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## Explaining the Establishment of the Independent Prosecutor of the International Criminal Court

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Graduate Program in Political Science  
A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of Philosophy  
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EXPLAINING THE ESTABLISHMENT OF THE INDEPENDENT PROSECUTOR OF  
THE INTERNATIONAL CRIMINAL COURT

(Thesis format: Monograph)

by

Laszlo Sarkany

Graduate Program in Political Science

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies  
The University of Western Ontario  
London, Ontario, Canada

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## **ABSTRACT**

The aim of this dissertation is to discern and explain why states established the International Criminal Court (ICC) with an independent Prosecutor with the aid of theories of international relations. The theories utilized were neorealism, neoliberal institutionalism, historical institutionalism, constructivism and liberal-pluralism. In order to complete the above-stated task, two supplemental questions were asked: first, how is one be able to explain policy formulation in regards to the ICC; and second, what accounts for the victory of the supporters? The comparative case study method of the ‘method of agreement’ was employed. Canada and the United Kingdom – from among the supporters of the institutionalization of the independent Prosecutor – and the United States and Japan – from among the opponents of the initiative – were selected for the study at hand. Elite interviews and declassified diplomatic documents were consulted and supplemented by analyses of secondary sources documents such as negotiating transcripts and transcripts of parliamentary debates. In the final analysis, constructivism and its liberal variant – liberal constructivism – in tandem with liberal-pluralism seem the best able to explain the establishment of the Court with an independent Prosecutor because these two theories are best able to account for the role of ideas and interests of key actors during the process of establishing the Court. In addition, and given that the establishment of the Court is a substantial departure from its institutional predecessors, liberal constructivism and liberal-pluralism are also able to account for this revolutionary change in the establishment of international institutions. The study at hand highlights the role of domestic political actors in the acceptance of international treaties as well.

Therefore, this study underpins the need for further scholarship in regards to under what conditions do states allow themselves to be bound by international legal mechanisms.

**Key Words:**

International Criminal Court, Prosecutor, Rome Statute, neorealism, neoliberal institutionalism, historical institutionalism, constructivism, liberal-pluralism, Canada, the United Kingdom, the United States, Japan, international treaties

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at the United Nations; Mr. Bill Pace, the Convenor of the Coalition for the International Criminal Court; Mr. Niccolo Figa-Talamanca, the Secretary General of ‘No Peace Without Justice’; the late Mr. Christopher Keith Hall, Senior Legal Advisor, International Justice Project, Amnesty International; Mr William Schabas, Professor at the National University of Ireland in Galway, Ireland; and Professors Valerie Oosterveld and Darryl Robinson, members of the Canadian delegation in Rome.

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## **CHAPTER 1: INTRODUCTION**

The Rome Statute establishing the International Criminal Court is one of the most important international accomplishments of the post-Cold War era. It raises the world community to a higher level of civilization (Comments by the Honourable Douglas Roche, member of the Canadian Senate, during the third reading of Bill C-19 on Wednesday, June 28<sup>th</sup>, 2000).

The creation of a permanent international criminal court is a historic task. It will be a major organ that will play a crucial role on the world stage for many decades to come (Remarks by Lord Whitty in the House of Lords of the United Kingdom and Northern Ireland, June 9<sup>th</sup>, 1998).

The problem is not in the principle, but in the modalities of establishing the court (Allan Kessel, member of the Canadian delegation at the Rome Conference in 1998).

The International Criminal Court (ICC), the first permanent international criminal court, was established on July 1<sup>st</sup>, 2002, by the time 60 states ratified its foundational document, the Rome Statute (RS) of the Court. The permanent Court is seen as a crowning achievement of an effort, more than a century in the making, by non-governmental organizations (NGOs) as well as states to bring to justice those who have committed the most heinous crimes in the history of intra-state and inter-state warfare. As Michael Struett states, “the ICC represents the most substantial effort in human history to institutionalize individual criminal responsibilities for atrocities committed by states’ leaders during interstate warfare or civil conflicts” (Struett, 12). Although the ICC was preceded by a number of ad hoc and hybrid tribunals which were tasked with bringing war criminals to justice, the Court is markedly different from these institutions in two key respects. First, it is a *permanent* institution. The Court does not have a set territorial or

temporal<sup>1</sup> mandate; there are no limitations as to which conflicts it should address, and within which time periods. Second, it is an *independent* Court, meaning that it does not fall under the jurisdiction of any state or set of states, not even the United Nations Security Council (UNSC). The ICC does originate from within the United Nations (UN) system, and the Court does exhibit the same operational rules and procedures used within the UN system. However, the Court is only accountable to its own Assembly of State Parties (ASP), composed of states which have signed and ratified the Statute.

Advocates of a permanent international criminal court trace their efforts to establish such an institution to the founder of the International Red Cross / Red Crescent, Gustav Moynier, and the war-ravaged years of the late 19<sup>th</sup> century. The World Federalist Movement, in turn, had also supported the creation of the Court since the movement's establishment in 1947.<sup>2</sup> However, it was not until almost 100 years later, in 1989, that the issue attracted official legal and political attention. In 1989, the former Prime Minister of Trinidad and Tobago, A.N. Robinson, proposed in the UN General Assembly (UNGA) the establishment of an international criminal court to prosecute and deter narcotics traffickers and trafficking in the Caribbean. Following a mere four-year process, the Court's foundational document, the Rome Statute (RS) – named after the 1998 conference in Rome where the statute was accepted by 120 out of the 160 participating states – established the legal as well as political foundations for the creation of the Court.

The statute of the Court was accepted with the support and advocacy of the so-called 'like-minded states', but also with the help of numerous non-state actors. In a

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<sup>1</sup> The Court's jurisdiction is only bound by its non-retroactivity, meaning that the Court's jurisdiction is not applicable to the relevant crimes committed prior to July 1<sup>st</sup>, 2002, the date when the Rome Statute came into force.

<sup>2</sup> Pace, William. Skype Interview. 01 Aug. 2011.

matter of four years, between 1998 and 2002, 104 states signed the Statute<sup>3</sup> and at least 60 states ratified it. Given the gravity of the crimes for which the Court is responsible, and its potential impact on state sovereignty, it is quite puzzling why states would cede their sovereignty to such an institution. What is further puzzling – and what directly concerns the subject matter of this dissertation – is why states would endow the Court with an independent Prosecutor with the ability to unilaterally initiate investigations without state restraint? Given the liberty of the Prosecutor to pursue leads, the Office of the Prosecutor (OTP), more than any other design feature of the ICC, challenges most concretely the sovereignty of states in a very direct manner.

The particular role bestowed on the Prosecutor in the RS was unprecedented, unexpected, and yet crucial for a functioning Court. As Morten Bergsmo and Jelena Pejic explain, at Rome “it came as a surprise for many that States were willing to accept an independent international prosecutor who can freely conduct preliminary examination of allegations of core international crimes and make public statements about such activities” (Bergsmo and Pejic in Triffterer, 585). Yet, as Sylvia DeGurmendi – a judge at the Court, and a former diplomat representing Argentina at Rome – explains, “the majority of States participating in the Rome Conference considered that the *proprio motu* role of the Prosecutor was an indispensable feature of an independent and effective Criminal Court” (DeGurmendi in Politi and Nesi, 55). More important, this role bestowed on the Prosecutor was not only a function of Prosecutorial independence alone, but it was a crucial role bestowed on the Court as a whole.<sup>4</sup>

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<sup>3</sup> Signing the Statute is the first step in joining the Court, but at this stage states are not legally bound by it. For that to take place a state must formally ratify the RS, or make it a part of its domestic laws.

<sup>4</sup> Talamanca, Niccolo-Figa. Skype Interview. 06 Sept. 2011.

Within international relations scholarship, the independent role ascribed to the Prosecutor – and the ICC as a whole – has not been put under the rigorous and substantial analytical examination it deserves. As many astute observers and scholars of the ICC posit, “thus far few social scientists have given this innovative institution close scrutiny.” (Simmons and Danner, 226) At the same time, the existing literature discussing the role of the Prosecutor tends to be located within the legal literature. International relations and comparative politics scholars have yet to take a committed step towards attempting to explain this very interesting and important design feature of the first permanent international criminal court.

The aim of this work then is to provide an explanation – with the aid of five international relations theories, including neorealism, neoliberal institutionalism, historical institutionalism, constructivism and liberal pluralism – as to why states agreed to establish an independent prosecutor for the ICC. In order to attempt such analysis, the proposed work will shed light on two further sub-questions intimately related to the central research question. First, which states supported and which opposed the establishment of an independent Prosecutor, and why? Second, why and how did the supporters of an independent Prosecutor win? It will be argued that, given the role of domestic ideas and interests as well as the activism, effort and skill of individual political actors during the pre-Rome process, in Rome, and during the post-Rome ratification phase of joining the Court, theories such as liberal pluralism and liberal constructivism provide the most appropriate explanation. These theories are most suitable as they are able to account for the causal relevance of, not only state-level actors prior to and during the negotiations, but also for the effort and principled convictions of domestic-level

actors as well. More importantly, these theories – as opposed to their systemic and institutionalist alternates – are better able to account for political change. The establishment of the ICC with an independent Prosecutor is a revolutionary phenomenon, and a large scale departure from other, prior institutional arrangements. Therefore only theories which are able to account for political change are best suited for the ensuing analysis.

Through the application of qualitative and case study methods this study will show that it was mainly liberal and social democratic states which advocated for the establishment of the independent Prosecutor. In particular, the case studies of Canada and the United Kingdom, on the one hand, and the cases of the United States and Japan, on the other, will show that particular interest groups and political parties from within the domestic political arena of these states advocated either for, or against, the establishment of the independent Prosecutor. In these regimes, the domestic political groups occupying key foreign policy-making positions, and the general consensus regarding the issue of the ICC and the independent Prosecutor, provide the answer as to why these regimes supported or opposed the establishment of the ICC and the independent Prosecutor. It was therefore domestic interest groups, and their successful framing of the national interest in such a way that the independent Prosecutor was seen as either not a threat to state sovereignty – or directly not jeopardizing state sovereignty – that are responsible for the establishment of the ICC with an independent Prosecutor. The domestic interests resonated with the general sentiment in the mid-1990s that certain societies were ‘unwilling or unable’ to bring war criminals to justice. To paraphrase the late Christopher Keith Hall, the then-Legal Counsel of Amnesty International, and Rolf Einar

Fife, the Direction of Legal Affairs of the Foreign Ministry of Norway, neither the ICC, nor the independent Prosecutor, would have been established in any other temporal and historical contexts.<sup>5</sup>

### **The International Criminal Court: A Primer**

At the outset, it is worth looking more closely at the ICC, the international context it was developed in, and what its particular design features are in order to lay the groundwork for the forthcoming chapters. Taking a step back, one of the most discussed international issues of the 1990s was the phenomenon of an increasing number of intra-state conflicts as opposed to inter-state conflicts. Quite naturally this new dynamic was attributed to the end of the Cold War, and the end of the bipolar material and ideological ‘standoff’ between the United States of America and the Soviet Union. At this time there was also a rise in the number of so-called ‘failing’ or ‘failed’ states where the central authority of a government has not only been challenged but also diminished in certain respects. In parallel with this phenomenon, more attention was paid to human rights violations within states. Leaders and individuals who were responsible for mass violations of human rights were publicly identified and acknowledged across the globe as well as within particular sovereign states. It became clear that certain states and their leadership either could not hold certain individuals accountable for crimes committed during war, or were not willing to do so. The civil wars in the former Yugoslavia and Rwanda were glaring examples of this need for the international community to ‘step in and step up’ in bringing individuals to justice who would otherwise walk free (Ibid).

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<sup>5</sup> Fyfe, Rolf Einar. Telephone Interview. 11 July 2011.; Hall, Christopher Keith. Telephone Interview. 11 July 2011.

Also, at this juncture in time, the notions of humanitarian intervention and human security gained conceptual and practical relevance. What these proposals signaled, however, was a certain ‘diminishing of the state’, or at the very least a challenge to the deeply ingrained concept of state sovereignty and with it the capacity of states to deal with the most heinous crimes against humanity. Overall, states as well as the United Nations were more often than not confronted with situations in which the apparent remedy necessarily challenged age-old practices underpinned by the sanctity of state sovereignty.

Organizationally, the ICC is comprised of four main organs: the Presidency, the judiciary, the Office of the Prosecutor and the Registry. The Office of the Presidency is entrusted with the overall administration of the Court, except for the Office of the Prosecutor. The Presidency is headed by three judges who are elected by their fellow jurists at the Court for a term of three years. The presiding judge of the Court is assisted by a first Vice-President and a second Vice-President. The Judiciary consists of the judges of the Court – eighteen in total – who serve in one of three judicial divisions: Pre-Trial, Trial and Appeals Division. The assignment of judges to the different divisions is based on the ‘function’ of the different division as well as the ‘qualifications and expertise’ of the judges. In terms of qualification, it is ascertained that the personnel have ‘expertise in criminal law and procedure and international law.’ The Office of the Registry “is responsible for the non-judicial aspects of the administration and servicing of the Court.” This organ is headed by a Registrar who is under the supervision of the President of the Court. The Registrar is elected by the judges of the Court for a five- year term. Lastly, the Court also contains three other so-called ‘semi-autonomous’ offices



which fall under the administration of the Registry, though these offices operate autonomously. These are the Office of Public Counsel for Victims, the Office of Public Counsel for Defence, and the Trust Funds Office. The Office of the Prosecutor (OTP) is an autonomous and independent organ of the Court. It is administered neither by the Presidency of the Court nor by any other international organ, including the United Nations or the United Nations Security Council. The OTP is headed by the Prosecutor. The Prosecutor is elected for a non-renewable nine years by the Assembly of State Parties. He or she is assisted by the Deputy Prosecutor who is in charge of the three subdivisions within the OTP: the Prosecution Division, the Jurisdiction, Complementarity and Cooperation Division, and the Investigation Division. The latter two divisions are headed by a Director and a Head respectively.

The Prosecutor may initiate investigations based on two types of modalities: a) referrals from state parties to the Rome Statute or the UNSC; and b) communications from individuals who are referring to one of the three crimes – genocide, crimes against humanity, war crimes – under the jurisdiction of the Court. Thus far, there are eight states from which cases are being heard at the Court. These cases deal with the situations in Northern Uganda, Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Sudan, Kenya, Libya, Cote d’Ivoire, and Mali. The situations in Uganda, Cote d’Ivoire, CAR and the DRC have been referred to the Court by state parties. The cases of Libya and Sudan have been referred to the Court by the UNSC. At the present time, the Prosecutor has been granted authorization to “investigate *proprio motu*” (‘on his/her accord’) the situation in Kenya. In addition to the active cases and investigations described above, the Prosecutor is also involved with the “preliminary analysis” of

developments in Afghanistan, Colombia, Comoros, Georgia, Nigeria, Guinea, Honduras, Iraq and Ukraine.<sup>6</sup>

Among the different design features of the ICC, the OTP stands out as the feature that potentially has the most significant impact on the sovereignty not only of the states which signed the Rome Statute, but also on the so-called ‘third-party states’ that have not signed nor ratified the Statute. Even though there are numerous works within the international relations literature theorizing why and in what circumstances states would cede their sovereignty to international institutions, this particular design feature of the ICC is undertheorized. This circumstance is what this work will attempt to remedy. Why would states - 120 at that, which signed and ratified the statute, including states that are members of the UNSC such as the United Kingdom and the France in particular – do so? And, of particular importance to this work, why would states establish an independent prosecutor whose ability to bring indictments against individuals goes unchecked by any other, outside organ?

## **Methodology and Data Gathering**

This dissertation employs the ‘method of agreement’ (or ‘most different’) comparative case study method in order to isolate causal variables. It also employs process-tracing within cases to identify specific causal mechanisms. Data for these cases were gathered through textual analysis, elite interviews, participant observation, as well as descriptive statistics. The aim in this section then is to provide an outline of the method and methodologies, and the utility of the cases for the arguments at hand. Some attention will

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<sup>6</sup> International Criminal Court. *News and Highlights*. Web. 25 October 2014. [www.icc-cpi.int](http://www.icc-cpi.int).

also be paid to possible cases which could have been selected but were left out of the discussion.

From the strictly methodological point of view of comparative case analysis, the four cases selected fit very well with the ‘method of agreement’ research design, which espouses that “cases should differ in every respect except for the variables being studied” (Hopkin, 268). Apart from representatives of all four states used as case studies continually participating in the debates about the Prosecutor and the Court in general, the four cases show substantial difference in their foreign policies, governmental structures, and party politics. With respect to foreign policy, Canadian foreign policy was at the time still focused on multilateralism and peace-keeping. The foreign policy of the UK emphasized “maintaining a strong alliance with the US, and a commitment to place Britain at the heart of Europe.”<sup>7</sup> Finally, the US had become the sole superpower and was viewed as the hegemon within the international realm. It was at the forefront of nearly every major inter- or intra-state conflict, from Rwanda, Somalia to Bosnia and later Kosovo. In Japan, certain constitutional provisions did not allow it to engage in any military activity. With respect to state structures, Canada and the UK are both parliamentary democracies. Canada is a federal state while the UK is confederation. By the same token, even though Canada and the US are both federations, the US government is characterized by a presidential system, and Canada is characterized by a parliamentary system. Lastly, Japan is a monarchy, and a bicameral parliamentary liberal democracy. Overall, there is substantial variation between the governmental structures of these four states. Yet despite this variation, the common denominator is that the particular policies

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<sup>7</sup> Lunn, Jon, Vaughne Miller and Ben Smith. “British Foreign Policy since 1997.” *House of Commons of the United Kingdom and Northern Ireland Library Research Paper 08/56* (2008): 1-123. Web.

pursued, and later made into national law, were a function of particular domestic groups occupying positions of power and influence. In other words, domestic interest groups were able to drum up enough support for their bargaining position regarding the ICC, at a particular juncture in time.

In order to trace ‘initial conditions to outcomes’, records of the negotiation process were analyzed in order to uncover how different actors – namely members of the ‘like-minded group’, NGOs, and the US and the ‘not-so-like-minded-states’ – negotiated and argued for, or against, the establishment of an independent Prosecutor. In general terms, the preferences of states were observed beginning with the publishing of the first draft statute of the Court in 1994 by the International Law Commission (ILC), continuing with the Preparatory Committee (PrepCom) meetings throughout the 1990s, and ending with debates in national legislatures of the states under scrutiny shortly before the RS was ratified and made into national law.

The cases outlined above were selected because these states were in positions of leadership during the timelines under scrutiny and were considered as very important within the debates regarding the independent Prosecutor. Canada was approached in 1995 by the NGO Coalition for an International Criminal Court (CICC) to lead the charge of establishing the Court after the successful Ottawa conference banning the use of land mines in conflicts. Supporting the ICC and the independent Prosecutor seemed a natural extension of a multilateralist Canadian foreign policy, which included a leading role of the newly established Human Security Network (Axworthy 2004, 202). At the same time, the official opposition in the House of Commons, the Canadian Alliance party, did oppose – unsuccessfully because of a Liberal majority supported by the New Democratic

Party – the establishment of an independent Prosecutor. The case of the UK is very important as well, as this state is a member of the so-called ‘permanent 5’ (P-5) of the UNSC. The P-5 was seen as a group-to-contend-with, and a group which – as cohesive as it was – argued against the establishment of an independent Prosecutor throughout the PrepComs until the UK changed its stance.<sup>8</sup> This will provide us with an opportunity to explore factors responsible for this shift in position.

The US is an excellent case because it vehemently opposed the establishment of an independent Prosecutor even though this was not a major policy aim of the US – at least not in Rome. The pressure provided by the Pentagon and certain members of the US Congress and US House of Representatives towards the US negotiating team in order to shield US service members and civilians from the reach of the Court by whatever legal means necessary – and the failure of the Clinton Administration and the State Department to absorb this pressure – shed light on a key explanatory factor for US opposition: domestic partisan interests. Lastly, the case of Japan is key to this study as well. Even though Japan was intimately involved in the diplomatic conferences prior to Rome, in Rome, and during the work of the Preparatory Commission after the conference, it took Japan nearly a decade to ratify the statute. Japan ratified the statute in 2007, after the unanimous support of the members of the Diet, and the tireless advocacy of certain members of the Democratic Party of Japan.

A few additional cases could have also been selected. From among the supporters, Australia, France and even Senegal seemed to be acceptable choices. Uruguay and Israel were possible choices from the group of states which did not – at least

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<sup>8</sup> Later on during the Rome conference, France, another member of the P-5, also changed its stance. However, in the case of France, the change was due to the achievement of that nation’s negotiated goals as opposed to a change in government.

initially – support the establishment of the independent Prosecutor. The main obstacle to using most of these cases was data acquisition. This study was conducted a decade after the negotiations were concluded and the Statute was ratified by key states. Access to information regarding these cases was quite difficult, because, for example, states and publics were not as interested in the establishment of the Court, or because public information about state positions was kept confidential, or simply because members of delegations – as in the case of Uruguay – were by then deceased. In certain other cases, materials relevant to state positions regarding the Court were not available in English.

As is quite evident from the cases selected, authoritarian states have not been used for the study. Other than the Islamic Republic of Iran, and Egypt, for example, none of the so-dubbed authoritarian states played a key role during the negotiations. The Islamic Republic of Iran was quite active in Rome, but mostly when the issue of the role of the UNSC was debated. Egypt did comment on the role of the Prosecutor within the Court, and its stance seemed to have changed to supporting the independent Prosecutor as the negotiations progressed. However, the inaccessibility of information regarding these states' policies on the ICC would have created significant obstacles for the study. Overall, the biggest obstacle to using these types of states was the availability of information on preference formation in these states, and the lack of accessibility to key decision makers.

Process tracing was also key to explaining case studies. According to George and McKeown, it entails evaluating “the decision process by which various initial conditions are translated into outcomes” (George and McKeown in King, Keohane and Verba, 226). The authors note that via process tracing the individual actors responsible for the

particular decisions can be identified. More importantly, by way of process tracing one is able to pinpoint outcomes, which “often imply a particular set of motivations or perceptions on the part of these actors” (Ibid., 227). This type of methodology then is very well fitting for the analysis. The aim of process-tracing in this study is to note the specific causal variables by tracing the impact of ideas and interest groups on national preference formation regarding the establishment of the ICC with an independent Prosecutor.

Data was further gathered through content analysis of key primary documents – including a declassified diplomatic cable, through elite interviews and through participant observations. Key policy papers, parliamentary committee and debate transcripts, as well as policy and media publications were used to discern the reasons why the above-mentioned key actors negotiated for an independent Prosecutor. Interviews were conducted with a former Minister of Foreign Affairs, a former Under-Secretary General of the United Nations, a current Ambassador accredited to the United Nations, a number of former negotiators representing states as well as senior bureaucrats in key Ministries of Foreign Affairs, along with NGO representatives. Between 2010 and 2013, participant observations were also conducted at the Assembly of States Parties meetings of the ICC, at the headquarters of the United Nations in New York and in The Hague. The objects of these observations were to not only further understand the position of states under scrutiny, but also to understand under what circumstances do states change position on key foreign policy issues.

Finally, ordinal and nominal statistical methods were used to extract data regarding state support or opposition from secondary sources found in transcripts of the

negotiations in Rome as well as transcripts of meetings of the ILC and the UNGA.<sup>9</sup> The utility of these research methods was that they provided a basic outline of how many – and which – states supported the establishment of an independent Prosecutor. Further, basic statistics also pointed to the number of ‘free’, ‘partially free’ and ‘not free’<sup>10</sup> states that supported or were against the establishment of an independent Prosecutor. Data from the statistical database of Freedom House was used for this statistical sketch.

### **The Argument**

In order to answer the overall question posed in this work – namely ‘why did states establish an independent Prosecutor?’ – there are two interrelated questions one must examine. First, it must be determined what accounts for state-preference formation of those states which advocated for, but also against, the independent Prosecutor. Second, it must also be established why the advocates of an independent Prosecutor prevailed during the negotiations, and in debates during the ratification process. Even though the existing literature on the topic points to mostly national interest-type explanations, liberal pluralist and liberal constructivist explanations provide a more complete explanation. These theories are fitting here because they problematize the formation of national interests and preferences, as opposed to assuming them to be constant irrespective of the ideational and material interests of the political actors involved. These theories can also better account for political change.

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<sup>9</sup> It was the General Assembly which commissioned the ILC to construct a preliminary draft for a future conference regarding the Court. It was also the General Assembly which established first the two Ad Hoc Committees and later the six Preparatory Committees as well.

<sup>10</sup> Data from the statistical database of Freedom House was used for this statistical outline. States labeled ‘free’ scored high on provision of political and civil rights. States labeled ‘partially free’ scored in the mid-range, and states labeled ‘not free’ scored low or ‘0’ on their ability to provide political and civil rights to their citizens.



It will be shown that the Court with an independent Prosecutor was the achievement of political interest groups and political parties from within the domestic politics of states which supported the independent Prosecutor – as was the case with Canada and the United Kingdom. At the same time, the opposition of states to the initiative can also be explained by referring to political groups occupying positions of domestic political power in key opposing states, as was the case in the US and Japan. The ruling and dominating groups framed the national interests and a particular conception of national sovereignty in relation to the establishment of the independent Prosecutor in such a way that it either maintained, if not enhanced, state sovereignty – as in the case of Canada and the UK – or detracted from state sovereignty – as was the case of the US and Japan. With the institution of the Pre-Trial Chamber as a check on the power of the Prosecutor in the event that he or she initiates investigations on his or her own, certain states were satisfied that their personnel would not be brought in front of the Court. If their personnel would commit any of the crimes falling under the three categories of crimes under the jurisdiction of the Court, these individuals would be tried in domestic judicial systems.

David Wippman argues that states established an independent Prosecutor because it was in their national foreign policy and security interests to do so. This explanation is plausible as one may argue that states wanted to establish an independent Prosecutor because they knew that their personnel – military or civilian – would never be brought in front of the Court. On the other hand, states that did not want the establishment of an independent Prosecutor were potentially concerned that their personnel – and their civilian leaders themselves – could be brought before the Court. Given the present

configuration of the regime, a soldier, for example, from Sweden or Canada may not in fact be brought in front of the Court because he or she would be tried within the Swedish or Canadian judicial system. However, even in these extreme cases, with the establishment of the ICC, more pressure would be placed on functioning domestic judicial systems to try certain individuals. In some sense then, all states are – even if indirectly – bound by the principles the Court seeks to uphold. Other authors point to states and NGOs as the main catalysts in establishing the independent Prosecutor (Schiff, 2008), while others would point to the role of normative legal ideas upheld by certain delegations (Brubacher, 2004) as key for instituting an independent Prosecutor. What is common to these explanations is that, on the theoretical level, they mainly utilize the disambiguated concept of the ‘state’ as the key variable. By extension then, and if the discussion remains at state-level discussions, national interest calculations are quite plausible as explanatory factors.

Another major assumption made within the national interest-based explanation is that national interests would remain the same across time and irrespective of who forms the government in a particular state. Evidence will show that this was not the case with the establishment of the ICC. For example, the position of the United Kingdom changed when the New Labour government led by Tony Blair came to power in 1997. This change in official stance was a source of victory for the supporters of an independent Prosecutor. In the case of Canada, and as the discussion regarding the ratification process will show, if the official opposition would have been in power in 1998, Canada perhaps would have not been counted as one of the unbridled supporters of the Court. In the case of the US, a Democrat-dominated Congress could have perhaps ushered in more support

for the Court, if not even ratification. In the case of Japan, had the Democratic Party of Japan formed the government – or if it would have been a key coalition member – Japan could have, at least, joined the Court earlier. In essence, then, one must necessarily go beyond considering states as unitary actors and evaluate the sources of national interest formation. This exercise gives rise and validity to a liberal pluralist explanation.

What is very important to discern is how the national interests were defined within the particular states, and by whom. This is the reason why it is argued in this work that it was valuational and ideational factors originating from within key states – and by so-called ‘sub-state’ actors – that contributed to the establishment of an independent Prosecutor. The valuational and ideational factors underpinned the framing of national interests with respect to state sovereignty. These arguments give rise to a liberal constructivist and pluralist explanation. As David Madar explains, within liberal – or pluralist – international relations theory “groups are the basis of political life” (Madar, 35). In this conception, “people form groups with others who share their interests, and together they seek to influence policies and decisions that affect them. Policies are not proclaimed by government but result from government’s effort to balance and reconcile contending interests” (Ibid.). Underpinning the very utility of using more liberal constructivist and pluralist investigations of the establishment of the Court, scholars such as Caroline Fehl point out that “liberal approaches that focus on sub-state explanatory factors” are important and needed because they “shed light on ... domestic (re)evaluations of sovereignty costs, ... or on the interaction between governments and national publics in the face of atrocities abroad” (Fehl, 384).

These theories would suggest that the reason why certain states – including Canada and the UK – supported the establishment of an independent Prosecutor, was that state delegations were representing domestic interests which framed their own national interests in such a way as to appeal to the widest domestic as well as international opinion regarding the Court with an independent Prosecutor. Therefore, the institution of a Pre-Trial Chamber serving as an oversight mechanism satisfied particular states and most NGOs. The Pre-Trial Chamber provided – and underpinned – the notion of enhanced sovereignty for these states. In case these states’ personnel committed crimes of international criminal concern, and if by way of machination and misunderstanding, the Prosecutor did decide to indict these persons, states would be assured that the Pre-Trial Chamber – as a check on the power of the Prosecutor – would not allow the investigation to proceed.

Domestic sources of foreign policy seem also to be the reason why certain states opposed – and were suspicious of – the establishment and functioning of the independent Prosecutor. In the case of the US, the administration of President Clinton did sign the RS on the last possible day. However, this administration experienced substantial opposition from within the US Congress – in particular from such individuals as the Republican Senator Jesse Helms from North Carolina (R-NC) who was the main proponent of the ‘Hague Invasion Act’ authorizing the US President to use any means necessary to free US service members if arrested and/or transferred to the Court. In the case of the US, it was the national interest formulation emanating from the Pentagon and the US Congress that carried the day, with the State Department and the White House not being able to provide an alternative formulation. The Pentagon and the Republican members of the US

Congress were successful in framing the issue of the independent Prosecutor as an office which would detract from the sovereign ability of the US to protect its personnel or to pursue its national interest globally. Some allies of the US fell in line behind it, states such as Israel and Japan.

The emphasis on the framing of national interests by particular governments representing key states animates the overall argument in this work. In Chapter 2 the emphasis will be placed on existing explanations of the establishment of the independent Prosecutor and the Court. In this chapter, the existing literature will be reviewed with the explicit aim to situate this work in the broader intellectual discussion regarding the establishment of the Court and its Prosecutor. Chapter 3 will compare the Prosecutorial powers of the independent Prosecutor of the ICC with the powers of the Prosecutors of the ICTY, ICTR and the Nuremberg and Tokyo tribunals. The aim of this Chapter is uncover the way in which the powers of independence of the Prosecutor of the ICC differ from other international Prosecutors. Chapters 4 and 5 will focus on the cases, namely Canada and the UK in Chapter 4, and the US and Japan in Chapter 5. The aim in these chapters is to understand state preference formation during the negotiation processes as well as during the ratification processes in national legislatures. Chapter 6 will focus on the negotiations and will provide an explanatory discussion regarding why the supporters of the independent Prosecutor were successful in Rome. In the concluding chapter, a few suggestions for further study will be discussed along with several policy-relevant recommendations.

## **Anticipated Contributions**

How, and in what ways, will this work contribute to the burgeoning literature related to the ICC? Even though the ICC is widely discussed in the overall – albeit quite interdisciplinary – scholarly literature, there are relatively few attempts at explaining cooperation in relation to this institution. Consequently, there are even fewer attempts at empirically explaining cooperation with respect to the establishment of an independent Prosecutor, which embodies the constraints states are faced with to bring to trial their own citizens, or nationals of other states who commit crimes on their territory.

The aim of this work is to provide an empirically based causal narrative as to why states agreed to allow an individual largely unconstrained by states to investigate high-ranking civilian or military personnel who serve on behalf of sovereign states. In other words, the primary aim in this work is to discern why states willingly agreed to allow an individual, without state constraint, to investigate high ranking civilian or military personnel for potential crimes committed during armed conflict. The secondary aim is to discern how this particular design feature impacts the operation of the ICC as a whole.

Overall there are three broad contributions of this work. First, dealing specifically with international relations scholarship, five particular theories will be tested to discern which theory – or theories – are better suited to explain the questions posed in this work. Neorealism, neoliberal institutionalism, historical institutionalism, constructivism, and liberal pluralism will be outlined and used to explain state preference formation, as well as why the proponents of a Court with an independent Prosecutor prevailed. Special attention will be paid to the extent to which these theories are able to explain the establishment of international organizations. What is missing from the explanatory

calculus regarding the topic at hand is a discussion which moves beyond the conceptual coherency of the 'state' as a cohesive – and timeless – source of national interests. The emphasis is on the formation of 'the national interest' by domestic interest groups within states. In this light, national interests are formed – and change – based on the interests and policy formulation of the groups forming government in a particular time period. Neorealism, with its emphasis on the unitary state involved in power relations and maintaining this equilibrium, does not fit the empirical mold. Neoliberal institutionalism with its emphasis on the utility of international institutions as origins – and motivators – of international cooperation falls short as it cannot account for the central importance of actors other than states. Nor can it account for the origins of state interests, or for why particular interests – changing as they are – sought to be implemented in a particular time period. Historical institutionalism falls short in a very key respect: the ad hoc manifestations of international criminal justice – such as the Tribunals for the former Yugoslavia and Rwanda – are markedly different from the work of the independent Prosecutor of the ICC. The territorial and temporal constraints with which the Prosecutors of the Tribunals contended are done away at the ICC, save the notion of the Court not having legal reach prior to its establishment, on July 1<sup>st</sup>, 2002. Therefore, the historical continuity on which this theory hinges does not provide a complete explanatory image. Constructivism (and more specifically liberal constructivism), along with liberal pluralism, do provide a satisfactory explanatory narrative. Liberal constructivism is able to explain the creation and upholding of a set of principles – shared by the vast majority of states participating in establishing the ICC – which ushered in the creation of the Court with an independent Prosecutor. Liberal pluralism then is able to explain the origins of

these principles. The origins of these principles are particular formulations of national interests – as promoted by domestic political groups in power, at a particular junction in time, and in particular states.

Second, this study contains a number of empirical contributions to the scholarly work on the establishment of the independent Prosecutor and the ICC in general. In order to complete this study, and in addition to primary and secondary source documents, elite interviews were conducted with former government officials, diplomats, and representatives of key NGOs. In order to complete this research, interviews were conducted – over the telephone, Skype, e-mail and in-person, at the United Nations headquarters – with Dr. Lloyd Axworthy, the former Minister of Foreign Affairs of Canada; Dr. Hans Corell, the former Under-Secretary General for Legal Affairs of the United Nations; Mr. Rolf Einar Fife, the Director General in the Department of Legal Affairs in the Norwegian Ministry of Foreign Affairs; Ambassador Christian Wenaweser, the Permanent Representative of the Principality of Liechtenstein at the United Nations; Mr. Bill Pace, the Convenor of the Coalition for the International Criminal Court; Mr. Niccolo Figa-Talamanca, the Secretary General of ‘No Peace Without Justice’; the late Mr. Christopher Keith Hall, Senior Legal Advisor, International Justice Project, Amnesty International; Mr. John Washburn, the Convenor of the American Coalition for the International Criminal Court; Professors Valerie Oosterveld and Darryl Robinson, members of the Canadian delegation in Rome; Dr. Morten Bergsmo, member of the Norwegian delegation in Rome; and Dr. William Schabas, Professor at the National University of Ireland in Galway, Ireland. The Assemblies of States Parties meetings of the ICC were also attended in New York and in The Hague in order to further gain an



understanding of state positions and state preference formations regarding the Court. Lastly, and in addition to these forms of new data generation, declassified documents were also used to be able to discern the intentions of governments regarding the Court.

The empirical investigation shows that, despite the overwhelming acceptance of the Rome Statute at the end of the conference in 1998, considerable variation of positions regarding the Court – in state sovereignty terms – existed between political groups in certain states very important to the establishment of the Court with an independent Prosecutor. It mattered quite substantially which political group was in power in Canada, and the United Kingdom, as well as in the United States and Japan. A Conservative government in power in Canada or the United Kingdom at the time would have had a considerably different position regarding the Court and the Prosecutor. In similar terms, without the centrality of the voice and interest of the Pentagon in US decision-making circles, or the opposition of Jesse Helms in the US Congress, the US would have had – at the least – a slightly more favourable position on the Court. Finally, with greater influence on Japanese politics, the Democratic Party of Japan could have in fact placed greater pressure on the ruling Liberal Democratic Party in order to join the Court sooner.

Third, this study contains practical recommendations as to under what domestic political conditions it is likely that the Rome Statute of the Court would be ratified. To date there are 124 states which have ratified the RS and 139 which have signed it.<sup>11</sup> The overall aim of those who were involved in establishing the Court is for it to attain universal jurisdiction. The hope was – and still is – to have every state ratify the Statute. In the concluding remarks this work will provide a few practical recommendations

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<sup>11</sup> Coalition for the International Criminal Court. Together for Justice. <http://www.iccnw.org/>. [accessed January 31<sup>st</sup>, 2011]

regarding the domestic political conditions which might be necessary for a successful ratification campaign, and for the jurisdiction of the Court to attain universal reach. In regards to further research, this work shows that more investigation and analysis is warranted regarding why – and how – certain states ratify international treaties and why – and how – certain states do not. In other words, this work provides groundwork for theorizing treaty ratifications as well.

## **CHAPTER 2: THEORIZING THE INDEPENDENT PROSECUTOR AND THE ICC**

The purpose of this chapter is to review the existing explanatory literature on the creation of the independent Prosecutor and the International Criminal Court in order to outline the gap in the literature this dissertation seeks to remedy. In doing so, it will be argued in this chapter that the scholarly literature *explaining* why states agreed to include the *proprio motu* provisions in the Rome Statute – enabling the Prosecutor to initiate investigations on his or her own – is very much wanting as it leaves a number of interesting questions unanswered, such as who was responsible for setting policy with regards to the independent Prosecutor and the ICC, and why the supporters prevailed. Further, the existing explanation tends to focus on a very definite time frame: 1994 - 1998. Existing explanations tend to be overly state-centric and downplay the key role played by domestic interests and ideas in the formation of state preferences and behavior. An expanded time frame that encapsulates the ratification process in key states will further broaden the explanatory calculus and the overall understanding of how the Court with an independent Prosecutor was established.

The chapter begins by reviewing the explanatory and descriptive literature on the creation of the independent Prosecutor. It is argued, first, that there are only a very small number of works that specifically focus on the creation of the independent Prosecutor and its *proprio motu* powers. Given the significance of these powers – and the departure they herald from standard practice – a more in-depth study is warranted. For example, explanations pointing to a compromised position on the independent prosecutorial powers leave a number of key questions out, including: what enabled the compromises to be made, and why were states able to come to a compromise regarding the inclusion of the

Prosecutor? This section argues that the existing approaches tend to reflect the more state-centric approaches of neorealism, neoliberal institutionalism and certain strands of constructivism, which downplay the role of domestic ideas and interests. The overall temporal frame the works utilize crucially leaves out the ratification process. Consequently, without a substantial understanding of the ratification process, the overall establishment of the Court with an independent Prosecutor will only lend itself to a partial explanation.

The second section of the chapter reviews the explanatory and descriptive literature on the creation of the ICC as a whole and categorizes it with respect to specific theoretical approaches employed in international relations, including neorealism, neoliberal institutionalism, historical institutionalism, liberal pluralism and constructivism. Even though explaining the establishment of an independent Prosecutor in isolation from the other processes that culminated in the overwhelming acceptance of the Rome Statute is important, attention must also be placed on the explanatory discussion of the ICC as well. The entire process – spanning from 1994 until 1998 and beyond – mainly encapsulated negotiations regarding the particular design features of the Court. This aspect of the institutional development of the ICC validates the discussion at hand. However, at the end of the Rome conference and when national legislatures were attempting to ratify the RS, it was the entire statute that needed to be considered by national legislatures. This section argues that, while there is a much broader and more theoretically diverse literature on the creation of the ICC, the main gap in this literature is, again, the lack of emphasis on the role played by domestic actors, their interests, and the conceptual formulations put forth by these actors regarding state sovereignty. Once

again, by focusing on a very definite time frame, the existing works stop short of a more encompassing explanation.

Following a summary and identification of the overall gap in the literature in the third section, the fourth section of this chapter outlines the theoretical approach employed in this dissertation. More specifically, it will outline a broadly liberal-pluralist approach which takes into account the role of domestic interests and ideas (sometimes referred to as actor-centered constructivism'). This approach draws on Andrew Moravcsik's 'liberal theory of international relations' and liberal constructivism more broadly. After outlining the main assumptions of this approach, the chapter will demonstrate how this approach informs the key hypotheses of this dissertation. The final section of this chapter will outline the comparative case study and historical process tracing methodologies being employed and how they will test the liberal-pluralist and liberal constructivist explanations in contrast to the other theoretical approaches.

### **Existing Explanations of the Independent Prosecutor**

David Wippman provides an insightful description and explanation as to why states established an independent Prosecutor. Implicitly adopting a broadly neorealist approach emphasizing national interests and the international distribution of power, Wippman explains that the draft statute provided by the International Law Commission (ILC) in 1994, in preparation for the conference in Rome, included two particular trigger mechanisms that could be used to initiate investigations: the first outlined that only states could trigger the jurisdiction of the Court meaning that the Prosecutor would get involved in a case only if a particular state referred a case or situation to the Court. The other trigger mechanism entitled the United Nations Security Council (UNSC) to refer a case

or a situation to the Court, and thereby trigger the jurisdiction of the Court and the involvement of the Prosecutor. The ILC statute did *not* contain a provision for the Prosecutor to initiate investigations on his or her own accord.

The proponents of the Court – including the so-called ‘like-minded states’ and the NGO community – ‘almost unanimously’ pressed for an independent Prosecutor in Rome. Their argument was “that both the Security Council and individual states would employ inappropriate political criteria in determining which situations to refer to the court” (Wippman in Reus-Smit, 169). The permanent members of the UNSC would veto any case that would involve themselves or their political allies. States would not want to refer cases against other states due to fears of retaliation. The NGO community also pointed to the two existing ad hoc tribunals at the time – both of which had Prosecutors with *proprio motu* powers – as supporting the need for a strong, independent Prosecutor (Wippman in Reus-Smit, 169).

As Wippman states, the opponents of the Court also warned that political meddling would diminish the value and *raison d’etre* of the Court: “the prosecutor, despite various checks on his or her authority built into the statute, would ultimately be unaccountable to any executive or legislative authority” (Wippman in Reus-Smith, 169). Without state or UNSC backing the Court “would lack the support necessary for effective prosecutions” (Wippman in Reus-Smith, 169).

The two opposite sides of the debate, according to the author, testify to “divergent interests and a related divergence in conceptions about the appropriate role of international law and institutions” (Wippman in Reus-Smith, 170). According to Wippman, the so-called ‘like-minded group’ and the participating NGOs “wanted to give

the prosecutor authority comparable to that exercised by national prosecutors in liberal democratic states” (Ibid.). On the other hand, the US argued that this would only make sense if it “could be supervised by a higher executive authority and ultimately held accountable to a legislature and a larger body politic” (Ibid.). Overall, Wippman explains that the realist currency of ‘traditional national interests’ carried the day. It was a lot less risky for the like-minded states to agree on an independent Prosecutor as they would be much less of a target of politically motivated trials and cases than the US. The reason why the like-minded states could expect that their personnel would be less likely to appear before the court is because these states could reasonably expect that their legal systems would not be deemed ‘unable’ or ‘unwilling’ to prosecute on their own.

Second, Matthew R. Brubacher, writing from a legal perspective, also points to an explanation as to how and why states established an independent Prosecutor. Brubacher’s perspective is implicitly constructivist, as the author points to the role of normative legal ideas and the professional affiliations of the members and delegates prior to Rome, in Rome, and during the so-called Preparatory Commission meetings following the conference. The author explains that, “although participants in the Preparatory Committee came from diverse legal backgrounds and with an even greater variety of specific interests, their approaches generally fell into one of two main categories: liberalists and realists” (Brubacher, 72). In terms of the so-called ‘liberalists’, the author explains that they considered the ICC “as the manifestation of aspirations to promote the building of ethical legal processes through the creation of institutions capable of promoting due process and the rule of law” (Brubacher, 73). Liberalists, in other words,

viewed the ICC as an institution that helped maintain “mutual obligation between states.” (Ibid.)

On the other hand, such actors as the US, reflected a more realist conception of international law. According to Brubacher, within this perspective, “the primary obligation of states, as the central actors in the international community, is to their citizens rather than to foreigners” (Ibid.). The key here is the guarding of national sovereignty and the national interests. Therefore, legal rules or norms would be trumped by national interests and state sovereignty. In this sense, “independent prosecutorial discretion within the ICC is thus incongruent with the realist view, as it is an attempt to create a non-state actor, capable of independently modifying state behaviour” (Ibid.). It is therefore quite natural that states such as the US “lobbied for an ICC that gave more deference to state interests,” which would include prosecuting only as a result of state referral and a referral from the UNSC. As Brubacher points out, the proposal by Argentina and Germany to have the Pre-Trial chamber authorize *proprio motu* prosecutions can be seen as a certain compromise between the two camps, with the ‘liberalists’ being victorious (Ibid.). The active, yet unsuccessful, US opposition to the ICC during the beginning of the new millennium clearly testifies of liberal victory.

Benjamin Schiff provides a short, descriptive, albeit insightful explanation as to how the independent Prosecutor was established. Adopting the neoliberal institutionalist emphasis on states, international NGOs and the negotiating process itself, Schiff explains that the provision for an independent Prosecutor in the Rome statute was made possible because “some NGOs and some of the LMS [like minded states] pressed for a much more independent Prosecutor” (Schiff, 82). Further, Schiff also points to a possible



compromise between different legal traditions as well. The statutory provision requiring the pre-trial chamber to authorize prosecutions by the independent Prosecutor was “also a reaction by civil-law country representatives to what they perceived as the overly common-law-dominated structure of the ICTY and the ICTR” (Ibid.). Overall, Schiff’s explanation provides a new level of insight as to how and why states established an independent Prosecutor.

