoming government to carefully consider ratification and, if possible, to avoid it. As a result, the US quickly revoked its signature, concerned with the implications of the Court for the

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<sup>183</sup> Ibid, 196.

personnel involved in international missions abroad.<sup>184</sup> This became of notable and significant concern following the most recent war in Iraq, presumably due to the scandals that erupted at Abu Gharib prison regarding the dehumanizing treatment and torture of prisoners by American military personnel. Particularly, the United States was a strong opponent to the amount of discretion given to the prosecutor during the drafting of the Rome Statute, and the country remains fairly sceptical. It preferred to give greater regard to the interests of the state, which is a realist approach, rather than foreign countries.<sup>185</sup>

The ICC, nevertheless, enjoys the approval of a vast number of states, as 120 countries voted in its favour and only seven against it, with 21 abstentions. It is interesting to note, however, that countries with policies that the US publicly condemns, including Iran and Cuba, seem to parallel America's opinions on the ICC.<sup>186</sup> In fact, controversy surrounds the notion that the US does not accept the limited jurisdiction imposed by the ICC, but rather imposes its will on other nations even when this may not be legitimate. As remarked by a former trade negotiator from the European Union, the American administration "will enforce its rights but not necessarily respect its obligations."<sup>187</sup>

Thus, the United States passed the American Service Members Protection Act (ASPA) which prohibits the United States from cooperating with the ICC, and has obtained signatures from at least 35 of the ICC's signatories.<sup>188</sup> The Bilateral Immunity Agreements (BIA), also known as the Article 98 Agreements, are treaties stating that

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<sup>184</sup> *Ibid*, 200-202.

<sup>185</sup> Brubacher, 73.

<sup>186</sup> Nancy Guffey-Landers, "Establishing an International Criminal Court: Will It Do Justice?" *The Maryland Journal of International Law and Trade* 20 (1996): 204.

<sup>187</sup> *Ibid*.

<sup>188</sup> "US Bilateral Immunity Agreements or So-Called "Article 98" Agreements," *Coalition for the International Criminal Court* [article online]; accessed on 5 July 2006; available from [www.iccnw.org](http://www.iccnw.org).



nationals of the United States, and the states operating under the purview of this Act, agree to extradite individuals accused of violating humanitarian law to their country of nationality, not to the ICC. Furthermore, this Agreement is based on Article 98(2) of the Rome Statute, which states that,

the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>189</sup>

Although many countries were reluctant to commit to such an agreement, the United States employed cunning coercive measures, such as threatening to withdraw aid, as a means of obtaining the signature and commitment of these states. Latin America was threatened with withdrawal of funding for its war on drugs, the Balkans faced cuts to military aid, and so on. Needless to say, these funds amount to millions of dollars, and to have this financial aid revoked can significantly devastate the recipient. As a result, many countries were forced to sign the BIAs.<sup>190</sup> The American administration took advantage of a provision that was meant to clarify a conflict of interest in cases where the country being asked to extradite an individual had already committed itself to previous agreements with other nations regarding such situations.<sup>191</sup>

As of April 2006, the non-government organization *ICC Now* has documented that, of the 100 States Parties to the International Criminal Court, 54 have publicly

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<sup>189</sup> The United Nations, Rome Statute of the International Criminal Court (1998): 54. [statute online]; accessed 25 July 2006; available from [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

<sup>190</sup> Kerstin Pastujova, "Was the United States Justified in Renewing Resolution 1487 in Light of the Abu Gharib Prisoner Abuse Scandal?" Journal of International & Comparative Law 11 (2004): 213.

<sup>191</sup> Diane F. Orentlicher, "Unilateralism Multilateralism: United States Policy Towards The International Criminal Court," Cornell International Law Journal 36 (2004): 424.

declared their refusal to sign the Bilateral Immunity Agreements, bringing the total number of refusals to 56. Of these, 18 States Parties have suffered significant financial loss from the withdrawal of funding previously provided by the United States.<sup>192</sup> The aid that the American administration provides throughout the world addresses a variety of issues pertaining to the welfare of the citizens of those countries, often related to matters of stability. For example, Brazil lost \$500,000, Ecuador and South Africa each lost \$7.6 million, Tanzania \$230,000, Peru \$2.4 million, and Croatia lost \$800,000 in funding.<sup>193</sup> The political repercussions of these economic pressures can be multilayered, as they prevent countries from achieving the goals they have set for themselves. This revocation is especially harmful when the funding is used to address issues of fundamental importance to countries, such as the control of drug trafficking, education about AIDS, peace promoting programs, and so on.<sup>194</sup> The unavailability of funding can thus lead to destabilization throughout the region, as the 'spill over' of problems can flow easily through porous borders. Yet, although much of this funding aids developing countries battle issues unique to them, many have opted to relinquish this help rather than submit their morals and beliefs to a cause they view as unjust. Nevertheless, since significant monetary values are at issue, these nations should be commended for adhering to the security of the world instead of economic motivations.