Still located within the explanatory genre but most certainly falling within the legal literature is a chapter written by Kai Ambos, entitled *Prosecuting Crimes at the National and International Level: Between Justice and Realpolitik*. Ambos also employs a neoliberal institutionalist approach (with some concessions to pluralism and domestic actors) and argues that “from the very beginning of the ICC negotiations, the so-called, like-minded states wanted an independent and strong prosecutor, comparable to the prosecutor in national criminal justice systems – who...possess the power to initiate investigations ex officio” (Ambos, 56). In similar vein, Ambos notes the resistance of the US, China and India to the initiative. In the US, in particular, mired in the then-legal and political wrangling with the Lewinsky affair, and the somewhat opaque role of the Independent Counsel Kenneth Starr in the process, public opinion could not accommodate another office of this kind – especially not within the international realm (Ambos, 57). The solution, according to Ambos, was brought about by a “compromise that...was to provide for an early judicial control of the prosecutorial investigations and this was the origin of the so-called Pre-Trial Chamber, modeled after the French *Chambre d’Accusation* and the US Grand Jury. This chamber intervenes at a very early stage in case of a *proprio motu* investigation, namely, if the Prosecutor concludes, “there

is reasonable basis to proceed with an investigation (Article 15(3) ICC Statute)” (Ambos, 56).

In addition to these more explanatory accounts, there are a number of more purely descriptive accounts of the creation of the independent Prosecutor which, by emphasizing states, international NGOs and the negotiation process itself, tend to implicitly adopt a neoliberal institutionalist framework. These accounts provide an explanation as to how the provision for an independent Prosecutor was included in the Rome Statute of the Court. These accounts are important as they provide the empirical roadmap for a theory-testing explanation of the subject matter at hand.

Marlies Glasius provides an excellent descriptive account of how states came to accept the inclusion of an independent Prosecutor.<sup>12</sup> The subjects of Glasius’ accounts are NGOs and their impact at the Rome conference as she provides exceptional insight into the activism of NGOs and how states reacted to this activism. Overall, Glasius attributes the success of the establishment of an independent Prosecutor to the efforts of NGOs, but also participating states which include Argentina and Germany in particular.

Perhaps the distinct value of her work is that she outlines the four issue areas which were connected to the independence of the Prosecutor: “the division of competencies between national courts and the ICC; the way in which a case could come to the attention of the Court; which parties, if any, might block a case from being heard by the Court; and the extent of the jurisdiction of the Court” (Glasius, 47). Viewing the issue of the independent Prosecutor as a part of a ‘package of issues’ of complementarity,

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<sup>12</sup> Some of the legal literature – more particularly Danner (2003), Greenwalt and Wouters et. al. – discussed below also contains descriptive accounts of how the *proprio motu* powers of the Prosecutor were included in the RS.

trigger mechanisms, regarding who can block a case, and of jurisdiction will be key to a better understanding of the reasons why states established an independent Prosecutor.

Following a brief overview of the genesis of the ILC draft, Glasius points out that it was in fact Amnesty International (AI) “which produced one of the earliest NGO documents on the ICC, recommending that the Prosecutor would be able to initiate investigations on his or her own initiative or after receiving a complaint by or on behalf of an individual” (Glasius, 49). Another organization, the International Commission of Jurists, proposed that “victims should be able to initiate proceedings” (Ibid.). As she explains, “both organisations expressed concerns that very few cases would be likely to come to the Court” if states or the UNSC could exclusively refer cases to it. Lawrence Weschler noted that “as it happened, Human Rights Watch (HRW) had recently spent several years shopping around the very case of Hussein’s Anfal campaign, trying to find a country willing to lodge a formal complaint against Iraq with the International Court of Justice (ICJ) in the Hague” (Weschler, 94). Several states declined, citing bilateral issues of trade, retaliation or even domestic political upheaval (Ibid.). Later on, states such as Austria, Greece, the Netherlands, Norway and Switzerland suggested that the Court should employ an independent Prosecutor. Further, Chile and the Czech Republic also suggested that “individuals, victims, and/or NGOs should be able to trigger a procedure” with the help of the prosecutor (Ibid.).

Glasius then outlines the dynamics of the Preparatory Committee meetings where the draft statute to be considered in Rome was being developed. She points to such key dynamics as the speech made by Louise Arbour, the first Prosecutor of the ICTY, to the fifth PrepCom meeting where Mme. Arbour “made a ‘dramatic and forceful

address...which appears to have made a deep impression on the thinking of government delegates on crucial issues, including the role of the Security Council and of the prosecutor” (Glasius, 51). She further points to a certain ‘change of heart’ by the United Kingdom (UK) to ‘listen’ to proposals that advocated an independent Prosecutor. According to Glasius, the UK also declared that it would accept the so-called Singaporean proposal which, instead of allowing the UNSC to block certain prosecutions, proposed that the UNSC could request a 12 month stay of the proceedings. This stay of proceedings could be further renewed. Also of interest during this phase in the development of the pre-Rome statute was the Argentine-German proposal which, having been published in April 1998, proposed that the Prosecutor could proceed with an investigation, but would need the approval of the Pre-Trial chamber to start building a case (Glasius, 52).

Christopher Keith Hall also attributed the success of the establishment of the independent Prosecutor to the efforts of NGOs and like-minded states. In his article entitled “The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight Against Impunity,” the author explains that “it was only after intense lobbying by the group of like-minded governments and approximately eight hundred non-governmental organizations in the Coalition for an International Criminal Court (CICC) ...that the 1998 diplomatic conference provided for an independent prosecutor with powers *proprio motu* to initiate investigations” (Hall, 125).

Antonio Cassese, a distinguished international jurist, provided a lucid descriptive account of the inclusion of the *proprio motu* powers of the Prosecutor of the ICC in the RS. Cassese explained that:

It is well known that two tendencies clashed at the Rome Conference: some states (including the United States, China and others) insisted on granting the power to set investigations and prosecutions in motion to states and the Security Council only; the other states (the group of so-called like-minded countries) were bent on advocating the institution of an independent Prosecutor capable of initiating *proprio motu* investigations and prosecutions. The clash was between sovereignty-oriented countries and states eager to implement the rule of law in the world community. The final result was a compromise (Cassese, 161).

Cassese further noted that once the compromise was reached, two further options presented themselves. The first option was a so-dubbed ‘Nuremberg model’ in which the Prosecutor would remain under the authority of states. The second option was to institute a Prosecutor who would be able to initiate investigations independently (Cassese, 161). As the historical record shows, the latter option was chosen.

Ultimately scholars have attempted to explain the establishment of the independent Prosecutor in broadly neorealist, neoliberal institutionalist and constructivist terms. Wippman provides a number of key insights into the negotiations. His contention is that the proponents and the opponents argued with their best national interests in mind. Therefore, national interests seemed to be at the heart of this mostly neorealist explanation. Marlies Glasius and Christopher Keith Hall mostly focus their attention on the efforts of the NGOs present in Rome. In their conception, it was the efforts and expertise of NGOs that compelled states to establish an independent Prosecutor. Successful cooperation between states within an institutional forum – a neoliberal institutionalist conception - was a result of intense NGO lobbying, information provision and even direct participation.<sup>13</sup> Benjamin Schiff, while providing a broadly neoliberal

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<sup>13</sup> A number of NGO members served on official states delegations during the conference. For example, Mr. Niccollo Figa-Talamanca, the Secretary General of ‘No Peace Without Justice’, an NGO based in Brussels, Belgium, served as the deputy head of the delegation of Bosnia and Herzegovina. (Interview, Figa-Talamanca)

institutionalist explanation, also points to the efforts of NGOs as a key explanatory variable. However, Schiff also points to the reconciling of legal traditions – common versus civil traditions – and the role of the pre-trial judges in pressing charges against an individual. In his conception NGOs advocated – and later, states accepted – a key role played by the so-called ‘Pre-Trial Chamber’ in the initiation of investigations which placed an institutional check on the powers of the Prosecutor. This institutional check, according to Schiff, then ensured that states accepted the establishment of the independent Prosecutor. Kai Ambos and Antonio Cassese, while also providing neoliberal institutionalist explanations, point strictly to the institution of the Pre-Trial Chamber – the result of the blending of different legal traditions and roles for the Prosecutor – as the main reason why states accepted the establishment of the independent Prosecutor. Finally, Matthew Brubacher, providing more of a constructivist explanation, notes that the debate about the independent Prosecutor was conducted along the legal ‘liberal’ versus ‘realist’ ideational lines. The ‘liberal’ ideas were victorious and the ‘realist’ ideas fell by the wayside. It is important to note that Brubacher’s constructivist argument differs from a more liberal constructivist argument in that it does not disaggregate the concept of the state in the analysis. His argument may be dubbed a more state-centric constructivist argument.

What is clear is that the common thread in attempts to explain the establishment of the independent Prosecutor is the role ‘states’, as conceptually disambiguated entities, played. The causal importance – albeit with substantial involvement and effort exerted by NGOs – was ascribed mainly to states as unitary actors. These analyses also seem to be the natural extensions of the more limited temporal frames which they employ:

namely the Rome and the pre-Rome negotiation processes at the international level. These insights do provide valid explanations and much needed insight. However in order for the ICC to be established and the RS to be legally binding – in effect establishing a functioning court with an independent Prosecutor – the statute had to be ratified in national legislatures. Therefore to explain the establishing of independent Prosecutor for the ICC, domestic level analyses need to be included in the explanatory calculus.

Equally importantly, state-level explanations further assume that national interests are held constant over time. In practice this would mean that any state involved in the negotiations would not change its interest-calculations substantially from the beginning to the end of the negotiation process and beyond. The empirical record, however, shows otherwise. In a very key respect, the position of the United Kingdom changed substantially in 1997, after the New Labour government of Tony Blair came into power. Further, and only by looking deeper within the ratification processes, will one be able to see that national interests calculation were not uniform, and were substantially debated, even in states which seemed at the forefront of establishing the Court, namely in Canada. Therefore, a more nuanced and deep understanding of state preference formation is needed because preferences changed over time, and were contingent on what group formed the government during the ratification process.

### **Existing Explanations of the International Criminal Court**

This section reviews the explanatory and descriptive literature on the creation of the ICC as a whole and categorizes it in terms of specific theoretical approaches including neorealism, neoliberal institutionalism, constructivism and historical institutionalism. Before doing so, each theoretical strand of IR is outlined in order to aid the discussion.

In this section, it is argued that, while there is a much broader and more theoretically diverse literature on the creation of the ICC, the main gap in this literature is the lack of emphasis on the role played by domestic interests and ideas in the formation of state preferences.

### **Neorealist Approaches**

Jeffrey W. Legro and Andrew Moravcsik point to three basic assumptions that are common to realist theory: i) “rational, unitary political units in anarchy are the main actors or entities in international relations; ii) “state preferences are fixed and are uniformly conflictual,”; and lastly, iii) what is most important within this anarchic structure of international relations is “material capabilities.” In other words, “the ability of a state to do [interstate bargaining] successfully is proportional to its underlying power, which is defined in terms of its access to exogenously varying material resources” (Legro and Moravcsik, 12–17). The ‘material resources’ are thought to be mostly military and economic assets.

Key neorealists, such as Kenneth Waltz and John Mearscheimer argue that it is this anarchic nature of the international realm that determines how states will act. Anarchy, in this sense, “means that states have to protect and look out for themselves...Self-help is the basis for enforcing rules and protecting interests” (Ibid., 14). The next natural step in this puzzle is to realize that these conceptions give rise to the security dilemma in which defensive posturing by one state in order to enhance its security compels other states to take up defensive postures as well (Ibid.).

In the neorealist conception “the structure of the international system forces states to attend not just to their own interests but to any changes in the power of other states”



(Ibid., 11). Therefore, this conception paves the way for the conception of the balance of power. As Rosenau and Durfee explain, states may use “law, war, and diplomacy” to keep the balance within the system of states (Rosenau and Durfee, 21). Even though classical realists believe that states have much freedom in choosing to balance or not, neorealists would posit that the balance is created naturally due to the anarchical nature of the international realm (Ibid.).

The next important question that must be addressed in this anarchic international realm is if cooperation is possible. Neorealists believe that cooperation is possible only if the most powerful state, or the hegemon, sets the rules and enforces these rules within the international realm (Ibid., 26). In essence then, neorealism only affords a secondary role for institutions, domestic or international. In this conception institutions, or their more general variant, regimes, are established only if the most powerful in the system wish them to be established. Even in the neorealist case, these institutions and regimes will be at the mercy of the most powerful states. Without the explicit help in establishing and guiding these institutions by the most powerful actors, they will be ineffective and irrelevant.

Rehearsing a neorealist position, Erik K. Leonard focuses on the role of ‘power-based factors’ in explaining the establishment of the ICC. The author explains that, as the only hegemon, the US worked quite consistently to oppose the RS (Leonard, 141). Yet in practice, the US had quite a substantial impact on the negotiations and even on the final outcome at Rome (Leonard, 141). According to many, including members of the CICC – the support of the US was necessary for the Court to be seen as legitimate and functional. Therefore, the author explains that the negotiators in Rome did attempt to

cater to the US demands (Leonard, 142). Despite all these efforts, and even though the US initially signed the statute, it withdrew from the Rome Statute shortly after depositing its signature to the United Nations (UN).

Jay Goodliffe and Darren Hawkins provide a more systemic explanation for the adoption of the Rome Statute. The authors argue that by taking into consideration direct benefits and costs, geography, identity and NGOs, states aligned their positions with their bilateral and multilateral partners (Goodliffe and Hawkins, 977). In essence, then, state preferences in regards to the Court were a function of judging the reaction of ‘international partners’ with whom they enjoyed long relationships (Ibid., 978). Although this explanation is plausible, key allies of the US for example – namely Germany and Japan – acted counter to this explanation. Germany signed and ratified the RS in 2000. Japan initially signed the RS, and it acceded to the Statute a decade later, in 2007.

### **Neoliberal Institutional Approaches**

Neoliberalism shares a number of assumptions with neorealism. However, the theory’s ability to explain cooperation via multilateral institutions not only sets it apart from neorealism but also affords it utility when attempting to explain the ICC and the independent Prosecutor in particular. Neoliberal institutionalism is well suited for the analysis it affords the multilateral negotiating fora causal relevance. In other words, via neoliberal institutionalism one is able incorporate the negotiating tactics, for example, into the explanatory calculus. It is also able to shed light on other aspects of the conference as well, such as leadership, and the relevance of different negotiating camps.

As Robert O. Keohane explains in his chapter entitled “Institutional Theory and the Realist Challenge After the Cold War,” both neorealism and neoliberalism hold that states are the main actors within the international realm. This realm is seen as anarchic, meaning that there is no overarching government within the system, and that this conception will also have a major impact on the behaviour of states. States are also utility maximizers – borrowing some conceptions from economic theory – which means that they will attempt to structure their behaviour to maximize their own gains. Simply, states are self-interested. Interests in terms of gains – relative and absolute – will be important; relative gains will be important for neorealists, and absolute gains for neoliberals (Keohane, 271). Neorealists are mainly concerned with material capabilities, culminating in concerns over security. Neoliberals are thought to be more concerned – broadly speaking – with mainly economic and environmental issues.

It is important to note that power itself, as well as how it is distributed, are important for both theories. However, neoliberals posit that institutions can in fact “change conceptions of self-interests” (Ibid.). For this camp, self-interests will best be pursued through institutions. To sum up, Keohane explains that within the neoliberal conception, “governments will still seek to attain their end, including increasing shares of the gains from cooperation, through the use of political influence. However, the exercise of influence will depend not merely on their material capabilities but also on the relationship between their ends and means, on the one hand, and the rules and practices of the international institutions, on the other” (Keohane, 274).

In contrast to neoliberal institutionalism, neorealists would see institutions as ‘means-to-an-end’, and as always serving the interests of the most powerful states. In

this regard, institutions always occupy the role of dependant variables. Institutions will be subject to state interests, but more importantly the interests of the great powers. As Robert Jervis explains in his article “Realism, Neoliberalism, and Cooperation,” within the realist conception, institutions are viewed as not “more than a tool of statescraft” (Jervis, 43). As Keohane and Martin explain in their article “*The Promise of International Institutions*,” neoliberals, on the other hand, would view institutions as dependent and independent variables. In their conception, institutions will be the result of state agency, but at the same time, institutions will also impact state behaviour (Keohane and Martin, 46). Because of their direct impact on the behaviour of states, institutions are able to deal with the problem of cheating in the international arena, the key obstacle to cooperation. More specifically, institutions may mitigate cheating by attempting to show that collective, as opposed to individual interests will be attainable if the “short-term benefits...[are given up]...for the sake of long-term benefits” (Mearsheimer, 17).

One of the main strengths of neoliberal institutionalism is its emphasis on cooperation (Jervis, 48). If it is the case that cooperation is very difficult to attain and maintain, and the international realm is made up of self-interested utility maximizers who do not trust each other, then the question is why would there not be constant conflict within the system – or a constant all-against-all war? (Keohane, 275) Quite clearly, cooperation does occur, and it occurs within the security realm but also within other realms as well. Realists would posit that it is quite easy to cooperate within realms other than the security realm as the stakes within these realms are not as high. Keohane and Martin explain however, that institutions provide information – a mitigating factor of

uncertainty – even within the realm of security as well. Hence institutions can enhance the attainment of maximized utility as opposed to only assuming the worst case scenario where policy provisions cannot aim for utility maximization (Keohane and Martin, 44).

Erik K. Leonard poses three questions relating to the establishment of the ICC, which could be addressed by neoliberal institutionalism: “1) why have so many states approved the Statute? 2) why has the United States so vehemently opposed the Statute? 3) and, what has the impact of American opposition been on the formation process” (Leonard, 85). Leonard begins his analysis with a discussion of the US and its position on the ICC. He outlined the objections the then-US Ambassador for War Crimes, David Scheffer, communicated when appearing before the US Senate Foreign Relations Committee. Leonard noted that, from the US perspective, “cooperation was impossible and that the formation of the ICC [was] implausible” (Leonard, 89). Yet, Leonard himself notes, clearly states did cooperate, and this cooperation did not need the guiding – and coercing – hand of the hegemon (Leonard, 89).

Therefore, Leonard posits that there are at least three factors that explain the establishment of the ICC. First, the participating states were assumed to be rational, utility-maximizing actors. Second, “the mutual goal of the Rome Conference participants is the security of a known and enforceable system of international justice.” Third, because “states’ interests are static” and they desired the above-mentioned common goal, cooperation then “was the result of institutional preference, not basic interest” (Leonard, 90). Yet the author states further that the task in Rome was not only the establishment of an international criminal court, but the particular design features that it was to take. In a

similar vein, the US objections to the Court were not in principle – or if the Court should come into existence at all – but what form the Court should take.

The neoliberal paradigm does seem to provide an explanation as to the motives and actions of such group of states as the ‘like-minded’ group, the ‘non-aligned movement’ as well as the US. However, there were a few anomalous situations surrounding the establishment of the Court that neoliberalism is not be able to explain. First and foremost, NGOs were involved in the process *en masse*. As a state centric theory, neoliberalism cannot account for the causal importance of NGOs. Second, as Leonard himself points to the static nature of state interest, this paradigm does not seem to explain the underlying origins of states’ interests. Third, and stemming from the previous point, neoliberal institutionalism cannot explain the change in preference formation of certain states taking place even during the negotiations. Fourth, and as Leonard suggests again, neoliberal institutionalism cannot account for the “question of why now” (Leonard, 100). In other words, neoliberal institutionalism cannot explain why the Court was established in that particular juncture in time.

For Leonard, regime theory holds much more utility for explaining the establishment of the Court. Leonard chose Young and Osherenko’s “multivariate model of regime formation” as the theory that would best explain the formation of the ICC. The author explains that “what Young and Osherenko’s model accomplishes is to combine the traditional schools of thought, while adding the cross-cutting factors of leadership and context, to achieve a more plausible mode for understanding regime formation” (Leonard, 130). Turning to the particulars of the theory, it “consists of two independent variables: social driving forces and cross-cutting factors. The social driving forces

(power, interest and knowledge factors) impact the institutional bargaining process in a direct manner ... The key is that this model demands that its users look at all three factors when analyzing regime formation” (Leonard, 131).

The second independent variable “cross-cutting factors” such as “leadership and context”, have an ‘indirect’ impact (Leonard, 131). The ‘cross-cutting’ factors “determine how actors exercise their power and the ability of these actors to use knowledge factors in the process. They often establish and maintain the rules of the bargaining process and they establish the global environment within which negotiations take place” (Leonard, 131). Yet the authors explain that the ‘cross-cutting factors’ have an ‘important but indirect impact on regime formation” (Leonard, 131).

The author begins by explaining that interest-based accounts – even though they may account for the motivation of states to establish the Court – are “not enough” (Leonard, 134). Interest-based accounts consider “the formation of the Rome Statute as a result of state negotiation and cooperation. In assessing the success of the Rome Conference this perspective predicates its findings on the overlapping of states’ interests” (Leonard, 133). Leonard then turns his attention to the influence of NGOs in the process. The Coalition for an International Criminal Court (CICC), formed on February 25, 1995, was very much at the heart not only of the Rome Conference but also of the entire process of establishing the Court. The CICC was involved in knowledge-provision, knowledge-communication and it also had an interpretive role with respect to the main message it wanted to communicate to states and the international community (Leonard, 137).

Next, Leonard focuses on ‘leadership’ as the first ‘cross-cutting factor’ that helps to explain the establishment of the Court. The focus here is on ‘structural’, ‘entrepreneurial’ and ‘intellectual leadership’ as explanatory factors (Leonard, 144-145). Adrian Bos from the Foreign Ministry of The Netherlands is identified as a ‘structural leader’ and Ambassador Philippe Kirsch of Canada as an ‘entrepreneurial leader’. Adrian Bos was instrumental in the process prior to the conference and leading up to the conference as well (Leonard, 146). Ambassador Kirsch, who was the Legal Advisor of the Canadian Department of Foreign Affairs and International Trade, and Chairman of the Committee of the Whole during the Rome Conference very much ‘pushed’ the delegations towards ‘consensus’ (Leonard, 147). With respect to ‘intellectual leadership’, the emphasis is placed on Cherif Bassiouni and William Pace. Cherif Bassiouni “was the Vice-Chair of the PrepCom and the Chairman of the Rome Conference Drafting Committee” (Leonard, 149). Bassiouni’s intellectual leadership originated “from Bassiouni’s extensive research on the issue of a permanent ICC and his work as both an NGO activist and a DePaul University Law School Professor” (Leonard, 149). William Pace is dubbed as an ‘intellectual leader’ due to his “dedication to the formation of the CICC and then the unprecedented success of this organization” (Leonard, 149).

The last set of explanatory variables Leonard discusses are contextual factors. These factors are “national and world circumstances and events seemingly unrelated to the issue area under consideration” (Young and Osherenko in Leonard, 150). Leonard discusses five contextual factors such as the end of the Cold War, the increasing phenomenon of civil or intra-state wars, the establishment of the tribunals for Yugoslavia



and Rwanda, the US policy, the establishment of new institutions of global governance (Leonard, 150). These factors, in general, had at the very least proximate impact on the outcome of the negotiations and the establishment of the Court with an independent Prosecutor.

Caroline Fehl, in her article entitled “Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructivist Approaches”, provides yet another rationalist argument for explaining the establishment of the ICC, as well as the particular institutional features which were bestowed onto the Court. She notes that “first, states faced a public good problem in international criminal justice, having disincentives to prosecute perpetrators in national courts on the basis of universal jurisdiction; the ICC solves this problem by centralizing prosecutions. Second, the ICC lowers the transaction costs incurred in a system of ad hoc tribunals established by the UN Security Council” (Fehl, 382). Rationalism would posit that for states, an institutional arrangement such as the ICC would in fact reduce so-called ‘sovereignty costs’ as well as uncertainty, as states would be able to participate and have an impact on the institutional arrangement itself. In other words, by joining the ICC, states would be able to ensure that their own ability to prosecute is not threatened.

Interestingly enough, the author explained that holding “sovereignty costs and uncertainty as objective, constant values,” masks the dynamics present when one takes a look inside the ‘pandora’s box’ of the state, a box that rationalists dare not open. In the case of the United Kingdom as well as the United States, domestic factors played a key role in “contesting” the nature of sovereignty costs. In the case of the UK, it “initially supported US objections, but joined the LMG after the 1997 Labour victory” (Fehl, 378).

In the case of the US, “several studies point out that the critical stance of the US towards the Rome Statute has been shaped especially by the Pentagon... and individual Congress leaders” (Fehl, 378). Fehl rightfully explains then that rationalism cannot explain the “domestic underpinnings of ‘sovereignty costs’” (Fehl, 378-379).

In sum, Fehl points to a more functionalist explanation – as opposed to the ‘rationalist’ one she proposes. According to Harmes, functionalism “focuses on the transition from one institutional form to another. It explains change as the outcome of an evolutionary dynamic in which institutions respond to changes in their environment” (Harmes, 13). In international relations theory, the utility of ‘functionalism’ lies in its ability to explain institutional change as a process whereby earlier incarnations of institutions are replaced by other, more robust institutions, ‘international and supranational institutions’ in particular (Harmes, 13). Fehl’s use of ‘rationalism’ therefore is too narrow and imprecise as it seems to exclusively refer to dynamics often described as ‘functionalist’.

Finally, Beth A. Simmons and Allison Danner, arguing within the functionalist camp, posit the following central question: “why was [the ICC] created, and more importantly, why do states agree to join this institution?” (Simmons and Danner, 225) The authors utilize ‘credible commitment theory’ to explain that “the states that are both the least and the most vulnerable to the possibility of an ICC case affecting their citizens have committed most readily to the ICC, while potentially vulnerable states with credible alternative means to hold leader accountable do not” (Ibid.). The authors explain that, according to ‘credible commitment theory’, states are thought to be unable to cooperate as they are not able to commit to agreements (Ibid., 232). Therefore institutions must be

established in such a way as to compel states to keep commitments. The aim then is to “empower an independent third party to make and carry out policy decisions that effectively remove the decision from the credibility-challenged actor’s authority” (Ibid.). The ICC provides such a solution as it increases the “risk for states of future punishment of their senior leaders. This exposure to prosecution by an independent international institution acts as an implicit promise by governments that they will forswear particularly heinous military options” (Ibid., 234). In the domestic political sphere, a loss of ‘popular support’ would be a high enough cost to deter engagement in atrocities. Overall, then, the authors explain that “joining the ICC is therefore a form of self-binding commitment, in which states attempt to persuade other players – rebels, potentially supportive publics – that the government has voluntarily abandoned the option of engaging in unlimited violence, thus creating incentives for other actors to alter their behavior as well” (Ibid.).

There are two particular concerns with the utilization of ‘credible commitment theory’. Although it provides a plausible neoliberal institutionalist explanation for the establishment of the ICC, it fails to provide an explanation regarding why states are not able to commit – or are perceived by others to not be able to commit – to international agreements. One plausible explanation for this is that representatives of states cannot in fact guarantee that when another group forms the government, the policy on a particular issue area will remain the same. Second, if in fact it is the case that by joining the ICC states are signaling to their domestic adversaries and ‘publics’ that they are willing to play by the ‘rules’ of international criminal justice, then more emphasis should be placed on the domestic impact of this signaling. It still remains to be seen if this ‘signaling’ by

states is in fact perceived as self-binding, or simply as a strategy to stay in power and garner domestic and international support while possibly masking one's own wrongdoing in a conflict.

### **Constructivism and Constructivist Explanations**

According to Emmanuel Adler, in his article entitled "Seizing the Middle Ground: Constructivism in World Politics", "international reality is socially constructed by cognitive structures that give meaning to the material world" (Adler, 319). Further, how the material world is given meaning depends on 'normative and epistemic interpretations' of the social and material worlds (Adler, 322). Institutions and conceptions that seem natural and inevitable are actually "based on collective understanding; they are reified structures that were once upon a time conceived *ex nihilo* by human consciousness; and these understandings were subsequently diffused and consolidated until they were taken for granted" (Ibid.). Adler also explains that it is the "human capacity for reflection and learning" that impacts the construction of meaning as well as cognitive processes about the world. In fact, 'collective understandings' give "indications as to how they [humans] should use their material abilities and power" (Ibid.).

Adler notes that there are four different strands of constructivist thought. The first one, termed 'modernism', posit that "once ontological extremism is removed, there is no reason to exclude the use of standard methods alongside interpretive methods" (Ibid.) Within this strand, one can also distinguish between state-centric constructivists and those who take nation-states or ethnic groups as the main actors in international relations. (Adler, 335). The next strand of constructivists is led by Kratochwill and Onuf who "use insights from international law and jurisprudence to show the impact on international

relations of modes of reasoning and persuasion and of rule-guided behaviour” (Ibid.). The third strand “emphasizes narrative knowing,” where “particular attention has been given to gender-based narratives, actions of agents such as social movements, and the development of security images” (Adler, 336). The last strand of constructivism encompasses some of the methods of postmodernists such as “Foucault’s genealogical method ... [or] ... the ‘deconstruction of sovereignty’ by means of a detailed history of the delegitimation of non-Western polities by Western states” (Ibid.).

Returning to the ‘modernist’ strands in constructivist thought, Alexander Wendt explains in his article entitled ‘Constructing International Politics’, that constructivists hold the following in common with the rationalists: that anarchy characterizes the international realm, states do possess offensive capabilities, intentions are quite opaque, survival is a prime motivation in the system, and states are rational actors. Further, states are the primary units of analysis within constructivism, and according to Wendt, third image – or systemic – theorizing is also at the heart of the constructivist project (Wendt, 72). Where constructivism diverges from the rationalist and materialist approaches is regarding the conception of structure and its affect on state interests and identities. Constructivists posit that structures are a social milieu and that they arise out of processes of interaction between states. In turn, these processes condition and shape actors’ – or states’ – identity as well as interests. Furthermore, material capabilities are important vis-à-vis the meaning that actors attach to them. In and of themselves, material capabilities are not meaningful; but rather only in relations between states.

One can sum up by stating that it is within the processes of interaction that social structures are formed which conditions states’ identities and interests, and are the basis of

assigning meaning to material capabilities. Within the rationalist and materialist schools of thought, identity and interests are exogenously given, meaning that they are assigned prior to interaction. Further, the system does condition these but only insofar as behaviour is concerned. Neorealism and neoliberalism do not contain elements that allow for a transformation of identity and interests; they are static and only changing superficially as opposed to substantially.

Therefore, as Wendt explains in his book entitled a *Social Theory of International Relations* (1998), there are two main constructivist assumptions: a) structures are shaped by shared ideas as opposed to material capabilities; b) identity and interests of actors are shaped by these socially constructed ideas as opposed to being assumed to be ‘given by nature’ (Wendt 1998, 1). In order to fully appreciate – as well as understand – the above-outlined statements, one must pay particular attention to what is meant by structure. Within the neo-neo debate, structure means the interactions of individual, self-interested states within the international realm, which compel states to modify – if not change – their *behaviour* and patterns of interactions. Under this light, structure is seen as a static and deterministic entity that is underpinned by material pillars such as the economy as well as military capabilities. In the case of constructivism, on the other hand, structure is viewed under a fundamentally different light. Constructivists conceive of structure as a function of shared knowledge, material resources, and practices.

As Wendt explains, social structures are – in part – defined as “shared understandings, expectation, or knowledge” (Wendt 1998, 73). These aspects of structures define the actors and the relationships in which the actors are engaged in. Wendt distinguishes between the security dilemma and a security community, which is

seen as an aspect of 'intersubjective understandings'. The 'security community', is characterized by shared knowledge, and therefore trust. Further, social structure does give rise to the 'ideational' aspects of international relations, which are socially based due to their intersubjective quality, and therefore shared knowledge.

The second aspect of structure is the meaning of the material aspects of international relations, such as military or economic capabilities. As was indicated above, rationalists conceive of material structures as in and of themselves determinant factors within the international system. Constructivists, on the other hand, conceive of material capabilities in a social sense as well. In particular, material capabilities in this sense are *meaningful because they convey meaning*. Wendt uses the example of nuclear weapons possessed by the United Kingdom and North Korea. Even though the United Kingdom may possess more nuclear weapons, North Korea is seen as more threatening because of the conflictual relationship that exists between the US and North Korea. Ultimately, then, material capabilities are important insofar as they are a function of meaning, relationships and knowledge between actors within the international realm.

Lastly, social structures are a function of practices first and foremost and therefore are reinforced by these practices themselves. Structures exist in processes, and are not exogenous to them. As Wendt explains, the Cold War was a social process that was underpinned by shared knowledge. Once this 'interaction' was over, the Cold War in itself ceased to exist. One can therefore assert that it was not the arms race alone that characterized the Cold War, nor the nuclear build-up. It was in fact the process of interaction between the Soviet Union and its allies, and the United States and its allies.

Erik K. Leonard points to the notion that, seemingly, “a knowledge-based theory provided the best understanding of the ICC formation process” (Leonard, 127). The reason for the apparent utility of the knowledge-based theories is because they “explore the origins’ of states’ interests, the process of learning, and the role of epistemic communities such as the NGO Coalition for an International Criminal Court (CICC)” (Leonard, 125). Fehl also points to the utility of constructivist explanations, not only for explaining the emergence of the ICC but also the particular institutional design features it encompasses. According to Fehl, constructivists – by pointing to the importance of norms – do add much depth to the explanatory calculus. Fehl specifically notes that “in looking at the normative developments preceding the ICC’s establishment, one can explain how states came to intersubjectively identify the ‘public good’ of prosecution and deterrence” (Fehl, 372). In essence then, not only did the end of the Cold War contribute to the establishment of the ICC, but also “the proliferation and increasing worldwide acceptance of human rights norms” as well (Fehl, 371). The nature of these norms define the “community of liberal states and of its members” (Fehl, 372).

In essence if a state would wish to be a member of the international community – in good standing at that – and to “view itself” as well as be viewed by others as such, a state must comply with these human rights norms. Therefore, the adherence to these norms “can explain that massive human rights violations, as well as impunity for the perpetrators of these crimes, were increasingly perceived as a collective problem of just that international community” (Fehl, 372). In addition, “there is also some evidence that constitutive human rights norms contributed to a greater demand for the prosecution of atrocities” (Fehl, 373). Here the author points to “the emotional calls by Western publics



upon the ‘international community’ to ‘do something’ about human rights violations in Yugoslavia and Rwanda that triggered the establishment of the two ad hoc tribunals” (Fehl, 373). Furthermore, the author also points to a statement made by David Scheffer who noted that with the advent of the end of the Cold War and the increasing number of democracies and ‘pluralistic societies’, public opinion in these societies could not accommodate tolerance for such horrendous crimes (Fehl, 373).

Fehl mentions that the constructivist perspective “could be complemented by a liberal theoretical argument that emphasizes rational action of sub-state actors” (Fehl, 373). Contradicting this, however, she then seems to explain away the impact of these sub-state groups by stating that “since the reaction of the public must itself be explained by normative changes that lowered the tolerance for massive human rights violations, it seems fair to treat the argument as constructivist at the ‘aggregate-level’ of the state” (Fehl, 373).

Turning the discussion to explain the design features of the ICC, Fehl lists four contested issues that the negotiators and members of the Preparatory Committee wrangled with. These issues were the so-called ‘trigger mechanisms’ of the Court, the role of the UNSC, the status of non-party states with respect to the jurisdiction of the Court, and finally, the issue of ‘opt-out provisions’ which allow states to ‘opt-out’ from the jurisdiction of the Court for a specified amount of time. For the discussion at hand, the first one is of most importance. The RS provides for the UNSC, states as well as the Prosecutor to trigger the jurisdiction of the ICC. At Rome, “a number of states led by the US sought to restrict the right of initiative to the Security Council, notably to prevent an independent prosecutor” (Fehl, 376). Other negotiating teams – India, Mexico and

Egypt for example – opposed the role of the UNSC in triggering investigations (Fehl, 376).

A constructivist explanation for the institutional design of the ICC points to the effort as well as involvement and activism of certain NGOs, in the considerations of the “contested provisions – notably the *proprio motu* power of the prosecutor and the jurisdiction over non-member states in certain cases” (Fehl, 381). Naturally, NGOs would not have been able to take part in the process to the extent they did “if states had not already been receptive both to the general involvement of NGOs in the process and to the demands put forward by them” (Fehl, 381). The author attributes this to the phenomenon of ‘new diplomacy’ very much in vogue at the time (Fehl, 381). Within this strand of ‘treaty-making’, the assumption is that it is more preferable to have a functional treaty which may be opposed by some, as opposed to having a ‘weak’ treaty which is accepted by all (Fehl, 381). Another aspect of the negotiations was the “bundling” of the final package by the conference leadership, which is presented to the participants as a whole at the end of the conference, with no possibility for individual states to request an unbundling” (Fehl, 381).

Turning to discourse-based explanations, Michael J. Struett, in his book entitled *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency*, attempts to explain the establishment of the ICC from the perspective of the role NGOs played in the process. Focusing on the impact of NGOs, and anchoring his story in the involvement of civil society, the author focuses on the ‘reasoning ability’ of NGOs and analyzes how the reasoned discourse of NGOs contributed to the establishment of the ICC.

The central question of his work is: “How did it come to pass that so many states were willing to cede such substantial authority to an international [Court]?” He, too, places the phenomenon of establishing the ICC within the wider context of global governance, but Struett’s focus is on the ability of NGOs to shape the content of the Rome Statute. Struett’s argument is “that nongovernmental organizations (NGOs) played a crucial role in shaping the Rome Statute of the ICC and in securing its entry into force less than four years later after it opened for signatures” (Struett, 2). In order to fully develop his argument, Struett asks a few other questions as well: “How is it that NGOs were able to play such a decisive role? What are the implications for the structure and legitimacy of emerging forms of global governance?” (Struett, 2) The author’s answer – based on an “analysis of NGOs’ discursive practices” is that “NGOs were persuasive, and ultimately effective, because of their reliance on communicatively rational arguments that can be justified to a (potentially) universal audience” (Struett, 2).

Struett places fundamental importance on the notion of individual criminal responsibility which is enshrined in the Rome Statute of the ICC. The author views the emphasis on individual criminal responsibility, coupled with the establishment of a permanent International Criminal Court, as “an idea about how to modify the organization and conduct of international politics” (Struett, 4). By the same token, “the court’s establishment represents a powerful change in the rules of state sovereignty because it creates a supranational judicial authority with the power to rule whether or not particular uses of force by state officials are criminal and sanctionable violations of international law” (Struett, 4-5). In essence, then, NGOs were successful because of the ‘nature of their normative discourse’ which was geared towards finding norms-based

solutions to individual impunity which would be accepted across the proverbial ‘board’ (Struett, 7).

These constructivist explanations share a common aim: to explain why the ICC – along with its design features – was established with the help of the emergence of international norms, ideas, as well as continuous contact between states’ representatives. The ‘proliferation of human rights’ after the Cold War, the emphasis placed on individual as opposed to ‘state’ responsibility, the common understanding within the international realm that institutions of international criminal justice are one of the most prudent ways to hold individuals accountable all point to the causal relevance of norms and ideas in impacting and guiding the actions of states. While the causal relevance of norms and ideas is crucial to the ensuing analysis, due to the fact that their relevance is only investigated in ‘state-to-state’ interaction, they leave a key question unanswered: where did these ideas and norms originate from? Ideas and norms are a function of social interaction of actors. Therefore they must originate with actors and then are reproduced in social structures within the international as well as the domestic political realms.

Fehl notes that “liberal approaches that focus on sub-state explanatory factors – both from a rationalist and a constructivist perspective – were excluded from the analysis. Yet they could shed further light on some aspects of the ICC’s establishment and design, for example on domestic (re)evaluations of sovereignty costs (constructivist arguments), or on the interaction between governments and national publics in the face of atrocities abroad (constructivist and rationalist arguments)” (Fehl, 384). In conclusion, what is clearly missing from the above outlined analyses – as well as from general analyses about the Court and its design features – is an investigation of the causal impact, and origin, of

norms within the domestic political realms. By extension, then, what is further missing from the analyses are explanations of how domestic norms and ideas, with the help of domestic actors, helped establish the ICC and its design features.

### **Historical Institutional Approaches**

A welcomed addition to the arsenal of explanatory theories regarding the independent Prosecutor and the ICC in general is historical institutionalism. Historical institutionalism is mostly used within comparative politics, and is part of a group of so-called ‘new institutionalist’ theories. These theories differ from ‘old institutionalist’ theories because they “focus on how institutions impact political outcomes, rather than simply on how institutions work” (Tremblay *et. al.* in Harmes, 14). As a theory, therefore, which aims to explain the impact of institutions on political life, historical institutionalism “is a broadly liberal approach in that it focuses on actors and ideas as well as institutions” (Harmes, 14). Yet because “its proponents view institutions as “ontologically prior” to actors and ideas,” institutions will be the key “determinants of policy and institutional change” (Harmes, 14). Further borrowing from liberal pluralist theory, historical institutionalism looks beyond the state and at the “constitutive and regulative role of both international *and* domestic institutions” (Harmes, 14). The aim of historical institutionalism, then, is to explain “how existing institutions have worked, over time, to construct political actors and their preferences as well as to impose constraints on them through mechanisms such as path dependence and unintended consequences” (Ibid.).

Historical institutionalism contributes to the theories used in this work for two particular reasons. First and foremost, none of the existing theories provide a historically

contingent explanation, even though a number of observers pointed to the probability that in a different historical period, the ICC would have not been established (Fife, Interview). Second, and more importantly, none of the theories used to explain the ICC to date offer a historically contingent institutionalist account even though the empirical research points in the direction of a possibly institutionalist explanation.

Historical institutionalism offers a few interesting hypotheses when attempting to explain the establishment of the independent Prosecutor and the ICC. This particular theory is able to account for the fact that predominantly democratic and liberal democratic states were at the forefront of attempting to establish the ICC and the independent Prosecutor in particular. The theory is able to account for the institutional experience of democratic states with such an institutional arrangement. At the same time, staunchly authoritarian – or even totalitarian – regimes were very much against establishing the Court and the independent Prosecutor. At the end of the Rome Conference, the states that voted against the ICC included Iraq, Cuba and Yemen. Similarly, the states comprising the ‘like-minded group’ led by Canada was comprised of mostly liberal and social democratic states, and newly democratizing states. With respect to the independent Prosecutor, data shows similar patterns. States scoring low on the Freedom House, ‘political’ and ‘civil rights’ indexes tended to oppose the institution of the independent Prosecutor. Those states which score high on these indicators tended to favour the institution of the independent Prosecutor.<sup>14</sup>

The empirical record also shows patterns which seem to head against the theoretical grain of historical institutionalism. In particular, in the case of the US and Japan – which are both liberal democratic states – the former had not joined the Court at

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<sup>14</sup> Please see Appendixes I – III.

the time of writing and was even vehemently campaigning against the Court and the independent Prosecutor at the turn of the millennium. In the case of Japan, even though Japanese diplomats were very active during the initial stages of establishing the Court and the RS contained a provision for the independent Prosecutor, Japan did not join the Court until nearly ten years after the conclusion of the Rome Conference.

### **Gap in the Literature**

Overall, there are three broad observations that can be made about the state of the literature on the creation of the Independent Prosecutor and the ICC. First, there are relatively few explanatory accounts of why states established an independent Prosecutor. Given the revolutionary nature and importance of the Court and its Prosecutor, this scarcity should certainly be remedied. The independent Prosecutor is a unique phenomenon, and its origin and impact on state sovereignty will only add to the overall understanding of role of states, NGOs and sub-states groups and processes as functions of global governance. Second, the existing explanations hold the ‘state’ as a unitary actor, and naturally ascribe casual importance to state and national interests. While referring to state-level explanations, a number of key issues and dynamics are not problematized which provide further depth to not only the overall analysis, but also to the understanding of the establishment of the Court with an independent Prosecutor as well. The role of sub-state actors is neglected in the explanatory calculus. The role of NGOs is certainly discussed and attributed to the success of establishing such institutions. However, the broader ontological form of NGOs – as manifestations of an active civil society in democratic states – stops short of attributing the origins of NGOs and their ideas as well as their relevance to political processes located within domestic political realms. In this

vein then, it is quite proper to argue that norms and ideas contributed greatly to the establishment of the Court and the Prosecutor. Yet most of the explanatory relevance is placed on the proliferation of global norms, principles and ideas regarding human rights and international criminal justice, among others. At issue therefore is that these norms, principles and ideas, while embedded in social structures – global and domestic – originate with actors which primarily originate from domestic and local political realms. Therefore adding a domestic element to the origin of norms, ideas and processes is crucial for the understanding of the origins and establishment of the Court with an independent Prosecutor.

Given the intellectual and practical significance of the independent Prosecutor, a more in-depth study is warranted. For instance, explanations pointing to a compromised position on the independent Prosecutorial powers leave a number of key questions out, including: what enabled the compromises to be made, and why were states able to come to a compromise regarding the inclusion of the Prosecutor? Further, the existing state-centric approaches of neorealism, neoliberal institutionalism and constructivism downplay the role of *domestic* ideas and interests. As Caroline Fehl observes in the case of the ICC, these analyses are important for ongoing debates, contemplations and conversations about the origins of the very first permanent and independent international criminal court.

Essentially, there are three distinct ways in which this dissertation will supplement the explanatory scholarship regarding the ICC. First, it will focus on a particular institutional design feature of the Court: the independent Prosecutor of the ICC. This design feature – or others in fact – have not been explained adequately in the



international relations literature. Second, the dissertation will disaggregate the ‘state’ and will use domestic interest groups as units of analysis. Third, by using sub-state actors as units of analysis, the particular ways in which these actors formulated the notion of their own state sovereignty in the event that an independent Prosecutor for the ICC is established will bring to light the importance of these sub-state actors in shaping national interests. Further, this type of an analysis will outline how their dominance at a particular junction in time and in a particular historical and temporal contexts helped establish an independent Prosecutor for the International Criminal Court.

### **Theoretical Approach**

This section outlines the theoretical approach employed in this dissertation, that is a broadly liberal-pluralist approach which takes into account the role of domestic interests and ideas (sometimes referred to as ‘actor-centered constructivism’). This approach draws on Andrew Moravcsik’s ‘liberal theory of international relations’ (and its three-stage approach), and liberal constructivism more broadly. After outlining the main assumptions of this approach, this section demonstrates how this approach informs the key hypotheses of this dissertation.

In his article entitled “Taking Preferences Seriously: A Liberal Theory of International Politics,” Andrew Moravcsik notes that the domestic and international social context states are embedded in have an impact on state behavior in international relations (Moravcsik, 513). Moravcsik further notes that “societal ideas, interests, and institutions influence state behavior by shaping state preferences...” (Ibid.). In essence, ‘state preferences’ matter the most to world politics for liberals, as opposed to “the

configuration of capabilities”, as for realists, and “the configuration of information and institutions” as for institutionalists and ‘functional regime theorists’ (Ibid.).

Moravcsik points to three fundamental assumptions of a liberal theory of international politics. First, he notes that the most important actors in international relations are “individuals and private groups, who are on average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence” (Moravcsik, 516). Second, the author notes that “states (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences” (Moravcsik, 518). Third, Moravcsik further points to a variant of liberal theory – ‘ideational liberalism’ – which seems to provide explanatory clout for the analysis. The point here is that ideational liberalism “views the configuration of domestic social identities and values as basic determinant of state preferences and, therefore, of interstate conflict and cooperation” (Moravcsik, 525). This theoretical approach then informs the key hypotheses of this study in such a way that it emphasizes the causal importance of key individuals and groups – mainly political parties and non-governmental organization – within key polities, which were crucial for the establishment of the Court with an independent Prosecutor.

## **Methodology**

In this section, comparative case study and historical process tracing will be outlined. The case study method and the methodology of process tracing are used in order to test liberal-pluralist as well as neorealist, neoliberal institutionalist, constructivist, and historical institutionalist explanations. In order to satisfactorily answer the overall

question animating this work – namely, why states established an independent Prosecutor – there are two further questions under contention. First, and foremost, which states supported and which opposed the establishment of an independent Prosecutor, and why? Second, why and how did the supporters of an independent Prosecutor win?

Turning to the question of who supported, who opposed, and for what reasons, the establishment of an independent Prosecutor, it will be hypothesized via liberal pluralism that domestic ideas and interests played the central role. These domestic ideas and interests originated from the political parties in power and their domestic constituencies. By extension, then, a change in parties in power, and the ideas these alternate parties held regarding the independent Prosecutor, have led to a change in a state’s position. The key test for liberal-pluralist explanations will be to discern if domestic ideas and interests (non-governmental organizations (NGOs), political parties and their ideational backdrops), as well as a change in government, add to the explanatory calculus. The neorealist, neoliberal institutionalist and constructivist explanations do not disaggregate ‘the state’ as an analytic concept, therefore they do not ascribe primary causal relevance to domestic actors. In addition, these theoretical strands explain preferences based on a state’s position in the international distribution of power or they leave the source of state preference unexamined.

In general terms, comparative case studies may rely on the ‘method of difference’, the ‘method of agreement’, and the ‘method of concomitant variable’. Jonathan Hopkin notes that the ‘method of difference’ “involves studying two very similar cases, which differ only in respect of the variables whose relationship to each other one is studying” (Hopkin in Marsh, et. al., 252). The ‘method of agreement’, on

the other hand, “is the opposite of the ‘method of difference’: the two cases should differ in every respect except the variables being studied” (Ibid., 253). Lastly, “the ‘method of concomitant variables’ seeks to identify variables which seem to move more or less contemporaneously in the hypothesized direction” (Ibid.).

The four selected cases fit very well with the ‘method of agreement’ research design, which espouses that “cases should differ in every respect except for the variables being studied” (Hopkin, 202). Apart from representatives of all three states continually participating in the debates about the Prosecutor and the Court in general, the three cases show substantial difference in their foreign policies, governmental structures, and party politics as well. With respect to foreign policy, Canadian foreign policy was at the time still focused on multilateralism and peace-keeping. The foreign policy of the UK was “maintaining a strong alliance with the US, and a commitment to place Britain at the heart of Europe.” (Research Paper, House of Commons, UK) The US became the sole superpower and was viewed as the hegemon within the international realm. It was at the forefront of nearly every major inter- or intra-state conflict, from Rwanda, Somalia to Bosnia and later Kosovo. Finally, Japan was certainly seen as a regional economic power in the Asia-Pacific with very strong military and defense ties to the United States.

With respect to state structures, Canada and the UK are both parliamentary democracies, however Canada is a federal state while the UK is a unitary state. By the same token, even though Canada and the US are both federations, the US government is characterized by a presidential system, and Canada is characterized by a parliamentary system. Lastly, Japan is a Constitutional Monarchy, and unitary state, which is characterized by a bicameral parliamentary liberal democracy.

In general terms, the selection of cases is balanced in a more geo-strategic sense as well. Canada and Japan – states from either sides in this debate – are thought to be more ‘middle powers’ regionally, as in the case of Japan, and globally as in the case of Canada and Japan as well. The United Kingdom and the US – once again, straddling both sides of the debate – are thought to be more either regional or global major powers. This balance between, and across the debate, further affords the study credibility and strength.

The above-indicated cases were selected because these states had the most impact and were the most influential in the debate regarding the independent Prosecutor. In the case of Canada, it was approached in 1995 by the NGO Coalition for an International Criminal Court (CICC) to lead the charge of establishing the Court after the successful Ottawa conference banning the use of land mines in conflicts. Supporting the ICC and the independent Prosecutor seemed as a natural extension and continuation of a multilateralist Canadian foreign policy – which included a leading role of the newly established Human Security Network. At the same time, the official opposition in the House of Commons, the Canadian Alliance party, did oppose – unsuccessfully because of a Liberal majority supported by the New Democratic Party – the establishment of an independent Prosecutor. The case of the UK is very important as well as this state is a member of the so-called ‘permanent 5’ (P-5) of the UNSC. The P-5 was seen as a cohesive group arguing against the establishment of an independent Prosecutor all throughout the PrepComs until the UK – due to a change from a Conservative

government to a Labour government in 1997 – changed its stance.<sup>15</sup> Lastly, the US is an excellent case because it vehemently opposed the establishment of an independent Prosecutor even though it was not a major policy aim of the US – at least not in Rome. The pressure provided by the Pentagon and certain members of the US Congress and US House of Representatives towards the US negotiating team in order to necessarily shield US service members and civilians from the reach of the Court sheds light on a key explanatory factor for US opposition: domestic partisan interests. Lastly, Japan was involved all throughout the international diplomatic process of establishing the Court, yet its government formed by the Liberal Democratic Party of Japan at the time took nearly a decade to ratify the RS. In addition Japan was initially very much opposed to the establishment of the independent Prosecutor as well.

With respect to the second key question under contention in this work – or why and how did the supporters of an independent Prosecutor win – it will be hypothesized that states, INGOs, leadership, agency and coalition-building, and norms mattered in negotiating process. In order to map the relevance of these hypotheses the method of historical process tracing will be used.

Historical process tracing is defined by David Collier as “an analytic tool for drawing descriptive and causal inferences from diagnostic pieces of evidence— often understood as part of a temporal sequence of events or phenomena” (Collier, 824). In particular, ‘process tracing’ “gives close attention to sequences of independent, dependent, and intervening variables” (Collier, 823). For the purposes of this study, the aim here was to shed light on the ILC document that preceded the RS, evaluate the six

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<sup>15</sup> France, another member of the P-5 also changed its stance later on during the Rome conference. However, in the case of France, the change was due to the achievement of that nation’s negotiated goals as opposed to a change in government.

sessions of the Preparatory Commission prior to the Rome conference and then trace the negotiation process in Rome as well as post-Rome process in particular legislatures – up to the point in time when states ratified the RS. In particular, records of the negotiation process were analyzed in order to uncover how different actors – namely members of the ‘like-minded group’, NGOs and the US and the ‘not-so-like-minded-states’ – negotiated and argued for – or against – the establishment of an independent Prosecutor. Key policy papers, parliamentary committee and debate transcripts, as well as policy and media publications were used to discern the reasons why the above mentioned key actors negotiated for an independent Prosecutor.

Lastly, it is important to note that data was gathered via primary and secondary sources, as well as interviews with key participants. With respect to alternative hypotheses, one is able to posit – via neorealism and power-based approaches – that the US should have been able to prevent the establishment of the ICC. Further, one should be able to argue that, due to the absence of the US from the group of states which are members of the Court, the Court is ineffective. Neoliberal institutionalism could lead one to argue that state interests were sacrosanct – which would in fact dictate the establishment of a Court without an independent Prosecutor and a strong UNSC involvement – and they would matter most, in conjunction with international NGOs and the dynamics of the negotiation process. Constructivist hypotheses would posit that what is at stake in this explanation is the role and impact of international norms. One could argue that international norms were the catalysts as well as the causal mechanisms which enabled the establishment of an independent Prosecutor. Lastly, liberal pluralist explanation will shed light on the role of domestic interest groups such as political parties

and domestic NGOs. Considering this theoretical explanation, it will be important to see if changes in the parties which formed the government – during the negotiations process and beyond – signalled a change in official state policy whereby highlighting the causal importance of domestic ideas and interests.



### **CHAPTER 3: THE INDEPENDENCE OF THE PROSECUTOR**

The exercise of prosecutorial discretion with regard to the investigation of criminal conduct and the institution of judicial proceedings is a necessary and fundamental concept in the administration of criminal justice. Its necessity springs from the practical need for a selective, rather than automatic approach to the institution of criminal proceeding, thus avoiding the overburdening and perhaps clogging of the machinery of justice. Somebody somewhere thus has to decide whether or not to institute proceedings and for what offence or offences (Hassan B. Jallow, Chief Prosecutor, International Criminal Tribunal for Rwanda, 145).

The overall purpose of this chapter is to provide the historical, legal and institutional background to the establishment of the ICC with an independent Prosecutor. In order to satisfy this purpose, first, the work of the Prosecutor – and with it, the corporate identity of the Office of the Prosecutor (OTP) as an organ of the Court – will be described via an exposition of the basic structure of the relevant parts of the Rome Statute, the ICC in its organizational forms, as well as the OTP itself. Here special attention will be placed on the ways in which the OTP, from an institutional point of view, and the Prosecutor, from a statutory point of view, are independent actors within the Court. In order to locate the discussion in the international and legal and political context, this chapter will then describe and show the qualitative difference in the independence of the Prosecutor of the ICC and his/her international predecessors. The debate over the ‘independence’ of prosecutorial discretion is quite extensive in the legal and – to a lesser extent, political – literature. Some attention will be paid to this debate as well. However, approaching the notion of independence from a political and international relations point of view, the central claim of this chapter is that the ‘independence’ bestowed on the Prosecutor of the ICC – by virtue of the Court’s mandate as a permanent international criminal court, along with its key statutory provisions – has made the Court fundamentally different from

its predecessors. Politically, the exercise of independent decision-making and discretion of the Prosecutor of the ICC is fundamentally different than those of earlier ad hoc tribunals.

The ICC itself is one of the most innovative, yet controversial, international institutions that emerged in the late 20th century. It is a permanent international criminal court which is responsible to prosecute individuals who have committed crimes against humanity, war crimes or genocide in conflicts which are deemed “the most serious conflicts of international concern” (Rome Statute, Article 1). It is also ‘complementary to national criminal jurisdictions,’ so the Court is restricted to operate in situations where the state is either incapacitated or is unwilling to prosecute (Rome Statute, Article 1). With respect to its jurisdiction, the reach of the Court is not restricted to only signatory states, or states that have signed the Rome Statute. As the Statute outlines, the Court may exercise jurisdiction if the crime committed occurred within “the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; b) the State of which the person accused of the crime is a national” (Rome Statute, Article 12). Therefore, nationals of non-party states may also be brought in front of the Court if they have committed crimes on the territory of a signatory state.

Before embarking on an exposition of the Court and the role of the Prosecutor within the Court, it is important to place the forthcoming discussion within the statutory framework of the Rome Statute. In this section, particular attention will be paid to the provisions in the RS that directly address the role and work of the Prosecutor within the Court.

At the outset, it is important to mention that some observers and scholars note that “[T]he Rome Statute...[is] one of the most complex international treaties ever drafted...” (Olasolo 2003, 87). Substantively, the final version of the RS accepted by state delegations in Rome in 1998, had two earlier incarnations, one originating from the International Law Commission (ILC), and the other emerging from the Preparatory Committee negotiations<sup>16</sup> leading up to the Rome Conference in 1998. The ILC draft originating from 1994 only gave states and the UNSC the power to refer cases to the Court. The fear was that an independent Prosecutor would only encourage politically-charged prosecutions. Overall, the ILC reasoned that “affording the Prosecutor the power to initiate investigations on his own – what has come to be known as his *proprio motu* powers – was not advisable ‘at the present stage of development of the international legal system’” (Fernandez de Gurmendi in Danner 2003, 513). During the Preparatory

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<sup>16</sup> The article describing the role of the Prosecutor as it appeared in the Preparatory Commission’s Draft – Article 12 – in preparation for the Rome Conference: “*The Prosecutor [may] [shall] initiate investigations [ex officio][proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5, paragraphs (a) to (d), from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]*” (Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court United Nations Conference Records, Addition , A/Conf.183/2/Add.1, Page 37)

In comparison, the Draft Statute originating from the ILC in 1994 reads as follows: *Article 12 The Procuracy; (1.) The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source. (2.) The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required. (3.) The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States Parties, from among candidates nominated by States Parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election. (4.) The States Parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required. (5.) The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality. (6.) The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor. (7.) The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor* (Draft Statute for an international criminal court, United Nations, 2005).

Committee meetings however, delegations began suggesting that the Prosecutor should be able to receive information from ‘nonstate sources’, including NGOs (Danner, 2003, 513). As a result then the notions of an independent Prosecutor became one of the most contentious issues addressed throughout the negotiations (Danner 2003, 513).

The final version of the RS which “was adopted by 120 states on July 18<sup>th</sup>, 1998,” is “composed of a preamble and thirteen parts, including 128 articles” (Arsanjani, 24). Overall, the RS is a document which is an ‘instrument’ establishing an international organization, it contains a ‘penal code’ and a ‘criminal procedure code’ (Olasolo 2003, 87-88). Arsanjani notes that the Statute itself is underpinned by three pillars: first, the principle of ‘complimentarity’ ensures that national jurisdictions are necessarily prior to the jurisdiction of the Court. The Court is ‘complementary’ to national jurisdictions, and not the other way around (Arsanjani, 24-25). There are two particular reasons for the inclusion of complementarity in the RS. First, “the majority of participating states ... had a vital interest in remaining responsible and accountable for prosecuting violations of their laws. The international community had a comparable interest, inasmuch as national systems are expected to maintain and enforce adherence to international standards” (Arsanjani, 25). The second pillar of the Statute is that it is designed to address the ‘most serious crimes’ that “affected the selection of crimes, as well as the determination of their threshold application” (Arsajnani, 25). The thought behind this perspective was that “this principle would promote broad acceptance of the court by states and consequently enhance its credibility, moral authority and effectiveness. In addition, it would avoid overloading the court with cases that could be dealt with adequately by national courts, at the same time limiting the financial burden imposed on the international community”

(Arsanjani, 25). The third pillar is the pillar of ‘customary international law’. The intent behind this pillar was that states wanted the statute to be acceptable by as many states as possible (Arsanjani, 25).

The overall Statute is composed of thirteen different parts, of which Part 2 dealing with “Jurisdiction, Admissibility and Applicable Law” is the most important for the ensuing discussion. Part 2 “is the heart of the statute and was the most difficult to negotiate. This part deals with the list and the definition of crimes, the trigger mechanisms, admissibility and applicable law. The text of part 2 was negotiated until the penultimate day of the conference” (Arsanjani, 25). Overall, the jurisdictional regime of the Court holds that the Court has jurisdiction over crimes enumerated in the statute if the Court has consent to prosecute from the territorial state where the crime occurred, or if the accused is a national of a state which ratified the statute (Arsanjani, 26). The jurisdictional regime of the Court with respect to the UNSC is different, however. In the case that the UNSC refers a situation to the court, the Court would have a wider jurisdiction which would be exercised even if the accused is a national of a non-party state, and without the explicit consent of the territorial state or the state of which the accused is a national (Arsanjani, 26). Further, at Rome, the P5 of the UNSC voiced further concerns over the possibility that the jurisdictional regime of the Court would interfere with the work of the UNSC. At issue was the possibility that an investigation by the Court would coincide with the work of the Council in regards to resolving a conflict (Arsanjani, 26). According to Arsanjani, as a compromise, the UNSC could ask the Court to defer the investigation for a renewable 12 months (Arsanjani, 27).

In essence either a state party or the UNSC acting under Chapter VII of the UN Charter may refer a ‘situation’ to the Court.<sup>17</sup> In addition, the Prosecutor may authorize an investigation on his or her own accord – or *proprio motu* (Arsanjani, 27). In this case, the Prosecutor would have to inform all stakeholders of her or his decision in advance. If any state has proceeded with an investigation, the Prosecutor then would have to defer the investigation. The Prosecutor may ask for periodic updates in regards to the investigation. Further, the Prosecutor may even review the state investigation if there has been a large-scale change in the particular state’s “unwillingness or inability genuinely to carry out the investigation” (Arsanjani, 27).

Organizationally, the ICC is comprised of four main organs: the Presidency, the Judiciary, the Office of the Prosecutor and the Registry. The office of the Presidency is entrusted with the overall administration of the Court, except for the Office of the Prosecutor. The Presidency is headed by three judges who are elected by their fellow jurists at the Court for a term of three years. The presiding judge of the Court is assisted by a first Vice-President and a second Vice-President.<sup>18</sup> The role of the Judiciary consists of the judges of the Court – eighteen in total – who serve in one of three judicial divisions: Pre-Trial, Trial and Appeals division. The assignment of judges to the different divisions is based on the ‘function’ of the different division as well as the ‘qualifications and expertise’ of the judges. In terms of qualification, it is ascertained that the personnel have ‘expertise in criminal law and procedure and international law.’ The office of the Registry “is responsible for the non-judicial aspects of the administration

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<sup>17</sup> Including the word ‘situation’ as opposed to ‘case’ meant to “minimize politicization of the court by naming individuals” (Arsanjani, 27).

<sup>18</sup> International Criminal Court. Chambers. <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Chambers.htm>. Web. 31 Jan. 2011.

and servicing of the Court.” This organ is headed by a Registrar who is under the supervision of the President of the Court. The Registrar is elected by the judges of the Court for a five year term. Lastly, the Court also contains three other so-called ‘semi-autonomous’ offices that fall under the administration of the Registry, though these offices operate autonomously. These are the Office of Public Counsel for Victims, Office of Public Counsel for Defense, and the Trust Funds office. The Office of the Prosecutor (OTP) is an autonomous and independent organ of the Court. It is not administered by the Presidency of the Court nor any other international organ, including the United Nations and the United Nations Security Council. The OTP is headed by the Prosecutor. The Prosecutor is elected for a non-renewable nine years by the Assembly of State Parties. She is assisted by the Deputy Prosecutor who is in charge of the three subdivisions within the OTP: the Prosecution division, the Jurisdiction, Complementarity and Cooperation Division, and the Investigation Division. The latter two divisions are headed by a Director and a Head respectively.<sup>19</sup>

In order to show the distinctiveness and uniqueness of the *proprio motu* powers of the Prosecutor of the ICC, one must provide at least a cursory exposition of the independence – or lack thereof – bestowed on the Prosecutors of the institutions dealing with international criminal justice which preceded the ICC, namely the Nuremberg and Tokyo trials, and the *ad hoc* tribunals dealing with atrocities in the former Yugoslavia and Rwanda.

The first institutional approach pursued by the Allies at the end of World War II took place at the Palace of St. James in 1942, when the Allies established the United

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<sup>19</sup> Hector Olasolo notes that the “(a) Presidency; (b) the Appeals, Trials and Pre-Trial Divisions; and (c) The Registry,” along with the OTP are “the so-called four judicial organs of the Court provided for in the R.S. Art. 34...” On the other hand, the “political organs established by the R.S. [Art. 112] are “(a) The Assembly of States Parties; and (b) The Bureau of the Assembly of States Parties” (Olasolo 2003, 90).

Nations War Crimes Commission (UNWCC). This commission essentially led to the establishment of the International Military Tribunal at Nuremberg (IMT) (Bassiouni, 21). The Commission was composed of 17 state representatives and it did amass 8172 dossiers of persons who were thought to have committed war crimes (Ibid., 22). However, between 1942 and 1945, the work of the commission did not progress as planned. The intention of the Allies to prosecute war criminals was further cemented at the signing of the Moscow Declaration in 1943, which was signed by Churchill, Roosevelt, and Stalin. At that point, there was less thought about an institutional approach, and more about capital punishment for the perpetrators. Nearly all three sides agreed to this course of action, with the only dissent coming from the United States (US), even after President Truman had replaced President Roosevelt. Following the work of the commission and the Declaration, the IMT was essentially established on August 8<sup>th</sup>, 1945 by way of the London Agreement. It was signed by the four major Allied powers as well as nineteen other states. The US did take the lead on logistics as well as personnel for the operation of the tribunal. Ironically, it was the efficiency of German record keeping that provided the Allies with most of their evidential ammunition (Bassiouni, 28).

The London agreement contained the charter of the new tribunal. The charter essentially reflected the 1907 Hague Convention and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (Bassiouni, 25 – 26). One additional Law – the Control Council Law No. 10 – further contributed to the codification of the prosecutions, as it allowed the Allies to prosecute German military personnel within their own respective zones (Bassiouni, 29). Of further note is the fact that the Kellogg-



Briand Peace Pact of 1928 was used along with treaties that Germany had itself signed, such as the Locarno Treaties (King, 40). The aim was to prosecute i) crimes against peace; ii) war crimes; and iii) crimes against humanity. The type of crimes prosecuted will be important as it will become evident that crimes prosecuted by subsequent tribunals and institutions became more focused on individual criminal responsibility.

The purpose of the tribunal was to provide “for the just and prompt trial and punishment of the major war criminals of the European Axis” (IMT Statute). The jurisdiction of the IMT – as described in Article 6 of the IMT – was such that it had “the power to try and punish persons who, acting in the interests of the European Axis, whether as individuals or as members of organizations...” have committed ‘crimes against peace’, ‘war crimes’ and ‘crimes against humanity’.

In the IMT, the role ascribed to Chief Prosecutors was outlined in section III of the Statute called the “Committee for the Investigation and Prosecution of Major War Criminals” (IMT Statute). Article 14 of the Statute outlined that “[E]ach Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals” (IMT Statute). The Committee was then charged “a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff, b) to settle the final designation of major war criminals to be tried by the Tribunal; c) to improve the Indictment and the documents to be submitted therewith; d) to lodge the Indictment and the accompanying documents with the Tribunal; c) to draw up and recommend to the Tribunal for its approval draft rules of procedure...” (IMT Statute). Article 15 then outlined that each Chief Prosecutor will also be responsible for “a) investigation, collection, and production before or at the Trial of all necessary evidence;

b) the preparation of the indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof; d) the preliminary examination of all necessary witnesses and of the Defendants; e) to serve as a prosecutor at the Trial; e) to appoint representatives to carry out such duties as may be assigned to them; f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial” (IMT Statute).

It was the Chief Prosecutors who decided whom to prosecute. As Article 14 stated, it was within their responsibilities. Together with the outlined jurisdiction of the IMT – members of the European Axis powers, “individuals or ... members of organizations” – it was therefore within the powers of the Chief Prosecutors to decide who would be tried and who would not be tried. As William Schabas notes, these Prosecutors were not ‘independent’. They were representing the interests of their own governments (Schabas 2008, 372). Schabas further notes that potentially they might have gotten instructions from their own governments in regards to whom to prosecute or not<sup>20</sup> (Schabas 2008, 732).

Turning to the Far East, the Tokyo trials were preceded by the Far Eastern Commission which was agreed to in Moscow in December of 1945. It was comprised of eleven states<sup>21</sup> and the Commission was based in Washington. The Allied Council of Japan was the local governing body taking directives from Washington. The Council was made up of the US, the United Kingdom, China and Russia. Its mandate was more

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<sup>20</sup> It is interesting to note that “[A] recent study shows how intelligence agents were planted on the staff of the American Prosecutor at the highest levels. One aspect of their job was to ensure that high-ranking Nazis who had collaborated with the United States in the final months of the war were not prosecuted” (Schabas, 732).

<sup>21</sup> These states were: Australia, Canada, New Zealand, Great Britain, India, the United States, the Philippines, China, the Soviet Union, France, and the Netherlands. However, the Commission further “received evidence relating to Manchuria, the People’s Republic of Mongolia, Thailand, Cambodia, Burma, and Portuguese possessions in East Asia” (Pritchard, 27, Footnote).

political as opposed to investigative as it sought to establish the occupation policy in Japan. The actual Tribunal – dubbed the International Military Tribunal for the Far East (IMTFE) – and its Charter, issued as an order by General Douglas MacArthur, the Supreme Commander for the Allied Powers were issued and signed on January 19<sup>th</sup>, 1946. The eleven states were represented at the Tribunal by one representative each. (Pritchard, 27) As far as the defendants were concerned, they did not, for example, include the Emperor Hirohito, whose prosecution and eventual trial were bypassed out of political considerations (‘From Versailles’, Bassiouni, 35). It is important to note that certain states did hold trials in the Pacific Theater, including Australia, China, France, the Netherlands, the Philippines, the UK, the United States and the USSR (Ibid.).

The jurisdiction of the IMTFE was such that it had “the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace” (IMTFE Statute). The crimes within the jurisdiction of the IMTFE were ‘crimes against peace’, ‘conventional war crimes’, and ‘crimes against humanity.’ The prosecutorial role within the IMTFE was assigned to the ‘Chief of Counsel’ who is appointed by the ‘Supreme Commander for the Allied Powers’ (IMTFE Statute). Based on this designation, the Chief of Counsel can hardly be seen as independent from other judicial authority. Further, the IMTFE did provide for the appointment of an ‘Associate Counsel’ whom was to be appointed by “any United Nation with which Japan has been at war...” (IMTFE Statute).

With respect to trigger mechanisms, seemingly it was the Tribunal with its no “less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers...” that determined which individuals the Chief of

Counsel could “investigate and prosecute” (IMTFE Statute). In addition, the rules of evidence outlined in Article 13 provided further insight into whom and how individuals may be brought in front of the IMTFE. Article 13 stated with respect to ‘Admissibility’ that “[T]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible” (IMTFE Statute).

During the Cold War and its preference for ‘realpolitik’, institutions of international criminal justice were not used. Hardships and setbacks notwithstanding, the Security Council did establish the Tribunal for the former Yugoslavia (ICTY) on May 3, 1993 when it passed Resolution 827, which also included a draft Statute of the Tribunal. The ICTY officially came into existence on May 25<sup>th</sup>, 1993. One must pay particular attention to the crimes the Statute of the ICTY is able to prosecute: “individual criminal responsibility, including that of Head of State...[as well as] ... 1) grave breaches of the Geneva Convention of 1949; 2) violations of the laws or customs of war; 3) genocide; and 4) crimes against humanity” (Bassiouni, 43). A further feature of the tribunal was that it applied to everyone who violated humanitarian law as opposed to only a select few, as was the case with the IMT and the IMTFE. The tribunal was not answerable to the UNSC, but rather to the General Assembly of the UN, but only in regards to budgetary matters. The track record of the Tribunal at its inception was as follows: twenty-two persons were indicted within months of the establishment of the tribunal, and as of September 1996, “seventy-five persons have been indicted, one is being prosecuted, one plead guilty, and seven are being held in custody” (Bassiouni, 45). It must be

mentioned that after 1996 and before 2001 such other figures indicted and transferred to the Hague as the former Federal Republic of Yugoslavia's president Slobodan Milosevic, Serbia's President Milan Milutinovic, the president of the Serbian Radical Party Vojislav Seselj, and a few other former leading Serbian politicians. The Hague also saw the indictment of one of Kosovo's Prime Ministers as well who willingly traveled to The Hague to appear before the Court. Overall, the ICTY was the most successful tribunal in history. Its success stems from the fact that it arrested all of its indictees.

There are three particular components of the Statute of the ICTY that are relevant for the discussion at hand. First, the role of the Prosecutor is relevant as it provides an outline for the functioning of the Prosecutor. Second, the jurisdictional parameters of the tribunal are also important as they provide the jurisdictional context for the operation of the Tribunal. The third element of the Statute that is relevant is the way investigations are initiated.

The assumption of the role of the Prosecutor as well as his or her duties and responsibilities are outlined in Article 16<sup>th</sup> of the Statute. Article 16, section 4 states that it is the responsibility of the UNSC to appoint the Prosecutor, based on the recommendation of the Secretary General. It is also stipulated – as it is in the case of the ICC – that the appointed person “shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases” (ICTY Statute). Article 16 section 2, on the other hand, outlines that “the prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source” (ICTY Statute).

Section 1 of the Statute outlines the temporal, territorial and therefore jurisdictional parameters of the Tribunal. Section 1 states that “the Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991” (ICTY Statute). Lastly, Article 18 of the Statute describes the way in which investigations may be initiated by the Prosecutor.<sup>22</sup> The Article 18, section 1 states that the Prosecutor may initiate investigations ‘ex-officio’ or on the basis of information obtained from states, the UN and its organs, and intergovernmental organizations or NGOs (ICTY Statute).

It is clear from the above discussion that even though the Prosecutor of the ICTY was to act independently from any other governmental or institutional organ, ‘the investigations and prosecution’ of cases that he or she may pursue are clearly outlined along with the beginning of the temporal jurisdiction of the Tribunal. The Prosecutor therefore, in the case of the ICTY, is prescribed a set temporal and territorial jurisdiction. Lastly, the Prosecutor may act independently – as described in Article 18 – but only with respect to crimes that fall within the territorial and temporal parameters of the Statute.

Turning the discussion to the ICTR, it is once more the UNSC that established the Tribunal. As is the case with the ICTY, the jurisdictional parameters are similarly outlined – in somewhat of a clearer fashion than for the ICTY. The Statute of the ICTR

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<sup>22</sup> The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. (2.) The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source. (3.) The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required. (4.) The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations. (5.) The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor (Statute of the ICTY).

also outlines the powers of the Prosecutor. Lastly, the independence of the Prosecutor is contained within the statute.

The Rwandan Commission of Experts was established in July 1994 by the UNSC passing Resolution 935. The Commission was charged with investigating possible genocide as well as ‘grave violations of international humanitarian law’ (Bassiouni, 46). The Rwandan commission had a total of three weeks to complete its reports and very limited resources. The Report submitted to the Secretary-General “was based on reports made by other bodies, and other media and published reports” (Bassiouni, 46). It came into existence temporarily during 1994 – from January 1<sup>st</sup> until December 31<sup>st</sup> – but it was not until 1996 that the ICTR became fully operational. Due to the nature of the conflict – a civil war fought between two ethnic groups within Rwanda– neither the Geneva Conventions nor the laws regulating customs of war could be used as bases for prosecution. The type of crimes prosecuted, therefore, were genocide and crimes against humanity. There were 75,000 people held by the government of Rwanda in 1996, who were waiting to be tried either within the national system or by the ICTR. The trials of those held had to be postponed as a task of that magnitude could not be accomplished without substantial help from the UN and the UNSC. Due to the devastation in the country, the UNSC was responsible not only for the logistics and resources of the ICTR but also to assign the seat of the Court to Arusha, Tanzania, which was not well equipped to deal with the Tribunal of this magnitude (Bassiouni, 46).

The jurisdictional parameters of the Statute of the ICTR are such that the Tribunal has jurisdiction over “genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide

and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994” (ICTR Statute). Clearly, the territorial and temporal of the ICTR are even more specific than those of the ICTY.

At the outset, the “the Statute of the ICTR provided...for the Prosecutor of the ICTY to also be the Prosecutor of the ICTR (Article 15, para. 3)” (Jallow, 147). On August 28<sup>th</sup>, 2003, the UNSC, via an amendment of the statute of the ICTR provided a separate Prosecutor and prosecutorial office for the Rwanda trial (Jallow, 147).

Article 15 of the Statute of the ICTR describes the role of the Prosecutor, which, similarly to the ICTY, “shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source” (ICTR Statute). Lastly, and as is the case with respect to the Prosecutor of the ICTY, he or she may initiate investigations independently and from information provided from a variety of sources. The wording of Article 15 of the statute of the ICTR is identical to the wording of Article 18 of the Statute of the ICTY.

The OTP of the ICTR was designed to be wholly independent from outside – or inside – interference. Jallow explains that “[i]mplicit in this independence of the OTP is the recognition that in the exercise of its functions, it is not to be subject to control by any other person or entity, save the law” (Jallow, 147). Just as in the case with the ICC, the Prosecutor of the ICTR “is vested with responsibility to initiate investigations at his discretion on the basis of information received by him” (Jallow, 147). Yet, contrary to the RS of the ICC, “the Prosecutor does not require any prior authorization to initiate an investigation. The Chambers have no rule under the Statute in this respect. The



Prosecutor acts at his discretion, subject to some qualifications...” (Jallow, 147). At the ICTR, “once an investigation has been concluded, the Statute again vests authority in the Prosecutor to exercise his discretion and judgment as to whether an indictment should be filled” (Jallow, 147).

The establishment of the ICTY and the ICTR both paved the way for the establishment of the ICC. As Kirsch and Oosterveld explain, the need for the creation of these ad hoc tribunals “sent a strong signal to the international community...that an international court was necessary, even if it had to be established on an ad hoc basis. The creation of the two tribunals gave a working model, showing that an ICC was intellectually and procedurally possible (Kirsch and Oosterveld, 1146).

Yet, in order to understand the way in which the Prosecutor of the ICC may initiate investigations and exercise his *proprio motu* powers, it is important to focus both on the notion of situations and cases (Schabas 2008, 734). Before an arrest warrant may be unsealed, a ‘situation’ must be under the Court’s legal jurisdiction. The documents establishing the IMT, IMTFE, the ICTY or the ICTR did not afford such a provision to the Prosecutors of those institutions. With respect to the ICC, situations are then ‘identified’ through state referral, UNSC referral or based on the *proprio motu* powers of the Prosecutor. Schabas explains that “in the first two, neither the Prosecutor nor the judges have any discretion. This is a manifestation of state sovereignty, through either the action of one state or that of the international community, acting collectively through the Security Council” (Schabas, 734). The great and ‘controversial’ departure from prior legal practice is in the ability of the Prosecutor to initiate investigations on his or her own accord, and simultaneously select cases to investigate as well, once he or she has received

authorization from the Pre-Trial Chamber (Schabas, 734). In a more practical sense, regardless of how the jurisdiction of the Court has been triggered, the selection of cases rests with the Prosecutor. As Schabas notes, “the Prosecutor can decide that there simply are no cases, and choose to proceed no further, subject to the review of this decision by a Pre-Trial Chamber” (Schabas, 734).

In the wider statutory and therefore procedural sense, “...the States Parties have established a number of material prerequisites...[‘activation prerequisites’] provided for in arts. 15(3) and (4), 16, 18(2) and 53(1) RS<sup>23</sup> and in rule 48 (RPE)<sup>24</sup> that must be met

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<sup>23</sup> The relevant articles are as follows: Art. 15 (3): “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.” Art. 15 (4): “If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.” Art. 16: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Art. 18 (2): “ Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.” Art. 53 (1) 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b)The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” (“Rome Statute of the International Criminal Court” Office of Legal Affairs, United Nations, 1999. Web. 31 Jan. 2011. <http://legal.un.org/icc/statute/romefra.htm>).

<sup>24</sup> Rules of Procedure and Evidence, rule 48: “ In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)” “Rules of Procedure and Evidence.” ICC-CPI.INT, *International Criminal Court*, 2002. Web. 31 Jan. 2011. [www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf) .

for the ICC's power to investigate, prosecute, declare and enforce the individual criminal responsibility arising in any given situation to be activated..." (Olasolo 2005, 39). Olasolo then further states that "[O]nly after defining the situation at hand and verifying that the activation prerequisites provided for in arts. 15(3) and (4), 16, 18(2), and 53(1) RS and rule 48 RPE are met in connection with it, will the Court's competent organ activate its dormant jurisdiction" (Olasolo 2005, 40).

### **Analysis**

At this juncture one must address a question that is logically lurking in the background: why is it important to determine why states agreed to include the *proprio motu* provisions, given that the majority of the literature addressing the independence of the Prosecutor indicates that the Prosecutor's ability to utilize her *proprio motu* powers is very much curtailed in the Statute? In other words, why is the question of the inclusion of the *proprio motu* powers of the Prosecutor important given that other statutory provisions limit the Prosecutor's independence?

The first answer to this question is that the provisions included in the RS for the work of the Prosecutor – and the OTP in general – are fundamentally unique from the other, earlier institutional incarnations of international criminal justice. If one only takes the mandate of the ICC into account, one can clearly see that due to its global reach the Prosecutor of the ICC is not limited to only considering particular conflicts, but is able to investigate or initiate an investigation against anyone – given the statutory provisions of territorial and personal jurisdiction of the Court, of course – and can do this in instances of inter-state or intra-state conflict. David Scheffer, the head of the US delegation at Rome explains that “the fate of the tribunals of the Balkans, Rwanda, Sierra Leone, and

Cambodia is their temporary and limited jurisdiction. These courts were built as ad hoc judicial remedies for specific theatres of atrocity crimes committed during snapshots of time. They are meant to close their doors soon, with their courtrooms and offices likely converted to regional justice or some other public endeavour” (Scheffer, 163). In a similar vein, as Olasolo states, “the personal, material, territorial and temporal jurisdictions of the International Criminal Tribunals for the Former Yugoslavia ... and Rwanda... have been precisely defined by the political body, the Security Council of the United Nations (Security Council), that created them” (Olasolo 2003, 91). Consequently, because the tribunals have been established with very specific territorial, temporal and crises in mind, they are characterized as ‘ad hoc’ tribunals (Olasolo 2003, 91-92). In comparison, the ICC is a permanent Court and it does not have the same constraining parameters. In addition, Danner states that the ICC may bring ‘high officials’ to justice regardless of the position of the accused. The Tribunals may do the same, however their work is very much curtailed by the UNSC and the territorial and temporal limitations on their work. The ICC is by-and-large independent of the UNSC. The power to investigate such officials rests with the Prosecutor (Danner, 510). As a result, “...the RS, unlike the ICTYs and the ICTRs, creates a permanent Court whose jurisdictional powers cover the territory and the nationals of the States Parties, and are universal in the case of Security Council referrals. Thus, it is impossible to determine a priori in which situations the ICC will get involved” (Olasolo 2005, 39).

Quite clearly, notwithstanding the statutory provisions which may limit the independence of the Prosecutor, the fact that the mandate of the Court is global – in other words it has no personal, temporal and only very limited territorial limits – and is not

entirely reactionary to conflicts already occurring, the inclusion of the *proprio motu* powers in the RS for the work of the Prosecutor of the ICC is revolutionary, and, therefore unique in international criminal jurisprudence.

The second reason why it is significant to understand the reasons and dynamics by which the *proprio motu* powers were included in the RS is because, at the time of the negotiations, most of the statutory implications for the independent role of the Prosecutor were not clearly known. Some statutory limitations – such as the requirement that the Pre-Trial Chamber authorize investigations that have been proposed to it by the Prosecutor – were very well known and were also sought by certain states. This particular statutory limitation in fact played a key role in the inclusion of the *proprio motu* powers in the RS. However, the impact of other statutory provisions that could have a constraining effect on the independence of the Prosecutor was only brought to the fore after years of reflection and study. The point is simply this: the negotiators in Rome could not foresee in as much detail as consequent commentators could in what ways and to what degree the Prosecutor would be able to exercise his or her discretionary powers. The negotiators were debating and eventually voting on a provision which enabled the Prosecutor of the ICC to initiate investigations on his or her own accord, given that the Pre-Trial Chamber authorized the initiation of such investigation. In some ways, the Prosecutor was given a kind of ‘carte blanche’ within certain procedural parameters.

At this juncture it is of great importance to say a few words about the nature of ‘independence’ and discretion in general. Discretion in any instance provides one not only the freedom to act, but also the freedom not to act. Independence, as applied to the Prosecutor of the ICC, provides the Prosecutor the power to pursue certain situations, but

it also affords – certainly in a less detailed way – the power not to act in certain circumstances. As Cote explains, in addition to the rules and procedures which provide a legal basis for the Prosecutor to act, certain statutory provisions also allow the Prosecutor to not proceed with an investigation, especially if he or she has “serious reasons to believe that an investigation would not serve the interest of justice” (Cote, 142). According to Cote, this ability to decide if a situation or a case may or may not serve the ‘interests of justice’ conveys great ‘political responsibility’ on the prosecutor (Cote, 143). There a number of ‘criteria’ listed in Article 53 which provide guidelines if the ‘interest of justice’ has or has not been served in a particular situation or case, yet “this list is not exhaustive and cannot relieve the prosecutor of the duty he has, in certain cases, to ‘set off the obligation to serve interests of justice against the obligation to serve interests of peace’” (Cote, 143). Yet, it is important to note that the determination of the Prosecutor will be subject to ‘judicial review’ as well.

‘Independence’ in the case of the Prosecutor of the ICC provides him or her the freedom and responsibility to select situations and cases to pursue, as well as situations and cases not to pursue. At the same time, by their very nature and the ‘freedom and discretion they afford’, these discretionary powers thrust the independent Prosecutor out of the realm of justice and into the realm of politics. As much as the trigger mechanisms of the Court guide the work of the Prosecutor, given the global reach of the Court and, therefore, the non-existence of temporal, personal and territorial limitations of the Court, the choice of the Prosecutor regarding which situations and cases to pursue will not only be seen as politicized but will also be seen as impacting – or impinging – on state sovereignty. Why did states establish an independent Prosecutor who, by the virtue of

this independence, can choose what situations to pursue and which individuals to prosecute? More specifically, which actors were the most important in establishing an independent Prosecutor for the ICC, and why?

## **CHAPTER 4: EXPLAINING SUPPORT FOR THE INDEPENDENT PROSECUTOR: THE CASE OF CANADA AND THE UNITED KINGDOM**

“Some favour a strong, robust Court; others say they do but clearly don’t; while others say they don’t and mean it. It often depends on who happens to be in power back home at the moment” (Ambassador Philippe Kirsch in Weschler, 87).

The aim of this chapter is to investigate the way in which the policy preferences of Canada and the United Kingdom contributed to the support for the establishment of the ICC with an independent Prosecutor. The cases show that the sources of support stem from particular formulations of national security interests which originate from domestic interest groups – in this case political parties and their leadership in power at around the time of negotiating the Rome Statute (RS) and during the process of ratifying the RS. These ideational and interest-based formulations of national interests encompassed a reformulated conception of state sovereignty which was able to accommodate, and support, the establishment of a Court with an independent Prosecutor who is able to initiate investigations in addition to state and UNSC referrals.

The primary explanatory and causal focus in this chapter is on domestic actors, their ideas and interests. This explanatory focus exemplifies a liberal pluralist and constructivist theory of international relations. In essence, this focus also challenges realist and institutionalist explanations. Realists would argue that Canada and the UK, partly due to their very different geopolitical and geostrategic positions, would have very different and divergent positions on the independent Prosecutor. Realists would further argue that the UK should have in fact opposed the establishment of the independent Prosecutor and should have been more sympathetic to the US position on the matter.



Institutionalists on the other hand would posit – with much plausibility – that it was mainly democratic states which advocated for the establishment of an independent Prosecutor, because an independent Prosecutor was consistent with their domestic legal and political institutional practices. Further in line with institutionalist explanations, one can argue that democratic states supported the establishment of an independent Prosecutor mostly because these states were satisfied with the institutional checks and balances provided by the Pre-Trial chamber.

Even though an institutionalist explanation would add a considerable degree of clarity to explaining the establishment of an independent Prosecutor, a deeper look at the United Kingdom reveals a dynamic which is better explained by way of a liberal pluralist and constructivist theory of international relations. In 1997, just months before the start of the Rome conference, the British Labour Party led by Tony Blair won the elections and replaced the Conservative John Major in the House of Commons. Mr. Blair and his government's 'ethical foreign policy' were more than sympathetic to an independent Prosecutor which would be free from state or UNSC restraint. According to a number of observers in Rome and beyond, this change in government paved the way for a change in the policy of the UK. Liberal pluralist and constructivist theory is better fitted therefore to explain the establishment of an independent Prosecutor because realist and institutionalists would not afford much explanatory clout to domestic actors and their ideas and interests. As the latter theories hold state interests as constant, they are not able to explain substantial shifts in policy formation after a change in government. In the UK case, support for the independent Prosecutor came specifically following such a change.

The Canadian case also shows that liberal pluralist and constructivist explanations are better suited for explaining the establishment of the independent Prosecutor. In the Canadian case, former Foreign Minister Lloyd Axworthy and the Liberal Party of Canada clearly supported the establishment of an independent Prosecutor. Lloyd Axworthy championed the notion of ‘human security’ in the post-Cold War international realm which counted individuals as referent objects of security as opposed to states. The very *raison d’etre* of an independent Prosecutor unencumbered by constraints from states or the UNSC was to bring individuals to justice who endangered the safety of others, and who were often agents of the governments in conflicts. The empirical record also shows that the official opposition of the day, the Canadian Alliance, openly opposed Canada’s ratification of the RS in 2000, the year legislation was introduced to ratify the RS. Transcripts from legislative as well as committee debates show that, had the Canadian Alliance been in power, Canada would not have been as supportive of the establishment of an independent Prosecutor.

### **Canada and the International Criminal Court**

In this section the aim will be to discern why Canada supported the establishment of the ICC with an independent Prosecutor. In other words, the aim here will be to uncover what Canada’s sources of preference formation were regarding the Court and the independent Prosecutor in particular. It will be argued that domestic actors along with their ideas and interests best explain Canada’s support for the Court and the independent Prosecutor. The Liberal Party of Canada’s foreign policy directive at the time involving the notion of human security – advocated and championed by the Foreign Minister at the time – paved the way for Canada’s support and leadership in establishing a Court with an

independent Prosecutor. Relying on domestic actors and ideas also explains the opposition of the more conservative groups to the Court, both ‘across the floor’ in the House of Commons, as well as within the Canadian domestic political realm as well.