In response to American fears of the ICC being used as a political tool of retribution, those who support the endeavours of the Court suggest that the checks and balances implemented in the Rome Statute are sufficient to provide the necessary

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<sup>192</sup> "USA and the ICC," Coalition for the International Criminal Court [article online]; accessed on 5 July 2006; available from [www.iccnw.org](http://www.iccnw.org).

<sup>193</sup> *Ibid.*

<sup>194</sup> Katherine Stapp, "Mexico Defies Washington on the International Criminal Court," Common Dreams News Center (2005): 1.

safeguards from any possible risks. It was during the Clinton administration that negotiations were taking place to draft the Statute, and the main concern in the White House was that the ICC would “constrain America’s freedom of action abroad.”<sup>195</sup> In order to prevent such obstacles, Washington played a key role in shaping the statute.

In explaining the initial support of the US for the ICC, it is important to note that, in its preliminary stages, the Court was meant to be under the purview of the Security Council and governed by the United Nations Charter. Essentially, it was going to be a permanent version of the ad hoc tribunals that the United States has been involved in creating since World War II.<sup>196</sup> However, during negotiations for the Rome Statute, many countries strongly objected to the ICC falling under the control of the Security Council because they wanted this Court to be independent of political influence. The caucus of like-minded states were very vocal in their position that political actors, such as state leaders, should not be capable of influencing the Court; otherwise its credibility is put in jeopardy of being severely undermined.<sup>197</sup> Thus, since it was decided that the Security Council would not govern the ICC, the Court was removed from control by states and transformed into an entirely new and independent body that had been absent from the international arena.

The role of the United Nations Security Council in the ICC, specifically argued for by the US, has since generated a great deal of concern. To ensure that American military personnel would not be tried for violations of international law, the UNSC pressed to obtain the right to prevent certain persons from facing prosecution. A number

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<sup>195</sup> “Europe: Soon It Will Be Dispensing Justice”, *The Economist*, 366 (Mar. 15, 2003) 39.

<sup>196</sup> William Shabbas, “United States Hostility to the International Criminal Court: It’s All About the Security Council,” *EJIL* 15, no. 4 (2002): 712.

<sup>197</sup> *Ibid.*, 714-716.



of countries opposed allowing the UN Security Council to interfere with the Court, since the ICC is independent and not affiliated with any political body. The compromise reached on this issue was that a deferral of the trial would be granted, for a renewable period of twelve months, with a resolution from the UNSC.<sup>198</sup> Although the US campaigned to have these twelve months automatically renewed at the end of its term, States Parties resisted, arguing that this provision would be a direct contradiction to the very essence and character of the Court.<sup>199</sup> Additionally, UNSC members are prohibited from vetoing any cases undertaken by the ICC, but the Rome Statute does allow Security Council members to veto a request to postpone trial.<sup>200</sup>

As a result, it is unfortunate that the United States has chosen to distance itself from the International Criminal Court since the checks and balances ingrained in the Rome Statute should appease those concerns continually raised by the American administration. It is clear that the refusal to submit to the ICC stems from political considerations, as the United States is desperately clinging to its status as the world's hegemon and thus often considers itself above those laws that apply globally. History has certainly shown that empires do not last indefinitely, and it is beneficial to stay within the sphere of current global movements.

The political repercussion of such a staunch American opposition is already becoming evident as it affects certain US diplomatic relations. The United States and European countries have, for the most part, been close allies in the international arena for decades. While this relationship did not deter any amount of authority attributed to America following the Cold War, the formation and enlargement of the European Union

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<sup>198</sup> Roach, 149-150.

<sup>199</sup> Orentlicher, 424.