In order to fully develop the argument outlined above, ‘human security’ – as a Canadian foreign policy principle – will be discussed, which will be followed by an exposition of the origins of the human security principle in Canadian foreign policy. Finally, light will also be shed on the domestic political debate during the ratification process of the Rome Statute, both in the House of Commons and in the Canadian Senate.

### **Human Security**

The notion of ‘human security’ became the central tenet of Canadian foreign policy during the last decade of the 20<sup>th</sup> century. Lloyd Axworthy, Canada’s Minister of Foreign affairs at the time, noted during an interview that Canada’s support for the independent Prosecutor and the ICC in general “began with the commitment to human security as the underpinning conception of foreign policy” (Axworthy, Interview). The changed nature of warfare – shifting in type from inter-state to intra-state type – showed that “protection of people is as important as protecting nation states. State rulers were becoming predators on their own people, and the international system based on nation-state sovereignty was not capable at that to hold them accountable” (Axworthy, Interview). Yet before embarking on a substantial exposition of Canadian foreign policy with respect to the ICC, an outline of the notion of human security is also warranted.

The treaty ending the ‘Thirty Year War’ in Europe in the 17<sup>th</sup> century, the Treaty of Westphalia, entrenched not only the state as the only legitimate ruling entity within a particular territory, but also the notion of state sovereignty. State sovereignty, or the

inviolability of the state as the only entity which could exercise control, power and force within a particular territory, was seen as sacrosanct. By extension, the protection of the security of the state was seen as sacrosanct. More specifically, state security was seen as a function of the state providing security for its subjects in exchange for an explicit and ‘free’ adherence to, and participation in, this arrangement by the population of the particular state. Thus, “the state’s ethical claim to primacy in security rested on a notional bargain whereby individuals traded their individual sovereignty for protection against both domestic and international anarchy” (McFarlene and Khong, 6).

Approaching the 20<sup>th</sup> century, such events and dynamics as mass conscription and the industrial revolution – and with it the improvement of weapons production techniques, the improvement of communication as well as advances in airpower – contributed to a need for a different conceptualization of security. Decolonization aided this process as well, as “weak states were frequently captured by elites who used the state’s resources in order to enrich themselves at the expense of the security and well-being of their citizens” (McFarlene and Khong, 7). Simultaneously, the bipolar world of the Cold War encouraged a ‘confrontational’ security climate in international relations.

With the end of the Cold War, and the advent of globalization, it became clear to the international community that the old conceptions of national security and sovereignty could not be sustained anymore. The processes and dynamics of globalization alone which exposed the state further to economic, social and political processes showed that it was difficult to support a purely ‘statist’ conception, not only of security but also, state sovereignty. In the post-Cold War context, the size of civilian casualties, the “rapid proliferation of small arms” along with “the growing salience of civil war, and the

significance of ethnicity and identity in these wars”, and the phenomena of “weak and collapsing state structures that were unable to cope with the effects of war on civilian populations [with the effects of] starvation, disease-related death, and mass displacement” all further contributed to the urgent need to reconceptualise security (McFarlene and Khong, 8-9).

The phenomena of ‘failing’ or ‘failed’ states, in which the security of individuals was directly endangered by agents of the state, compelled members of the international community to call for the protection of these individuals. Hence the principle of ‘human security’ was born, originating within the UN system – the United Nations Development Programme (UNDP) in particular – in 1994. Concurrently, the notion of humanitarian intervention was brought to the fore as well, including the ‘Responsibility to Protect’ (R2P) doctrine. Among practitioners and scholars, the main concern was to strike a balance between sovereignty and human security, and understanding under what conditions intervention is acceptable.

Lloyd Axworthy, Canada’s Minister of Foreign Affairs noted the following:

“At a minimum, human security requires that basic needs are met, but it also acknowledges that sustained economic development, human rights and fundamental freedoms, the rule of law, good governance, sustainable development and social equity are as important to global peace as arms control and disarmament” (Axworthy, 184).

Axworthy, addressing an American audience at the Woodrow Wilson International Center for Scholars in Washington, further noted that “no longer are we limited to discussions of states’ rights and national sovereignty. This shift in language reflects a change in perception – a recognition that the needs of individuals must be our principal concern” (Axworthy, 2000). Shifting the subject of security from the state to the

individual carried with it a broadening of the understanding of not only who may pose a threat but also who may provide security for the individual. By extension, the concept of human security played a key role in not only establishing the ICC with an independent Prosecutor but also in animating Canada's advocacy, championing and leadership of the Court as well.

### **Canadian Foreign Policy and Human Security**

The Canadian foreign policy in the 1990s may be characterized as multilateralist while attempting to maintain an overall geopolitical role and image as a 'middle power'. In 1997, right before participating states were gearing up for the Rome conference, the Liberal Party of Canada was re-elected. The Liberal Party, a party more on the center-left of the political spectrum, was in majority in the House, and the Reform Party, a more right of center party – which later was renamed the Canadian Alliance – formed the official opposition. In the House, the New Democratic Party of Canada along with the Bloc Quebecois were also represented.<sup>25</sup> The Liberal Party, but more specifically Lloyd Axworthy, was very much in support of the ICC and was also the champion and main advocate of the 'human security' agenda. In an in-person interview in New York, William Schabas, a member of the NGO, 'Coalition for an International Criminal Court' (CICC) who attended the Rome conference noted that "the Liberals were more amenable to a world view – a Pearsean world view," which included an emphasis on diplomacy, peacekeeping and a certain intentional distance from the foreign policy of the US.<sup>26</sup> At the same time, within the domestic political context, the Canadian Alliance was very

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<sup>25</sup> "Members of Parliament." *Parliament of Canada*. House of Commons, 2000. Web. 31 Jan. 2011. <http://www.parl.gc.ca/Parliamentarians/en/members?parliament=36>

<sup>26</sup> Schabas, Dr. William. Personal Interview. New York. 05 April 2011.

much in opposition, if not to the ‘human security’ agenda specifically, then to the perceived diminished notion of Canadian national sovereignty.

The principles of human security permeated Canadian foreign policy in many respects. Most notably, the principles of human security were imbedded in Canada’s values-based support of the ICC, and Canada’s initiative to ban anti-personnel land mines as well. Human security was also at the heart of establishing the landmines treaty which was “passed with 155 votes for, none against, and 10 abstentions, [and] resulted in the prohibition of land mines to ‘non-state entities, such as revolutionary parties,” and instituted a ban on “the deployment of landmines in intrastate conflicts” (Ibid., 188). In a more institutionalized sense, Foreign Minister Axworthy and his Norwegian counterpart, Knut Vollenbaek, signed the so-called Lysoen Declaration in 1998, which paved the way for the Human Security Network as well as the Commission on Human Security and a Trust Fund for Human Security at the UN.<sup>27</sup> Therefore, with Canada at the helm, along with other ‘like-minded’ states, the principles of ‘human security’ were becoming more institutionalized and to some extent legalized.

The human security agenda found resonance in the establishment of the ICC with its emphasis on individual criminal responsibility, the primacy of the rule of law over force, accountability for crimes and the support of peace efforts. Furthermore, in the mid-1990s, Canada was seen as having the “capacity and the credibility to play a leadership role in support of human security in the developing world [because] Canada has sought to improve international governance through, inter alia, democratization, respect for human rights, and the peaceful resolution of disputes” (Axworthy CICC –

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<sup>27</sup> “The Lysoen Revisited Conference.” *Lysoen Revisited – 15 Years of Human Security*. University of Bergen, 2012. Web. 31 Jan. 2011. [www.uib.no/en/lysoenrevisited/50968/lysoen-revisited-conference](http://www.uib.no/en/lysoenrevisited/50968/lysoen-revisited-conference)

184). This leading role fit very well with Canadian diplomatic tradition, which sought “active support for multilateral efforts to develop and strengthen international institutions capable of enhancing global security...since the Second World War” (Donaghy, 47). In the 1990s in particular, “as a middle power free of the ‘baggage of colonialism’ and skilled in forming alliances with ‘like-minded countries’, Canada had “both the capacity and credibility to play a leadership role” (Donaghy, 43).

Canada’s support for the ICC also included practical considerations, considerations born out of experiences with the Tribunals. Elizabeth Riddell-Dixon noted an unnamed source within the Department of Foreign Affairs and International Trade (DFAIT), that for Canada, “a permanent Court is preferable to ad hoc arrangements on several counts. The former is more cost-effective than the latter. Ad hoc arrangements provide a more selective form of justice because a political body determines when they can act and what their mandate will be” (Riddell-Dixon, 1070-1071). With the ICC fully operating, Canada “would not want to see alternatives to the [ICC] established in the future. Canada does not like the idea of picking and choosing between instruments and considers it more effective and more equitable to have one principal court to try all cases of genocide, war crimes, and crimes against humanity” (Riddell-Dixon, 1071).

### **The Canadian Domestic Debate**

Further insight will be gained into the struggle to establish – but more importantly to permanently institutionalize – an independent Prosecutor, and with it an independent international criminal court, by examining the contours of the Canadian national debate on these matters. More specifically, in this section light will be shed on the extent to



which Canadian domestic political actors contributed to the establishment of the ICC with an independent Prosecutor. In order to provide a revealing discussion of the domestic debate and of the role of domestic actors in the debate and decision making, the narrative will begin with a discussion of the domestic debate prior to the Rome conference. Next, a brief exposition of the stages of the passage of the bill – Bill C-19, the *‘Crimes Against Humanity and War Crimes Act’* – in both Houses of the Canadian Parliament will follow. This sub-section will be brought to a close with a discussion about the debates of the bill in both Houses of Parliament, along with an outline of the attitudes of Canadian civil society groups. The discussion will then show two particular phenomena critical for this analysis. First, the debates in the House of Commons during the third reading of the Bill will show that the Official Opposition of the day, the Canadian Alliance and the Reform Party,<sup>28</sup> vehemently opposed the Bill. These parties suggested that they would not vote for it.<sup>29</sup> There was a very clear ideational divide between the more conservative members of the Houses of Parliament and the Liberal Party supported by the New Democratic Party and the Bloc Quebecois. Both camps publicly acknowledged the fact that in a different parliamentary climate the Bill would not have passed. The second key point is that these debates and testimonies underpin the overall argument in this work, which is that it was domestic actors and interest groups which helped pass implementing legislation in Canada which gave way to the ratification of the Rome Statute. It was also key domestic groups – in Parliament and in Canadian society as a whole – which vehemently opposed the passage of the Bill. As the

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<sup>28</sup> It is important to note that these parties – as nearly all other relevant parties and participants in the domestic as well as international debates and processes surrounding the Court – note that they were in fact in support of the bill, but only in principle. There however were a number of provisions in the bill – as well as general ideational notions about national sovereignty – which deterred these parties from voting for the bill.

<sup>29</sup> Their point was substantiated by the fact that on June 13<sup>th</sup>, 2000, at the end of the 3<sup>rd</sup> reading of the Bill, the Canadian Alliance and the Reform Party voted against the bill.

conservative members of parliament and members of civil society indicated, had they been in power, the Bill would have been repealed, which effectively would have, at least, stalled the ratification process.

### **‘All Roads Lead To Rome’**

Immediately before the Rome conference, the House of Commons Standing Committee on Foreign Affairs and International Trade met on Tuesday, June 9<sup>th</sup>, 1998. Its committee members heard from some of the members of the delegation which would eventually represent Canada at Rome. This delegation included members of DFAIT, the Department of Justice, the university community, members of NGOs, the Women’s Caucus on Gender Justice in the ICC, and the Unitarian Universalist Association. Members of Parliament also heard from think tanks such as the International Centre for Human Rights and Democratic Development and the International Centre for Criminal Law Reform and Criminal Justice Policy.

The over six-hour discussion included the outlining of the positions of a number of stakeholders, including the Canadian position on the Court itself, the NGO community, the gendered perspective on the Court, as well as responses and concerns from Members of Parliament. The discussion included questions and answers regarding the rules and procedures in Rome which led to a very brief yet crucial discussion on the main negotiating tactics Canada had been employing to that point in time. The discussion also highlighted the need for such legislation in Canada because, at the time, “the Minister of Justice decided to no longer undertake proceedings in Canada for crimes of genocide, crimes against humanity and war crimes when these crimes were committed outside the country” (Schabas, 6).

Mr. Allan Kessel, the Director, United Nations, Criminal and Treaty Law Division, Department of Foreign Affairs and International Trade spoke of the success of the Canadian delegation in the process up to that point, but he also shed light on the complexities, and perhaps of the uncertainties, of the negotiation process to come in Rome. Mr. Kessel explained that “we’re very optimistic going into this process. We’ve worked long and hard, and yes, the text is 172 pages long and has 1,300 brackets, but at the end of this process we expect to have an independent and effective court based upon a workable statute”.<sup>30</sup> Mr. Kessel also pointed to the issue of timing of the establishment of the Court. He elaborated on the reasons why the timing of the Court – in 1998 – was correct: “realistically, there’s only one chance to build a court that is universal, independent and truly effective, and that time is now. If we had stood in this room five years ago, and you were running this meeting and asked whether it was possible that five years from now we would have a court, most people would have said no” (Ibid.).

Going into the negotiations, Kessel pointed to four major issues that needed to be addressed in Rome. The key points Kessel brought to the fore dealt with the “court to be genuinely independent and able to exercise its jurisdiction without running into unnecessary obstacles” (Ibid.). The second point dealt with the UNSC. Kessel did see a role for the UNSC in the work of the Court, but he stated that “the court must not be allowed to be paralysed simply because the matter is on the Security Council agenda. Some situations have been on it for 30 years, without any action being taken” (Ibid.). With regards to “temporary suspension of court activities” due to UNSC involvement in certain cases, Mr. Kessel explained that “such suspension should be decided by a positive

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<sup>30</sup> Kessel, Alan. “Evidence – Number 063.” *Standing Committee on Foreign Affairs and International Trade: Comité Permanent des Affaires Étrangères et du Commerce International*. House of Commons Committees – FAIT (36-1), Parliament of Canada, 09 June 1998. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

decision of the Security Council, [and] should not be automatic, and should not be limited in time” (Ibid.).

Finally, Kessel also referred to the “issue of the independence of the prosecutor.” He stated that “Canada and many other states support a proposal that the prosecutor should also be able to initiate proceedings *ex officio*” (Ibid.). In his view, the Canadian delegation did “not believe that a prosecutor should depend entirely on the initiative of states or organizations if indeed the kinds of crimes that we have been discussing have been committed” (Ibid.). The rationale given for an independent prosecutor seemed to have been that “considering the high calibre of any prosecutor in such a position, we remain wholly unpersuaded by concerns that the prosecutor might somehow not behave responsibly. The independence of the prosecutor is, for us, essential” (Ibid.).

In his final comments, Mr. Kessel also focused on the notion of complementarity. He explained that “the basic principle is that the ICC will complement, not replace, national courts. This creates a presumption that the prosecutor will be precluded from taking any action when a state has a functioning, judicial system, unless the state is ‘unwilling or unable genuinely’ to carry out the investigation or prosecution” (Ibid.). Before closing, Mr. Kessel noted that “we must have a court that is worth having” (Ibid.).

Following the presentation of the Canadian government and NGO perspectives – which were also supportive of the overall initiative to establish the Court – members of the Reform Party as well as the Parti Québécois noted that Canada’s position had not been debated in the House of Commons before the commencement of the Rome conference. Bob Mills (Reform) noted that “this has never been debated in the House of Commons, where accountable people, elected people, can in fact say what Canadians

think about whatever the issue is. So I have a little problem: we sell democracy abroad and yet we sometimes seem to have little democracy in Canada.”<sup>31</sup> In a similar vein, Daniel Turp (Bloc Quebecois) noted that “this issue deserved to be fully debated beforehand, in a parliamentary environment.”<sup>32</sup>

Next, the Chairman of the Committee, Bill Graham (Liberal) explicitly asked the delegation about their negotiation strategy. While Alan Kessel first noted that “we do want an effective and independent court”<sup>33</sup>, he further noted the following:

*an objective of ours was to break the solidarity of the P-5. We did that at the last PrepCom. We now have the UK inside the tent, not outside ... Also, with the UK as the head of the European Union this time around, we have the presidency of the European Union, plus one of the P-5, inside our tent looking at the French outside the tent... We're optimistic that we can continue to erode the solidarity of those who don't like this particular issue, and we are very convinced that at the end of the day if there's even a third of those who don't care for this court, they will be quiet in the face of the two-thirds who do (Ibid.).*

## **Parliamentary Debates**

In order to ratify the Rome Statute of the ICC, and effectively join the ICC, Canada needed to pass implementing legislation. The implementing legislation, Bill C-19, was introduced by then-Foreign Minister Lloyd Axworthy. After a short, six month period, the Bill was adopted by both houses of Parliament in June, 2000. During this six month period, the Bill was read the first time on December 10<sup>th</sup>, 1999, the second time on May 8<sup>th</sup>, debated in committee on June 7<sup>th</sup> and reported on June 9<sup>th</sup>, and then read the third time in the House of Commons – and passed – on June 13<sup>th</sup>, 2000. In the Senate, it was

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<sup>31</sup> Mills, Bob. “Evidence – Number 063.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. House of Commons Committees – FAIT (36-1), Parliament of Canada, 09 June 1998. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

<sup>32</sup> Turp, Daniel. “Evidence – Number 063.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. House of Commons Committees – FAIT (36-1), Parliament of Canada, 09 June 1998. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

<sup>33</sup> Kessel, Alan. “Evidence – Number 063.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. House of Commons Committees – FAIT (36-1), Parliament of Canada, 09 June 1998. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

read the first time on June 14<sup>th</sup>, the second time on June 22<sup>nd</sup>, was discussed in Senate Committee on June 27<sup>th</sup> and then read the third time – and passed on division on the request of Senator Anne C. Cools – on June 28<sup>th</sup>.<sup>34</sup>

Bill C-19 is a form of implementing legislation. In other words, in order to Canada to ratify a bill needed to be passed in order to harmonize Canadian laws with the provisions in the Rome Statute. The Canadian legal practice is that Canada “adopt[s] legislation that implements treaties but we don't adopt the treaty.”<sup>35</sup> Once the implementing legislation was passed, then Canada could in fact ratify the Rome Statute. The Bill was “the first major comprehensive implementing legislation brought forward by any legislature around the world...”<sup>36</sup> With respect to its content, the Bill also made changes to the Criminal Code as well as other legislations.

The overall debate about Bill C-19 in both houses progressed from a less detailed and more conceptual discussion and debate, to a more ‘clause-by-clause’ discussion during the later stages of the passage of the bill. A number of experts who appeared before both houses of parliament provided key insight into both Canadian foreign policy on the matter, and Canadian law and jurisprudence as well. For the most part, all parties supported the bill, including the Official Opposition, but the latter only in principle. The Canadian Alliance/Reform Party – even after being pressured by a number of other parties to change its stance – voted against the bill during its third reading.

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<sup>34</sup> Cools, Anne C. “Crimes Against Humanity and War Crimes Bill: Third Reading.” *Debates of the Senate (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 28 June 2000. Web. 05 June 2013. <http://www.parl.gc.ca/HousePublications/>

<sup>35</sup> Graham, Bill. “Evidence – Number 063.” *Standing Committee on Foreign Affairs and International Trade: Comité Permanent des Affaires Étrangères et du Commerce International*. House of Commons Committees – FAIT (36-1), Parliament of Canada, 09 June 1998. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

<sup>36</sup> Axworthy, Lloyd. “Crimes Against Humanity and War Crimes Act: Second Reading.” *Edited Hansard \* 080 (Official Version)*. Parliament of Canada, 06 Apr. 2000. Web. 23 Oct. 2011. <http://www.parl.gc.ca/HousePublications/>

### *Debates in the Senate*

The debates in the Senate focused on the procedural aspects of the Bill, and the more substantial – or thematic – aspects of it, both *in camera* and during the committee stage as well. The Senators commented mostly on the speed at which the Bill was aimed to be passed and the lack of time afforded to them to debate the contents of the Bill. They noted the Bill’s impact on the protection of children, and the ways in which the Bill was to be – or not – a model for other countries to follow. The senators also noted the Bill’s jurisdictional aspects.<sup>37</sup> In general terms, Bill C-19 received widespread support from the government and from the official opposition. In Senator A. Reynell Andreychuk’s words, “the issues that plague the world will not be solved by Bill C-19, nor by the Rome Statute, but they will go a long way towards developing badly needed international acceptance of the rule of law with regards to ...horrendous crimes.”<sup>38</sup>

### *Debates in the House of Commons*

The debates during the House Standing Committee welcomed a number of different experts, including from the United States and Australia. Those appearing in front of the Standing Committee commented on the utility as well as substance of the bill. The testimony of one particular individual, Gwendolyn Landolt, the then-National Vice-President of REAL Women of Canada, was quite telling of the attitudes of the more conservatives groups in Canada regarding the Court. Her testimony is recounted below. The testimony is important as it sheds light on the sharp, wider ideological divide

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<sup>37</sup> “Crimes Against Humanity and War Crimes Bill: Third Reading.” *Debates of the Senate (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 28 June 2000. Web. 05 June 2013. <http://www.parl.gc.ca/HousePublications/>

<sup>38</sup> Andreychuk, Hon. A. Raynell. “Crimes Against Humanity and War Crimes Bill: Second Reading.” *Debates of the Senate (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 22 June 2000. Web. 05 June 2013. <http://www.parl.gc.ca/HousePublications/>

between the Liberal government, and those on the conservative 'right' who were only supporting the bill in principle, and who wanted in fact to repeal the bill. The testimony, in no uncertain terms, also shows that a different party in government would not have enacted the bill altogether.

In addition to Ms. Landolt's not only ideological but also quite threatening remarks, the remarks of the Members of Parliament representing the Canadian Alliance and the Reform Party were equally critical. These elected officials, via their foreign affairs critic, Gurman Grewal, commented on what they considered the nauseating speed by which this legislation was being led through Parliament, as well as on adverse effects of this legislation on Canadian national sovereignty. During the second reading of the Bill in the House of Commons, Grewal noted that the "Canadian Alliance supports the bill in principle. We believe it is a good initiative, a step forward, but we do not agree with the contents of the bill."<sup>39</sup> He noted that the Canadian Alliance was "committed to protecting national sovereignty, which is very important and which could be at stake" (Ibid.). In the same speech, Grewal noted that "the permanent international body may become unaccountable and may override the sovereignty of a nation's legal and government systems" (Ibid.). Echoing Grewal's words, John Reynolds noted that "the Canadian Alliance favours the prosecution of individuals who commit genocide, war crimes and crimes against humanity. At the same time, we are very conscious of the need

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<sup>39</sup> Grewal, Gurmant. "Crimes Against Humanity and War Crimes Bill: Second Reading." *Debates of the House of Commons (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 06 Apr. 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>



to protect our own sovereignty and want assurances that this will be built into Bill C-19.”<sup>40</sup>

The mantra from the Canadian Alliance was quite similar all throughout the committee stage of the Bill in the House of Commons. On the second day of deliberations on May 16<sup>th</sup>, 2000, Deepak Obhrai noted that “one of the major concerns that come around here is that Canadian sovereignty and the laws of Canada and the ability of Canada itself and the Parliament of Canada to maintain the democratic voice of the Canadian people. How much infringement is there on that?”<sup>41</sup> During the same debate, Obhrai noted that the concern is that “somebody from outside is going to take over” (Ibid.). To illustrate his point, Obhrai noted the example of Zimbabwe, where white farmers were being killed because of their race. His question was regarding who would be prosecuting these individuals. In his conception, “the local laws of that country should be prevailing to do that...” (Ibid.).

The overall response of the government – and an alternative view of sovereignty - to Obhrai’s questions was illustrated by Warren Allmand, who noted the following:

*“state boundaries should never protect people who commit genocide, crimes against humanity, and war crimes. The very idea that you can hide behind state boundaries or use state sovereignty to permit you to commit these crimes is an outdated notion. Sovereignty is not an unlimited concept ... the new policy on human security that’s being promoted in Canada and other countries of the world recognizes that the international community has a right to intervene when the security of individuals is being attacked.”*<sup>42</sup>

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<sup>40</sup> Reynolds, John. “Crimes Against Humanity and War Crimes Bill: Second Reading.” *Debates of the House of Commons (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 06 Apr. 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

<sup>41</sup> Obhrai, Deepak. “Evidence.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. Parliament of Canada, 16 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

<sup>42</sup> Allmand, Warren. “Evidence.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. Parliament of Canada, 16 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

In a similar vein, Bruce Broomhall, then of the Lawyers Committee for Human Rights, noted on the third day of deliberations in the House Standing Committee that the Rome Statute contains “the best balance between sovereignty and international justice that the world community was ready for at the time.”<sup>43</sup> He further explained that the “ICC is a balance between sovereignty and the needs of effective international justice. As such, it requires intensive cooperation from states if it is going to be effective as an institution” (Ibid.).

The Canadian Alliance and the Reform Party were never satisfied with these assurances. During this last – and extremely revealing – debate on May 29<sup>th</sup>, 2000, Grewal noted that the manner in which Bill C-19 was introduced in parliament and was pressed through “is a disgrace to Canada’s democratic institutions and the spirit of openness and accountability which Canadians deserve.”<sup>44</sup> He noted that the Canadian Alliance would add a clause stating that “notwithstanding anything in this act, Canada’s national sovereignty is to be protected,” and “international law is not to be permitted to supersede Canadian law” (Ibid.). In his opinion, the “bill is full of holes and may threaten our national security” (Ibid.). Grewal forcefully noted that he “would recommend that an Alliance government would repeal Bill C-19 so that the work that needs to be done actually gets done” (Ibid.). Svend J. Robinson, the then-leader of the NDP, also noted “the member said that a Canadian Alliance government would throw out

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<sup>43</sup> Broomhall, Bruce. “Evidence.” *Standing Committee on Foreign Affairs and International Trade: Comité Permanent des Affaires Étrangères et du Commerce International*. Parliament of Canada, 30 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

<sup>44</sup> Grewal, Gurmant. “Crimes Against Humanity and War Crimes Bill: Third Reading.” *Debates of the House of Commons (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 29 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

Bill C-19, that it would scrap Bill C-19, that it would repeal Bill C-19.”<sup>45</sup> At the end of the debate, and during the parliamentary voting on the matter, the Canadian Alliance was the only party out of five which opposed the bill – and voted against it – during the final vote. Bill C-19 was passed by a 224-36 vote on June 13<sup>th</sup>, 2000.<sup>46</sup>

### *Comments by Civil Society Groups*

In the midst of the debate on Canada’s position on the Court and on its implementing legislation, several civil society groups contributed to the overall discussion. Before leaving for Rome, a number of groups appeared before the House Standing Committee on Foreign Affairs in order to outline their position on the ICC. These groups included NGOs focusing on gender issues, and faith-based groups. In general terms, all these groups were in favour, not only of Canada’s support of the Court, but also of the Court itself. Naturally, each group also outlined their own general positions with respect to the ICC. The World Federalist Movement, for example, focused, among other issues, on disarmament. The Women’s Caucus on Gender Justice focused on promoting gender sensitivity, criminalizing sexual violence and attempting to steer the Court towards gender balance and expertise. Finally, the Unitarian Universalist Association focused on infusing language concerning spirituality in the preamble of the Rome Statute.

During the debates in the House of Commons, a member of the conservative REAL Women of Canada spoke. The comments emanating from this organization were quite significant and telling as they outlined a very different vision of the ICC.

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<sup>45</sup> Robinson, Svend J. “Crimes Against Humanity and War Crimes Bill: Third Reading.” *Debates of the House of Commons (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 29 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

<sup>46</sup> “Crimes Against Humanity and War Crimes Bill: Third Reading.” *Debates of the House of Commons (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 13 June 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

Gwendolyn Landolt represented REAL Women of Canada. The organization in general terms describes itself as “a pro-family conservative women's movement.” Its aim is to “promote the equality, advancement and well-being of women whether in the home, the workplace, or the community, and to motivate government to integrate the needs of the family into government policy and legislation.”<sup>47</sup>

Landolt told the committee that the ICC “is a gender court”, and that the “prosecutor, who no doubt will have a feminist bias, since the feminists’ control of this ICC is apparent, will insist that it include a worldwide right to abortion on demand.”<sup>48</sup> In her prior comments, Ms. Landolt, told the Committee that “the prosecutor unfortunately makes up complaints on the individuals and groups anywhere in the world, and there is no accountability under this statute” (Ibid.). She also commented on the apparently ‘less-than-transparent’ way in which the Department of Foreign Affairs, and the persona of the Minister of Foreign Affairs and the Prime Minister “control the entire situation with regard to Canadian delegations” (Ibid.). She told the committee that “you’re only told what the Department of Foreign Affairs chooses to let you know” (Ibid.). Her last words during her first intervention were, “if those who are on the Liberal side say, “That’s okay, we’re getting what we want”, think a minute. Some day you won’t have a Liberal government in power. It’s always possible. There may be another government that will reverse this” (Ibid.).

Overall then, most of the civil society groups were more than in support of Canada’s position with regards to the ICC. They clearly supported the establishment of

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<sup>47</sup> “Real Women of Canada: NGO in Special Consultative Status with the Economic and Social Council of the United Nations.” Web. 31 Jan. 2011. [www.realwomenofcanada.ca](http://www.realwomenofcanada.ca)

<sup>48</sup> Landolt, C. Gwendolyn. “Evidence.” *Standing Committee on Foreign Affairs and International Trade: Comité Permanent des Affaires Étrangères et du Commerce International*. Parliament of Canada, 30 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

the Court. However, comments by members of the Canadian Alliance and those of Gwendolyn Landolt of REAL Women of Canada further underpin the notion that because of ideological differences, conservative groups – and a conservative government – would have been opposed to the Court.

### **The Case of the United Kingdom**

The case of the United Kingdom is crucial for a discussion regarding the establishment of the independent Prosecutor and the establishment of the ICC. During the pre-Rome process, the position of the United Kingdom was very much in line with other permanent members of the UNSC. The aim was to achieve a strong role for the UNSC in referring situations to the Court. In 1997 however, the change in government in the UK signalled a fundamental change in position. The foreign policy of the incoming Labour government headed by Prime Minister Tony Blair introduced a more ‘internationalist’ agenda. This agenda included not only a support for the establishment of the ICC but also for establishing an independent Prosecutor. According to a number of key negotiators, the decision of the UK – and later of France – to deviate from the ‘Permanent five’ on the issue of an independent Court – tipped the scales towards achieving the four cornerstone positions of the ICC, which explicitly included the establishment of an independent Prosecutor. With the advent of the change in government in the United Kingdom, the state-consent regime embodied by state and UNSC referrals – as opposed to a referral by an independent Prosecutor – changed dramatically to a position supporting a lesser role for the UNSC and the establishment of an independent Prosecutor as well. The discussion below therefore will focus on highlighting the shift in the position of the government of

the UK in the wake of a substantial foreign policy change due to a change in government in Westminster.

### **The United Kingdom and the Pre-Rome Process**

Under the leadership of the Conservative party in the time period prior to the Rome conference, the UK's policy towards the ICC and the Prosecutor was very much in line with the perspectives and positions of the other permanent members of the UNSC. During the 46<sup>th</sup> session of the International Law Commission (ILC) of the United Nations, held between May 2<sup>nd</sup> and July 22<sup>nd</sup>, 1994, Derek William Bowett, the representative of the UK government, commented, among other topics, on the definition of crimes – including the crime of aggression – as well as on the proper role of the UNSC in referring situations to the Court.<sup>49</sup> With respect to the role of the UNSC, Bowett noted that even though the UNSC should be able to 'refer cases' to the Court, the reaction of governments to the initial draft statute was such that it was more prudent "not to refer specific complaints against specific, named individuals, but to bring to the attention of the court situations which warranted the opening of an investigation" (Ibid.). The actual investigation would essentially "be conducted by the Procuracy, [of the Office of the Prosecutor] which would decide whether an indictment should be brought against a named individual." He noted further that "it would be for the Procuracy, in accordance with normal procedure, to identify individuals who should be charged with responsibility" (Ibid.). Overall, Bowett's comments were quite consistent with the way in which the initial statute of an international criminal court was envisaged. Even though

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<sup>49</sup> United Nations General Assembly: International Law Commission: Working Group on a Draft Statute for an International Criminal Court, 46<sup>th</sup> Session, *Report of the Working Group*, Comments by Mr. Derek William Bowett of the United Kingdom and Northern Ireland, (A/CN.4/L.491/Rev.2) 14 July 1994. Accessed 05 Dec. 2012.

the powers of the UNSC with respect to referring ‘cases’ to the court were curtailed, the Council still retained an important role with respect to referring ‘cases’ – and later situations – to the court.

In Bowett’s comments, one is also able to see how attempts to limit the politicization of the role of the UNSC – and the court in general – were being opposed. With respect to the role of the Prosecutor at this early stage of statutory development, ‘independence’ was only envisaged once particular cases or situations were referred to the Court. The role of the Prosecutor was equated with the role – and powers – of the two tribunals originating from within the United Nations system. Overall, at this stage of statutory development, an independent Prosecutor who would be able to initiate investigations on his or her own accord was not envisaged. ‘Independence’ of the Prosecutor was seen as a function of professional conduct, and only once a ‘situation’ was in fact referred to the Court.

During the first two Preparatory Committee meetings in 1996, Christopher Keith Hall, then the legal counsel for Amnesty International, noted that “the United Kingdom, emphasized the primary right of states to bring criminals to justice, the integration of the concept of complementarity in all aspects of state cooperation with the ICC, and an exceptional and restricted role for the ICC” (Hall 1997, 182). This interpretation of the principle of complementarity meant that states and the UNSC would play a predominant role in referring cases to the ICC. The Prosecutor would not be afforded independent powers for initiating investigations on his or her own accord.

In 1997, during the third and fourth Preparatory Committee meetings, the position of the United Kingdom changed, in no small part because of the change in government.

By this time, Hall noted that “for the first time one permanent member, the United Kingdom, stated that, although it has always been mindful of the burden on the prosecutor for having to act on his or her own initiative, it was now listening closely to what other delegations had to say about this proposal” (Hall 1998, 132). In a similar vein, while appearing before the Canadian Standing Committee on Foreign Affairs and International Trade on June 9<sup>th</sup>, 1998, Mr. Warren Allmand, the then-President of the International Centre for Human Rights and Democratic Development noted that “the United Kingdom ...changed its position following the last election in the United Kingdom.”<sup>50</sup> Finally, a third source noted that “during the December 1997 preparatory committee session...the U.K. confirmed its decision to oppose the provision in the draft statute that would require prior approval by the Security Council before the court could proceed with investigations and trials. This change of policy by the U.K. ultimately led to it joining the Like-Minded Group” (Washburn and Benedetti, 16).

On the domestic political front, in 1997, the British Labour Party headed by Tony Blair won the general elections in the United Kingdom, replacing the Conservative government of John Major. With respect to the foreign policy of the Labour party, three key characteristics may be identified: “an activist philosophy of ‘interventionism’, maintaining a strong alliance with the US and a commitment to placing Britain at the heart of Europe.”<sup>51</sup> In more particular terms, “Tony Blair’s adoption of an interventionist foreign policy was set in motion by the 1999 Kosovo crisis, during which he made his

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<sup>50</sup> Allmand, Warren. “Evidence.” *Standing Committee on Foreign Affairs and International Trade: Comite Permanent des Affaires Etrangeres et du Commerce International*. Parliament of Canada, 16 May 2000. Web. 22 Jan. 2012. <http://www.parl.gc.ca/HousePublications/>

<sup>51</sup> Lunn, Jon, Vaughne Miller and Ben Smith. “British Foreign Policy since 1997.” *House of Commons of the United Kingdom and Northern Ireland Library Research Paper 08/56* (2008): 1-123. Web. 31 Jan. 2011. <http://www.parliament.uk/briefing-papers/RP08-56.pdf>



now famous ‘Chicago speech’, unveiling a ‘doctrine of the international community’.”<sup>52</sup> Blair noted in Chicago that “we are witnessing the beginnings of a new doctrine of international community...the explicit recognition that today more than ever before we are mutually dependent, [and] that national interest is to a significant extent governed by international collaboration.”<sup>53</sup> In addition, it was also the Foreign Secretary, Robin Cook, “who proposed in the first few weeks of the new Labour Government to inject ‘an ethical dimension’ into British foreign policy, most notably through what he proclaimed would be greater attention to human rights issues.”<sup>54</sup> Cook’s explicit aim was to get the UK to join the so-called ‘like-minded group’ and thrust away from the position of the ‘permanent 5’ members of the UNSC.<sup>55</sup> This way, the UK moved from a position of trying to ‘wreck’ the Court to “helping deliver it” (Pace, Interview).

The domestic debate in the UK prior to the Rome conference quite clearly underlined the domestic – yet divergent – debates regarding the support for the establishment of an independent Prosecutor. In a House of Commons debate on July 12<sup>th</sup>, 1996, the Conservative Member of Parliament William Powell noted that the government of the UK and the then-Minister of State, Foreign and Commonwealth Office, Nicholas Bonsor, did “endorse and encourage the establishment of an international criminal court.”<sup>56</sup> Bonsor noted, however – very much sporting a more reserved and ‘luke-warm’ support for the Court, and very much in contrast to the position of the incoming Labour government – that issues of efficiency and cost-effectiveness

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Pace, Willam. Skype Interview. 01 Aug. 2011.

<sup>56</sup> Powell, Mr. William. “House of Commons Debate: War Crimes Tribunal.” *War Crimes Tribunal (Hansard, 12 July 1996)*, Library of the House of Commons, 12 July 1996. Web. 02 Feb. 2013. <http://www.hansard.millbanksystems.com/commons/1996/jul/12/war-crimes-tribunal.html>

should be at the forefront when establishing the Court. Bonsor noted that “we must adopt imaginative and flexible arrangements for this unique court. I am afraid that history does not give us much encouragement when it comes to being sure that the United Nations will get adequate financial support for its operations, in that all too many countries are already in default of their payments to the UN.”<sup>57</sup> Sir Bonsor further noted that “we must be realistic about the sort and extent of court that we wish to set up, and that we must limit the cost of doing so” (Ibid.). With respect to the Prosecutor, Sir Bonsor only alluded to the proper qualifications of the individual the Court will choose, noting that “the choice of the prosecutor is also of the utmost importance, and we consider it essential to find someone for the job with the necessary experience in conducting investigations and prosecutions of criminal cases” (Ibid.).

In contrast to this fairly lukewarm and reserved support, in the House of Lords on June 9<sup>th</sup>, 1998, Lord Whitty (Larry Whitty, Labour) noted that the “United Kingdom Government will strongly support the independence of the prosecutor and the authority of that office. We need to protect that office from political pressure.”<sup>58</sup> Lord Whitty further noted that “the Government wish[es] to see the prosecutor having independent jurisdiction and the court having power to initiate prosecutions without those being approved by either the Security Council or the states involved and they should generally be free of political interference” (Ibid.).

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<sup>57</sup> Bonsor, the Honourable Sir Nicholas. “House of Commons Debate: War Crimes Tribunal.” *War Crimes Tribunal (Hansard, 12 July 1996)*, Library of the House of Commons, 12 July 1996. Web. 02 Feb. 2013. <http://www.hansard.millbanksystems.com/commons/1996/jul/12/war-crimes-tribunal.html>

<sup>58</sup> Whitty, Lord Larry. “House of Lords Debate: International Criminal Court.” *International Criminal Court (Hansard, 09 June 1998)*, Library of the House of Lords, 09 June 1998. Web. 02 Feb. 2013. <http://www.hansard.millbanksystems.com/lords/1998/jun/09/international-criminal-court.html>

## **The United Kingdom in Rome**

It was therefore with this new supportive approach that the delegation of the United Kingdom entered the negotiations in Rome on June 17<sup>th</sup>, 1998. According to the official record of the Rome conference, the UK delegation first spoke on Friday, June 19<sup>th</sup>, 1998, during a discussion regarding the articles of the statute which deal with the jurisdiction of the Court. The UK, in fact, brought forward an “alternative proposal regarding the acceptance of jurisdiction” (Bassiouni 2005, 145). During this debate, the UK also supported the inclusion of the word ‘situation’ as opposed to ‘case’ in the statute. As Elizabeth Wilmshurst noted, “it was not the task of a state to identify a particular offence and a particular culprit” (Ibid.). Three days later, on Monday, June 22<sup>nd</sup>, 1998, Wilmshurst commented on the role of the UNSC<sup>59</sup> in referring situations to the Court. In her comments, she noted that “her delegation strongly supported enabling the Security Council to make referrals, but agreed that that should be under Chapter VII of the Charter of the United Nations” (Bassiouni 2005, 183). She further noted that “she was puzzled by the fears expressed by some delegations that such referrals would interfere with the independence of the Court simply because the Security Council was a political body: no one had accused the Security Council of interfering with the independence of the Tribunals for the former Yugoslavia and Rwanda, which had already been in operation for some time” (Ibid.).

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<sup>59</sup> It seems to be the case that the bulk of the comments originating from the UK at the Rome conference were centered on jurisdiction, but most importantly on the role the UNSC would play in referring cases to the Court. The delegation of the UK in fact supported the initiative of Singapore – dubbed the ‘Singaporean compromise’ – on the role of the UNSC in referring cases to the Court. According to this compromise “the Court could, after a period of time, proceed with prosecutions of crimes within its jurisdiction unless requested not to do so by an affirmative vote of the Security Council” (Bassiouni, 144). The reason why the ‘Singaporean compromise’ is in fact significant is because there seemed to be a deadlock in Rome regarding the proper role of the UNSC in the referral process. Some thought that the ability of the UNSC to refer cases – especially instances of possible crimes of aggression – to the Court would reaffirm the role of the UNSC as an organ tasked with the “maintenance of international peace and security.” Others thought that in fact “such a role of the Council would introduce political considerations and undermine the Court’s independence” (Bassiouni 2005, 144).

One of the last comments during the Committee of the Whole originating from the delegation of the UK took place on Thursday, July 9<sup>th</sup>, 1998. Commenting directly on the role of the Prosecutor, Wilmshurst noted that “her delegation was in favour of provisions that would support and protect his or her independence and the authority of the office. Appropriate checks and balances should therefore be included to afford such protection as States might require in the light of all the provisions of the Statute, including the principle of complementarity” (Bassiouni, 304, 2005).

On the sidelines of the Rome conference, a number of further developments not only underscored the perspective of the UK in the negotiations but also paved the way for the inclusion of the *proprio motue* powers of the Prosecutor in the RS. Lloyd Axworthy noted during the interview that critical for the success of the inclusion of the *proprio motu* clause in what was to become Article 15 of the RS, was the support and influence exerted by the then-Foreign Secretary of the UK, Robin Cook.<sup>60</sup> In addition, the permanent 5 members of the UNSC seem to have splintered in such a way that France and the UK became part of the ‘like-minded group’. As Ambassador David Scheffer, the head of the US delegation at Rome, noted in his book “by July 8<sup>th</sup>, Britain had already jumped into the like-minded camp and voiced that group’s primary concerns, which were to have an ‘effective’ court built on fundamental principles of independence. Their view translated as support for an independent prosecutor” (Scheffer, 208). This was significant because according to Valerie Oosterveld, member of the Canadian negotiating team in Rome, with the split, there was a better chance of the inclusion of the *proprio motu*

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<sup>60</sup> In a similar vein, the then-Canadian Prime Minister Jean Chretien also, according to Dr. Axworthy, supported the initiative by ‘making telephone calls’ and lobbying other influential individuals (Axworthy, Interview).

clauses in the RS.<sup>61</sup> In clear terms, by weakening the strategic negotiating power of the ‘permanent 5’ of the UNSC and their insistence on a ‘state consent’ regime, the ‘like-minded group’ were better positioned to keep the *proprio motu* clause in the RS.

### **The Post-Rome Domestic Debate**

The post-Rome domestic debate in the UK followed, for the most part, the same legislative trajectory as in Canada – including the relative speed by which the RS was passed in both Houses of Parliament. It was debated in both houses of Parliament, and was put to extensive committee scrutiny. The bill was first introduced in Parliament on December 14<sup>th</sup>, 2000 in the House of Lords, and it received Royal Assent on May 11, 2001. In addition, and breaking with prior custom, the bill was also available for significant public consultations as well. In the UK, the implementing legislation was named the ‘International Criminal Court Bill’, which, after its passage in 2001 was named the ‘International Criminal Court Act’.

Research Paper 01/39, entitled ‘*The International Criminal Court Bill [HL]: Bill 70 of 2000 – 2001*’ – originating from the library of the House of Commons – outlines a number of important topics which were discussed in connection with the Bill. In the House of Lords – the legislative body which first had the opportunity to read and debate the Bill – the focus was on territorial issues with respect to the Bill’s applicability on the territory of the UK<sup>62</sup>, along with the issues of universal jurisdiction, command

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<sup>61</sup> The ‘permanent 5’ were seen as the main proponents of the ‘state consent’ regime for the operation of the Court, which meant that it was up to states to refer cases to the Court, which naturally included the ability of the UNSC to refer cases, or to stop investigations – for a renewable 12 months, but only if none of the ‘permanent 5’ members objected to the halt in the investigation. The ability of the Prosecutor to initiate investigations on his or her own accord flew in the face of such argument or arguments (Oosterveld, Interview).

<sup>62</sup> Lunn, Jon, Vaughne Miller and Ben Smith. “British Foreign Policy since 1997.” *House of Commons of the United Kingdom and Northern Ireland Library Research Paper 08/56* (2008): 1-123. Web. 31 Jan. 2011. <http://www.parliament.uk/briefing-papers/RP08-56.pdf>

responsibility, war crimes, and immunities from the legal reach of the Bill. The debates involving the Labour and Liberal Democratic parties focused on the overall utility and moral need to pass the Bill and establish a Court versus the more cautious and sovereignty-protecting tone and rhetoric of the Conservative party. The Conservative members drew very clear parallels with the objections of the US to the Court.

During the second reading of the Bill in the House of Lords, Lord Howell of Guildford, a Conservative Lord, drew attention to the concerns of the US. In his view, the US concerns “provide[s] guidance on where, if anywhere, we should seek to make further improvements or air worries on the Bill as currently drafted.”<sup>63</sup> His opinion was that “the project will not get under way until the US is convinced and on board in this vast international undertaking” (Ibid.). In a similar vein, during the second reading in the House of Commons, Crispin Blunt, a Conservative Party Member of Parliament, noted that “the United Kingdom and the United States have a proud record of protecting the interests of liberty and freedom in the decades since 1945. The issue is that, in the new world order to be policed by the ICC under the mechanisms set up in the Rome Statute, there is a threat to our willingness to go on making the contribution in security terms.”<sup>64</sup> Finally, and perhaps the strongest evidence of the Conservative desire seek solidarity with the US on the Court, as well as a deep divide between the two political camps, was a motion introduced by Lord Lamont of Lerwick on March 20<sup>th</sup>, 2001, during the 3<sup>rd</sup> reading of the Bill in the House of Lords.

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<sup>63</sup> Guilford, Lord Howard of. “House of Lords Debate – Second Reading: International Criminal Court.” *International Criminal Court (Hansard, 15 Jan 2000)*, Library of the House of Lords, 15 Jan. 2001. Web. 06 May 2013. <http://www.hansard.millbanksystems.com/lords/2001/jan/15/international-criminal-court.html>

<sup>64</sup> Blunt, Crispin. “House of Commons Debate – Second Reading: International Criminal Court Bill.” *International Criminal Court Bill (Hansard, 03 Apr. 2001)*, Library of the House of Commons, 03 Apr. 2001. Web. 08 May 2013. <http://www.hansard.millbanksystems.com/commons/2001/apr/03/international-criminal-court-bill.html>

Lord Lamont sought to introduce the following language into the Bill: “The Secretary of State shall not ratify the ICC Statute before it has been ratified by the United States of America.”<sup>65</sup> He proceeded to say – in referring to keeping in step with the US – that “we are the countries that are very much at risk. We cannot just dismiss the fears that have been expressed so widely in the United States.” He then noted that “it is not just a question of a so-called ‘conservative’ Congress, as has previously been alleged. There is very little Democratic support for the measure” (Ibid.). Blunt similarly noted in the House of Commons that “I believe that the Senate will never ratify the statute.”<sup>66</sup> His view was that if there was no support for ratification in the US Congress, then there was no need to pass any legislation in the UK either. This was a clear indication that a Conservative government in London would not pass such a bill. In the end, after the vote on the bill, the Conservative party voted against the bill. The bill did, however, pass with 238 votes for and 90 votes against.<sup>67</sup>

## **Analysis**

Which international relations theory is best suited to explain the preference formation of Canada and the United Kingdom towards to the International Criminal Court with an independent Prosecutor? In order to provide a satisfactory answer to this question neorealism, neoliberal institutionalism, historical institutionalism and liberal pluralism and liberal constructivism will be considered. After providing a basic exposition of the

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<sup>65</sup> Lerwick, Lord Lamont of. “House of Lords Debate – Second Reading: International Criminal Court.” *International Criminal Court (Hansard, 20 March 2001)*, Library of the House of Lords, 20 March 2001. Web. 06 May 2013. <http://www.hansard.millbanksystems.com/lords/2001/march/20/international-criminal-court.html>

<sup>66</sup> Blunt, Crispin. “House of Commons Debate – Second Reading: International Criminal Court Bill.” *International Criminal Court Bill (Hansard, 03 Apr. 2001)*, Library of the House of Commons, 03 Apr. 2001. Web. 08 May 2013. <http://www.hansard.millbanksystems.com/commons/2001/apr/03/international-criminal-court-bill.html>

<sup>67</sup> “International Criminal Court Act 2001.” House of Commons Debate – Third Reading *International Criminal Court Act (Hansard, 11 May 2001)*, Library of the House of Commons, 11 May 2001. Web. 19 Feb. 2013. <http://www.hansard.millbanksystems.com/search/%22International%20Criminal%20Court%20Bill%20>

aforementioned theories, it will be shown that liberal pluralism and liberal constructivism provide the best explanation for preference formation in Canada and the United Kingdom.

For realists, states are the most important actors within the international realm and are thought to be actors which are primarily concerned with the maximization of their power. Power is thought to be a function of material capabilities. Moreover – and importantly for this work – their preferences then are fixed and are uniform across time.

Neorealism does not lend itself very well to explaining preference formation regarding the ICC in Canada and the United Kingdom. Preference formation in both states was a function of particular domestic interest groups asserting their ideational preferences over foreign policy-making regarding the ICC at a particular time period. One may be able to argue that the United Kingdom could be viewed, at the very least, as a regional hegemon in Europe, which is also a member of the UNSC. These privileged positions could have afforded the UK an immense ability to influence other states to join the court. However, the UK broke with the solidarity of the Permanent 5 members of the UNSC when Tony Blair, and the Labour Party, came to power in 1997. This change in government also heralded a change in preference formation in the UK with respect to the ICC. Overall then, the very fact that there was a sharp change in the UK's policy towards the ICC and the Prosecutor points to the argument that neorealism is not very well suited for the explanation at hand.

Neoliberal institutionalism shares a number of core assumptions with neorealism. Both theories hold the state as the most important actor in international relations. Both theories also posit that states are utility maximizers which will attempt to further their



own goals within the anarchic international realm. Power is also very important to both theories. However, with respect to cooperation, states within the neoliberal institutionalist conception are more interested in absolute as opposed to relative gains. Unlike neorealists, neoliberal institutionalists argue that institutions and international organizations in particular are able to condition the way in which states formulate – and understand – their own interests. Institutions are thought to be products of human agency, and once established, are able to influence state behaviour because they “reduce the destabilizing effects of multipolar anarchy...” (Jackson and Sorenson, 108). Because of their direct impact on state behavior, institutions then are thought to be able to prevent – or dissuade – states from ‘cheating’ or renegeing on their promises and obligations – a major obstacle to state cooperation within neorealist thought. Institutions as modes of collective action for mutual benefit are shown to demonstrate and assure states that it is worth cooperating in order to gain long-term benefits. Those states which ‘cheat’ would be ‘punished’, and will thereby lose the long-term benefits of institutional membership. In addition, access to information regarding the intent and behavior of other states would further entice states to join and maintain institutions, even within policy areas which may be construed as ‘high politics’ such as the security realm, as opposed to only dealing with ‘low politics’ such as environmental politics and economic cooperation and trade. In sum, in the neoliberal institutionalist conception, “international institutions help promote cooperation between states and thereby help alleviate the lack of trust between states and states’ fear of each other which are considered to be the traditional problems associated with international anarchy” (Jackson and Sorensen, 108) In addition, institutions

“provide a forum for negotiation between states” and “provide continuity and a sense of stability” within the international realm (Jackson and Sorensen, 108).

Neoliberal institutionalism comes quite close to explaining the creation of the ICC with an independent Prosecutor. The ICC is seen as a hallmark of unprecedented state cooperation within the international realm. The Court – and its Prosecutor – was established after a series of ad hoc Tribunals which employed ‘independent’ Prosecutors. In addition, Canada and the UK both played key roles within the entire process of establishing the Court. Canada supplied the Chairperson of the Committee of the Whole at Rome and was very active during the pre-Rome process. The United Kingdom was also seen as a key member of the ‘like-minded group’, especially once the New Labour Party came into power in 1997.

This change in government in the UK shows, however, that neoliberal institutionalism does not provide a complete explanation. As Lawrence Weschler notes, “in what may have been the single most important development during the PrepCom process, in December 1997, Great Britain, under fresh New Labour auspices (with its highly valued ‘ethical foreign policy’) swung around the Singapore Proposal. In doing so, Britain became the first and only permanent five member to join what was becoming known as the ‘like-minded group’ – a loose coalition of some sixty countries” (Weschler, 93). In addition, in the Canadian case, it was the Liberal Party of Canada’s foreign policy directive on ‘human security’ which provided the ideational support for the Court and the independent Prosecutor. In either case, had another party been in power – as the empirical record shows – support for the Court from these two key states would have been less than favourable. Therefore, because neoliberal institutionalism does not

disaggregate the state as an explanatory variable, it stops short of being able to fully explain preference formation in Canada and the United Kingdom.

Historical institutionalism also provides a useful analytical tool with which to explain the establishment of the ICC and the institutionalization of the independent Prosecutor in particular. With the help of this theory, one is able to account for the role that the path dependence of long standing institutions – such as regime types, liberal or social democracies, or parliamentary systems – play in the establishment of the Court and the independent Prosecutor. Historical institutionalism is premised on the causal relevance of historical events – or events taking place in a particular sequence over time – and the causal primacy of domestic and international institutions. As was mentioned in Chapter 3, ideas and actors occupy important explanatory roles within historical institutionalism. However, historical institutionalism considers institutions as causally more relevant than the actors or ideas which helped establish them.

In the case of the establishment of the independent Prosecutor and the ICC, historical institutionalism does explain a number of interesting phenomena, especially within the cases considered in this work. With respect to international institutions, the ICC along with the Tribunals originated from within the UN system, and they also contain elements of the Nuremberg and Tokyo tribunals. In other words, there are a number of institutional continuities in relation to the UN as well as the earlier incarnations of institutions of international criminal justice. For example, originating from within the UN system means that the way in which personnel are selected by the Court – as well as the Tribunals – and the way in which the Court and the Tribunals were funded are very much consistent with the practices employed by the UN. Similarly, the

relative independence with which the Prosecutors – beginning with the tribunals at Nuremberg and Tokyo, and continuing with the ICTY, ICTR – were able to select individuals to be brought to justice also provides a sense of continuity between the institutions.

The natural departure between the tribunals and the ICC is in the way in which the Prosecutor of the ICC is able to initiate investigations on his or her own accord, thereby freeing the Prosecutor from the temporal and territorial constraints that were imposed on the Prosecutors of the ICTY, ICTR, IMT and the IMTFE. The fundamental change with respect to the ability of the Prosecutor to initiate investigations on his or her accord therefore, was not an institutional inheritance – but, rather, a stark departure – from the practices present in the Tribunals. Historical institutionalism overall however, with its emphasis on path dependence, is much better positioned to explain permanence than institutional change.

Shifting the focus to domestic institutions and their impact, the empirical record shows that for the most part, it was liberal, social and newly established democracies which supported the establishment of the Court and the Prosecutor, with mostly authoritarian and totalitarian regimes opposing both initiatives. It seemed to have been the case that ‘regime-type’ mattered with respect to supporting or opposing the ICC and the independent Prosecutor.<sup>68</sup> The ‘like-minded group’ which was led by Canada, Norway and other well- and long-established democracies, was very much at the forefront of this process. These states were also among the very first ones to ratify the Rome Statute as well. Their willingness to establish international organizations close to the likeness of their own domestic institutions – including the general primacy of, and the

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<sup>68</sup> See APPENDIX’ I – III

respect for the rule of law, along with the role Prosecutors play in national jurisdictions – further motivated these states to establish the Court and the independent Prosecutor.

The above outlined empirical record, however, shows that even though historical institutionalism does add to the explanatory calculus, the emphasis within historical institutionalism on the causal relevance – and priority – of institutions over ideas and actors falls somewhat short in explaining the establishment of the very first permanent International Criminal Court and the institution of an independent Prosecutor in particular. Notwithstanding international institutional processes and continuities, without explicit domestic support neither the ICC, nor the independent Prosecutor, would have been established. In the case of the UK, the change in government in London in 1997 signalled a change in policy that is difficult for historical institutionalism to explain. This change in foreign policy heralded support from a key UNSC member.

Without this change, the UK would most likely have aligned itself with the rest of the permanent five member of the UNSC which would have dealt a severe blow to the likelihood of establishing the Court and, with it, the independent Prosecutor. In the case of Canada, Ambassador Phillippe Kirsch, the head of the Canadian delegation in Rome, and the Chair of the Committee of the Whole, noted that “some favour a strong, robust Court; others say they do but clearly don’t; while others say they don’t and mean it. It often depends on who happens to be in power back home at the moment” (Weschler, 87). It so happened that in Canada, in the UK, and in many other nations in the world, sympathetic governments were in power at the particular junction in time.

Liberal international relations theory is able to remedy the explanatory gap left by neorealism, neoliberalism, and historical institutionalism. There are two main aspects of

liberal international theory that are at the heart of its explanatory force: (domestic) preference formation and agency. According to Madar, the source of state preferences is the domestic political realm. Both interests and ideas make up state preferences (Madar, 37). Societal groups organize in order to “protect their existing goods and benefits and will act to increase them if doing so does not put their existing holdings at risk” (Madar, 37-38). In essence within the liberal theoretical frame, interests are perceived in conceptual rather than material terms. The government is often “enlisted” in order to protect the interests of particular groups if the group is not able to do so.” Ideas – the other component in preference-formation – are non-material and may encompass ‘justice, security and identity’ (Madar, 38). Preferences regarding identity and justice become contested when the particular arrangement upheld for a certain period of time does not match the ideational aspects of these notions.

Liberal international relations theory also addresses institutions as well. In this sense, by ‘institutions’ it is meant “government organizations and laws” (Madar, 39). Particular ministries or other administrative units of governments are considered as institutions that employ “officials ... who have professional expertise in their policy area [and] have ... interests as well, and they can form policy preferences ...” (Madar, 39). In tandem with government, “the preferences of domestic agencies form a context in which some demands from domestic groups resonate more strongly than others” (Madar, 39). In this sense “representative institutions and practices vary among governments and ... they, as well as their society’s demands, determine what states seek to achieve” (Madar, 39). In essence the satisfying of new or re-emerging social demands explains the changing of state interests (Madar, 39).

Turning attention to interdependence, it arises out of the notion that “states pursue their preferences in light of the opportunities and constraints created by others, and realizing those preferences depends upon group aims, the way they are translated into state strategy and the way that strategy meshes with other states’ strategies” (Madar, 40). International relations take place on an ‘issue by issue’ basis. This also means that the “international system does not determine conflict or harmony;” rather, it is the way in which different interests are able to harmonize their interest (Madar, 40). Conflict – arising over material or ideational considerations – is a function of scarcity or threat. With respect to ideas about identity, justice and security, when they are based on ‘fundamental’ values and beliefs which are contested, conflict is more likely. When values and beliefs are less contested – or there are less than fundamental differences between values and beliefs about identity, justice and security – cooperation is more prevalent within the domestic as well as international realms.

Liberal pluralism thus provides an important addition to the explanatory calculus for the establishment of the independent Prosecutor and the ICC as a whole. By venturing beyond the conceptual rigidity of state-level analyses, the theory affords domestic-level explanations for the establishment of a truly unique institutional feature of the very first permanent International Criminal Court. In the Canadian case, the nucleus of support for the establishment of the ICC, including an independent Prosecutor, originated within the Liberal Party of Canada and with Canada’s Foreign Minister at the time, Lloyd Axworthy. The re-formulated notion of state sovereignty based on the human security doctrine provided the conceptual background for the establishment of an international organization and Court with a near-global reach. It also provided the

conceptual underpinning for the institutionalization of an independent Prosecutor who is able to trigger an investigation into a situation within the legal parameters of the Court on his or her own accord. The multilateral foreign policy agenda of the Liberal Party of Canada provided the institutional and organizational impetus for the former Foreign Minister – supported by the then-Prime Minister as well as the members of the Canadian diplomatic corps – to vigorously pursue the ‘cause of the Court’ domestically and internationally. It also provided the motivation for Canadian diplomats to play leading roles among nations in supporting the establishment of the Court and the independent Prosecutor. Domestically, the idea of the Court and the Prosecutor – and their meaning for state sovereignty and security in particular – found resonance within a number of different political parties, except for the ‘Official Opposition’ of the day, the Canadian Alliance / Reform Party of Canada.

Within the Canadian context one is able to argue that ideational interests of the government in power during the Rome Conference and during the ratification process, supported by the DFAIT and the diplomatic corps, provided the means by which Canada supported the Court and provide the leadership to other nations in order to support the Court as well. It can also be argued that without the overwhelming support from the members of the Liberal Party and the other three parties represented within the Canadian federal legislature, Canada’s strong support for the ICC – and its efforts to ratify the RS – would have been in jeopardy. In particular the fact that the members of the Canadian Alliance / Reform Party voted against the ratification of the ‘International Criminal Court Bill’ suggests that a government formed by the ‘Official Opposition’ of the day would have not signalled such an active support for the Court from Canada. It is further



conceivable that a government led by the Canadian Alliance/Reform Party would have not ratified the RS, and would have been more sympathetic to the position of the United States. In general terms, members of the Canadian Alliance / Reform Party envisioned state sovereignty as a function of territorial and national sovereignty. In their conception, securing the safety and security of an individual still rested within the confines of the territorial state. The notion that an international criminal court with an independent Prosecutor would conceivably be able to prosecute Canadians and Canadian soldiers – or other military or civilian personnel – was seen as too great a juxtaposition to Canada’s national and territorial sovereignty.

The case of the United Kingdom (UK) also underpins the crucial importance of domestic political actors and interests in ratifying the RS, thereby effectively helping to establish the ICC and the independent Prosecutor. The case of the UK is further important because it is one of the five permanent members of the UNSC, with equal veto powers with those of the US, China, Russia and France. The fact that the UK, while still maintaining some solidarity with the so-called P-5 of the UNSC prior to, and in, Rome, abdicated from this grouping of states, and supported the establishment of the ICC and the independent Prosecutor in general, affords it a critical and crucial piece within the explanatory puzzle of the establishment of the Court and the Prosecutor, in general.

The main reason why the UK joined the ‘Like-Minded Group’ was in no small part because of the success of the New Labour Party led by Tony Blair in winning the elections in 1997 and forming the government of the day. Blair’s emphasis on the importance of the international community and solidarity – along with an ‘internationalist foreign policy’ – provided the conceptual and ideational motivation for the UK to break

ranks with the P-5, join the 'like-minded group' and support the establishment of an independent Prosecutor. The more 'statist' conceptions of national sovereignty advocated in both houses of parliament by the Conservative and Independent Members of Parliament were hollowed out by calls from among the ranks of the New Labour and Liberal Democratic Party members of Parliament to ratify the RS which included the independent Prosecutor. A government represented by the Conservative Party would have been less than enthusiastic in joining the Court with an independent Prosecutor. The debates in the houses of parliament in the UK reveal that – once again, as in the Canadian case – members of the opposition were more in line with notions of 'inward looking' views of national sovereignty which placed tremendously more emphasis on national security by placing UK nationals – and, as an extension, British territorial sovereignty – as objects of national sovereignty. In addition, these more 'inward' looking notions of national security and sovereignty were certainly more in line with the views expressed and the arguments put forth, by certain groups within the US domestic political forum as well.

Constructivism further adds to the explanatory calculus. It places an emphasis on the 'socially constructed' nature of – in this case – international relations. In this sense actors within a social realm, through their repeated interactions create common meaning of different practices, principles, norms and values. At the very same time, through this repeated interaction new principles, norms and values are created as well. In this sense then 'sovereignty', 'human rights', 'security', 'humanitarian intervention', are constructed and the most prevalent form of the meaning will be accepted (Barnett, 165).

In the case of Canada the general foreign policy directive of the Liberal Party of Canada – mirroring the longstanding view of Canadian foreign policy as a function of multilateralism, occupying the position of a ‘middle power’ in global affairs, and also occupying a mediating role in international relations – along with an emphasis on ‘human security’, advocated by Lloyd Axworthy, can all be explained via constructivism. The primacy of the protection of individuals as opposed to states, which in essence included a re-defined notion of state sovereignty, resonated not only with the basic mandates of the Court but also conjured up a broad consensus in Canadian political life. This emphasis on the protection of individuals as opposed to other ‘subjects’ resonated very well with the way in which Canadians viewed themselves and their place in the world. This ability to self-identify with the basic tenets of the Court – not least with the institution of an independent Prosecutor free to initiate investigations on his or her own accord without being inhibited by a state – provided Canada with the ability to play a central role in establishing the Court. Identification with the fundamental tenets of the Court also provided for a fairly rapid and uninhibited ratification of the necessary legislation which helped Canada to accede to the Rome Statute and become a State Party to the Court.

Members of the Liberal Party of Canada along with the other three out of five parties represented in the House of Commons at the time shared in this view of Canadian foreign policy. This particular formulation of foreign policy saw the national interests and Canadian national sovereignty being intimately tied to the protection of individuals, not only within the territorial borders of Canada but across the globe. In a number of speeches, Lloyd Axworthy rightly pointed out that the protection of individuals from harm, but also the prosecution of those individuals who cause harm irrespective of the

role they occupy within a national governance structure, was very well tied to the safety and security of Canadians within Canada.

On the other hand, the arguments put forth by Official Opposition of the day, the Canadian Alliance / Reform Party were very much juxtaposed to an individual-focused foreign policy. In their formulation, the ‘status quo’ conception of state sovereignty and the Canadian national interest was sacrosanct in the case of the independent Prosecutor and the ICC in general. In this more ‘traditional’ or ‘conservative’ view, Canadians should have been more concerned with what takes place within the Canadian territorial borders as opposed to what takes place ‘far afield’, on the other side of the globe. In particular, Canada should ascertain that it protects its own personnel and that it also prosecutes criminals within its own borders. ‘Contracting out’ Canada’s sovereign right to prosecute individuals – Canadians and those of other nationalities – to an international organization over which Canada would have very little direct control did not bode well with the Official Opposition. In fact this formulation stood in stark contrast to what the Official Opposition conceived of as upholding Canadian sovereignty and the national interest.

In the case of the United Kingdom a similar pattern emerged. The Labour Party of the UK which formed the government envisaged a new role for the UK within the international realm. With the ‘Blair government’s’ embedding of an interventionist foreign policy with an ‘ethical dimension’ within a larger ‘doctrine of international community’, it was quite clear that support for the ICC and the independent Prosecutor was a natural extension of policy. The often cited change in the view of the UK after the change in government in London in 1997 further shows that had another party been in

power – mostly likely the Conservative Party – the position of the UK on the matter would have been significantly different, especially given its position on the UNSC. Similarly, the final parliamentary vote in the House of Commons – where all the Conservative Party members along with the Independents voted against the bill by which the UK ratified the RS – further shows that had the Conservative Party been in power, the UK would not have had such an overwhelming support for the Court and the Prosecutor.

Deviating from the P-5 in Rome therefore was very significant not only for the UK and its support for the ICC but also for the entire process of establishing the Court and the independent Prosecutor. With a splintered P-5 of the UNSC the support for a state-controlled ICC and Prosecutor was very much weakened. It was therefore a completely reformulated foreign policy initiative originating from the New Labour Party and the Blair government that enabled the UK to support the Court and the Prosecutor. The fact that the UK was willing to support an independent Prosecutor despite the fact that the UK is a permanent member of the UNSC showed that there was a fundamental departure not only in policy but also in thinking about the proper role of the UK in international affairs. Unlike the US, the UK did not hang onto giving the UNSC the final say regarding which situations would be referred to the Court.

## **Conclusion**

Canadian and British activism and support were crucial for the adoption of the Rome Statute as well as helping the Statute come into force after ratification. The Canadian delegates were intimately instrumental in ensuring that the Rome Statute was adopted in Rome. The position and work of the UK delegation was also instrumental, primarily

because of the UK being one of the permanent members of the UNSC. Yet it was the ideas the parties in power had about human security, multilateralism, and overall foreign policy in both, in Ottawa and London, which served as the nucleus of the positions of Canada and the UK. Lloyd Axworthy, supported by members of the Liberal Party in Canada, and Tony Blair and Robin Cook, supported by the New Labour Party in the UK, were instrumental in providing the conceptual backdrop for the work of the Court. Without their conceptual and principled commitment, and no less with a Conservative government in power in both legislatures, the outcome of the domestic ratification processes would have been in considerable jeopardy.

Assessing the possibly of a more symbolic aspect of the ratification process in the UK – and later, in Canada – given the UK’s position on the UNSC, if it had not passed implementing legislation, and had either stalled the process or would have not even ratified the Statute, would in essence have signalled a triumph for, and a return to, calculations of *‘realpolitik’* in international criminal justice and humanitarian law. Observers and commentators could then argue that power politics ruled the day even within this realm of international relations which required a necessary rising above considerations of power, posture and might. In a similar vein, with respect to Canada – and the crucial role it played in the adoption of the Rome Statute – stalling or ‘repealing’ the implementing legislation would have signalled to other states that perhaps the initial commitment was more superficial and related to posture within the international realm as opposed to substance.

## **CHAPTER 5: EXPLAINING OPPOSITION TO THE INDEPENDENT PROSECUTOR: THE CASES OF THE UNITED STATES OF AMERICA AND JAPAN**

Multilateral diplomacy cannot be conducted with delayed decision making or with spin control or military strong-arm tactics (Remarks by Ambassador Scheffer, pg. 229).

Above all, we should avoid being influenced by parochial considerations and insisting on viewpoints narrowly circumscribed by our respective national institutions. After all we are not here to decide which of our respective systems of criminal law is the best; we are here to work together for the creation of the most appropriate system for an international criminal court (His Excellency, Mr. Hisashi Owada, the Head of the Japanese delegation at Rome, 1998).

The aim of this chapter is to outline and explain the positions – and therefore opposition – of the U.S. and Japan to the independent Prosecutor. These two states were intimately involved in the process that culminated in the establishment of the ICC. Both the U.S. and Japan were fully involved in the PrepCom sessions taking place before the Rome conference. Japan even supplied the Rapporteur for the Committee of the Whole at Rome. Yet despite their involvement, both states were opposed to the establishment of an independent Prosecutor, and envisaged a substantially different Court than was established in 1998.

What explains US preference formation – and opposition – to the establishment of a Court with an independent Prosecutor? In a similar vein, why did Japan, sporting a fairly conciliatory role in Rome, take nearly a decade before it ratified the RS? These questions will animate the narrative in this chapter. The cases of the US and Japan are significant because although entertaining somewhat different policies on the Prosecutor and the ICC – and given that Japan later ratified the Rome Statute (RS) – they exhibited a number of policy aims which clearly indicated their opposition to the Prosecutor.

The nucleus of the US policy regarding the ICC and the Prosecutor was the determined aim of policymakers and lawmakers within the domestic political realm to protect and shield US service members and civilian leaders from the reach of the Court. These aims lay at the heart of not only the US policy during the PrepComs and the pre-Rome process, but also during the Rome conference as well. This policy stance also serves as a reason for the numerous objections of the US, and lies at the heart of a number of concessions it bargained for, and received, at Rome. Ultimately, the objections originated from within US domestic policy, bureaucratic and legislative circles.

In the case of Japan, Japanese diplomats were quite intimately involved throughout the process of establishing the Court. However, when the matter was transferred into the hands of domestic law makers and the Japanese bureaucracy, the process of acceding to the Court all but went subterranean in Tokyo. It was not until nearly a decade later, when the ruling Liberal Democratic Party, urged by members of the Democratic Party of Japan in both houses of the legislature, finally tabled the bill, which was unanimously accepted in both Houses of Parliament.

In the cases of the US and Japan, the sources of opposition and delay in accession were very much domestic political actors. In the US, at the heart of opposition to the Court was the Pentagon – or the Department of Defence – along with certain members of the US Senate and the US House of Representatives. In addition one finds a lack of policy coordination by a number of departments within the US bureaucracy and, finally, the ‘unavailability’ of President Clinton. In the case of Japan, the lengthy delay – attributed by some to a very careful legal examination of the proper conditions for



accession to the RS – finally ended with the members of the Democratic Party of Japan pressing the government to table a motion in both houses of parliament. The unanimous acceptance of the bill in both Houses signalled that the delay by the party in power was unnecessarily long, and that perhaps the bill could – and should – have been proposed and accepted earlier.

In order to undertake the discussion and analysis, the narrative will focus on the time frame beginning with the 1994 ILC draft for an international criminal court, continuing with the ‘ebbs and flows’ of the Rome conference, and culminating with the domestic political and policy debate in both states. The discussion will encompass a description of the sources of US and Japanese policy towards the ICC and the independent Prosecutor, as well as a description and discussion of the US and Japanese strategies in Rome.

### **The United States and the Pre-Rome Process**

The US position regarding the independent Prosecutor – and the Court as a whole – was underpinned by a ‘state consent regime’ involving the type of jurisdiction the Court could exercise. This so-called ‘state consent regime’ – meaning that the jurisdiction of the Court over a situation or an individual would have been contingent on a state giving its consent as opposed to the Court automatically assuming jurisdiction – was vehemently insisted upon by US domestic policy and political actors. The insistence on state consent – cloaked in rhetoric regarding the sanctity of state sovereignty – was quite consistent throughout the process of establishing the Court, certainly to the detriment of US success.

Michael Scharf notes that once the proposal of Trinidad and Tobago was voiced at the UN in 1989 to establish an international criminal court, some in the US State

Department were charged with making the proposal ‘go away’ (Scharf, 8). The government “proposed that the issue be assigned to the International Law Commission, a UN body known for taking several decades to complete its projects. The plan was to stall any international debate on the issue” (Ibid.). By the same token, and referring to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) “there was hope among U.S. policy makers that Security Council-controlled ad hoc tribunals would be established elsewhere in the world to prosecute crimes against humanity” (Ibid.). UNSC-controlled ad hoc tribunals would not prosecute US servicemembers in any shape or form.

At this stage, the three government agencies involved, namely the Departments of Defence, State and Treasury, were all opposed to a permanent international criminal court. Michael Scharf noted that the State Department was opposed to the initiative because of “the International Court of Justice’s adverse ruling in the Nicaragua case, which resulted in the United States’ withdrawal from the compulsory jurisdiction of the Court” (Scharf, 98). The Justice Department was opposed because of “a belief that the establishment of an international criminal court (ICC) would undermine the Department’s existing international law enforcement efforts, including its controversial unilateral authority to apprehend international criminals abroad” (Ibid.). The Department of Defence was opposed to the Court due to “the concern that an international court might attempt to prosecute U.S. military commanders for internationally controversial action such as the 1989 invasion of Panama or the 1986 bombing of Tripoli, both the subject of widespread international condemnation”<sup>69</sup> (Ibid.).

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<sup>69</sup> The Pentagon’s anxiety outlined by Scharf was later reflected in a comment by Senator Jesse Helms during the Senate Foreign Relations Committee meeting, held after the Rome conference, and

Given, however, the overwhelming support for the Court at the UN and across the globe, the US did adjust its perspective on the establishment of the Court. David Scheffer, the head of the US delegation at the Rome conference and the then-Ambassador at Large for War Crimes, noted that “on October 13, 1993, the first full-scale meeting took place in the State Department to discuss policy toward an International Criminal Court. Almost two weeks later the U.S. National Security Council convened a high-level interagency meeting to examine the options” (Scheffer, 169). The Department of Defence wanted to make sure that national prosecutions were by and large prior to the jurisdiction and prosecutorial action the Court would or could undertake. As Scheffer noted, if US concerns were addressed, and if the Court would be subordinate to national legal jurisdictions then the Pentagon could support the Court (Ibid.). A month later, during a joint Defence and Justice Department meeting, “the lawyer from the Joint Chiefs of Staff saw the court as a last resort after the failure of national prosecutions. Jurisdictional arrangements must be fixed, he said, but he reconfirmed that in principle the Joint Chiefs of Staff wanted an international criminal court” (Ibid.).

In 1994 – coinciding with the publication of the ILC draft – the Pentagon had two primary aims and objectives with respect to the ICC: first, the so-called Status of Forces Agreements (SOFAs)<sup>70</sup> needed to be respected and upheld. Second, the Pentagon supported President Clinton’s positive approach towards the Court as long as the UNSC could refer situations to the Court, the primacy of national prosecutions would be

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during which Ambassador Scheffer, the head of the U.S. delegation in Rome, was called to testify. Weschler noted that Senator Helms was “going to be damned if any so-called International Court was ever going to be reviewing the legality of the U.S. invasion of Panama or Grenada or of the bombing of Tripoli and to be holding any American president, Defence secretaries, or generals to account” (Weschler, 111).

<sup>70</sup> As Scheffer notes, “Criminal investigations and prosecutions of American soldiers deployed overseas are governed by the SOFAs, which ensure that U.S. military or federal courts will handle such cases and not the courts of the county where the crime allegedly was committed” (Scheffer, 171).

sacrosanct, and as long as “genocide would stand apart from war crimes” (Scheffer, 171). In the fall of 1994, the draft statute published by the ILC – according to Scheffer – was unsatisfactory to US interests. At the same time, however, a number of US concerns were in fact addressed by the draft (Scheffer, 173). During the next phase of the development of the Court – from the fall of 1995 onward “the intent of the US was to once again, stall the negotiating process until its interests could be accommodated” (Scheffer, 177).

At this time, both President Clinton and Secretary of State Madeline Albright spoke in support of the Court. President Clinton noted at the opening of the Thomas J. Dodd Research Center in Storrs, Connecticut that

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of international law (Scheffer, 177 – 178).

Later on in 1996, Madeline Albright, while testifying before the House of Representatives Appropriations Subcommittee, noted the US’ support of the Court but, as she explained “we are not going to buy a pig in a poke...We will not accept a raid on our sovereignty. The United States is very conscious about our sovereign rights. The key agencies have to feel comfortable” (Scheffer, 179). In the meantime, an interagency meeting took place, organized by the National Security Council, at which it was decided that the US would advocate for a diplomatic conference in 1998. The US supported state referral of an ‘atrocious situation’, yet this referral could not come in conflict with a UNSC decision (Scheffer, 178).

In 1997, Walter Slocombe, the then-Undersecretary of Defence for Policy, reiterated the general US position that a treaty agreed to in Rome would not be accepted in the US if it would leave US military or civilian personnel vulnerable to its jurisdiction (Scheffer, 184). The reasons for the insistence of the Pentagon on this point were because “there [had] been six emergency embassy evacuations in Africa during the prior two years; 200,000 American troops were stationed overseas in forty countries; the United States was party to almost one hundred Status of Forces Agreements; enforcement operations with heavy U.S. commitments had been undertaken against Iraq, Bosnia and Herzegovina, and in Haiti during recent years” (Ibid.). Mr. Slocombe also suggested that he will attempt to drum up the support of ‘foreign militaries’ for the US position (Ibid.).

This effort by the Pentagon drew considerable attention in the popular media shortly before the Rome conference. The *New York Times* reported that “the Pentagon urgently called in more than 100 foreign military attaches from embassies” for a briefing.<sup>71</sup> During the briefing, a memorandum was distributed to the attendees, noting that “the U.S. is committed to the successful establishment of a court. But we’re also intent on avoiding the creation of the wrong kind of court” (Ibid.). More specifically, the Pentagon warned against the independent powers of the Prosecutor, and it also warned against a too broad of a definition of war crimes (Ibid.). As a follow-up, a team of personnel were sent to Europe to further advocate for the US position in key European capitals (Ibid.). Military attaches stationed in Washington also sent messages to their respective capitals. However, Ambassador Scheffer remarked that he “never saw any evidence that any government bent its will towards the Pentagon’s demands as a result of

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<sup>71</sup> Schmitt, Eric. “Pentagon Battles Plan for International War Crimes Tribunal.” *The New York Times*, 14 April. 1998, On-line. <http://www.nytimes.com/1998/04/14/world/pentagon-battles-plans-for-international-war-crimes-tribunal.html>

the cable. Indeed, from what foreign negotiators conveyed to me, the cable only strengthened their opposition to us” (Scheffer, 190).

Even though the US delegation during the sixth Preparatory Committee meeting declared that it “had not yet taken a position on any state consent regime [and] atrocity situations must be made by the Security Council or with council approval if a state party referred a situation that the Council already was addressing on its agenda,” President Clinton endorsed, once again, the creation of the ICC (Scheffer, 186). As a result the late Senator Jessie Helms, (R-SC) sent a letter to Ms. Albright noting that the statute would be ‘dead on arrival’ in the U.S. Senate unless Washington could veto its decisions” (Ibid.). In the letter, Senator Helms placed the ICC on an equal footing with the UN, and also sought a US veto of situations being referred to the Court. Yet, this is not a characteristic of international treaties. The effect then of Senator Helms’ letter was that it “alienated 99 percent of the world when he put it that way” (Ibid.). The nearly permanent damage of Senator Helms’ public comments was felt immediately after his statement was released: delegations did not see the US as a ‘serious’ participant during the negotiations. These delegations equated the opinion of Senator Helms with that of President Clinton on the matter. Participants simply thought that the Senator spoke on behalf of the US government, and that his comments on the matter carried near-equal weight to those of President Clinton (Scheffer, 188).

### **The United States at the Rome Conference**

In order to better prepare for the Rome conference, Ambassador Scheffer designed a new strategy. The first point of the strategy was that state consent was required only if the

state whose citizen is being charged is not a member of the Court. A UNSC referral would override this requirement (Scheffer, 191). The second aspect of the US strategy before the Rome conference was that “the state party that had custody of the suspect would not be required to transfer him or her to the court unless the court had determined that the case pertaining to the individual was admissible under the complementarity regime” (Scheffer, 190). The purpose of this aim was that the US could in fact ‘refuse to cooperate’ with the Court (Ibid.). The third strategy point was that the US would blatantly refuse to cooperate with the Court – even if it ratified the RS – because then the matter would be sent to the UNSC where the US would, again, be able to shield itself from the reaches of the Court (Ibid.).

Prior to leaving for Rome, instead of meeting with the President, who would approve the new strategy, Ambassador Scheffer met with Hilary Clinton along, with James E. Baker, who was the legal advisor at the National Security Council. At the meeting Baker represented the interests of the Pentagon. The discussion was moderated by Eric Swartz, the multilateral affairs director at the National Security Council (Scheffer, 195). At this time, President Clinton was not available for consultations as he was preoccupied with the Monica Lewinsky issue, and his upcoming visit to China (Scheffer, 195).<sup>72</sup> Baker informed Hillary Clinton that the US should hold to its earlier position on the Court. Ambassador Scheffer retorted that holding steadfast to these positions would in fact damage the ‘credibility’ of the US. Ambassador Scheffer also

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<sup>72</sup> Ambassador Scheffer notes that the Lewinsky affair and President Clinton’s visit to China in 1998 essentially “overshadowed the endgame of the International Criminal Court negotiations, which may not have seemed as important at the time in his (or his chief of staff’s) calculus but would prove critical in the coming years in terms of America’s standing in the world” (Scheffer, 195). In fact, Ambassador Scheffer notes that “the Lewinsky scandal grievously impaired U.S. national interests because Clinton and his closest aides did not focus enough on matters of state” (Scheffer, 195).

noted that it was impractical to aim for full immunity of US personnel (Scheffer, 197).<sup>73</sup> However, following this meeting, the instructions for the US delegation heading to Rome stayed the same. This particular position was supported by the Pentagon and was not supported by the other two agencies involved in the inter-agency negotiations (Ibid.).

At Rome, the US delegation decided that, as a strategy and as its first move, it should spell out its opposition to the Prosecutor in no uncertain terms. Ambassador Bill Richardson delivered the initial speech of the US delegation outlining the US position. Meanwhile, back in Washington, the age-old resistance was still present: the US would support the establishment of the Court only if a total guarantee could be obtained that US citizens would not come under its jurisdiction. Ambassador Scheffer's words reflected the overall US position at the outset of the conference. He noted in an interview with Lawrence Weschler of *The New Yorker* that:

The American armed forces have a unique peacekeeping role, posted to hot spots all around the world. Representing the world's sole superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts. And we simply cannot be expected to expose our people to those sorts of risks. We are dead serious about this. It is an absolute bottom line for us (Weschler, 92).

During the second week of the conference, the US delegation advocated – with certain success – the ‘complementarity proposal’. According to this proposal, the Court would be ‘complementary’ to national jurisdictions in that national jurisdictions would be given the first attempt to bring perpetrators to justice. If the national jurisdictions were

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<sup>73</sup> Ms. Clinton's last words to Ambassador Scheffer were an acknowledgement that Abassadors Scheffer's work in Rome will be a difficult one. Ambassador Scheffer correctly interpreted this as support for the position of the Pentagon as opposed to his position. Later on, as Senator from New York, Ms. Clinton voted for the American Service-Members' Protection Act “which was a blunt assault on the International Criminal Court that penalized (e.g., by withholding economic or military assistance).



deemed to be ‘unable or unwilling’ to prosecute, that would then trigger the jurisdiction of the Court through appropriate legal processes. Complementarity in essence became one of the cornerstones of the RS (Scheffer, 202).

During this week, the US delegation also circulated a ‘detailed paper’ discussing its objection to the independent Prosecutor. In this document the US laid out its main objections not only to the ability of one individual to initiate investigations, but also to the position of states which supported the establishment of an independent Prosecutor. The so-called ‘Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor’ published and disseminated on June 22<sup>nd</sup>, 1998 began with a discussion regarding the type of referrals that should be made in the first place. The US delegations noted that cases as such should not in fact be referred to the Court by states, nor the UNSC, nor any other organization. The delegation called for the referral of ‘situations’ instead. In their view, “it must lie with the Prosecutor to determine whether a crime has been committed and by whom.”<sup>74</sup> The statement then focuses on one of the foundational aspects of the Rome Statute. Namely, it notes that in the preamble of the Rome Statute, the mandate of the ICC is “to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole.” Given the fairly ambiguous definition of some of those crimes, the US delegation was of the opinion that there had to be a firmer benchmark regarding what constituted such a

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<sup>74</sup> The US delegation at this point was aiming to convince other delegations that the way the Prosecutors of the ad hoc tribunals were functioning was the proper way to proceed with respect to the role of the Prosecutor of the ICC as well. In the case of the ad hoc tribunals, the particular situations – given the territorial and temporal parameters of the conflicts – were referred to the Prosecutor via the UNSC. Then the Prosecutor – on his or her own accord – was able to decide on and pursue cases against individuals he or she deemed most appropriate to prosecute. In the case of the ICC, the jurisdictional parameters are not limited at all. The Court has territorial and personal jurisdiction all across the globe. Therefore, the ability of the Prosecutor of the ICC to initiate investigations on his or her own accord – especially with respect to the position of the US – was seen as a grand departure from practices observed at the level of the ad hoc tribunals (US Statement June 22<sup>nd</sup> 1998).

crime. In their opinion one individual cannot, and should not, be made responsible for determining such a definition (Ibid.).

The US delegation then attempted to dismiss at least two particular arguments for the institution of a *proprio motu* Prosecutor. First, and as noted by Ambassador Wenaweser, a number of state delegations opined that states in the past were less than willing to refer other states to international human rights bodies due to fears of retaliation. The US delegation noted that this argument is ‘entirely cynical’, and that “the United States and other States...worked hard to establish and support the work of the ad hoc tribunals, and which are in Rome to facilitate future prosecutions through the establishment of a permanent court” (Ibid.). In further stressing its point, the US delegation pointed to a “variety of legal, political, practical and resource difficulties” which will enable states – unlike in the past – to “take on national prosecutions of atrocities committed thousands of miles away” (Ibid.). Second, the US delegation also addressed the concern of some states that UNSC referrals would politicize the work of the Court, and that the institution of an independent Prosecutor would in fact be more impartial (Ibid.). According to the delegation, there were no possible ways to guarantee that international organizations – such as the ICC – or states for that matter will not in fact act based on political calculations and place undue political pressure on the Prosecutor (Ibid.).

The delegation then turned the proverbial ‘tables’ on the issue of the politicization of the work of the Prosecutor and noted that state and UNSC referral “has a ‘political’ component which is beneficial’, if not essential, to the work of the Prosecutor” (Ibid.). If states would be able to provide referrals to the Court then they will be showing – and

‘signalling to other states’ – that they are ‘concerned’ about the issues, and that they are ‘committed’ to the capacity of the Prosecutor to take the appropriate measures. With a Prosecutor who possesses *proprio motu* powers, in essence, states would be able to ‘pass on’ their responsibility to “individuals, organizations, and the Prosecutor himself” (Ibid.). The Prosecutor will need the “political will and commitment only States can provide” (Ibid.). Without such state support, the Prosecutor would not be able to properly operate within the international realm (Ibid.). In essence, the US delegation noted that politicization of the work of the Prosecutor is necessary and indispensable.

The US delegation also saw the institution of the Pre-Trial Chamber as a potential function of inappropriate and misplaced politicization. In their view, due to the fact that it would be rare that the Prosecutor’s decisions would be unlawful under the Statute,” the US delegation noted that “the judges’ review would simply substitute their own personal or policy preferences for that of the Prosecutor” (Ibid.). This exercise would then “find perceptions of their impartiality and fairness undermined” (Ibid.).

Finally, the US delegation was also concerned about the number of resources that would have to be used in the event the Prosecutor is ‘bombarded’ with the sheer ‘volume of complaints’. The US delegation pointed to the number of communications forwarded to the United Nations Human Rights Commission in 1997 totalling 30,000, with an additional 1,200 sent to the Commission in the same year. They also pointed to the European Commission of Human Rights which received 1500 applications in 1998 – from January 1<sup>st</sup>, 1998 to the beginning of the Rome Conference. In order to process these potential referrals the resources of the office of the Prosecutor would have to be expanded at a great financial cost (US Document). In addition to the expanded resources,

the Prosecutor – in order to meet the demand to process the number of purported communications – “will be turning to States for information to determine the credibility of allegations and whether they are being handled at the national level. Thus the costs and frustrations that will come with the *proprio motu* scenario will in the long run fall on States as well” (Ibid.). In the final analysis, the US delegation noted that the ‘benefits’ of the *proprio motu* powers of the Prosecutor “are significantly outweighed by the costs involved in diminution of the Prosecutor’s focus and efficiency” (Ibid.).

By July 6<sup>th</sup> – and well into the second half of the conference in Rome – Ambassador Scheffer seemed to have been receiving even less support from the State Department and The White House with respect to the three primary concerns of the US: “how to control referrals to the court, on the right of reservations, and on the role of the independent prosecutor” (Scheffer, 207). At that juncture, Secretary of State Madeleine Albright asked “what can we do to blow up the entire conference?” (Ibid.). The two options presented were to simply walk out of the conference or lobby for an extension. The later strategy was chosen.

On July 8<sup>th</sup>, President Clinton sent new instructions to the negotiating team in Rome (Schwartz, 208). Yet before receiving them, the US delegation met with its P-5 counterparts where the US proposed that the Prosecutor should – instead of initiating investigations on his or her own accord – brief the Assembly of States Parties with the hopes of ‘at least’ one government referring the situation to the Court (Scheffer, 208). This proposal did not present a common ground on the role of the Prosecutor. The Russian and Chinese delegations were very much against an independent Prosecutor.

France<sup>75</sup> and the UK were very much in favour of it, with France believing that the oversight offered by the Pre-Trial Chamber was sufficient (Scheffer, 208).