<sup>200</sup> Popovski, 410.



has become a new globally imposing presence. As the EU garners strength and solidifies its policies, it shifts increasingly away from America's approach to international relations.<sup>201</sup>

Presently, the battle between the US and the EU stems beyond a minor disagreement that can be pushed aside as a matter of opinion. This is most visible in the fact that the EU unanimously approved the International Criminal Court, while the US adamantly opposed it.<sup>202</sup> Although the US had grown accustomed to being able to influence the international position of its European friends in order to pursue its own interests, the EU is now a consolidated bloc of countries integrated on a level far deeper than simply economics.<sup>203</sup> This is therefore making it nearly impossible for the US to exert its authority on Europe. Part of the reason for the EU's comparable strength to that of the US is that

it has a larger population than the United States, a larger percentage of world trade, and approximately equal gross domestic product... It pays a larger percentage of the U.N.'s core budget (37 percent versus the United States' 22 percent) and a much larger percentage of the U.N.'s funds and special program costs (50 percent versus the United State's 17 percent). On a per capita or per-GDP basis, every one of its member countries contributes more to development assistance than does the United States.<sup>204</sup>

In fact, the EU has explicitly acted in contravention to an increasing number of requests and expectations of the United States, much to the latter's consternation. One of the changes that the EU is experiencing falls under the influence of the German and Dutch positions regarding the environment. Over the past ten years, lobby groups and

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<sup>201</sup> Jessica T. Mathews, "Estranged Partners," *Foreign Policy* 127 (2001): 2.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*, 4-5.

<sup>204</sup> *Ibid.*, 5.

NGO involvement has risen in the EU, most notably within the European Parliament, which corresponds to the European public's increased attention towards certain issues.<sup>205</sup>

Interestingly, and often contrary to international support, the unilateral approach that the United States has often engaged in, has resulted in the EU further solidifying itself as a single unit. This is readily seen in the EU's support of the Kyoto Protocol in the face of explicit American rejection, and EU's involvement with North Korea despite strong US objection and historical tension.<sup>206</sup>

Tension between the US and the EU are also impacting other states and prospective relations with the United States; primarily due to the fact that most nations have affiliations with the US but are torn between which opposing side of the policies to support. France has even warned prospective EU applicant and member-states that their decision, for or against the US, if made poorly, will impact the EU's decision regarding their applications. While this may seem like sheer manipulation, it is important for future EU members to understand the depth of their involvement with the Union, especially since every member is committed to follow the regulations set forth in the Treaty on the European Union. Article 11 of this Treaty states that members of the EU are understood to provide support, based on the "spirit of loyalty and mutual solidarity", for all of the EU's foreign and security policies. Members states are expected to act in accordance with the interests of the EU, and in not in opposition to it, or there will ultimately develop severe negative ramifications for the unity of the organization.<sup>207</sup>

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid, 6.

<sup>207</sup> Janusz Bugajski and Ilona Teleki, "Washington's New European Allies: Durable or Conditional Partners?" *Washington Quarterly* 28, no. 2 (2005): 3-4.

It is clear that the US does not want to be held to the same standards as those that apply to the rest of the world. Accordingly, this has not escaped the attention of the European Union, which strongly contests the US campaign forcing countries to sign the BIAs. Deeply offended with the tactics used by the Americans to gain signatories for these Agreements, the EU warned that its members should not accede to US wishes as America continues to undermine the ICC, in which the EU is an active participant.<sup>208</sup>

Subsequent to the EU's message to member states regarding its stance on the BIAs, the Bush administration sent letters to individual EU member-states imploring them to disregard the request of the Union. The US went so far as to threaten to alter its role in the North Atlantic Treaty Organization (NATO) if countries did not sign the Agreements. Moreover, the Bush administration told prospective NATO candidates that any refusal to sign the Bilateral Immunity Agreements would adversely affect their consideration for entry into the organization.<sup>209</sup> By 2003, the US had effectively cut military aid to 35 countries, six of which were potential EU member states that had followed the EU's policy pertaining to the ICC.<sup>210</sup>

Despite Washington's intense stance against the International Criminal Court, recent events in world politics have caused, some suggest, a minor shift in US policy towards the passive acceptance of the authority of the Court. Sudan has been in the midst of severe internal conflict, most notably in the Darfur region, whereby an alarming number of residents are being displaced on a daily basis. Throughout this conflict, the perpetrations of egregious crimes against humanity were being conducted at an astronomical rate, creating a stir of concern within the international community. After a

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<sup>208</sup> Orentlicher, 424.

<sup>209</sup> *Ibid*, 425.