The new instructions from President Clinton included the following: i) the citizens of non-party states would not come under the jurisdiction of the Court, unless the UNSC referred the situation to the Court, or the ‘non-state’ party provided its explicit consent; ii) automatic jurisdiction should only be exercised over nationals of states parties, and only with respect to the crime of genocide, iii) the US delegation was to signal that they could potentially accept the Singaporean compromise but only in return for support for their “primary objectives in the negotiations,” iv) if the main objectives of the US are met, then the US would publicly note that it is considering signing the RS”<sup>76</sup> (Scheffer, 209). Yet again, there was no substantial change in the US position.

During the last week of the conference, the US saw even more opposition to its ‘bottom line.’ During that final week, “Austria delivered the statement of the European Union governments and expressed their unified support for an independent prosecutor who could refer situations to the court. Berman [of the UK] fully endorsed it for the United Kingdom. With that...any further U.S. opposition to an independent prosecutor would prove futile” (Scheffer, 213). On July 17<sup>th</sup>, a vote was called on the statute. Following last-ditch efforts by India and then the US to make further consensus-breaking amendments to the treaty involving the exclusion of the UNSC and the exemption of non-

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<sup>75</sup> Interestingly enough the position of France at this stage of the process was very much in opposition to its earlier stances on the matter. Simply, France changed its stance on the proper role of the Prosecutor within the Court. During the first Preparatory Commission session, on April 3<sup>rd</sup>, 1996, France noted that “complaints should be referred to the court both by States parties and by the Security Council operating under Chapter VII. The court prosecutor should not be able to initiate prosecutions on his own.” Coalition for the International Criminal Court. History of the ICC. <http://www.iccnw.org/?mod=icchistory> [accesses January 31, 2011].

<sup>76</sup> “The final step of formally ratifying the Rome Statute (following signature), and thus obliging the United States under it, likely would have to wait many years before the constitutionally required two-thirds of the Senate would endorse it” (Scheffer, 209).

parties from the jurisdiction of the Court, Norway introduced a ‘non-action motion in both cases (Scheffer, 223). Then the final vote took place: 120 delegations voted for the statutes, 21 delegations abstained and 7 voted against (Scheffer, 224). Ambassador Scheffer remarked that besides “Israel and China, which publicly acknowledged their opposition...it appeared that the rogue’s gallery of Iraq, Cuba, Syria, and Yemen also registered ‘no’ votes” (Scheffer, 224). At the end of the conference, the US delegation found itself among very curious company.

On December 31<sup>st</sup>, 2000, Ambassador Scheffer did sign the treaty at the UN headquarters on behalf of the Clinton Administration. When President Clinton signed the Statute, the statement released by the Administration “retained its serious concerns about jurisdictional issues in the Rome Statute” (Schwartz, 229). Nonetheless, the statement argued that “signature is the right action to take at this point,” as it would put the United States “in a position to influence the evolution of the Court” (Ibid.). More specifically, with respect to the independent Prosecutor, “the Clinton Administration feared that an independent ICC prosecutor might become (in the words of one U.S. official) an ‘international Ken Starr,’ bedevilling U.S. military personnel and officials” (Ibid.). The incoming Bush administration ‘unsigned’ the RS as soon as that was possible. On May 6<sup>th</sup>, 2002 a declassified diplomatic cable, a ‘*demarche*’, was sent from the Secretary of State to US Ambassadors noting that “the United States Government sent a formal notice to the Secretary-General of the United Nations, as depositary for the Rome Statute, declaring the United States will not become a party to the treaty establishing the International Criminal Court” (Demarche, AMICC).

## **The Case of Japan**

The case of Japan is further illustrative of not only why certain states have been 'lukewarm' at best with respect to joining the ICC, but also what the role and impact of domestic actors and dynamics was in debates, deliberations and struggles to join the Court. Japan was closely involved in the process of establishing the Court. Its diplomats played key roles during the PrepCom process and at the Rome conference. Even though Japan voted for the Rome Statute of the Court, it took nearly a decade to accede to the RS and join the ICC. In the discussion below the aim will be to outline the sources of the Japanese position and opposition with respect to the independent Prosecutor and the particular institutional design the Court took in 1998. It seems to be the case that a very careful – if not too careful – analysis of the impact of the Rome Statute on Japanese law by the government in power at the time, led by the Liberal Democratic Party (LDP), was at the heart of the delay. The unnecessary length of delay is illustrated by the fact that, after the insistence of the Democratic Party of Japan (DPJ), both houses of parliament unanimously accepted the legislation which enabled Japan to accede to the Rome Statute and join the ICC. At the very same time, the seeming quite rapid change of course in 2007 coincided with not only an election in Japan, but also with the coming to an end of a nearly-fifty year 'uninterrupted' rule of the LDP and an electoral victory of the DPJ (Lipsy and Scheiner, 311).

### **Japan During the Pre-Rome Process**

Japan was intimately involved with the creation of the ICC from the very beginning of the process, starting with the so-called '*ad hoc*' committees established in 1995. Hirofumi Ryu, a member of the DPJ noted on March 20<sup>th</sup>, 2007, in the General Assembly of the

Diet, that Japan occupied the key position of the Vice Presidency during the Ad Hoc committee meetings, and Japan was very active during the preliminary processes (Ryu, House of Representatives). During the first PrepCom meetings on April 3<sup>rd</sup>, 1996, on the topic of inherent jurisdiction of the Court, Japan noted that the ‘consent’ of the state where the individual was arrested, along with the state of which the individual is a national, and the consent of the state where the alleged crime took place, should all be required. Japan also noted that states should be able to trigger the jurisdiction of the Court, and refer cases to it.<sup>77</sup> During the very same PrepCom, on April 4<sup>th</sup>, 1996, Japan noted that the proposed statute of an international criminal court should not override the UN Charter, which outlines that the United Nations Security Council (UNSC) can make the determination if the ‘peace and security of mankind’ is endangered. Japan, at this juncture, preferred that the UNSC refer cases to the Court (Ibid.). Overall, despite Japan’s quite active role during the pre-Rome process some observers and NGOs pointed to the fact that Japan, at that juncture of the negotiating process was not entirely certain that there was an explicit need for the establishment of the Court (Luckner, 96).

### **Japan in Rome**

Kerstin Luckner notes that there seemed to have been a change in Japan’s approach towards the Court at Rome. As opposed to a generally neutral stance on the overall utility of a Court, Japan, at that juncture openly supported the establishment of the Court (Luckner, 97). At the very first meeting of the ‘Committee of the Whole’ in Rome, Mr. Yasumasa Nagamine of Japan was elected by acclamation to be the Rapporteur. In

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<sup>77</sup> “International Criminal Court Should Not Have Inherent Jurisdiction, Preparatory Committee Told.” *Preparatory Committee on Establishment of International Criminal Court, First Session, 15<sup>th</sup> Meeting*, 03 April 1996. <http://www.iccnw.org/documents/RoleofSC4Apr96.pdf>



addition, His Excellency Mr. Hisashi Owada, the head of the Japanese delegation, noted explicitly that “the Government of Japan fully supports the establishment of an international criminal court at this juncture... the establishment of the international Criminal Court is *par excellence* a problem of primordial political significance” (Ambassador Owada, Speech). Japan also seemed to be quite prepared for the negotiations at hand. John Washburn and Fanny Benedetti noted that “Japan... came to each session with long instructions worked out through elaborate internal decision-making” (Washburn and Benedetti, 13). Overall, Japan was a no mere bystander in Rome. Its diplomats were readily and actively involved in the process of establishing the ICC.

Later on, however, while providing a full-fledged exposition of the position of the Government of Japan on the establishment of the ICC at Rome, Ambassador Owada very much supported a Court built on a more conventional conception of state sovereignty, which led him to ask what role, if any, the Prosecutor should play in triggering the jurisdiction of the Court. Ambassador Owada outlined four ‘basic principles’ which underpinned the position of Japan. First, Japan wanted an “independent and impartial organ of the international community.” Second, Japan envisioned an “international organization capable of carrying on its task effectively” in such a way that “the Court must ensure cooperation of all the countries concerned, so that it may work effectively in dealing with the cases brought before it.” Third, Japan was a very strong supporter of the principle of ‘complementarity’, arguing that “the jurisdiction of the Court must be established only when the national system of criminal justice is not operational or effective in relation with the case concerned.” Lastly, Japan advocated for ‘universal

participation’. Without a universal acceptance of the Court, “the Court’s significance will be greatly diminished” (Ibid.).

In the second part of his speech, Ambassador Owada focused on issues of key importance to Japan. Among these issues were the crimes within the jurisdiction of the Court, the formulation of war crimes, the Court’s relationship with the UNSC, the notion of complementarity, the issue of the trigger mechanisms – or what organ may trigger the jurisdiction of the Court – cooperation with the court and surrender, and the Court’s relationship with the United Nations.

Two particular issues were key for the discussion at hand. With regards to the issue of trigger mechanisms, Ambassador Owada noted that only states and the UNSC should refer cases to the Court. Accordingly, the Ambassador noted that due to the gravity of the position of the Court within the international realm, a proper ‘balance’ between the interests of the Court and state parties must be maintained. In light of this, he noted that “Japan...considers it inappropriate to give the prosecutor the right to initiate investigations *proprio motu*” (Ibid.).

The second key issue relevant for this discussion was Japan’s stance on the role of the UNSC with respect to the crime of aggression. Ambassador Owada remarked that “Japan would support including the crime of aggression provided its definition was acceptable and there was a Security Council screen for determining whether an act of aggression had occurred” (Scheffer, 200). In more specific terms, Ambassador Owada noted that even though there was a compulsion to disaggregate the act of aggression committed by a state from an act of aggression committed by an individual, the key was to focus on the ‘act’ itself. The only organ, according to Japan, that was suited to

determine if an ‘act’ of aggression was committed was the UNSC. Therefore, it is clear from this position that Japan envisioned a central role for the UNSC which underpinned the tension at the heart of the establishment of the ICC and the work of the Prosecutor as well.

During the conference, Japan was a frequent participant in the debates taking place in the ‘Committee of the Whole’ (CW) commenting on nearly every part of the Rome Statute. Japan’s position regarding the independent Prosecutor and the institutional design the Court took did not change substantially. Japan continued to insist on the central role of states in the work of the Court. At the 10<sup>th</sup> meeting of the ‘Committee of the Whole’ on June 22<sup>nd</sup>, 1998, while discussing the role of the Prosecutor, Mr. Matsuda of Japan noted that “allowing the Prosecutor to launch investigations *ex officio* would upset the balance between State parties and the Court by making the latter a kind of ‘supra-structure’ with authority over States” (Bassiouni, 178). Mr. Matsuda noted that outside pressure to consider a case could damage the credibility of the Prosecutor and the Court (Ibid.). With regards to the role of the UNSC, Mr. Matsuda, in the same debate, noted that due to the fact that the crimes which the Court would have jurisdiction over are crimes of ‘international concern’, and because the UNSC was the organ responsible for ‘maintaining international peace and security’, the UNSC should be involved in referring cases to the Court (Bassiouni, 183).

Japan’s stance, however, seemed to have shifted somewhat during the second part of the Rome conference. On July 8<sup>th</sup>, during the “finalization and adoption of” the RS, Ambassador Owada spoke once again. His comments further underpinned the overall position of Japan with respect to the Court and the independent Prosecutor. At this

juncture, however, Ambassador Owada seemed to have put forth a more conciliatory tone with respect to the overall design of the Court, as opposed to the one displayed at the beginning of the conference. Commenting on the ‘crimes within the jurisdiction of the Court’, Ambassador Owada noted that Japan sought a sense of flexibility on these matters. He noted that the RS should preserve the balance between “existing national judicial systems and the Court’s international mechanisms” (Bassiouni, 269). The very next day, on July 9<sup>th</sup>, 1998, Ambassador Owada, referring specifically to the issue of the ability of the Prosecutor to refer situations to the Court, noted that the Prosecutor “should act strictly in accordance with the law and that he or she should be totally free from any influence by a country or group” (Bassiouni, 308). In addition, Ambassador Owada noted that the Prosecutor of the ICC would function within a very different legal context with respect to accountability; different from those in national jurisdictions. Within the international realm, the Prosecutor needs to consider the “legal interests of the international community” and therefore a mechanism should be included in the RS which would ‘legitimize’ the Prosecutor’s actions (Ibid.). Then, Ambassador Owada, unlike his previous comments about the ability of the Prosecutor to initiate investigations *proprio motu*, noted that “Japan would continue to seek a formula acceptable to all” (Ibid.).

Ambassador Owada’s comments on July 13<sup>th</sup> in fact came after the Japanese delegation organized a key meeting between Japan, the United Kingdom, France, Germany, Australia, Italy and Canada. During the private meeting, Ambassador Owada described the state of the Rome conference at that point as a ‘divided house’ between those delegations which thought of the Court as an instrument which was to directly impinge on state sovereignty on every possible turn, and a Court which was to ‘prosecute

the culprits' across the world. In his view, achieving the latter, "might involve some departure from the traditional notion in international law of obtaining the consent of the engaged governments" (Scheffer, 211). Overall, this meeting can be seen as an attempt by Japan not only to act as a mediator in the 'divided house' but also to convince the US to support the establishment of the ICC with an independent Prosecutor.

The Japanese Ambassador proposed two particular ideas. First, Japan proposed that the Court should not have jurisdiction over individuals who are citizens of a state which is not a party to the RS (Ibid.). This notion in fact flew in the face of universal jurisdiction of the Court which a number of governments, including those in the 'like-minded camp', held onto. Instead of universal jurisdiction, Ambassador Owada noted that if a crime was committed on the territory of a state which is a party to the RS, or if the state that apprehended the individual is a party to the Statute, then the Court would have jurisdiction in the matter, unless the state of which the individual is a national joined the Court, or unless this state has given its consent to the Court to proceed (Ibid.). In return for this jurisdictional regime, the US would, among other considerations, "accept an independent Prosecutor with 'checks' on his or her power" (Ibid.). With respect to the UNSC, it could refer any case to the Court – under its Chapter VII powers – which would involve a state which was not party to the Statute. This would be done with or without the consent of the state in question (Ibid.). As comments and reaction to this proposal "came fast and furious" Japan was very much insistent that a state which is not a party to the statute should be given the right to consent to a prosecution of its citizens. By the same token, Japan hoped that this initiative would bring the US on board in regards to the independent Prosecutor whose powers would be checked by the proposed Pre-Trial

Chamber (Ibid.). Unfortunately, despite the nobility of Ambassador Owada's intentions and ideas, his proposals were not accepted.

Overall, even though not all of Japan's proposals were accepted, they were very much indicative of Japan's willingness to compromise and mediate during the Conference. However, the conciliatory tone and attitude at the Rome conference – not to mention the fact that Japan voted for the Rome Statute of the Court – did not translate into a rapid accession to the Statute by the Diet or the House of Councillors in Tokyo.

### **The Post-Rome Legislative Debate and The Accession Process in Japan**

The aim in this section is to describe the domestic political debate in Japan within the context of relevant Japanese domestic political developments. The debate ended with Japan acceding to the Rome Statute in 2007, nearly a decade after it voted for the adoption of the Statute. By acceding to the RS, Japan became the 105<sup>th</sup> state to join the Court. The discussion below will outline the general thrust of the debates along with the contents of these debates which will shed light on Japan's preferences with respect to joining the ICC. This discussion will provide the basis for the analysis which will focus on an explanation of Japanese policy preferences, along with an explanation as to why Japan needed almost a decade to join an institution which it was intimately involved in establishing.

Unlike the party systems in the other cases under consideration in this work, Japanese politics are characterized by frequent elections, coalition governments and an often changing party system where new parties are often formed out of parties coalescing for a variety of reasons. Overall, Japan is described as a “robust two-party system”

(Lipsy and Scheiner, 315). The two of the most well-represented parties in both Houses of Parliament are the Liberal Democratic Party (LDP), which occupies a center-right position on the political spectrum – and the Democratic Party of Japan (DPJ), which occupies a more center-left position.<sup>78</sup>

The LDP was established in 1955 with the joining of two ‘conservative’ parties, the Liberal Party and the Democratic Party (Crespo, 200). In 2005, it celebrated nearly a half-century rule (Ibid.). It is dubbed by observers as a conservative, right-of-center party. The LDP remained in power for thirty-eight years – from 1955 until 1993. Following a short absence in 1993, it then swiftly returned to power until the House of Councillors election in 2007 and the House of Representatives election in 2009 when the DPJ enjoyed a short-lived victory (Lipsy and Scheiner, 311). The party once again returned to power in 2010 (Ibid.).

During the long tenure of the LDP, it established very close relationships with the state bureaucracy and the business elite. Policies, for the most part, originate within the bureaucracy. The Diet – or the House of Councillors – then “passes, rejects or more commonly, modifies [policies] according to the criteria for the make up of its different committees” (Crespo, 201). The bureaucracy enjoys a certain degree of autonomy in policy making due to its ‘specialized technical knowledge’ (Ibid.). The business elite, on the other hand, is – and was – the LDP’s ‘principle’ client, along with farmers. The relationships between the governing party – in this case, the LDP – the state bureaucracy and the business elite is characterized by agreement and accommodation, mostly due to the lengthy tenure of the LDP in power.

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<sup>78</sup>Other parties represented in the legislature are the Japan Restoration Party, New Komeito Party, Your Party, Japanese Communist Party, People’s Life Party, Social Democratic Party, New Party Daichi – True Democrats, New Renaissance Party and the Okinawa Socialist Masses Party.

The overall policy aims of the LDP – via the state bureaucracy – may be characterized as ‘conservative’ and based on the ‘conservative capitalist model’ (Crespo, 207). In general terms, the LDP has succeeded for a number of decades to oversee “a national project of economic growth and income distribution” (Ibid.). It has also catered to its biggest interest groups and clients, which are big business and farmers (Ibid.). With respect to foreign policy, during the rule of the LDP, Japan maintained strong and close ties with the United States, not least because of the US “providing Japan with far-reaching security guarantees” in the wake of China’s growth as a military power, and the threat emanating from a ‘nuclear’ North Korea (Luckner, 102).

The Democratic Party of Japan is the second most prominent party in the Japanese parliament, and occupies the center-left of the political spectrum. It came to power in 2007 in the Diet and in 2009 in the House of Representatives, ushering in the end of a nearly half-a-century rule of the LDP. The DPJ campaigned “on a platform of change,” which included scaling back of the power of the bureaucracy. The party also sought to “enact generous new programs such as child allowance and elimination of highway tolls, reduce fiscal waste and pursue a foreign policy that is more independent of the United States” (Lipsy and Scheiner, 312). What is further interesting is that, as Krauss and Pekkanen noted, the DPJ sought “a more equal relationship with its military ally, the United States” (Krauss and Pekkanen, 14). For the discussion at hand, the DPJ’s wish to enact foreign policy more independently of the United States is of crucial importance. As will be seen below, certain members of the Japanese parliament commented on this very issue.



With respect to discussions in the Japanese parliament, secondary documents show that the bill required for Japan's accession to the Rome Statute – entitled '*Cooperation with the International Criminal Court*' – was discussed on a total of six working days in the House of Representatives – the 'lower' house – spanning from October 2005 to March 2007. These debates took place in the assembly as well in committee meetings. The House of Councillors – the 'upper' house – discussed the issue on four working days between April 13<sup>th</sup>, 2007 and April 27<sup>th</sup>, 2007, both in the assembly and during committee meetings. The lower house unanimously adopted the bill on March 29<sup>th</sup>, 2007. The upper house followed suit on April 27<sup>th</sup>, 2007 (Hein, 303).

In LPJ/New Komeito coalition government-led legislatures, the most active members of the debates were members of DPJ. One of its members, Senator Tadashi Inuzuka of the Nagasaki prefecture, was credited by many as the individual who did most to urge the government of the day to join the Court. He was considered as the “driving force within the Diet to support early ratification of the Rome Statute” (Hein, 303). In addition to the members of the DPJ, members of the New Komeito party, the Communist Party and the Social Democratic Party also spoke.

The legislators participating in the debates noted a number of key issues – and perhaps even explanations – relevant for Japan's accession to the ICC. These issues may be divided into two categories: 'legal-technical' and political. The main issue the legislators contended with was the legal-technical issues dealing with Japan's accession to the ICC. The debates in both the Japanese House of Representatives and in the House of Councillors may be characterized as interchanges mostly between members of DPJ and the parties forming the government LDP/New Komeito coalition. In the General

Assembly of the House of Representatives, an intervention by Hirofumu Ryu of DPJ is illustrative of the general thrust of the debates. His intervention, occurring on March 20<sup>th</sup> 2007, began with an inquiry as to why Japan had not acceded earlier to the RS, and why the governing coalition had hesitated on the matter. He noted that the DPJ actively worked on accession. Ryu also noted that Japan, by joining the ICC, would continue to occupy a leading role in the international community as it did during the negotiations process. Yet, he cautioned that Japan should not follow in the footsteps of the US on the matter. With respect to more substantive matters, Ryu inquired if the ICC may shield against North Korean abductions and ‘forced disappearances’.

The reply from the governing coalition, delivered by Maruya Kaori of the New Komeito Party, was that if the discussion went well in the Diet, then Japan could accede. He also noted issues relating to child soldiers, weapons of mass destructions and terrorism as being key in this debate as well. In his conception, Japan could stand as a model for such ‘naysayers’ as India, China, the US and the Russia on the matter. In the foreign relations committee, Mr. Kaori once again noted that Japan could take a leading role in the Asia-Pacific region when it came to ratifications, as the Asia-Pacific region had the lowest number of ratifications in the world. He particularly took note of Canadian initiatives in helping other nations accede to the RS.

The discussion in the House of Councilors on the matter of cooperating with the ICC was led by Senator Tadashi Inuzuka of the DPJ. During his intervention during the 166<sup>th</sup> plenary session of the House of Councilors, spanning from April 13<sup>th</sup> – 19<sup>th</sup>, 2007, Senator Inuzuka noted that by joining the ICC Japan may be a strong advocate of human security. Next, he further noted that as there were two vacancies for sitting judges at the

ICC Japan could nominate an individual and seize the opportunity to lead in this regard as well. Lastly, Mr. Inuzuka drew parallels with Japan's relationship to the Trust Fund for Victims of the ICC, and noted the connection between the ICC and the 'responsibility to protect' doctrine. Overall, Mr. Inuzuka noted that, by joining the Court, Japan would be able to capture a leading role not only within this international institution but also in the Asia-Pacific realm, and with respect to the notion of human security as well. Mr. Inuzuka's comments were addressed to the then-Foreign Minister of Japan, Mr. Taro Aso, who then deliberated on the legal-technical aspects of joining the Court. All future discussion in the House of Councillors focused on the legal-technical dimensions of joining the Court.

On the legal-technical front, Motoo Noguchi, now the Chair of the 'Trust Fund for the Victims' of the Court, noted that there were four overarching legal-technical issues at stake with respect to Japan's accession to the ICC. First, Japan needed to make fundamental changes to its Constitution in order to join the ICC. Japan had not taken part in any regional or international conflict since the end of the World War II, mostly because of its experience in that World War. In Professor Yasushi Higashizawa's words, Japan "has long been able to keep distance from armed conflicts and atrocities in neighbouring regions."<sup>79</sup> Japan did not want any mention of armed conflict in its foundational legal document.

In particular, Article 9 of the Japanese Constitution placed large "constraints...on her ability to adjudicate war crimes under the auspices of the ICC" (Ko and Meierheinrich, 237). In essence, Article 9 of the Constitution outlaws war and armed

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<sup>79</sup> Higashizawa, Professor Yasushi. "Experiences in Japan for the Coming Accession to the Rome Statute." *Symposium on the International Criminal Court*. Beijing, China. 3 – 4 February, 2007.

conflict, and makes them illegal. This meant that there was a “lack of domestic legislation dealing with matters of international humanitarian law and the possibilities and limits of the deployment of Japan’s Self-Defence Forces (SDF) abroad” (Ibid.). Therefore, a “very strong political initiative” was required to change the Constitution in order to help Japan accede to the ICC. Second, Mr. Noguchi noted that the elements of criminal law enumerated in the RS – such as “individual criminal responsibility, the responsibility of commanders and other superiors (Article 28), and non-applicability of statute of limitations (Article 29)” – did not have “direct equivalence in Japanese law” (Noguchi, 600 – 601).

The third legal issue was the notion that Japan had to decide to “criminalize the core crimes under the jurisdiction of the of the Court, i.e., whether to have domestic penal provisions that are equivalent to each and every category of crimes as provided for” in the RS, “or to deal with them with existing domestic provisions” (Noguchi, 601). Lastly, at issue was cooperation with the Court (Noguchi, 602). Japanese law – up until acceding to the RS – dealt with cooperation with states and not international organizations. In essence, Japan needed to enact legislation – or modify existing statutes – which would allow Japan to cooperate with the Court (Ibid.).

In order to join the ICC and undertake the necessary legislative changes, Japan passed the so-called *Yujihonsei* – or “the legal dispensation legislation applicable in the event of an armed attack,” (Babovic, 3) which contained a “package of seven laws that made possible, among other things, the country’s long delayed accession to the 1977 Additional Protocols of the 1949 Geneva Conventions” (Ko and Meierheinrich, 237). Without the *Yujihonsei*, Japan would have not been able to accede to the RS.

In addition to the above-outlined legal-technical issues, Japan also needed to consider financial matters as well. The budget of the Court is made up of donations from state parties to the RS. The amount each state contributes “is based on that of the United Nations’ regular budget with necessary adjustments to reflect the differences in number and the composition of States Parties” (Ibid.). This essentially meant that budget of the ICC is carried by the major financial donors to the UN. Yet, because the US did not join the Court, this meant that Japan bore a larger financial burden – and perhaps the largest, after Germany – at 19%. According to Itsunori Onodera, a member of the Justice Committee in the House of Representatives, Japan’s financial obligations were approximately “several billion yen” (Onodera, House of Representatives).

Overall then, joining the Court in essence helped Japan further advocate its “human security” agenda, and further signal to the international community that it is a “responsible member” (Babovic, 3). Legislators noted that Japan’s accession to the RS would bring international prestige in the form of being able to nominate and appoint judges to the bench of the Court. In addition, the changed security environment in the post-Cold War era, and with it, “a greater possibility of an armed attack and involvement in humanitarian crisis abroad” by the SDF brought further attention to “debates about war and Article 9 revision” (Babovic, 3). Second, and quite pointedly, joining the Court would put the US-Japanese security alliance in jeopardy. In 1952, Japan had concluded the so-called Administrative Agreement with the US. The agreement notes that “the US should have criminal jurisdiction over its military personnel stationed in Japan and that Japan has the obligation to surrender its military or other personnel to the US military authority and cooperate in evidence finding and criminal proceedings” (Babovic, 4). Due

to the fact that the Agreement did not contain the issue of extradition to the ICC, the US pressured Japan to sign additional BIAs. However, Japan withstood this pressure and did not sign the additional agreements.

It is also important to address the most pressing issue when it comes to institutions of international criminal justice and Japan's role in atrocities committed during World War II. The so-called 'Tokyo trials' of the IMTFE were often treated with 'apathy and frustration'. Joining the ICC "raised debates with respect to still unresolved issues of Japan's war responsibility," including the use of Chinese and South Korean 'comfort women' during the war (Babovic, 5). Sexual slavery is punishable by the ICC and is included as a crime within the RS. Yet if Japan joined the ICC, it needed to recognize these acts as crimes, and heed rights of reparation to the victims of these crimes. In essence, then, Japan "risked being retroactively blamed" for these acts (Ibid.). By joining the RS, Japan would undertake "indirect diplomatic apology to its neighbours and international community for the past crimes and the opportunity to 'avert the syndrome of the Tokyo Trial'" (Ibid.).

In sum, Japan's accession to the RS included overcoming significant legal – and constitutional – hurdles. Yet the prospect – and seeming prestige – of joining the Court seemed to have provided Japan with the necessary motivation. Overall, this motivation was fuelled by individual actors within the domestic Japanese domestic political sphere, namely members of The Democratic Party of Japan and Senator Tadashi Inuzuka in particular.

## **Analysis: Explaining the Policy Preferences of the US and Japan**

In this section, the aim is to understand which international relations theory is best able to explain the policy preferences of the US and Japan. Neorealism, neoliberal institutionalism, historical institutionalism, liberal pluralism and constructivism – but more precisely, liberal constructivism – will be considered. Following a brief description of each theory, and the way in which these theories are able to explain the policy preferences of the cases under consideration, it will be argued that liberal pluralism and liberal constructivism seem to best explain the preferences of the US and Japan in regards to the International Criminal Court with an independent Prosecutor.

Neorealism attempts to address issues of “security, conflict and cooperation” (Lamy, 207). States are the most relevant actors within the neorealist conception of international relations, and are afforded causal relevance. States are thought to be unitary actors – meaning that they act similarly regardless of who forms the government and what the ideological underpinning of the government in power is. States are also thought to be rational actors seeking to “maximize benefit and minimize losses” (Lamy, 210). The way in which states seek to achieve these goals is through the accumulation of material power. The main determinant of state behavior is the anarchic nature – or the structure – of the international realm. The lack of central governing structure within the international realm prompts states to seek and maintain power within the system, and to be selfish (Ibid.).

Cooperation within the neorealist conception is not possible due to the competitive and survival-focused nature of states. Within the neorealist conception, states are thought to be concerned with ‘relative gains’, meaning that they are “concerned

with how much power and influence other states might achieve ... in any cooperative endeavour” (Ibid.). Therefore, international organizations, international institutions or regimes are only established with the help and aid of the most powerful actors within the system, and only for these actors’ own benefit. These international actors are not afforded causal primacy, nor are thought to have significant effect on the way in which international relations are conducted. They are merely tools within the material ‘arsenal’ of the powerful.

Neorealism, given its emphasis on state-level analysis, on material power capabilities and the inability of states to cooperate effectively due to the anarchic nature of the international realm, does not explain why the ICC was established, nor why it employs a Prosecutor who may be able to initiate investigations on his or her own accord. Based on the core assumptions of neorealism, the United States, and possibly China, – the hegemons within the international realm – should have been the most important actors initiating the process, and only for their own benefit. This, in fact, was not the case. The empirical record shows that, from the very beginning of the process of establishing the Court – reaching back to 1994, and to the initial discussion on the subject of establishing the Court at the United Nations – the United States was ‘lukewarm’ at best, and vehemently opposed to, at worst, in aiding to establish the Court and the independent Prosecutor. The US was opposed to establishing the ICC and the independent Prosecutor because the Court was envisaged as an international organization which would detract from the sovereign right of the US to be able to prosecute individuals on its own. By the same token, US service members and civilian leaders could have come under the Court’s jurisdiction which, once again, was unacceptable to



the US. Much more support was shown for establishing tribunals which came under the auspices of the UNSC, where the US enjoys veto power. Curiously enough, the empirical record also shows that the US was not successful in attaining all it wished for during the negotiation processes. Nor was the US successful – during the administration of George W. Bush, beginning in 2000 – in turning global public, legal, political and military opinion against the Court. Simply, the US failed to ‘get all it wanted’ when it came to the establishment of the ICC and the independent Prosecutor in particular.

Now that the Court is in fact functioning, neorealists would argue that the Court, due to the very low number of trials completed, the few individuals apprehended, and, simply, due to the lack of any sort of ability to apprehend and arrest individuals on its own, lacks tangible force and relevance in international relations. Further, neorealists would argue that some of the most important situations – as well as individuals – sought by the Court did come with some sort of, albeit indirect, help from the US. The US abstained in the UNSC from referring the case of Sudan to the ICC which led to the indictment of President Al-Bashir. The US also voted in the UNSC to refer the case of Libya to the ICC. Finally, Congolese warlord Bosco Ntaganda surrendered at the US Embassy in Kigali, in Rwanda, before being transferred to The Hague for trial.<sup>80</sup> In essence, those subscribing to neorealist thought would argue that even without explicitly ratifying the Rome Statute and becoming a State Party to the Court, the help of the US was necessary for some of the most significant situations and individuals to be transferred to the Court.

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<sup>80</sup> “DR Congo: Warlord Ntaganda at ICC a Victory for Justice: Investigations of High-Level Suspects Needed to End Abuses.” *Human Rights Watch*. 25 March 2013. Web. 05 June 2013. <http://www.hrw.org/news/2013/03/25/dr-congo-warlord-ntaganda-icc-victory-justice>

While the above-outlined arguments seem valid, the empirical record shows that the ICC was established without explicit US support, and often in the midst of US maneuvering to shield itself from the legal reaches of the Court. The US asked a number of its ‘allies’ to sign so-called ‘Bilateral Immunity Agreements’ (BIA) which would assure the US that its service members would not be arrested and transferred to the Court by these allies in exchange for continued military and other aid. Some states signed these agreements, but some others did not. Notably, Japan, a long term US ally, did not sign a BIA, nor did Germany or Canada, for that matter. Therefore, power-based considerations were not enough to change the minds of states, or even dissuade states, from effectively participating in the work of the Court.

In addition, and most importantly, the focus on a state-level analysis misses a crucial point. The US policy-making establishment – including the White House, the US Congress, and the various departments and councils – were considerably divided on the issue of the Court, and more importantly on the shape the Court as an institution should take. The White House with President Clinton in the Oval Office, certain Democratic members of the US Congress, along with the State Department, were supportive of the Court, and most of its institutional design features. On the other hand, the Pentagon, the National Security Council, the Treasury Department and some members of the Republican Party occupying key posts on key committees – such as the former Senator Jesse Helms who headed the Council on Foreign Relations and Armed Services, – very much opposed the Court as a whole, and the independent Prosecutor in particular. The independent Prosecutor was opposed on the grounds that upon its institutionalization, the UNSC would not be the final arbiter in regards to which situations would be referred to

the Court. Therefore, the US would not have a direct say in who is referred to the Court and who is not. Further, the Democratic Administrations of Presidents Bill Clinton and Barack Obama were – and are – much more supportive of the Court than was the Administration of President George W. Bush. It seems to be the case that Democratic leaders and legislators are more supportive of the Court than are their Republican counterparts.

With respect to the case of Japan, at least one neorealist explanation could be – at the very least – entertained, yet with not much success. Kerstin Luckner noted that Japan's will to join the Court did not surface until the middle of 2006. The mantra of Japanese officials was that Japan had to undergo a very “complex and time-consuming domestic legal adjustment process” in order to be able to join the ICC (Luckner, 101). Luckner notes, however, that despite the purported complexity of this process, the appropriate ministries did not begin considering the issue until 2006. An alternative explanation is that “Tokyo appears to have deliberately delayed decision-making regarding its ICC membership, in order to circumvent confrontation with the US” (Luckner, 102). Japan closely observed Mexico's accession process, and once Japan saw that the US did not vehemently oppose the Mexican accession, it went ahead and began its own accession process. The US' approach towards Mexico's accession, in other words, gave Japan the confidence to pursue its own accession to the Court. Although this explanation is quite plausible, as Luckner herself notes, it is “difficult to prove” (Luckner, 102). Further, the reference to Mexico's accession process does not explain why Japan supported the independent Prosecutor in the first place.

Neoliberal institutionalism, for its part, “subscribes to a state-centric perspective, which like [neorealism] considers states to be unitary, rational, utility-maximizing actors who dominate global affairs” (Sterling-Folker in Dunn, *et al.*, 117). According to neoliberalism, “states are treated as unified entities with particular, specifiable goals, rather than composites of many different domestic actors and competing interests” (Ibid.). States are thought to be self-interested actors which seek to maximize their own utility-functions. However, neoliberal institutionalism places greater emphasis than does neorealism on “increased interaction and informational exchange among self-interested individuals...” (Ibid.). Institutions, therefore, are very well suited for the purposes of cooperation. Jennifer Sterling-Folker notes that “the structure or design of international institutions plays an important role in determining the extent to which collective goals can be realized” (Sterling-Folker in Dunn, *et al.*, 118). In her conception, actors are able to establish institutions in order to “more effectively obtain collective interests” (Ibid.).

In the case of the US, the primary objective was to establish a Court which could not, in any fashion or form, indict US service personnel, military or civilian leaders. National self-interest as a function of self-preservation therefore played a larger role among US policy makers than the establishment of an institution which would allow for a more efficient forum for cooperation. In the case of Japan, once again, protecting the national interests seems to have played a larger role than establishing the Court. Further, in either case, it was sub-state actors who provided the policy directives for their respective delegations. Therefore, neoliberal institutionalism is not particularly well suited to explain policy preferences in either one of these cases.

Turning the attention to historical institutionalism, institutions which have been developed over time are given causal primacy over particular actors. The earlier stages in institution-building, in particular, will have long lasting effects and will have causal relevance in the operation and longevity of institutions. In historical institutionalist analysis, domestic and international institutions matter more than agents who may have established these institutions.

The US was very actively involved in establishing prior incarnations of the institutions of international criminal justice. The US was at the forefront of establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), as well as the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE). There are a number of institutional continuities between these institutions and the ICC – including the role and functioning of the Prosecutor. Yet, just as there are continuities, there are disjunctures as well. In particular, the ICC is an independent Court, especially independent from the UNSC. All of the tribunals, on the other hand, were established via UNSC resolutions or through cooperation and agreement with a number of other states actors, as was the case with the IMT and, to a lesser extent, the IMTFE. More importantly, the Prosecutor of the ICC is independently able to initiate investigations on his or her own. The work of all the other Prosecutors was curtailed, at the very least by the temporal and territorial parameters of the conflicts they addressed.

Turning to a discussion regarding domestic institutions, the US is often heralded as bastion of liberal democracy, the rule of law, due process in litigation and a state which places great emphasis on seeking justice for past and present wrongdoings. When

the process of establishing the Court and the Prosecutor was viewed from a purely geopolitical and geo-strategic perspective, it was clear that the US would, at most, be a reluctant participant. However, the fact that the US was so vehemently opposed to the establishment of the Court seemed to run contrary to the political and legal values and ideals underpinning its own institutions. Viewed from an institutional perspective, the democratic and legal institutional tradition in the US reaching back at least a few hundred years did not seem to have weighed heavily on the minds of those policy and law makers who were deciding US policy in regards to the ICC.

In the case of Japan, the liberal democratic institutional tradition and the respect given to the rule of law did not seem to have swayed the Japanese bureaucracy, nor the government of the day headed by the Liberal Democratic Party of Japan, to accede more rapidly to the ICC. In an institutional sense, it was, however, significant that the delay in accession was a function of ascertaining that Japanese law complies with the tenets of the RS, which, in and of itself, required significant and foundational Constitutional – and even legal-cultural – changes. Viewed from this perspective, the institutional aspects of accession were, in fact, to be blamed for the delay in accession to the RS. Japanese institutions did not seem to allow for a rapid accession. It was therefore domestic actors such as key members of the Democratic Party of Japan, especially in the persona of Senator Tadashi Inuzuka, who were instrumental in ensuring that Japan finally acceded to the RS.

Liberal pluralism and liberal constructivism seem to provide the most plausible explanation for the particular policy preferences of the US and Japan. Liberal pluralism rests on the notion that it is domestic actors – parties, government agencies, civil society

groups – that are at the forefront of government policy-making. These actors would compete within the domestic political forum to represent the interests of a particular ‘state’. State preferences then are a function of the policy preferences – representing particular interests – of those domestic actors which are dominant in the domestic political sphere.

The US opposition to the independent Prosecutor – and other institutional features of the ICC – can most certainly be explained by appraising the role played in the policy making process by domestic actors. In the case of the US, the White House with President Clinton at the helm, the Departments of Defence, State, Treasury and Justice, along with certain key members of the US Congress were the key actors in setting, and then later helping to steer, US policy with respect to the independent Prosecutor and then the ICC as a whole. The White House, certain members of the Democratic Party and the State Department were very much open to the idea of the US joining the Court. Members of the US State Department were involved in the work of the Preparatory Commission following the Rome conference where such documents as the Rules of Procedure and Evidence (ROPE) of the Court were negotiated. In addition, President Clinton outright noted in a speech to the UN General Assembly on September 22<sup>nd</sup>, 1997 that “before the century ends, we should establish a permanent international criminal court to prosecute the most serious violations of humanitarian law (Ferencz 1997, 18). However, it seemed to be the case that the final arbiter on US policy with respect to the Prosecutor, but more importantly, the ICC as a whole, was the Department of Defence. Michael Scharf notes that “it was no secret that the serious dissension within the U.S. delegation was ultimately overruled by William Cohen, Secretary of Defence and former Republican congressman”

(Scharf, 102). Scharf further notes that “there has been conjecture that Cohen was influenced by Senator Jesse Helms (R-NC), a vocal opponent of the ICC” (Ibid.).<sup>81</sup>

Further, members of the US Congress and House of Representatives – and in particular the late Jesse Helms, and Bob Carr – were in vehement opposition to Prosecutor and the ICC. The *New York Times* reported on July 20<sup>th</sup>, 1998, that “the real reason for the U.S. position may have been Senator Jesse Helms, who said any treaty exposing Americans ...[to] a court will be ‘dead on arrival’ (Lewis, New York Times). Lawrence Weschler also contended that during the Rome conference:

The U.S. delegation seemed increasingly gripped by a single overriding concern. Senator Jesse Helms, the Republican head of the Foreign Relations Committee, had already let it be known that any treaty emerging from Rome that left open even the slightest possibility of any American ever, under any circumstance, being subjected to judgement or even oversight by the Court would be ‘dead on arrival’ at his committee (Weschler, 91).

Policy and lawmakers from Canada and the United Kingdom were of the same opinion. Lloyd Axworthy, the then-Foreign Minister of Canada noted during a testimony in front of the Senate Foreign Relations Committee that the American position was centred around the issue of complementarity. He further noted that an ‘exemption’ is sought by the US on the matter, which is “driven in part by the Congress.”<sup>82</sup> Axworthy noted that “Senator Helms has introduced a bill that is outlandish in terms of its provision of cutting off assistance to any country that ratifies the statute, with the exception of NATO allies.” Axworthy further noted that this bill is in line with “that very right-wing Republican

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<sup>82</sup> Andreychuk, Hon. A. Raynell. “Evidence - Proceedings of the Standing Committee on Foreign Affairs.” *Debates of the Senate (Hansard): Edited Hansard \* Number 080 (Official Version)*. Parliament of Canada, 27 June 2000. Web. 05 June 2013. <http://www.parl.gc.ca/HousePublications/>



attitude that does not believe in the UN, international institutions or anything else.” Senator Reynell Andreychuck, a Conservative Senator, noted on June 27<sup>th</sup>, 2000 during the proceedings of the Canadian Senate Standing Committee on Foreign Affairs, that in the US, the issue of the ICC “has been in the hands of one department” (Ibid.).

In the House of Lords of the United Kingdom, Lord Moynihan noted similarly that “in a sharply-divided Congress, where Republicans have vowed that they will never ratify the treaty and the chairman of the Senate Foreign Relations Committee, Senator Jesse Helms, has promised to work to erase ‘swiftly and surely’ President Clinton’s signature, the ICC and the international system of justice is likely to become a pawn in a vicious game of partisan politics in which clashes over the court’s impact on US national interests and the President’s constitutional powers to conduct foreign policy will raise the stakes sky-high.”<sup>83</sup> Lastly on this matter, Lord Lester of Herne Hill noted that the fact that the US Senate must approve international treaties is an impediment to the US joining the Court. In his conception, “it is precisely that which has caused a prevailing conservative majority in the Senate,...to tack on to international treaties amendments of their own in order to frustrate the purpose of government in entering into them on the international plane.”<sup>84</sup>

A further reason why Clinton’s views did not prevail was the seeming preoccupation of President Clinton with trade and personal matters that detracted from a balanced attention to the merits and drawbacks of the Court for the US. The other

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<sup>83</sup> Moynihan, Lord. “House of Lords Debate – Second Reading: International Criminal Court.” *International Criminal Court (Hansard, 20 March 2001)*, Library of the House of Lords, 20 March 2001. Web. 06 May 2013. <http://www.hansard.millbanksystems.com/lords/2001/march/20/international-criminal-court.html>

<sup>84</sup> Hill, Lord Lester of. “International Criminal Court Act 2001.” House of Commons Debate – Third Reading *International Criminal Court Act (Hansard, 11 May 2001)*, Library of the House of Commons, 11 May 2001. Web. 19 Feb. 2013. <http://www.hansard.millbanksystems.com/search/%22International%20Criminal%20Court%20Bill%20>

departments involved in policy making all throughout the process – namely the Departments of Justice and Treasury – showed positive or negative interests to particular aspects of the Court. Due to their very specific interests in the certain institutional and legal aspects of the Court, these departments gave way to others, namely the Pentagon. With respect to the Department of State, it seemed to have only played the intermediary role between the different organs of the US government in Washington.

The Pentagon's perspective on the Court in general, and the Prosecutor in particular, can very well be explained by taking a close look at the changed security environment the US found itself in after the end of the Cold War. As the only remaining 'superpower' – or hegemon – within the international realm, the US was compelled to be involved in a number of different military as well as international criminal justice initiatives. The US was intimately involved in conflicts in Bosnia, Rwanda and, to a lesser extent, Somalia. With respect to institutions of international criminal justice, the US – through the UNSC – was closely involved in the setting up of both the Yugoslavia and Rwanda tribunals. In the midst of talks regarding military overextension, and 'tribunal fatigue' in terms of monetary issues involved in establishing functioning institutions of international criminal justice, it is, to an extent, understandable why the Department of Defense – or the Pentagon – was less than inclined to support the establishment of a Court which would be able to – at least theoretically – investigate its own civilian and military personnel.

Japan's hesitance with respect to acceding to the Rome Statute and joining the Assembly of State Parties can also be explained by a focus on domestic political actors. In the case of Japan, the Foreign and Defence Ministries, the government represented by

the Liberal Democratic Party of Japan, and the Democratic Party of Japan were the main actors involved in the process of determining if, and when, Japan would join the Court. The key puzzle with respect to Japan's hesitance to accede to the Rome Statute is centered around, on the one hand, Japan's very active involvement in the process of establishing the Court within the international forum, and on the other, stalling for nearly a decade to join the very same institution it was so intimately involved in establishing. In order to explain this puzzle one must consider the key role of domestic political actors in Japan, and, to some extent, the domestic processes of acceding to an international organization. It seemed to have been the case that the governing coalition needed the insistence and the proverbial 'push' from the Democratic Party of Japan and one of its key Senators, Tadashi Inuzuka, to table the bill in the lower and upper houses of parliament. The unanimous acceptance of the bill clearly shows that Japan was more than ready to accede to the RS. The vote also alludes to the fact that the governing coalition and the relevant bureaucracy waited perhaps too long to join the Court.