<sup>210</sup> Bugajski and Teleki, 3-4.



number of investigations into the allegations of human rights abuses, the *International Commission of Inquiry on Darfur* – a group sponsored by the United States – created a complete report on the situation. In January 2005, the Commission indicated that the judicial system and authorities in Sudan were neither capable of nor willing to render those individuals responsible for perpetrating the atrocities accountable. They further emphasised in the report a strong recommendation that the case against the responsible individuals in the Sudanese government and the army it allegedly supports, the Janjaweed, be referred to the International Criminal Court with urgency.<sup>211</sup> It is at this juncture that the United States was forced to sway from its strong and very active stance against the ICC. When UN Security Council Resolution 1593 was presented before the assembly of states, thereby referring the Darfur case to the ICC, the United States desisted from using its veto power. Such an event, scholars suggest, represents an initial acceptance by the American administration towards the relevance of the ICC in the global community, and has since prompted a few remarks by politicians acknowledging the potential of an international justice mechanism.<sup>212</sup>

However, the question remains as to whether the United States would have acted similarly had one of their strong allies been the subject of such referral by the UNSC to the ICC. The United States most likely did not relax its opposition to the ICC, but merely deemed the Sudan case of little consequence to its foreign policy endeavours. Had an American ally been subjected to the UNSC for potential reference, the United

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<sup>211</sup> John Stompor, "The Darfur Dilemma, US policy Towards the ICC," *Georgetown Journal of International Affairs* 7, iss. 1 (2006): 9 pages [journal online]; accessed 20 July 2006; available from <http://proquest.umi.com.myaccess.library.utoronto.ca/pqdlink?did=988417491&sid=2&Fmt=3&clientId=12520&RQT=309&VName=PQD>.

<sup>212</sup> Ibid.



States would most probably have blocked it and launched a campaign to prevent further discussion on the matter.

Those who support the policy adopted by the United States towards the International Criminal Court explain that the actions of the government are in line with protectionist measures and are reasonable. The first claim is that much of the burden of the peacekeeping and stabilization of Sudan, when the conflict slackens, will fall on the United States. As such, proponents of American policy suggest that the abstention from Resolution 1593 merely acknowledges that the global community would benefit from cooperation; it must not be viewed as a weakening of US opposition to the ICC. They maintain that the Rome Statute is still lacking safeguards in certain areas, and adhering to the belief that the US is very wise in protecting itself from potential backlash.<sup>213</sup>

It has been since the Cold War that the United States has imposed its will in the international arena without being held accountable for its actions. As a result, it is difficult for the American administration to support a new force that has the ability to stand up to the US. What makes this an additional humiliation for Washington is that the very institution that is rejecting America's political endeavours used to abide by many American requests.

Though the implications of the American opposition to the International Criminal Court have not yet fully manifested themselves, it is likely that they will come to light with greater involvement of the Court in international relations. The fact remains that many countries have chosen to reconcile their differences, and have reached negotiated compromises in order to minimize any impediments to the creation of the Court. This

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<sup>213</sup> John R. Crook, "Contemporary Practice of the United States Relating to International Law," The American Journal of International Law 99, no. 3 (2005): 692.

movement does not necessarily signify a shift towards world peace; but merely suggests the recognition by most leaders that the enemy is a mysterious and powerful entity, which is no longer easily identified and can come equipped with significantly destructive capabilities. There is an increase in the willingness of many countries to unite, regardless of alliances, ideologies, and political identities because of the recognition that they all share a common goal. Hostilities, conflicts and open warfare is the type of enemy that states are accustomed to dealing with; but a group of civilians with a message and an impressive amount of arsenal, threatening to resurface anywhere and at any time, is a relatively new phenomenon.

It is worth mentioning that the positive achievements throughout the past several decades that have aided and perpetrated by the advancement of technology, have also facilitated the task of violent individuals and ill-wishing government members. Accessibility to all areas of the world is no longer a feat when in possession of the means to travel, meaning that all nations can potentially fall prey to the destructive consequences of violence. As such, state leaders are leaning towards a system of unity in attempting to deter the perpetration of crimes that transcend borders. To this end, they have opted to vest their faiths in a universal mechanism that can promise the most efficient and independent methods for the prosecution of criminal activities under its jurisdiction.

In fact, the aggressive campaign launched by the American administration will inevitably increase the distrust of many nations towards the United States; while potentially undermining the Court, since it does not have the support of the leading superpower. Its actions are inconsistent with the messages that American leaders seem to

propagate through the media: that international norms should be respected and cooperation to achieve a similar end is encouraged. However, the United States administration, under President George W. Bush, only requires cooperation for efforts undertaken and supervised by the US but will not partake in measures over which it is not in full control. The US has discredited itself, and proven to the world that its commitment to human security will only prevail when there is a clear benefit to gain from the endeavour, but not when the benefit is mutual universally. Certainly, this fact became glaringly obvious when the Bush administration had to strong-arm states in order to get the BIAs signed. America's lack of involvement will likely cause little harm to the functioning of the Court, but will make the funding and law enforcement aspects a little more difficult of organize. The United States is in one of the best positions to provide both man-power and capital to ensure that the ICC has the resources necessary to work and conduct its job efficiently. However, it will not do so unless it is given considerable reins to control the organization, but the difficulties presented by that lack of funding are not so insurmountable as to warrant stripping the Court of its independence.