Finally, constructivism and liberal constructivism also add to the explanatory calculus. Constructivists emphasize that social reality is constructed by the individuals navigating this reality. The intelligibility and comprehension of social facts then gives meaning to these facts within particular temporal contexts. The meaning of social 'objects' will be 'imbued with social values, norms, and assumptions rather than being the product of purely individual thought or meaning' (K.M. Fierke in Dunn, *et al.*, 179). By focusing on temporal context, constructivists are able to better explain social – or political – change in particular. Overall, then, "international politics is a 'world of our making'" (Onuf in K.M Fierke, 180). Constructivists emphasize agency in international

relations, where “actors make choices in the process of interacting with others and, as a result bring historically, culturally, and politically distinct ‘realities’ into being ... states and other actors do not merely react as rational individuals but interact in a meaningful world” (K.M. Fierke, in Dunn, *et al.*, 180). In essence, international relations are “a social construction rather than existing independently of human meaning and action” (Ibid.).

In the case of liberal constructivism, Harnes notes that ‘ontological priority’ is given to individual actors. Liberal constructivism then focuses on “how ideas shape the preferences of actors; both by framing how they perceive their interests and values as well as by constructing identities which, in turn, further frame these perceptions. Therefore, in contrast to liberal-pluralists, ideas are not simply viewed as an extension of material interests” (Harnes, 24). In other words, and in opposition to a more liberal-pluralist explanation outlined above, ideas are central to the constructivist explanatory calculus because ideas shape the interests and values of actors. The preferences of actors, then, will be made up – or constructed – of ideas about actors’ interests and values.

Constructivism – but more importantly, liberal constructivism – provides a quite accurate explanation as to why states established an independent Prosecutor and the ICC in general. Liberal constructivism would note that the ideas particular actors had about the Court and the independent Prosecutor were a function of the self-perceived identity of actors and the meaning these actors attributed to establishing the Court and the independent Prosecutor.

In the case of the US, it viewed itself as needing to survive in a besieged international realm, needing to protect itself – and its personnel – in an environment

which was seen as nothing less than hostile to its national interests – especially viewed from the vantage point of the Department of Defence. This conception of the national interest was also a function of a self-image which was inward-looking, protectionists and ‘exceptionalist’ as opposed to ascribing to an identity which would be more global or ‘cosmopolitan’ in kind. The latter formulations of national identity were more in line with an identity which held the rule of law as sacrosanct and which viewed the US as the bastion of democracy and democratic global citizenship. At issue here is that the former vision of ‘exceptionalism’ and ‘protectionism’ was supported by key government agencies such as the Pentagon as well as the Republican-dominated Congress. The latter vision was more supported – or was seen as more viable – by a Democrat-led US Administration, the White House, the State Department and certain Democrat members of the US Congress and House of Representative.

It must be pointed out that the idea of the ICC as a whole was always supported in the US but not in the institutional form in which it was presented initially, or at the end of the Rome Conference. It was never accepted wholesale by any domestic actor. At issue, however, is the fact that certain actors – such as the State Department, the White House led by President Clinton, and the Democratic members of the US Congress and House of Representatives – were more inclined to accept the ICC than members of the Pentagon and the Republican members of the legislatures. The actions of President Bush on the one hand in actively opposing the Court during his tenure in the White House, and later the actions of the Obama Administration in directly and indirectly supporting the work of the ICC, on the other, shows the difference in the ideational and valuational differences between the two Administrations on the subject of the Court and the Prosecutor.

Finally, in the case of Japan the Liberal Party of Japan and the Democratic Party of Japan had significantly different views on the subject of the Court. The delay and the overtly cautious stance taken by the Liberal Party of Japan underpinned the fundamental difference in stances taken between the two domestic actors. The Democratic Party of Japan was more concerned with Japan's international image and its ability to exert its influence internationally as opposed to ensure, for example, how close Japanese foreign policy is to that of the US on the matter, or if the ICC could in fact be used to shield Japanese citizens from the reach of the North Korean regime. In other words, in the case of Japan it is also clear that the actors supporting accession had fundamentally different views in regards to Japanese foreign policy, how Japanese national interests were conditioned by joining the Court or not, and even in regards to state sovereignty. The government of the day saw the national interest as a function of a well-protected and nearly inward-looking policy regarding the ICC. Japan did join the Court, though it might have missed a number of opportunities – including the opportunity to be a leader in the Asia-Pacific in its respect for international criminal justice – by joining nearly a decade later. Had Japan joined the Court earlier, it could have provided valuable financial backing for the Court at the initial stages of the Court's establishment, a time period which is crucial in the development and establishment of any international organization.

## **Conclusion**

In the case of the US and Japan, it was domestic political actors who were responsible for policy formation regarding the ICC with an independent Prosecutor. In the US, it was the Pentagon and certain members of the US Congress whose views were constantly being

reflected in US policy regarding the Court. In the case of Japan, the government formed by the Liberal Democratic Party of Japan seemed to have dictated Japanese policy with regards to the Court. Yet, in the case of Japan it was another individual, Tadashi Inuzuka of the Democratic Party of Japan who continued to advocate – successfully at last – for the Japan’s accession to the Rome Statute. Therefore, liberal pluralism and liberal constructivism, with their emphases on the role of agents and ideas, seem to provide the best explanation for the position, and opposition of the US and Japan in regards to the ICC with an independent Prosecutor.

## **CHAPTER 6: WHY DID THE SUPPORTERS WIN IN ROME?**

The establishment of the ICC with an independent Prosecutor was an “extraordinary development in a very short time”.

The Rome conference was the “most document intensive conference ever held by the UN – over 700 documents were translated into the official UN languages (Hans Corell, the former Under-Secretary General of the United Nations, July 11, 2011).

Do you realize how long the world has been straining towards this moment – since after World War I, and after World War II. It’s extraordinary. Who’d have thought it, even ten years ago, that you could get one hundred twenty countries to vote for holding their militaries personally liable before a Prosecutor with even a limited degree of independent initiative? I mean, it’s unprecedented, it’s absolutely unprecedented. One day it may even be seen to have been a birth of a new epoch (Michael Posner of the Lawyers Committee for Human Rights, in Weschler, 109).

The aim of this chapter is to explain why the supporters of the ICC with an independent Prosecutor won the diplomatic, political and legal battle in Rome. The emphasis will be placed on such elements of the negotiations as cooperation and coalition-building – or the lack thereof – in explaining why the supporter won, and why the opponents lost the legal and political battles in Rome. In broad theoretical terms, the discussion will juxtapose agency – as a critical ingredient of coalition-building – and structure as a function of historical, legal, institutional factors and the distribution of power affecting the outcome of the negotiations. For the purposes of this analysis, five particular theories of international relations will be utilized, namely neorealism, neoliberal institutionalism, historical institutionalism, constructivism and liberal pluralism. Neorealism would posit that the Court with an independent Prosecutor would not come into existence without the support of the hegemon, the United States. Neoliberal institutionalists would posit that state cooperation in establishing a Court with an independent Prosecutor was the initiative of states in order to decrease coordination issues, increase information flow and,



in essence, built continuous trust. Historical institutionalists would argue that the Court with an independent Prosecutor was established by ‘like-minded’ states which had prior domestic legal, political, and institutional experience with such an institutional design. Constructivists would argue that the Court was established within a social realm which contained a number of fundamental norms which have been institutionalized and accepted as appropriate. Finally, liberal pluralists would argue that the Court and its Prosecutor were established with the coalescence, agency, and initiative of individuals representing ‘like-minded’ governments whom had a number of convergent interest-based and norm-based stakes in the establishment of the ICC with an independent Prosecutor.

In order to provide an answer to the research question posited above, the chapter will begin with a discussion on the pre-Rome negotiating process. Second, emphasis will be placed on the institutional arrangements which preceded the establishment of the ICC, as well as on the development of human rights, and other norms, which provided the valuational backdrop. Emphasis will further be placed on the negotiation process and dynamics in Rome which will provide valuable insight into the reasons why the ICC with an independent Prosecutor was established. Lastly, the five different international theoretical explanations will be entertained in order to discern which one provides the best narrative for the establishment of the Court.

The ICC with an independent Prosecutor was established by individuals who, by the virtue of their actions, signalled a deep-seated and principled commitment to the establishment of the Court. These individuals originated from states that were represented by governments which shared in these principles and beliefs. It will be

argued in this chapter that, given the activism, effort and skill of individual actors during the pre-Rome and Rome process, IR theories such as liberal pluralism and liberal constructivism provide the most appropriate explanation – and answer – for the question posed in this chapter, namely, why the supports won.

### **Predicting the Victors via International Relations Theories**

The aim in this section is to discern how the five theories mentioned above would predict why states were able to establish the ICC with an independent Prosecutor. The overarching conceptual dichotomy within this discussion is between explanations – or theories – which emphasize the primary importance of structural explanations, and those theories and explanations which point to the initiative and agency of particular actors as primary causes.

Neorealism posits that international institutions are established if and when it is in the interest of hegemonic actors. Neorealism points to the overall distribution of power as dictating outcomes of the negotiations. In this conception, great powers should generally get their way. Therefore, neorealism does not seem to be able to provide a coherent explanation. In fact, neorealism is better positioned to provide an explanation as to why the US, China and even Russia did not join the Court. The two institutional theories – neoliberal institutionalism and historical institutionalism – point to the importance of institutional factors when predicting why states were able to establish the ICC. Neoliberal institutionalist theory would point to the shadow of the future as well as to path dependence from the tribunals in the 1990s as explanatory variables. They would also point to what issues were discussed during the negotiations, issue-linkage as well as the procedural ways in which the negotiations took place in Rome (Sterling – Folker in

Dunne, 124). This theory would further point to the motivation of state actors to establish more cost-effective means by which individuals would be brought to justice as an explanatory factor (Ibid., 126). Historical institutionalists would also point to path dependence and to particular states as being the catalysts in establishing the ICC, states which led the charge in fashioning the ICC to their own institutional preference.

In contrast to the more structural and institutional explanations briefly outlined above, liberal constructivism and liberal pluralism provide additional and deeper explanations as to why certain states, represented by key individuals, were successful in bringing the Rome conference to a successful conclusion. Liberal pluralism points to agency of individual and states representatives during the negotiations, as well as to the persuasive role of NGOs. Constructivist theory would point to the role of norms and the socialization of key actors as key components to the explanatory narrative. In the final analysis, with their emphasis on the activism and the identity and socialization of individual agents and actors, liberal pluralism and liberal constructivism provide the most complete answer to the questions posited above.

### **The Outcome: Who Won and Who Lost**

At the end of the fourth week of the conference, on July 17<sup>th</sup>, 1998, Ambassador Philippe Kirsch of Canada, the Chairman of the Committee of the Whole (CW) “brought the meeting to order at 7:15...and presented the Draft text as a whole, hoping to fend off amendments of any sort” (Weschler, 109). India and the United States both proposed strategic amendments which could have brought the success of the entire conference into jeopardy. India wanted to ensure that the use of nuclear weapons was criminalized (Ibid.). If successful, this would have meant that none of the states that possess nuclear

weapons would vote for the Statute. The United States wanted to introduce language whereby non-State Parties would be completely shielded from the reach of the Court. In both cases, Norway – as a strategic initiative of the ‘like-minded group’ – tabled ‘non-action’ motions and both amendments were voted down with overwhelming majorities. Thirty minutes later, state delegations voted 120 to 7, with 21 abstentions, to accept the Rome Statute of the very first International Criminal Court, which would employ an independent Prosecutor. Despite US and Chinese opposition, the majority of states voted for the establishment of the Court.<sup>85</sup> Irrespective of US objections, along with diplomatic and political maneuvering - and the attempted revisions – the Statute was adopted.

Overall, then, the adoption of the Rome Statute and the establishment of the ICC with an independent Prosecutor despite US, and - to a lesser extent – Chinese opposition presents a substantial challenge to realist, but more importantly, neorealist theory. The Court should have not been established without explicit US – or hegemonic – support. Further, according to neorealism, the Court should not be – even if established – a relevant actor within the international realm. However, not only is the Court a permanent and relevant fixture within the international realm, but it has also enjoyed indirect US support, even through the UNSC, as was the case when the Council referred the situations of Sudan and Libya to the Court.

### **Context and Norms: Old, New, Domestic and Global**

In order to investigate the importance and significance of the establishment of the permanent International Criminal Court with an independent Prosecutor, an exposition of

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<sup>85</sup> The other three members of the permanent five members of the UNSC voted for the statute, including the Russian Federation (Weschler, 108).

the global political and normative context is warranted. The Nuremberg and Tokyo trials at the conclusion of World War II seemed to have provided a blueprint and momentum for a permanent Court. However, the bipolar power struggle between the United States and the Soviet Union prevented the international community from making progress on the issue. As Elizabeth Riddell-Dixon notes, “the creation of the International Criminal Court would have been impossible during the Cold War because of great power opposition” (Riddell-Dixon, 1090). The fall of the Berlin Wall, along with the fundamental changes within the international realm, provided an opportunity to establish the Court.

The end of the Cold War, and the thawing of the relations between the Soviet Union and the United States, can be seen as the key catalysts which enabled the international community to consider purposefully the establishment of an international criminal court. William Schabas and late Christopher Keith Hall of Amnesty International noted in interviews that this period can be characterized as a “new political landscape” and in the “afterglow of the Cold War” (Schabas and Hall, Interview). In addition, Benjamin Ferencz, one of the Prosecutors at Nuremberg and a strong supporter of the ICC, remarked that, as the ILC was considering the notion of establishing an international criminal court at the beginning of the 1990s, “Iraq had completed the unlawful annexation of its peaceful neighbouring state of Kuwait. Iraqi troops were busy murdering, torturing, raping, pillaging, burning and committing every conceivable war crime and atrocity against innocent civilian. At the same time, terrorism, drug trafficking and other crimes against humanity continued unabated” (Ferencz, 385).<sup>86</sup> International

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<sup>86</sup> Ferencz, Benjamin. “An International Criminal Code and Court: Where They Stand and Where They’re Going,” *Columbia Journal of Transnational Law*, 30 (1992): 375 – 399, p. 385.

public opinion deeply condemned these actions. Simultaneously, the US President at the time, President Bush Sr., “warned Iraq to remember Nuremberg; Britain’s Margaret Thatcher (as well as Mrs. Bush) had been more explicit in calling for prosecution before a Nuremberg-type tribunal” (Ibid.). In addition, Hans-Dietrich Genscher, the Foreign Minister of Germany at the time told the UN General Assembly, ‘We call for an international court of justice of the United Nations where crimes against humanity, crimes against peace, genocide, war crimes and environmental criminality can be prosecuted and punished’ (Ibid.). Even though there were calls for international prosecution of individuals at this time, these calls were made with the sanctity of state sovereignty in mind.

Underpinning, supplementing and motivating these calls for action with regards to Iraq’s annexation of Kuwait – and later its use of chemical weapons against the Iraqi Kurd population – was the realization that, on the one hand, a change in the nature of conflict had also occurred in the post-Cold War era. A further realization was that citizens of certain states needed explicit protection from agents of the governments who were traditionally thought to protect them. A number of so-called ‘failed states’ and ‘failing states’ came to exist – and were labelled as such – where governing was either impossible for the governments in power, or the government itself was endangering the safety and well-being of citizens it was commissioned to protect.

In key terms, the traditional notions of state security and state sovereignty as guiding principles were fundamentally altered. An alternative principle of state security was needed, a principle that would be able to encompass the protection of individuals, especially in situations where their safety was endangered by the state. In 1994, the

notion of ‘human security’ was brought to the fore via the United Nations Development Program (UNDP). Later on this principle came to animate the foreign policies of Canada, Norway and a number of other states. The developing norm of ‘human security’ was later one of the guiding principles and norms which was institutionalized with the establishment of the permanent International Criminal Court.

The sacrosanct nature of state sovereignty came to be challenged in direct ways in the post-Cold War international realm. Hans Corell, the Under-Secretary of the United Nations from 1994–2004, noted in an interview that in general terms, those who were being ruled needed protection from those who ruled over them (Corell, Interview). Supplementing the more general notion of human security was the additional doctrine of the ‘responsibility to protect’ (R2P), and these two principles were operationalized via the notion and praxis of intervening on humanitarian grounds – or humanitarian intervention. Humanitarian intervention was undertaken via the notion that the international community – in some cases – is justified in overriding the principle of non-intervention on the territory of a sovereign state if and when that state is ‘unwilling or unable to’ govern and protect its citizens. This exact notion of intervening when a state is ‘unwilling or unable to do so’ came to be enshrined in the preamble of the Rome Statute of the International Criminal Court. This principle also guides justifications with respect to what situations warrant triggering the jurisdiction of the Court.

### **Learning from Prior Institutions**

Prior to the establishment of the ICC, there existed – and still exist – a number of so-called *ad hoc* institutions of international criminal justice. These institutions were dubbed ‘ad hoc’ as they were established to address a specific conflict and at a specific,

determined and finite period in the past. Starting from the conclusion of World War I and the mid-1990s, “there were five ad hoc international investigative commissions, four ad hoc international tribunals, and three internationally mandated or authorized national prosecutions arising out of World War I and World War II” (Bassiouni, 11).<sup>87</sup> These institutions were set up “to appease public demand for a response to the tragic events and shocking conduct during armed conflicts” (Ibid.). From the middle of the 1990s, there were seven international criminal tribunals created (Artz, 226).<sup>88</sup>

The 1919 Commission was established by the Allies at the 1919 Preliminary Peace Conference in Paris. On the agenda was the “surrender of Germany and a peace treaty” as well as the possible prosecution of Kaiser Wilhelm II of Germany and Turkish officials thought to have been responsible for war crimes and violations of the customs of war (Bassiouni, 14 -15). Articles 227, 228 and 229, respectively, set out an ad hoc tribunal to prosecute King Wilhelm II, as well as German military officers for acts committed during the war (Ibid.). Out of this preliminary conference emerged the “Treaty of Versailles – or the Treaty of Peace between the Allied and Associated Powers

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<sup>87</sup> The few ad hoc investigative commissions were: i) the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties; ii) the 1943 United Nations War Crimes Commission; iii) the 1946 Far Eastern Commission; iv) the 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia; v) the 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate War Crimes and other Violations of International Humanitarian Law in the Territory of Rwanda. The four tribunals have been the following: i) the 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater (IMT); ii) the 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East (IMTFE); iii) the 1993 International Criminal Tribunal for the Former Yugoslavia (ICTY); iv) the 1994 International Criminal Tribunal for Rwanda (ICTR). Finally, the three national prosecutions included the following: i) 1921 – 1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles (Leipzig Trials); ii) 1946 – 1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10; and finally, iii) 1946 – 1951 Military Prosecutions by Allied Forces in the Far East Pursuant to Directives of the Far Eastern Commission (‘From Versailles’, Bassiouni, 13, Footnote). Bassiouni further notes that “there has been one nongovernmental investigatory commission: The Carnegie Endowment for International Peace established a commission to investigate alleged atrocities committed against civilians and prisoners of war during the First Balkan War of 1912 and the Second Balkan War of 1913” (Bassiouni, 53) .

<sup>88</sup> The seven tribunals were the following: International Criminal Tribunal for the Former Yugoslavia (ICTY, 1993); The International Criminal Tribunal for Rwanda (ICTR, 1994); ‘Regulation 64’ Panels in the Courts of Kosovo (1999); Special Panels for Serious Crimes for the District Court of Dili (East Timor, 2000); the Special Court for Sierra Leone (SCSL, 2002); the International Criminal Court (2002) ;and the Extraordinary Chambers in the Courts of Cambodia (2004) (Artz, 236, Notes).



and Germany – signed on June 28, 1919” (Bassiouni, 14 – 15). The commission establishing the Treaty of Versailles investigated war crimes allegations and it “submitted a list of 895 alleged criminals” in 1920. It also sought to charge Turkish officials as well for ‘crimes against the law of humanity’ based on “the Preamble of the 1907 Hague Convention” (Bassiouni, 16). Although it did carry much weight, the prosecution stemming from the treaty did not come to fruition.

The next institutional approach pursued by the Allies took place at the Palace of St. James in 1942 when the Allies established the United Nations War Crimes Commission (UNWCC). This commission essentially led to the establishment of the International Military Tribunal at Nuremberg (IMT) (Ibid., 21). The intention of the Allies to prosecute war criminals was further cemented with the Moscow Declaration of 1943, which was signed by Churchill, Roosevelt, and Stalin. At that point, there was less thought about an institutional approach, and more of capital punishment for the perpetrators. Nearly all three sides agreed to this course of action, with the only dissent coming from the United States (US), even after President Truman replaced President Roosevelt. Following the work of the commission and the Declaration, the IMT was essentially established on August 8<sup>th</sup>, 1945 by way of the London Agreement. It was signed by the four major Allied powers as well as nineteen other states.

The London agreement did contain the charter of the new tribunal as well. The charter essentially reflected the 1907 Hague Convention and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (Ibid., 25 – 26). One additional Law – the Control Council Law No. 10 – further contributed to the codification of the prosecutions, as it allowed the Allies to prosecute German military

personnel within their own respective zones (Ibid., 29). The infractions subject to prosecution were to be i) crimes against peace; ii) war crimes; iii) crimes against humanity.

Turning one's attention to the Far East, the Tokyo trials were preceded by the Far Eastern Commission which was agreed to in Moscow in December of 1945. It was comprised of eleven states<sup>89</sup> and the Commission was based in Washington. The Allied Council of Japan was the local governing body taking directives from Washington. The Council was made up of the US, the United Kingdom, China and Russia. Its mandate was more political as opposed to investigative, as it sought to establish the occupation policy in Japan. The actual Tribunal – dubbed the International Military Tribunal for the Far East (IMTFE) – and its Charter, issued as an order by General Douglas McArthur, the Supreme Commander for the Allied Powers were issued and signed on January 19<sup>th</sup>, 1946. As far as the defendants were concerned, they did not, for example, include the Emperor Hirohito, whose prosecution and eventual trial were bypassed out of political considerations (Bassiouni, 35).

Bassiouni dubs the years between the end of the Control Council Law No. 10 proceedings in 1955 - as well as the end of the proceedings in Tokyo – and the establishment of the tribunals in the former Yugoslavia and Rwanda in 1992 as 'The Years of Silence'. During this period, according to the author, the 'rules of the Cold War' dominated. There was very little progress toward a systemic approach to international criminal justice due to the political 'tug of war' displayed by the U.S. and the Soviet Union and their allies. In addition, according to Michael P. Scharf, "there

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<sup>89</sup> These states were: Australia, Canada, New Zealand, Great Britain, India, the United States, the Philippines, China, the Soviet Union, France, and the Netherlands. However, the Commission further "received evidence relating to Manchuria, the People's Republic of Mongolia, Thailand, Cambodia, Burma, and Portuguese possessions in East Asia" (Pritchard, 27, Footnote).

were no wars in which a coalition, broadly supported by other members of the international community, had defeated an obvious aggressor and violator of the laws of war and humanity so decisively as to bring about its complete surrender and subjugation. The conventional wisdom was that only defeated war criminals were susceptible to international justice” (Scharf, 97).

With the outbreak of the conflict on the territory of the former Yugoslavia and later Rwanda – and the Cold War in the attic of history – the United Nations (UN) and the United Nations Security Council (UNSC) needed to act. Hardships and setbacks notwithstanding, the Security Council did establish the Tribunal on May 3, 1993 when it passed Resolution 827, which also included a draft Statute of the Tribunal. The ICTY officially came into existence on May 25<sup>th</sup>, 1993. One must pay particular attention to the crimes the Statute of the ICTY is able to prosecute: “individual criminal responsibility, including that of Head of State...[as well as] ... 1) grave breaches of the Geneva Convention of 1949; 2) violations of the laws or customs of war; 3) genocide; and 4) crimes against humanity” (Ibid., 43). A further feature of the tribunal was that it applied to everyone who violated humanitarian law, as opposed to only a select few, as in the case of the IMT and the IMTFE.

The Rwandan Commission of Experts was established in July 1994 by the SC passing Resolution 935. The Commission was charged with investigating possible genocide as well as ‘grave violations of international humanitarian law’ (Ibid., 46). The Rwandan commission had a total of three weeks to complete its reports and very limited resources. The Report submitted to the Secretary-General “was based on reports made by other bodies, and other media and published reports” (Ibid.). It came into existence

temporarily during 1994 – from January 1<sup>st</sup> until December 31<sup>st</sup> – but it was not until 1996 that the ICTR became fully operational. Due to the nature of the conflict – a civil war fought between two ethnic groups within Rwanda – neither the Geneva Conventions nor the laws regulating customs of war could be appealed to. The type of crimes prosecuted, therefore, were genocide and crimes against humanity.

Certain other types of institutions of international criminal justice were set up by the UN should also be mentioned here. The first one is the Special Court for Sierra Leone, which was established on January 16, 2002. The UN and the government of Sierra Leone established the Court to try individuals responsible “for crimes committed in Sierra Leone during the country’s violent conflict after 30th November 1996” (Chronology, ICC). In the case of Cambodia, the negotiations between the United Nations, with Ambassador Hans Corell, as the chief UN negotiator, and the Government of Cambodia, represented mostly by Prime Minister Sok An, showed little progress. The negotiations lasted from June 21<sup>st</sup>, 1997 until February 8<sup>th</sup>, 2002, yet a settlement could not be reached between the parties (Corell, Interview). In the meantime, however, the leader of the Khmer Rouge, Pol Pot, was brought to trial but in front of a national court. Ultimately, the Khmer Rouge Tribunal is administered by the government of Cambodia.

In the case of East Timor, the UN established the United Nations Transitional Administration in East Timor (UNTAET) on October 25, 1999 in order to “administer the Territory, exercise legislative and executive authority during the transition period and support capacity-building for self-government.”<sup>90</sup> Once East Timor became an independent state, UNTAET was replaced by “United Nations Mission of Support in East

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<sup>90</sup> “East Timor.” *United Nations Transitional Administration in East Timor (UNTAET)*. Peace and Security Section of the Department of Public Administration in cooperation with the Department of Peacekeeping Operations. <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm>

Timor (UNMISET) established by Security Council resolution 1410 of 17 May 2002 to provide assistance to core administrative structures critical to the viability and political stability of East Timor” (Ibid.). Therefore, the international legal process is administered by the UN and it unfolds within the UN authority in East Timor. Lastly, one must also mention the Court of Kosovo. It is administered by the United Nations Interim Administration Mission in Kosovo (UNMIK) which was established by Resolution 1244 of the SC on June 10<sup>th</sup>, 1999. It was administered at first by the Representative of the Secretary-General of the UN, Dr. Bernard Kouchner, the then-Foreign Minister of France.

The tribunals were established with resolution passed by the UNSC, and the hybrid tribunals were established between the UN and the national judicial institutions. Within the legal, territorial and temporal parameters provided for these institutions, the Prosecutors, in particular, enjoyed independence. Yet, precisely due to the above mentioned territorial and temporal parameters, none of the *ad hoc* institutions may be dubbed as truly independent – not in the way the ICC and its Prosecutor came to be independent of state or UNSC power. Kirsch and Oosterveld note that the reach and mandate of all the *ad hoc* and hybrid tribunals established thus far “have been limited to specific situations” (Kirsch and Oosterveld, 1147). The number of instances where an ‘international judicial intervention’ warranted were growing in the post-cold war realm. In addition, the most powerful states were – by the very nature of the *ad hoc* institutional arrangements – largely outside the reach of these institutions. By this very same token then, the UNSC could not be seen at the final arbiter in international criminal justice (Ibid.).

## **The Pre-Rome Negotiations**

How did the international community establish the ICC with an independent Prosecutor? There were a number of international attempts to establish a permanent Court. The international community went so far as to establish a number of ad hoc tribunals which addressed particular conflicts within particular time frames. Yet, as Ambassador David Scheffer noted, "...as the atrocity crimes of the early 1990s swamped the news and as tribunal fatigue undermined the will of the U.N. Security Council to reproduce an ad hoc tribunal with every mass killing, international lawyers and governments began to get serious about what a permanent court would look like and how it would function in the legal jungle of both national and global laws" (Scheffer, 168).

The calls for establishing a permanent international criminal court originated with the UN. It was via international drug trafficking – on the suggestion of Trinidad and Tobago in the General Assembly – that the ILC came to establish the Draft Statute of an International Criminal Court. This first draft statute limited the ICC's jurisdiction in cases that formed the subject of a complaint by a state party or were referred to the Court by the Security Council. It did not allow the Prosecutor to initiate a case absent either of these conditions, principally out of fear that an independent prosecutor would lead to "politically motivated or frivolous proceedings" (Ibid.). In 1994, the International Law Commission (ILC) declared a Prosecutor with *proprio motu* powers to be premature "at the present stage of development of the international legal system" (Ibid.). Once the negotiations turned to the Preparatory Committee, delegates suggested that the Prosecutor should have the ability to initiate investigations based on information received from non-state sources, such as individuals and NGOs" (Ibid.). Keith Hall noted that during this

time “a significantly larger group of delegations than in the Ad Hoc Committee argued that the prosecutor should have the power to initiate investigations ex officio or on the basis of information obtained from any source, particularly governments, UN organs, and intergovernmental and nongovernmental organizations” (Hall 1997, 178).

Prior to the Rome conference, an additional significant event took place which reaffirmed the international legal community’s support for an independent Prosecutor. The Max-Planck Institute for Foreign and International Criminal Law, based in Freiburg im Breisgau, Germany, in conjunction with Madame Justice Louise Arbour, the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), organized a two-day workshop, from May 28<sup>th</sup> – May 29<sup>th</sup> 1998, entitled “The Independence and Accountability of the Prosecutor of a Permanent International Criminal Court”. The aim of the conference was to bring together prosecutors from different national jurisdictions across the globe, and “identify fundamental principles relating to the independence and accountability of prosecutors, as recognized and applied in international instruments and in national criminal justice systems, which should also be reflected in a criminal justice institution at the international level” (Ambos, 301).

In essence, according to one of the convenors of the conference, Professor Albin Eser of the Max-Planck Institute in Freiburg, Germany, the workshop was organized in order to strengthen calls for the independent role of the Prosecutor. The general fear among observers was that the independence of the Prosecutor of the ICC could be greatly curtailed. On the other hand, independence was important because that aim was to have a

Prosecutor who is independent from political influence, including the strategic calculations of the ‘Permanent 5’ members of the UNSC (Eser, Interview).

At the end of the workshop, the participants “reached unanimous agreement, and issued” a 10-point declaration stating, among other items, that at a ‘minimum’ “the international criminal court should have a prosecutor that is separate and independent of the court” (Ambos, 302). In general terms, the declaration also provides a blueprint for the powers and responsibilities that the Prosecutor could be endowed with in order to function as an independent organ of the Court.

### **The Negotiations: Navigating Multilateral Complexity**

There are three key questions which will be addressed in the ensuing discussion. First, faced with a nearly insurmountable task, how did state actors organize for the negotiations? Second, how did it come to be that the provision for an independent Prosecutor was contained, and later remained, in the Rome Statute? Third, this section will also address what the negotiations reveal about why the supporters of the ICC with an independent Prosecutor won the diplomatic, political and legal ‘battle’ in Rome? The discussion will begin with a narrative about the origin of the idea of an independent Prosecutor, and then will touch on the Argentine-German proposal which provided the institutional safeguards against an over-politicized Prosecutor. Then, emphasis will be placed on the actors and processes in Rome who were instrumental in ensuring that the *proprio motu* provisions were kept in the Rome statute during the negotiations. It will be argued in this section that the way in which key actors took the lead on a number of key provisions relating to the independent Prosecutor of the ICC on the one hand, and the procedural and leadership novelties by which the negotiations unfolded on the other,



show that the establishment of the ICC with an independent Prosecutor was a result of individual and group effort by key actors at the Rome conference.

### **Actors**

Kirsch and Oosterveld note that the negotiations at Rome should be viewed through a ‘multilateral negotiations’ model which is “a process of mutual persuasion and adjustment of interests and policies which aims at combining non-identical actor preferences into a single joint decision” (Kirsch and Oosterveld, 1153). The authors note that “the complicating factor is that common ground not only needs to be found among hundreds of states, but also between groups of states” (Ibid.). The way in which this process was simplified at Rome – yet had origins in the pre-Rome negotiations as well – was through the formation of a number of state groupings. The authors note that “the Like-Minded group, the Arab group, the Non-aligned Movement, the European Union, and the Southern African Development Community,” comprised the key groupings during the conference. These groupings of states “assisted in the resolution of many difficult issues, as hundreds of different state approaches were reduced to a handful of proposals” (Ibid.). Of the above mentioned groupings, the Like-Minded Group (LMG) was the most influential. Erik K. Leonard notes that “the Like-Minded Group was literally the authors of the Statute. It was their vote that was counted at the end of the Rome Conference” (Leonard, 137). It is also important to note that, due to it having a clear strategy, the LMG “was the moving force behind the conference’s successful conclusion” (Sadat, 43). The LMG was the group which lobbied on behalf of the final package on July 17<sup>th</sup>, 1998 and adopted a successful defensive strategy against possible procedural saboteurs on the last day.

The LMG was founded during the PrepCom sessions, and as opposed to dispersing, it was still intact during, and beyond, the Rome conference (Washburn, 367). With Canada, Australia, Germany, The Netherlands, Argentina and Norway and South Africa at the helm, the group consisted of over sixty states, virtually from all continents, save Asia (Ibid., 368). Contributing to the success of the LMG was the fact that “its members shared and agreed on a set of principles, arrived at in Rome, which expressed a detailed vision of the nature and values of the Court.” These principles explicitly contained a provision for an independent Prosecutor for the Court (Ibid.).

At Rome, the LMG had a very close relationship with the Bureau, the UN staff, as well as with participating NGOs, under the umbrella of the Coalition for the International Criminal Court (CICC), the NGO Coalition with “800 member organizations”, which “accredited to Rome over 200 institutions and 450 representatives” (Washburn, 367). During the conference, the LMG and the CICC worked extremely closely together. The work included the exchange of “information, expertise, strategies, and moral support” (Washburn, 368). One of the reasons why this tri- or quadripartite collaboration took place was because these individuals “knew each other personally or by reputation at the start of the negotiations, remained in the negotiations through the diplomatic conference in Rome, and [were] at the work in the PrepCom in New York” (Washburn, 364). This sense of familiarity and “knowledge of each other’s styles, personalities, and abilities - both strengths and weaknesses – provided confidence, predictability and mutual forbearance” (Ibid.).<sup>91</sup>

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<sup>91</sup> Some NGO members, in order to show their determination, decided to partake in a hunger strike during the last 4 days of the conference. The fear was that if a statute would have not been accepted at the end of the Rome conference, the entire project would be in jeopardy. (Interview with Mr. Niccolo Figa-Talamanca.)

Washburn notes that “the coordination and support of [the UN staff, members of the Bureau and the LMG] by the CICC and its worldwide computer network and information system, profoundly influenced every aspect of the Conference and deserved much of the credit for its success” (Ibid.). The NGO community was able to intimately observe the negotiations by being present in rooms where the working groups operated. Some NGO delegates were even serving on key national delegations. Mr. Niccollo Figatalamanca, of “No Peace Without Justice” served as the deputy head of the delegation of Bosnia and Herzegovina in Rome. The aim of this NGO in particular was “to provide legal and technical assistance to delegations – through the provision of legal experts who worked as a part of these delegations.” This particular NGO alone had approximately “35 delegates or experts which were seconded to delegations” (Talamanca, Interview).

In general terms, a further coalition developed between the LMG, the UN, the Bureau and the CICC. In the case of the ‘Non Aligned Movement’ this group was quite active throughout the conference. However during the last day of the conference, when India – a key member of the Movement – introduced amendments to divert the acceptance of the ‘final package’, and when other members of the Movement itself did not support these amendments, it became clear that Non-Aligned Movement did not seem to have a “formal position on [those] proposals” (Ibid.). This dynamic also showed that it was a ‘less-than-cohesive’ negotiating block.

With respect to the ‘Permanent 5’ members of the UNSC, they did not nearly seem to exhibit the cohesiveness of the LMG. The United Kingdom drew away from the group when, in 1997, and with the election of the Blair Labour government in London, it

“swung around the Singaporean<sup>92</sup> proposal,” along with supporting an independent Prosecutor for the ICC (Weschler, 93). With this move by the UK, “Britain became the first and only Permanent Five member to join...the ‘like-minded’ group ...” (Weschler, 93). France was not a member of the LMG, but it did vote – and later ratified – the RS after it “[cut] a last-minute deal with Kirsch on their main concern: a seven-year opt-out clause, inside the treaty itself, limited on war crimes alone” (Weschler,105). Russia, China and the US seemed to have been on the same diplomatic wavelength. Russia even organized “an exclusive private dinner” on July 13<sup>th</sup>, during the last week of the conference to “pressure...renegade Britain,” but to no avail due to the “impressive lobbying blitz” of the NGO community (Weschler, 105). Later on, Russia voted for the ‘final package’ and signed the RS signalling that ‘in principle’ it supported the Statute. The US and China were the only two members of the ‘Permanent 5’ which voted against the RS, in the midst of quite curious company: “Libya, Iraq, Yemen, Qatar, and Israel...” (Weschler, 108). Both Libya and Iraq were still ruled at this time by dictators, Colonel Muammar al-Gaddafi, and President Saddam Hussein respectively.

## **Processes**

Where does the idea of an independent Prosecutor originate from, and by what processes and dynamics was it included in the final draft of the Rome Statute? The origins of the

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<sup>92</sup> The ‘Singaporean proposal’ enabled the UNSC to request a stay of proceedings for a renewable 12 month period. This proposal involved a proverbial ‘slight-of-hand’ because in the event that the UNSC could request such a stay, its permanent 5 members must agree to the proposal to do so. With the UK and France in the ‘yes’ camp, a unanimous agreement of the P5 could be quite difficult at best.

idea of an independent Prosecutor can be traced back to a document published by Amnesty International in 1994 in response to the draft statute that originated within the International Law Commission (ILC). The document, entitled *Establishing a Just, Fair, and Effective International Criminal Court*, noted that “the Prosecutor should be able to initiate investigations on his own initiative or after receiving a complaint by or on behalf of an individual with respect to any crime where the Court has jurisdiction over the suspect and the crime” (Document, Amnesty International, 25). The document lists three particular reasons why an independent Prosecutor is preferable to a Prosecutor which would receive cases or situations solely from states or from the UNSC. First, investigations originating from states could be “for political reasons.” Second, referrals from the UNSC “may put pressure on the Prosecutor to initiate investigations in a particular case.” Finally, and a reason which is echoed by observers and practitioners alike, “there is also a risk that few states will bring complaints against nationals of other states because such complaints might be viewed as infringing the sovereignty of those states or as interfering with political relations with those states” (Amnesty International, 25). Lloyd Axworthy noted that, if the Prosecutor was subject to the demands of the UNSC, the court would not be an independent court because the ‘permanent 5’ of the UNSC would use the court for their own interests (Axworthy, Interview). The document noted that “not many states have used the state complaint procedures in human rights treaties” (Amnesty International, 26).

Yet the draft statute only contained provisions for states and the UNSC to trigger the jurisdiction of the Court. Silvia A. Fernandez DeGurmendi, member of the Argentine delegation at Rome, and later a Judge at the ICC, noted that “at the 1996 session of the

Preparatory Committee, some governments expressed the view that developments in international law had not yet reached a stage where the international community as a whole was prepared to empower the Prosecutor to launch criminal investigations *proprio motu*” (DeGurmendi in Roy, 177). From this perspective, if a “widespread acceptance of the Court was to be achieved,” it was quite ‘unrealistic’ to call for the *proprio motu* provisions (Ibid.).

During the later stages of the negotiations in the PrepComs, Argentina and Switzerland introduced an expanded version of the powers of the Prosecutor, expanded from the original draft originating from the ILC. During the same PrepCom, in August, 1997, Argentina first put forward “orally a proposal to the effect that, while still at an early stage of the proceedings, the decision of the Prosecutor would be subject to another organ of the Court” (Ibid., 183). During the last PrepCom in April, 1998, Argentina and Germany proposed the institution of the Pre-Trial Chamber before the Prosecutor would proceed with a *proprio motu* investigation (Ibid.). This proposal “received favourable responses from some delegations,” which signalled that the institutional safeguards could motivate other states to support the establishment of an independent Prosecutor.<sup>93</sup> An anonymous participant at the Rome conference noted in a conversation that the establishment of the independent Prosecutor “was possible because of the existence of the pre-trial chamber.”<sup>94</sup>

The negotiations at Rome – held between June 15<sup>th</sup>, 1998 and July 17<sup>th</sup>, 1998 at the Food and Agricultural Organization (FAO) headquarters – were undertaken partially in the so-called ‘Committee of the Whole’ (CW) chaired by Ambassador Phillippe Kirsch

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<sup>93</sup> Please see APPENDIX III

<sup>94</sup> Conversation in New York, December 13<sup>th</sup>, 2011

of Canada (Washburn, 363). Ambassador Hans Corell, the then-Under-Secretary General of the UN, noted in an interview that the CW was a “key element in creating a collaborative political atmosphere”(Corell, Interview).<sup>95</sup> Ambassador Kirsch was assisted by members of the so-called ‘Bureau’ which “in practice involved all elected officials of a UN body or conference. These [were] members of state delegations” (Washburn, 363). Members of the Bureau were assisted by “members of the Secretariat assigned to assist the officials and other persons they may appoint as Conference secretaries, rapporteurs, coordinators, drafters and the like” (Ibid.). In conjunction with state delegations, NGO support and advocacy, the conference personnel were entrusted with attaining consensus – or at least a favourable outcome – out of a draft text which initially contained “116 articles with 1700 brackets containing disagreed language” (Ibid.). The negotiators met in the COW, in ‘coordinator-working group processes’, in informal meetings as well as in so-called ‘informal-informals’<sup>96</sup> as well.

Within this quite familiar set of arrangements, “the structure, organization and operational process of the negotiations had several unique characteristics” (Washburn, 366). Washburn notes that the “negotiations were always conducted on an existing text, not on accumulations of proposals” (Ibid.). This meant that debates on particular issues could be completed within the context of the entire draft statute (Ibid.). Every proposal by a state “appeared as a separate U.N. document. Following negotiation of this document, a revised text was issued indicating any suggested changes that had been proposed. This made clear to the participants that changes were encouraged and should be negotiated” (Ibid.). States which paid special attention to certain provisions in the text

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<sup>95</sup> Interview with Dr. Hans Corell, the then-Under-Secretary General of the UN, July 11, 2011

<sup>96</sup> The so-called ‘informal-informals’ were off-the-record, behind closed doors-type of consultations between delegations.

were called on by the Chairman to connect with states which were ‘dragging behind’. In this way, states were brought ‘on board’ with provisions in the text (Ibid.).

A further benefit of this process was that it encouraged state delegations to pool their ideas and so the resulting text included the proposal of not only one but many delegations all at the same time (Ibid.). An additional benefit of this strategy was that it encouraged state delegations to find common grounds on important issues. At the end then, “once the negotiation of a document was complete, a final draft would be issued and incorporated into the integral, but constantly changing draft text of the whole statute” (Ibid.).

Procedurally, Washburn notes, “the formal working groups in both the Commission and the Conference were supported by coordinators appointed by the respective bureaus who facilitated the discussion of individual issues”<sup>97</sup> (Washburn 368). The chairpersons of the working groups were asked to only submit text to the CW which has been agreed upon (Ibid.). The Bureaus were also engaged in “wide and intense inter-sessional activities to maximize the effectiveness of formal meetings” and processes whereby “during formal sessions, simultaneous work on large and small pieces of the rolling text by very numerous groups and sub-groups ranging from formal working groups that were part of the established structure of the PrepCom and the Rome Conference to negotiating parties of all sizes” (Washburn, 366 – 367). If at any point in time the negotiations slowed down because of too wide a gap with respect to state positions, Kofi Annan, the Secretary General of the UN would contact high level decision makers in the appropriate capitals (Corell, Interview).

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<sup>97</sup> The exceptions to these dynamics were the negotiations dealing with Part 2 of the Statute which dealt with jurisdictional issues and the trigger mechanism, and which included the role of the Prosecutor as well.



The negotiations on Part 2<sup>98</sup> of the statute – which included the provision for the *proprio motu* powers of the Prosecutor – were exceptional because it was understood by the participants that “the final form of this section of the Statute would determine the eventual effectiveness and viability of the Court” (Washburn, 369). Finally, these participants also “had to address these issues individually and in their complex interconnectedness with each other” (Ibid.). In the words of the then-Foreign Minister of Canada, Lloyd Axworthy, the issue of the independent Prosecutor was a ‘deal-breaker’ (Axworthy, Interview).

During the negotiations, the issue of the independence of the Prosecutor was discussed – in the Committee of the Whole – over five working days and spanned across nine working sessions – out of a total of forty-two. Yet, if one considers Session 7 where the issue of the *proprio motu* powers was included, along with Session 15 where the Office of the Prosecutor was discussed, and finally Session 25 where the first Bureau paper was introduced, then it is quite clear that over 25% of the entire discussion during the month-long negotiations was spent discussing the issue of the *proprio motu* powers of the Prosecutor in some fashion or form.

At Rome, there were 82 states commenting in favour of the *proprio motu* powers of the Prosecutor (Bassiouni, 167 – 401). Virtually all of them belonged to the ‘like-minded’ group. States such as Canada, Australia, New Zealand, the Netherlands, the Nordic states all favoured the establishment of an independent Prosecutor. It is also quite

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<sup>98</sup> Part 2 contains “the crimes it may try and their basic elements, the limited ways that cases may reach it, the place of the Security Council in its work, the duties and prerogatives of the prosecutor, and the rules and procedures for the Court’s determination of the admissibility of cases” (Washburn, 369).

clear that states with a more authoritarian past and present – along with outliers such as the US, Israel and Japan – were quite vehemently opposed to such a proposal.<sup>99</sup>

In general, there were three central issues debated during the negotiations that seem to have been crucial for the establishment of an independent Prosecutor. The first one, the German-Argentine proposal regarding the role of the Pre-Trial chamber – as an institutional ‘check’ – was widely supported in Rome (Wenaweser, Interview). Out of 82 states which supported the notion of an independent Prosecutor, 34 states favoured the notion that the Prosecutor must make his/her case before the Pre-Trial Chamber before proceeding with an indictment.<sup>100</sup> The gravity and importance of this institutional feature was so strong in fact that at the very end of the negotiations, when further safeguards could have been added to the Statute, these safeguards were left out. This particular feature seems to have assured the negotiators that the Prosecutor would have additional checks and balances on his or her conduct.