Scholars suggest that the United States is choosing to be isolationist as a matter of policy, stemming from their perception of themselves as being superior to other nations. As such, the American administration reserves itself the right to dictate expected behaviour to others, while they are free to conduct their affairs according to their own rules. Prior to the events of September 11, 2001, the United States preferred the route of 'systematic unilateralism', instead of 'institutionalized multilateralism'. Yet, following the terrorist attacks on the World Trade Center and Pentagon it has subverted to complete isolationist measures. As a result, the United States has had considerable difficulties

adapting itself to institutions that are neither heavily dependent upon nor influenced by American power.<sup>214</sup> A significant number of countries throughout the world, however, seem to be adjusting to this shift away from realist perspectives in international relations towards the creation of a greater global community.

<sup>214</sup> David P. Forsythe, "The United States and the International Criminal Court," *Human Rights Quarterly* 24 (2002): 977.



## Conclusion

Since the general atmosphere of the global community reflects the nature of states, the evolution of security studies is an excellent tool to determine that international relations has progressed from the traditional expectations of interaction. Whereas in the past it was the sovereignty of the state that was the defining feature of relations, and the basis upon which institutions were set up, than the creation of the International Criminal Court is quite telling. Logic can only conclude that the global community has recognized the need for an enforceable mechanism of accountability, created by the member states that are willing participants in the hopes of structuring future behaviour in a manner deemed acceptable. That this reflects the general opinion of the majority of the world's state leaders is evident in the amount of participants and signatories to the Court. However, it is also important to note that such an accomplishment would have been impossible under the old tenets of security studies, prioritizing sovereignty and state supremacy above the welfare of its citizenry.

The shift in security perspectives is increasingly putting value on humankind and the basic necessities for existence of humanity. The 'business of war' has developed significantly over the centuries, and more so since the early days of the twentieth century. Military attacks are no longer largely concerned with other soldiers, but target civilians and many aspects of civilian life. Moreover, technological advances have provided deadlier weapons and easier means of attaining them, which are often more rampant throughout developing countries. It is as a result of these changes, and many others, that human security is being threatened to a much larger degree, thus requiring the immediate attention of the global community.

This change from traditional notion of realism towards universalist perspectives is creating certain tensions on the international scene, as it requires the cooperation of states beyond the usual diplomatic, political, and economic concerns. Political actors, a title no longer relegated to governments and heads of states, must combine their individual interests with that of the global community in order to address problems that plague all four corners of the world. The progress of human rights and the codification of laws to protect the sanctity of humanity has been a long and arduous one, which requires continuous work if it ever hopes to address all the concerns expressed by the global community. Nonetheless, the developments to date are admirable in that they have forced many political leaders to acknowledge issues that were previously ignored or treated as inconsequential. The fact that human security has become a field of study and has attained governmental attention is an important feat, namely in that its recognition is a symbol of the emancipation of international tenets. The creation of the International Criminal Court is an important step in this direction because it codifies and legitimizes the values attributed to human security and highlights the vitality of basic human rights.

The study of international relations is an intricate network of many interdependent concepts and fields that continue to influence and shape each other in the global community. It is impossible to separate domestic concerns from international ones, legal concerns from political ones, and human rights from human security. If the ICC had not enjoyed the support of the majority of the world, American opposition could have severely hindered its success and credibility. However, just as many nations have refused to sign the bilateral immunity agreements at the expense of significant foreign aid, the world will continue on the path of honouring the sanctity of human life above – or on an

equal scale with – economic and political gains. One can only hope that a century from now, human security will be deeply ingrained in the international community as a testament to the universal standards that hold humanity in high regards. Consequently, the success of the ICC cannot be undermined on the basis of the shortcomings in the Rome Statute, nor should it be compromised by American resistance. The theoretical meaning and symbolism that it represents in the global community is a tribute to its success as one of the first truly independent accountable bodies at the international level.

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Throughout the various stages of her academic endeavors she has always made it a point to stay involved with the school community. Through these activities, she has met many interesting people, learned new skills, and has been the recipient of several awards.