The second issue that was debated – and accepted – in Rome was the issue of how the Prosecutor would learn of possible situations. A number of ‘like minded’ states along with the NGOs were arguing – in Rome and in the PrepComms – that information should be accepted by the Prosecutor from any source: individuals, victims, or NGOs. Out of 82 states, 16 supported information provision from any source.<sup>101</sup>

The third key issue debated quite widely in Rome – an issue which was necessarily tied to the success of establishing an independent Prosecutor – was the role of the UNSC in the process (Schabas, 2011). In particular, the issue seemed to be the veto power of the ‘permanent 5’. In other words, not only referrals by the UNSC were at issue

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<sup>99</sup> Please see APPENDIX I and II.

<sup>100</sup> Please see APPENDIX I.

<sup>101</sup> See APPENDIX I.

but also in what manner – if at all – the UNSC could block a prosecution at the Court. Overall, the aim by the ‘like minded group’, other groupings, and the NGOs, was to limit the possibility that the UNSC could block the pursuit of a particular case at the ICC. The Singaporean proposal seemed to have persuaded many. The ‘like minded’ group along with the NGOs were successful in ascertaining that there are as few barriers to access to the Court as possible.

One additional comment is warranted here regarding the negotiations. As is evident from APPENDIX I and APPENDIX II, those states that were in support of an independent Prosecutor argued for a much narrower set of provisions with respect to the Prosecutor. In fact there were five issues areas on which 82 states commented – or converged. In the case of those that did not support an independent Prosecutor, they commented on 10 different issues. Not only due to their sheer number, but the convergence around a small set of issues may in fact have assured success for the states that argued for an independent Prosecutor. In the case of those that did not support an independent Prosecutor, they were not united in any loose sense of the word. This latter group also made a wider range of comments that showed more individual interest as opposed to any will for convergence or concerted effort.

In order to navigate this labyrinth of positions on the issue of the independent Prosecutor, and on countless other issues as well, the Chairman of the Conference, Ambassador Kirsch, resorted to bilateral and private meetings in order to gauge the ‘real’ position of the participants. This endeavour did not bring any further progress to the negotiations on this part of the Statute. The negotiating positions of the delegations were

too divergent for a consensus (Washburn, 369). This also meant that, most likely, delegations would have to vote on the Statute, as opposed to accepting it by consensus.

Ambassador Kirsch hosted a meeting on July 5<sup>th</sup> at the Canadian Embassy in Rome to “to explore possible areas of compromise and to analyze the reactions of delegations” (Kirsch and Holmes, 5). The positions of the delegations at this point on Part 2 of the negotiations were still very divergent. The Bureau then decided on July 6<sup>th</sup> that it must “take the lead in moving the negotiations forward” (Ibid.). It issued a discussion paper on Part 2 of the negotiations and made it available to the negotiators the following day (Ibid.). The paper “incorporated the texts of articles that had already been substantially negotiated but, despite the strong trends in the debate, maintained several options” (Kirsch and Holmes, 6). The authors note that the structure of the paper was accepted but there were still great divisions with respect to the substance of the paper. At this point, state delegations were very much holding onto their entrenched negotiating positions (Ibid.). During bilateral meetings with delegations, the Chairman of the conference noted that some delegations were willing to compromise on certain issues in private but not in a public setting (Ibid.). On July 10<sup>th</sup>, it was decided that the Bureau had to continue the building of common grounds on as many issues as possible. (Ibid.). As a result, the Bureau issued yet another proposal to state delegations (Ibid.). The reaction of delegations to this second paper was, on the one hand “strong, almost confrontational,” but, simultaneously, “previously difficult issues became surprisingly muted” (Ibid.). The participants noted at this stage of the negotiations that “the end game was near,” and delegations needed to focus on “key priority concerns” (Ibid.). Discussion on these issues was opened on July 9<sup>th</sup> in the CW, where states were asked to only address issues that

were noted by the Bureau (Washburn, 370). The importance of these discussions was that the Bureau was able to note which delegations supported the provision in the paper, and which delegations did not. In essence, it was a ‘virtual vote’ before the final vote on the statute.

Dealing with issues contained in Part 2 of the Statute, the second Bureau paper “maintained two alternatives for the Security Council’s ability to defer cases before the court and also contained an option that no such provision be included” (Kirsch and Holmes, 8). Only some delegations resisted the involvement of the Security Council, but this resistance remained up until the final days of the conference. With respect to the Prosecutor, the paper “retained the provision of permitting the prosecutor to initiate cases *proprio motu* with no ‘zero option’. However, to balance this approach, reference was made to the possibility of “adding safeguards before the prosecutor could act on his or her own” (Ibid.). The initiative of the Bureau in relation to the Prosecutor elicited very few comments and discussion, which meant to many that “the battle against an independent prosecutor had been lost” (Ibid.).

As the final days of the conference drew near, agreement was still lacking on key issues. The Bureau had two options: to ask the delegations to vote on a ‘final package’ or to note to the delegations that a second negotiating conference was needed due to a lack of agreement on the statute (Kirsch and Holmes, 9-10). It was decided that the first option would be attempted. Members of the Bureau and the Chairman met with a number of delegations in the days before July 17<sup>th</sup> (Ibid.). The Bureau then submitted the ‘final package’ to the CW on July 16<sup>th</sup>, and on the next day, the last day of the conference, state delegations received it. In the final package, “the bureau maintained the

approach it had taken since the beginning of the conference: it sought to attract the broadest possible support for the statute” (Ibid.). The Bureau viewed that “a strong court required more than strong provisions in the statute. The court would also need widespread political and financial support to ensure its credibility and effectiveness in the world” (Ibid.). The fear with the final package was that delegations would not accept the final statute via procedural machinations (Kirsch and Holmes, 11). Surprisingly, this was not the case.

During the final hours of the conference, the ‘like-minded group’ continued its advocacy, and “developed a strategy to counter procedural challenges to the adoption of the package as a whole” (Ibid.). This foresight was invaluable when India introduced a motion to limit the role of the UNC and to criminalize the use of nuclear weapons. In turn, Norway introduced a ‘non-action’ motion which was supported by a majority of the delegations. Similarly, Norway introduced a further ‘no-action’ motion against amendments introduced by the US that would have shielded non-party states from the jurisdictional reach of the Court. The overwhelming majority of states supported the second ‘no-action’ motion as well. With amendments which could “unraveled the final package” out of the way, the stage was set for the adoption of the Rome Statute.

### **The US and the Negotiations**

In this section, emphasis will be placed on the role and negotiating tactics of the US delegation during the conference. Attention will be paid to the positions put forth by the delegation, the negotiating tactics, and on the reasons why the US did not vote for the final package. It will be argued that the main culprit for the US failure was the absolutely rigid stance held by the delegation – echoing the positions of the Pentagon and key

members of the US Senate – with respect to the way in which US service members needed to be shielded from the legal reaches of the Court.<sup>102</sup>

Before the US ‘unsigned’ the RS and opposed the Court during the first Administration of George W. Bush,<sup>103</sup> not only did the US initially sign the RS but it also played a necessarily key role during the Rome negotiations. Lawrence Weschler noted that US was represented by a “forty strong, and easily the best prepared and most professionally disciplined [team] at the Conference” (Weschler, 91). The head of its delegation was Ambassador David Scheffer, who had enormous expertise in international criminal jurisprudence. The US did also “chair one of the Committee of the Whole’s working groups. The US was also the vice-president of the entire conference, and a member of both the Committee of the Whole and the Drafting Committee” (Washburn, 373). In simple terms, the US delegation was ‘front and center’ during the negotiations.

The US, however, was not a part of the ‘private meetings’ between the LMG, the UN team, the Bureau, and the CICC. Washburn however noted that “it was through these private meetings that the Chairman was provided with essential parts of his strategy, and the discussions in them were an indispensable instrument for pursuing these strategies” (Washburn, 374). The US belonged to “no group or bloc in the negotiations” (Ibid.). The US was left to its own devices, with no real negotiating partner. What is further

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<sup>102</sup> Ironically, US service members and civilian leaders were – and still are – shielded from the reaches of the Court by the principle of ‘complementarity’ which was introduced, and was fought for, by the US itself.

<sup>103</sup> A declassified diplomatic cable – demarche – shows that the Bush Administration viewed that the Court was very much against the national interests of the US, not in small part because it endangers US national sovereignty (Demarche).

important is that the “US began from a position of extreme scepticism” (Washburn, Interview).<sup>104</sup>

During the negotiations, the US’s ‘bottom line’ was absolutely rigid, and it reinforced Senator Jesse Helms’ and the Pentagon’s view that no US service member could be brought under the jurisdiction of the Court under any circumstances. David Scheffer noted that “[r]epresenting the world’s sole remaining superpower, American soldiers ... stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts. And we simply cannot be expected to expose our people to those sorts of risks. We are dead serious about this. It is an absolute bottom line for us” (Weschler, 92).

In order to ensure this ‘bottom line’, the US did lose a number of significant battles, including the battle against the *proprio motu* powers of the Prosecutor, as well as the battle of over the jurisdiction of the Court. The US was adamant that the Court should not have jurisdiction over an individual citizen of a state that is a non-party to the statute. David Scheffer and the US delegation insisted that “when it came to the question of jurisdiction, ... not only ... would the United States refuse to sign any treaty that dealt with jurisdiction in any other manner, but it ‘would have to actively oppose’ any resultant Court” (Weschler, 99). The delegation noted however that if its conditions are met then it “could seriously consider favourably recommending that it sign the ICC Treaty at an appropriate moment in the future” (Ibid.). The message was quite clear: “defy us and we’ll kill the baby; accede to our terms and, well, we’re not sure; we’ll see” (Ibid.).

This negotiating tactic did not seem very reasonable to other delegations, while some, such as Botswana outright noted “the breathtaking arrogance” of the US position. It was also clear that, due to the fact that key domestic political actors on the issue, such

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<sup>104</sup> Interview with Mr. John L. Washburn, April 29th, 2011.



as Senator Jesse Helms and the Pentagon, were vehemently opposed to the Court, giving in to US demands would not bring it any closer to joining the Court. David Matas, a member of the Canadian delegation, noted that “David Scheffer could draft the entire document, every single word of it...and the Senate would never ratify it. It took America forty years to ratify the Geneva Convention. The United States still hasn’t even ratified the Convention on the Rights of the Child. So one has to wonder: why even bother trying to meet such demands?” (Weschler, 100)

Despite all the above, the US was kept in the ‘negotiating game’ so-to-speak, as it was in constant contact with the Bureau and the Chairman of the Bureau as well. The US delegation was “consulted almost every day by Kirsch, members of the U.N. team, leaders of the LMG and NGOs and by representatives of the various negotiating groups and caucuses” (Washburn, 374). Some delegations openly expressed their wish for the US to come on board, and that without US support, the Court could not be a ‘workable’ Court (Weschler, 104). Some observers noted – and feared – that in the final days and hours, the US would keep asking for concessions, especially on the *proprio motu* powers of the Prosecutor. However, the US delegation seemed to have been fixated on “that Helms/Pentagon imperative – that there be explicit language in the Treaty guaranteeing that no American could ever fall under the Court’s sway even if the only way to accomplish that was going to be by the U.S. not joining the treaty” (Ibid.). The Bureau offered to restrict the power and reach of the Prosecutor by “requiring the Prosecutor to attain a unanimous vote of a five-judge panel if there was going to challenge the efficacy of any given country’s complementary efforts” (Weschler, 105). However, there was no ‘give’ from the US delegation. In Weschler’s comments, “they seemed on an incredibly

short leash. Clearly, they had their instructions from back home – and very little room to maneuver” (Ibid.).

### **Battle Lost**

Ambassador Scheffer points to five overarching issues which shed light on the failure of the US negotiating strategy in Rome. These issues also influenced the US position with respect to the independent Prosecutor. First, he points to the Pentagon’s “reluctance to describe its changing role in the world following the Cold War” (Scheffer, 227). Second, the constant presence of Republican Senator Jesse Helms’ staff – as well as the damaging ideas regarding the Court – did, according to a number of different sources, provide an unnecessary inertia to the more pro-ICC perspectives shared by some members of the US delegation as well in Washington. Third, Ambassador Scheffer pointed to “the Washington bureaucracy[‘s]...inability to make policy decisions on complex treaties in a timely manner” (Ibid.). The fourth issue was President Clinton prioritizing his visit to China over the issue of the ICC, and his entanglement with the Monica Lewinsky case, as well as the political fall-out that followed. Lastly, Ambassador Scheffer also points to a “mysterious set of ‘talking points’ reportedly prepared for then-Defence Secretary William Cohen” which appeared in the New York Times as critical and key for the US failure in Rome (Ibid.).

However, at the heart of the US failure to negotiate a successful outcome with respect to the independent Prosecutor, and the ICC as a whole, was its insistence on the involvement of the UNSC in triggering the jurisdiction of the Court. As Ambassador Scheffer noted, “we undermined our own position by sticking so fervently to the Security Council as the controlling factor for referrals” (Scheffer, 2010). This negotiating position

originated from within the Pentagon. Lloyd Axworthy, Canada's Minister of Foreign Affairs at the time, remarked that even though "the US under President Clinton had been one of the most ardent backers of the International Criminal Court...once into the negotiations, [members of the US delegation] found themselves bracketed by opposition from the US military, who were concerned about their soldiers being prosecuted" (Axworthy, 203).

Further connected to the issue of the independent Prosecutor was the issue of states ability to provide their consent to one of their citizens being brought in front of the Court. This issue was also deeply connected to not only the *proprio motu* powers of the Prosecutor but also to the US position on this issue as well. Once again, the Pentagon's role was key. During a meeting with Hillary Clinton prior to leaving for Rome, Ambassador Scheffer noted that James E. Baker, a legal advisor at the NSC stated that "since the President finally understood the role of the military, if he were to support the Pentagon position President Clinton would earn the military's permanent respect and allegiance. And that meant that he needed to back the current U.S. insistence on full immunity from prosecution by the court as both a nonparty state and as a possible future state party to the court" (Scheffer, 197). Ambassador Scheffer later remarked that that "is exactly what he did" (Scheffer, 197). Even after the conclusion of the Rome conference, "only intense objections from the Pentagon prevented the Clinton administration from advocating a permanent world criminal court."<sup>105</sup>

The second factor which deeply influenced not only the rigidity of the US position on the independent Prosecutor but also the Court as a whole – and which really

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<sup>105</sup> Divine, Donald. "All for a Court?" *Washington Times*. 07 December 1999. Web. 19 Dec. 2012. <http://www.globalpolicy.org/component/content/article/172/30598.html>

hamstrung the US in Rome – was the rhetoric, and later actions, of the former US Senator Jesse Helms of South Carolina. Axworthy commented that “with the Republicans in control of the senate, the chairman of the Foreign Relations Committee, Senator Jesse Helms, was exploiting his power to hold up appointments and determine budgets in order to blackmail the administration on crucial issues, especially multilateral ones” (Axworthy, 2003). Anthony Lewis further noted that “the real reason for the U.S. position may have been Senator Jesse Helms, who said any treaty exposing Americans even theoretically to such a court would be ‘dead on arrival’ in the Senate.”<sup>106</sup> Ambassador Scheffer himself stated that even with a treaty fully addressing US concerns, one would not be able to predict if, and when, the US Senate would ratify the treaty (Scheffer, Speech, 1999).

Senator Helms – along with Senator Ron Grams of Minnesota – directly sent staffers to the Rome conference. These staffers were a part of the US delegation. Ambassador Scheffer remarked that he was “under instructions to accommodate them as courtesy to the legislative branch” (Scheffer, 229). The presence of these staffers “was very destructive [and] undermined my authority as a negotiator and, in my view, US interests” (Scheffer, 229). The dynamic that was created in Rome – as well as prior to Rome – gave the appearance of a delegation in discord at best, and a confused one at worst. In essence, Senator Jesse Helms’ rhetoric about the treaty being ‘dead on arrival’ in the US Congress gave the impression to other governments that “he was Washington speaking to them” (Scheffer, 229).

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<sup>106</sup> Lewis, Anthony. “At Home Abroad; A Turn in the Road.” *The New York Times*. 20 July 1998. Web. 05 June 2013. <http://www.nytimes.com/1998/07/20/opinion/at-home-abroad-a-turn-in-the-road.html>.

The third major issue that led to the US failure in Rome was the inability of key decision-makers on this issue in Washington to provide precise and accurate instructions to the negotiating team, and do so in a timely manner. In essence, the US delegation did not learn in time “how to make hard decisions, of considerable complexity, early enough to transform the negotiations” (Scheffer, 229). The ‘nowhere to be found’ instructions were echoed by John Washburn who noted that the US “had neither the flexible but detailed instructions, nor the timely backstopping and responsiveness from its capital, enjoyed by other delegations from comparable countries” (Washburn, 373).

The fourth factor in US failure was the President Clinton’s preoccupation with the fallout from the Lewinsky affairs and his upcoming visit to China. Perhaps the lack of attention to the negotiations by President Clinton was indeed a function of ‘bad timing’. However, as Ambassador Scheffer noted, he did not have access to, nor did he have private audience with, President Clinton immediately prior to, nor during the Rome Conference.

Lastly, Ambassador Scheffer notes that a curious set of ‘talking points’, allegedly prepared for Defence Secretary William Cohen, were published in the *New York Times*. The ‘talking points’ “threatened that the United States might withdraw its troops from Europe if Germany kept pressing for universal jurisdiction for the court” (Scheffer, 227). Naturally, the Department of Defence noted that it did not have knowledge of such a document, and the document could have not originated from the Pentagon (Scheffer, 227). In any case, the existence and publishing of these ‘talking points’ underscore Ambassador Scheffer’s point about the perceived role of the Pentagon in the post-Cold

War World: the Pentagon in essence was ‘stuck in the past’ on the one hand, and on the other, it was incapable of clearly articulating its position in the ‘new world order’.

### **Why did the Supporters Win: Explanations via International Relations Theory**

How might theories of international relations explain why the supporters of the ICC with an independent Prosecutor won in Rome? In this section, emphasis will be placed on the tenets – and explanatory prowess – of neorealism, neoliberal institutionalism, historical institutionalism, constructivism and liberal pluralism in order to provide a satisfactory answer to the question posed above. The emphasis will be placed on discerning whether agency or structure – as general theoretical notions – help explain the formation of the ICC with an independent Prosecutor. It will be argued in this section that liberal pluralism and liberal constructivism – with their emphasis on the activism of actors – are equipped to provide the best explanation. Agency, in other words, carried the day in Rome, as opposed to the structural factors of the negotiations.

In the case of the ICC with an independent Prosecutor, neorealism is at a loss to explain why the Court was established with its particular institutional design features. The US, while being intimately involved in the process of establishing the Court – and even winning a number of different concessions – did not vote for the final draft statute. It did sign the treaty yet later the US government withdrew from – or ‘unsigned’ – the statute, and actively opposed the ICC. Neorealists would further note that the Court, without explicit major power support, would be ineffective. Yet at the same time, the Court is functioning and it is supported – albeit indirectly – by the US. In sum, the basic tenets of neorealism cannot explain why an international organization such as the ICC

was established, not only without the explicit support of the US, but also despite its opposition to the work of the Court.

Neoliberalism does provide, yet only at most, a satisfactory explanation. States cooperated to establish a permanent Court in order, once and for all, to provide a venue for, and establish a process, to bring to justice individuals who have committed certain type of crimes during international or intra-national conflicts. States further cooperated at Rome in order to establish a more legally robust institution which would not only become a permanent fixture in the fight against impunity but would also be a more logistically and financially efficient institution as well. Dealing with 'tribunal fatigue', states were then willing to join forces to establish a permanent institution which would bind all of its members to the same legal and procedural standards. In general terms, neoliberal institutionalism places explanatory emphasis on inter-state cooperation to mitigate the opacity of what the future may hold. Within this institutional forum, states, along with the hegemons, will be persuaded to cooperate for mutual benefit.

Even though neoliberal institutionalism provides a satisfactory explanation for the establishment of the Court with an independent Prosecutor, by focusing on state-level analysis, a substantial amount of nuance is neglected. First and foremost, it was not only states but individual actors – representing individual states, nonetheless – who were responsible for advocating and later compelling other state participants and delegations to vote for the final draft. Second, not all states cooperated to establish the Court. The statute did not receive unanimous support in Rome. Some states, such as the US, China and Russia, which, due to their stature within the international realm had very little to fear from the Court, chose not to cooperate.

Historical institutionalism would suggest that the ICC with an independent Prosecutor was established as a function of ‘path dependence’ originating within the earlier institutional manifestations of international criminal justice. In other words, the ICC was designed based on the institutional blueprints provided by the tribunals, and even national judicial institutions. In certain ways, the institutional design of the ICC does reflect certain institutional continuities with the design features of the International Criminal Tribunals for Rwanda and the former Yugoslavia. More specifically, the Prosecutors of the tribunals – or even Prosecutors in most domestic legal systems – are thought to be independent in some regard. The Prosecutors are independent in that they are able to determine who gets brought in front of justice and for what reasons; but only within well defined territorial, jurisdictional and even temporal parameters. However, the scope of the ICC – its global reach, unabated by most temporal and territorial constraints – bestows certain independence on the Prosecutor of the ICC which is not enjoyed by the Prosecutors of the tribunals or by Prosecutors in national legal systems. In legal and legislative terms, the Prosecutor of the ICC may initiate investigations into any situation where crimes which fall under the jurisdiction of the Court are committed. Therefore, in the work of the Prosecutor, there is much more institutional innovation as opposed to institutional continuity. The entire notion of establishing an independent Prosecutor rested on institutional innovation. Mme. Louise Arbour, Dr. Albin Eser, along with the organizers of the Freiburg conference, aimed to ensure that the idea of an independent Prosecutor received substantial support prior to the Rome conference. Further, the aim of the German-Argentine proposal was also to ensure that the institution of an independent



Prosecutor became much more independent than Prosecutors of the tribunals were, and more independent than what certain delegations suggested.

Turning the attention to liberal pluralism, the utility of this theory is such that it places causal importance on not only individual actors but on domestic interests groups as well. With the theoretical tenets of this theory then one may argue – and quite successfully at that – that it was individuals and groups who established the ICC with an independent Prosecutor. Individuals representing different governments, key state groupings during the Rome conference, along with the key conference organs such as the Bureau, were central to the establishment of the Court, even though their role is often ‘underestimated.’<sup>107</sup> Dr. Morten Bergsmo, a member of the Norwegian delegation at Rome, noted in an interview at the United Nations in New York that Article 15 of the RS, which contains the provisions for an independent Prosecutor, was in fact single-handedly negotiated by representatives of France, Germany and Argentina, in the persona of Gilbert Bitti of France, the late Hans-Peter Kaul of Germany, and Fabricio Guareglia of Argentina (Bergsmo, Interview).<sup>108</sup>

More specifically, and for the most part, it was liberal democratic states and their representatives who helped establish the Court. Starting with the LMG, it was led by, and was made up of, liberal-democratic, social democratic and newly democratizing states. More specifically, the leaders of this group, such as Canada, Norway, and the United Kingdom, were represented by delegates who had vested interests in establishing the Court. Lloyd Axworthy, the then-Foreign Minister of Canada, along with the Chairperson of the Committee of the Whole, Ambassador Philippe Kirsch were

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<sup>107</sup> Schabas, Dr. William. Personal Interview. New York. 05 April 2011.

<sup>108</sup> Bergsmo, Morten. Personal Interview. United Nations Headquarters. New York. December 2011.

instrumental in ensuring that state representatives – at Rome and on a global scale – understood what is at stake in establishing this institution in the particular form it took. Further, Rolf Einar Fife of Norway and his delegation had a very significant impact on the negotiations when, at the very end of the Conference, Norway blocked attempts by the US and India to bring the conference to a less-than-successful conclusion.

Liberal pluralism further affords explanatory clout to NGOs as well. NGOs were very well represented at the Conference. Some observers, such as Christopher Keith Hall, noted that the establishment of the Court itself was a ‘triumph of civil society’ (Hall, Interview).<sup>109</sup> William Pace, for example, the Convenor of the ‘Coalition for The International Criminal Court’ (CICC) worked tirelessly to ensure that the Court was established with an independent Prosecutor. Overall then, liberal pluralism is able to point to the individual actors who were more than influential in bringing the Rome conference to a successful conclusion.

Constructivism, in general terms, lends itself more to an ideational and normative explanation, which is also fitting in the ensuing analysis. It emphasizes social interactions as the conditioning factor and explanatory element of the behavior of states. Repeated interactions between states are then the key to how states act, and based on what values, ideas and norms. Liberal constructivism, however, further affords more explanatory power to individual actors. It places causal relevance on the ideational and valuational elements of individual political actors. Politics and political change in particular is then initiated by individual political actors who use their normative, ideational and valuational arsenal to establish institutions or initiate change.

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<sup>109</sup> Hall, Christopher Keith. Telephone Interview. 11 July 2011.

As mentioned above, the negotiations in Rome took place in a historical context where the changed nature of conflict within the international realm required new approaches – logistical and normative. The notions of human security, humanitarian intervention and the ‘responsibility to protect’ all ushered in an era of a new type of ‘security’ – the security of the individual prior to the security of the state – and a widening of the notion of state sovereignty. Individuals needed to be protected, and state sovereignty was not to stand in the way of this protection.

Evidence compiled by observers does give credence to this argument. Many participants were naturally not new to negotiations within the UN system. John Washburn notes that “the U.N. as a venue, institution, and community was also the primary shaper of the psychology of the negotiations” (Washburn, 364). He further noted that “experience in the U.N. system gave many participants a strong, often emotional commitment to the ideals and purposes of the ICC” (Ibid.). Interestingly enough, as Dr. Bruce Broomhall and Assad Kiyani of the Liu Institute of Global Affairs at the University of British Columbia recalled, “young diplomats found themselves in incredible role and agency,” because, for the most part, “senior diplomats did not have the time” to spend in Rome (Broomhall and Kiyani, Interview).<sup>110</sup> These diplomats then went on to pursue careers centered around on Court, or became key personnel at the Court, as is the case of the current Registrar of the Court, Ambassador Herman von Hebel of The Netherlands.<sup>111</sup>

Similarly Lawrence Weschler noted while observing the negotiations in Rome that there seemed to have been a sort of ‘double vision’ so-to-speak with respect to the

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<sup>110</sup> Interview with Bruce Broomhall and Assad Kiyani, Liu Institute of Global Studies, University of British Columbia, Vancouver, November 24<sup>th</sup>, 2010; Interview with Christopher Keith Hall, June 4<sup>th</sup>, 2011.

<sup>111</sup> Ibid.

negotiations. On the one hand, delegations were very much in favour of establishing the Court – at least within their rhetoric. On the other, however, states had no qualms with clearly entrenching their negotiating positions within their conception of what their national interests were at the time, broadly speaking “to protect sovereignty, reduce costs, and dodge obligations” (Weschler, 88). These ‘visions’ blended, however, when individual delegates became “delegates of the ICC Conference back to their foreign ministry” (Weschler 88). These delegates noted that they negotiated in the following way: “my minister says this, ... but I think if you propose it this other way, he won’t notice, and we can still accomplish the same purpose” (Ibid.). The interests of the delegates, in other words, changed while continually participating in the process of establishing the Court with an independent Prosecutor. They were willing to shift the meaning of national interests – in certain ways – in order to accommodate support for the Court.

In sum then, neorealism does not seem to be able to provide a satisfactory explanation of the outcome of the negotiations. Neoliberal and historical institutionalism do explain particular components of the outcomes, but they fall short in that they emphasize the institutional – as opposed to the agential – components of the negotiating dynamics. Liberal pluralism and constructivism, then, are best suited for the task at hand because they are able to account for individual agency and the establishment of the ICC with an independent Prosecutor as a function of the framing of national interests and national sovereignty. These last two theories are further better able to explain the changes in states preferences as well.

## Conclusion

Leyla Nadia Sadat notes that “only a coincidence of positive political events (such as the end of the Cold War), strong committed leadership of key individuals and states, and the strength of global civil society made the ICC’s emergence possible at this time” (Sadat, 32). Yet, rather than a coincidence guiding ‘the hand’ of political actors, it was the initiative, activism and effort of individual actors – or delegates of states, and members of NGOs – seizing ‘the moment’ so-to-speak who were at the heart of establishing the ICC with an independent Prosecutor. These political actors acted based on deep-seated convictions that a permanent ICC with an independent Prosecutor is the most appropriate way to ensure that the Court will not be politicized. The will and activism of the actors, the processes put in place, and the outcomes achieved at the Rome conference signalled tremendous institutional innovation which cannot but be credited to individual diplomatic, political and legal actors who spared no effort or energy to ensure that the Court with an independent Prosecutor was established. Some NGO members even went as far as holding a hunger strike near the end of the conference to signal the importance of establishing the Court.<sup>112</sup> Agency – and to a lesser extent structure – played a key role in establishing the ICC with an independent Prosecutor. In theoretical terms, liberal pluralism and liberal constructivism are much better suited to explain the establishment of such a revolutionary design feature of the Court, than are neoliberal institutionalism, historical institutionalism, and neorealism, which contain less of an explanatory relevance due to their overwhelming reliance on the structural and institutional elements of international relations.

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<sup>112</sup> Talamanca, Niccolo-Figa. Skype Interview. 06 Sept. 2011.

## **CHAPTER 7: CONCLUSION**

There are three key contributions of this work: theoretical, empirical and policy-related. The aim in this chapter is to provide an exposition of these broad contributions and finally comment on areas of further research. The theoretical contributions focus on explaining why states establish international organizations and under what conditions. The empirical contributions of this work stem from the particular methodologies and methods used to shed light on empirical detail regarding state preference formation in regards to the ICC and the negotiations as well. The practical contributions of this work then deal with the circumstances under which one could expect that states which have yet to join the Court would join. Finally, and as a corollary of the above stated contributions, study of international treaty ratification – within international criminal justice and other international policy areas – are more than warranted, especially in light of an ever globalizing realm.

The International Criminal Court (ICC) with an independent Prosecutor was one of the most significant – if not *the* most significant – institutions of the 20<sup>th</sup> century. The ICC and its independent Prosecutor were established after nearly a century-long political and legal struggle. The Court and its design features revolutionized international criminal jurisprudence by, among others, permanently institutionalizing such notions as ‘complementarity’, or the primacy of national as opposed to international prosecutions. It provided an international legal definition for ‘war crimes’ and ‘crimes against humanity’ – and later on ‘crimes of aggression’. Lastly, it institutionalized an independent Prosecutor who is able to initiate investigations independent of state requests to do so.

The last provision, which ultimately concerns the subject matter of this work, is significant for one particularly important reason: it challenges a crucial concept in international law and politics, namely state sovereignty. Due to the unprecedented role ascribed to the Prosecutor, the international bargaining and negotiations were contentious, to say the least. This contention was not only experienced in state-to-state interactions nor only in state-to-civil society interactions. The contentious bargaining for an independent Prosecutor originated from within the domestic realm of individual states. The will to establish an independent Prosecutor originated from domestic political actors, their interests, and their particular notions and views of state sovereignty.

Yet the question remained: why would state representatives themselves agree to include a provision in the RS, and establish an international institution, which could potentially constrain state sovereignty? The answer to this question points to an expanded notion of state sovereignty. This new conception lunged away from traditional notions – where security was a function of states security exclusively – and approached a notion of state sovereignty which held the protection and accountability of individuals as sacrosanct. This expanded notion of sovereignty was shared by some states and was not shared by others. Yet, the causal story does not end there. The expanded notion of state sovereignty originated from the domestic political realm of particular states which were able to convince some others that a permanent and independent international criminal court necessarily requires its Prosecutor to be able to initiate investigations on his or her own accord.

In order to explain the institution of the independent Prosecutor two critical issues were entertained in this work. First, it was discerned how state preferences were set

within the domestic realm of key states – namely Canada and the United Kingdom along with the United States and Japan. Second, using the same cases as explanatory nodes, the question was posited as to why those delegations which were represented by groups sympathetic to the expanded notion of state sovereignty were able to persuade others at the Rome conference in 1998.

This work attempts to highlight not only the negotiating and bargaining elements of establishing an international organization, but it also delves deeper into the domestic political arenas of key states. The theoretical aim here was to shed light on how domestic interests and their ideas help establish international organizations. A further aim here was to show that the approach of governments towards establishing international organizations will be a function of which groups capture the most coveted political prize – that of forming the government in a particular state. State preferences, therefore, are not fixed; they vary based on which group is in power.

The existing explanatory literature on the topic of the establishment of the independent Prosecutor is very much wanting. As it mainly focuses on the national interests of liberal democratic governments, it places too great of an explanatory emphasis on state and institutional variables and dynamics. It is certainly true that it was states which established the ICC with an independent Prosecutor. However, at the same time, states were also represented by groups which, on the one hand were pitted against others within their domestic political realms on the very issue of the establishment of the Court and Prosecutor. On the other hand, these very same states navigated the international diplomatic realm in tandem with other groups representing states which held similar views. Key variables, therefore, which were very much left out of the existing



explanatory calculus, yet which provides further depth and breadth to the scholarly discussion regarding the Prosecutor and the ICC as a whole, are domestic political actors within key states.

This work also contains a number of empirical contributions. Primary and secondary documents of the negotiations were consulted in preparing this work. Transcripts of parliamentary debates were consulted in order to capture the essence of state preference formation at the domestic level. Further primary sources documents, such as a declassified diplomatic demarche, were also used in order to shed light on domestic policy making. Lastly, a number of elite interviews were also conducted with former ministers, Ambassadors, former members of state delegations at Rome, and with representatives of key NGOs as well. The aim with the above outlined empirical work was to bring to the fore more detail about an unprecedented event in contemporary history which deserves much further research and study.

In order to shed light on the relevance of domestic actors, the methodology along with the case studies chosen for the study at hand were of critical importance. Comparative case study was chosen as the key methodological approach. In addition, the particular techniques of process tracing and elite interviews were also employed in order to shed light and reconstruct the preference formation in key states and to gain further insight into the negotiating processes prior to, and in, Rome. Interviews with high-level former and current government officials were indispensable in order to gain an understanding of the ideational and decision-making processes in play during the negotiations and the ratification processes.

In addition to the methodological approach employed and the techniques used, the particular time frame and historical period under investigation in this work is also significant. The investigation began with the publishing of the first draft statute of the ILC in 1994 and commenced – in the case of Japan in particular – with the end of the ratification process in 2007. The breadth of this time frame is very significant because prior studies dealing with the independent Prosecutor and the ICC in general did not include the time period after the conclusion of the Rome conference in July, 1998. Much activity commenced after the Rome conference, including negotiations regarding additional protocols aiding the proper functioning of the ICC. During the meetings of the these so-called ‘Preparatory Commission’ key documents such as the Rules of Procedure and Evidence (ROPE) were developed, and with the participation of such states as the United States a that, a state which first signed but later ‘unsigned’ the RS.

For the purposes of this study however, it was critical that the domestic political processes – mainly involving national legislatures – be investigated. It was during these debates – sometimes shortly after, but also much later on after the conclusion of the Rome conference – that critical political, legal and societal processes took place. These debates shed light, on the one hand, on the intrinsically contentious nature of accession to the RS within domestic political and legal realms. On the other hand, the domestic political and legal dynamics highlighted the importance of the temporally contingent factors in, not only acceding to the RS but also, establishing the Court itself. Echoing the opinion of practitioners and participants at the Rome conference, the Court would most likely have not been established in a different temporal period. By focusing on the ratification process and the debates during these processes the temporally contingent

nature of the establishment of the independent Prosecutor and the ICC were also highlighted.

The cases selected for this comparative case study were Canada, the United Kingdom (UK), along with the United States (US) and Japan. Each case was carefully selected because the representatives of each of the states played critical roles during the international diplomatic and negotiating realms. Further, the cases were fitting for the study at hand because the political and legal dynamics within the domestic realms in these states reveal the importance of sub-state and domestic actors in the debate of establishing the ICC with an independent Prosecutor.

Canada and the United Kingdom were chosen from among those states which were supporting the provision for an independent Prosecutor in the RS. Canada's guiding foreign policy principle, namely human security, provided the conceptual and ideational support for establishing such an institution. In general terms, Canada's diplomatic tradition of multilateralism, assuming leading roles in international institutions, and acting as a 'middle power' with respect to geopolitics, fit very well with assuming a leading role during the Rome conference, and among the so-called 'like-minded states'. Within the domestic realm, the Liberal Party of Canada – forming the government at the time – and the then-Minister of Foreign Affairs of the day, Lloyd Axworthy, were the main supporters of the establishment of the Court. Parliamentary debates indicate that, for the most part, the ratification of the RS was supported by four of the five main parties represented in the House of Commons in Ottawa. The official opposition of the day, the Canadian Alliance, did not however support Bill C-19, and would have 'repealed' it, had it been in power at the time. In Canada, the parliamentary debate regarding the Court

with an independent Prosecutor mirrored the general societal debates as well. The more liberal versus conservative divide – a divide centered on a more ‘statist’ conceptions of state sovereignty versus the more ‘globalist’ conceptions – very much played out among non-governmental groups as well, with the more conservative groups opposing the ICC and the RS, even with respect to gender issues. The conclusion one is able to draw from the Canadian domestic debate is that, had the official opposition of the day – the Canadian Alliance – been at the helm of the government in the 1990s, Canada would have not been as much of a supporter of the Court, nor would in fact have ratified the RS in the form it held in 1998.

Domestic political dynamics were also at the heart of why the UK, abdicating from a general consensus on the issue among the ‘permanent 5’ members of the UNSC, supported the ICC with an independent Prosecutor. The critical event in the UK was the election in 1997 of the Labour Party lead by Tony Blair. After these elections, there was a very clear shift in the UK towards supporting the ICC with an independent Prosecutor. In addition to the ‘change of guard’ in London, the Labour Party and Mr. Blair also advocated for an ‘ethical foreign policy’ with the ‘international community’ in mind. Within the parliamentary debates – as was the case in Canada – there seemed to have been a very clear division between a more liberal and internationalist conception of state sovereignty and a more conservative and state-centric conception of state sovereignty. In addition, the conservative right in the UK also advocated the pegging of the UK policy – and law – with regards to the ICC to that of the US. At the end, the ‘International Criminal Court Bill’ was adopted with all of the Conservative and Independent members

of the House of Commons in London voting against the bill, and with all of the Labour Party and Liberal Democratic Party members voting for the bill.

In the case of the US and Japan, the research showed that domestic actors and processes were also responsible for the formation of policy preferences. Domestic political actors and process were also responsible for the continued opposition to the Court in the US, and to the eventual accession to the Court in Japan. The policy preferences of the US on the matter of the Prosecutor – and the jurisdictional regime of the ICC – seemed to have mirrored the preferences of the Pentagon. Out of the relevant departments involved – such as the State, Justice and the Defence Departments – it seemed to have been the case that the position of the Pentagon carried the day. The relentless and rigid insistence that the RS must include provision which would shield US service members and civilian leaders from the reaches of the Court did not only originate from the Pentagon but was also the reason why at the end of the Rome conference the US delegation lost the final vote. Within the US domestic political arena, the voice of the late Senator Jesse Helms, the Chairman of the Foreign Relations Committee, seemed to have echoed the loudest. His insistence that the RS would be ‘dead on arrival’ in the US Senate not only signalled to the negotiators in Rome that it will nearly be impossible to get the US on board, but also compelled the delegations to attempt to establish the Court – with an independent Prosecutor – without explicit US support.

Lastly, Japan played a very involved role all throughout the negotiations. Its diplomats occupied key positions all throughout the negotiating process, with Japan even playing a conciliatory role among the ‘permanent five’ members of the UNSC who were split on the Court by organizing a meeting at the Japanese embassy in Rome. Japan

signed the RS at the end of the conference in Rome. However, it took the Japanese bureaucracy and the Liberal Democratic Party / New Komeito coalition nearly a decade to bring the statute in front of parliament. It seemed to be the case that within domestic political circles, the Democratic Party of Japan, and the leadership of Senator Tadashi Inuzuka, tipped the scales in favour of a unanimous acceptance of the bill named the ‘Cooperation with the International Criminal Court’.

At Rome, particular political actors seemed to have carried the proverbial ‘torch’ for the acceptance of the RS. In tandem with well-motivated and well-represented members of global civil society, key members of the ‘like minded group’ aided with not only reconciling opposing views but also in ensuring that on the final day of the negotiations states could not derail the final vote. Members of the ‘Coalition for an International Criminal Court’ (CICC), a global NGO representing hundreds of other global civil society groups – and whose members even served as members of state delegations – ensured that legal and technical advice to smaller state delegations was available. This advice – and advocacy in general – was geared towards establishing the Court with an independent Prosecutor. In fact, the very origin of the notion that the Prosecutor should be independent of states and UNSC control originated from a policy paper authored and published by Amnesty International – a member of the CICC Steering Committee.

With respect to state delegations and their members, members of the ‘like minded group’ were responsible for the victory and institutionalization of the independent Prosecutor. It seemed to have been the case, that the Argentine – German proposal for the establishment of a pre-trial chamber, as a check on the power of the Prosecutor,

seemed to have ‘tipped the scales of interests’ towards the inclusion of a Prosecutor with *proprio motu* powers in the RS. Canada – supplying the chairperson of the Committee of the Whole – and later Norway, whose delegation ensured that neither India nor the US would introduce motions which would deem the RS unacceptable to many delegations before the final vote on July 17<sup>th</sup>, 1998, played key roles in this respect.

It was established that it was individual political actors who were responsible for setting states preferences and ensuring that the RS is passed with a provision for an independent Prosecutor. Therefore out of the five theories surveyed in this work, liberal pluralism and liberal constructivism as international relations theories provide the most plausible explanatory clout. In chapters four, five and six, neorealism, neoliberal institutionalism, historical institutionalism, liberal pluralism and liberal constructivism were surveyed in order to explain state preference formation and the final outcome in Rome. Neorealism seemed the least well equipped to provide an account as to why states insisted on establishing an independent Prosecutor, and why those states were victorious in Rome. Neorealism within this realm espouses that cooperation within the international realm will be a function of the most powerful states’ able to persuade others to cooperate within institutional fora. In the case of the ICC, therefore, neorealism falls short. It cannot explain why the ICC was established without explicit US support. Neorealism could however, explain the position of the US government.

Neoliberal institutionalism seems to fare slightly better in attempting to explain state cooperation on the matter of the ICC. This theoretic strand also ascribes causal primacy to states as the key actors within the international realm. The theory also holds much of the same assumptions as neorealism in regards to the context of the international

realm as well. The key difference between neorealism and neoliberal institutionalism is that in the later theoretic strand institutions are seen as fora which enable states to cooperate and build mutual trust. Within this theoretical strand, institutions themselves serve as avenues for cooperation. At issue, however, is that states are still thought to be unitary actors, which means that other than the institutional venue, it is very difficult to explain why certain states changed position with respect to certain policy preferences. This theory would not be able to explain why the UK, for example, changed its policy with respect to the independent Prosecutor in 1997.

Moving from the international realm to the domestic political realm, historical institutionalism seems also to offer a key insight which resonates quite well with the research conducted. This insight is not sufficient however as it fails in a key respect. Historical institutionalism – with its emphasis on established institutional practices and norms – may be able to explain why certain liberal democratic states supported the establishment of the Court with an independent Prosecutor. The historically contingent institution – with all its procedural, ‘rule of law’ and practical elements – can provide a satisfactory explanation. Yet this theoretical strand does not seem to be able to explain why the US, heralded as the bastion of liberal democracy and the rule of law, decided to oppose the Court. The age-old existence of certain types of domestic institutions does not, in other words, provide a satisfactory explanation.

What is left as analytical currencies are actors and their formulation of preferences, more specifically preferences with respect to state sovereignty. Liberal pluralism, with its causal emphasis on domestic actors and domestic preference formation reflected in the actions of governments – which themselves are represented by the victors



of domestic political processes and debates – seems to be able to provide the most plausible causal story. At the time of the Rome conference – as well as before and after the negotiations – certain domestic groups represented key governments in the negotiation process. These groups, for the most part, all believed that an ICC with an independent Prosecutor is the best plausible solution to end impunity in conflict. At the same time, however, these groups advocated a formulation of state sovereignty – an expanded notion of states sovereignty and security, namely human security – which was able to accommodate, and fit well, with the establishment of a Court with an independent Prosecutor. Liberal constructivism, with its emphasis on ideas – such as ‘human security’ and ‘ethical foreign policy’ – is best able to explain the formulation of state interests and the corresponding actions of key states in this process as well. At the same time, ideas underpinning a more inward looking and traditionally ‘statist’ foreign policy of the US, and, at least initially, Japan, informed these states’ policy preferences and actions with respect to the Court.

Lastly, this work also contains practical contributions as well. Perhaps the main practical contribution of this work is that it sheds light on the fact that accession to the RS, or joining the Court in general, is a function of a favourable domestic political and legal climate. Currently there are 124 states which are members of the Court. In order to raise this number and continuously strive towards universal acceptance and ‘jurisdiction’ the Court and civil society groups must seek favourable domestic political and legal conditions while encouraging states to join the Court. In a general sense, the key once again is domestic policy formation and formulation.

The theoretical investigation of domestic political and legal conditions and contexts which may, or may not, lend themselves to treaty ratification then is one of the key areas of further research which should be attempted. With the advent of globalization, states are more compelled to enter into international agreements bilaterally and within multilateral fora as well. Certain states are more likely to enter into international agreements and some others are less likely to do so. Some states prefer bilateral agreements over multilateral agreements. Concerted research is more than warranted in attempting to understand under what conditions – international and domestic – are states more likely to enter into, and bind themselves to, international agreements and under what conditions would states back away from entering into such agreements. It is also of crucial importance to understand how these decisions are made, by whom, and under what circumstances are the proponents victorious. In a broader sense, then, further research is warranted to uncover the connection between domestic political actors and the relevance of international law within international relations. More often than not, discussions regarding international law lend themselves to discussions encompassing dynamics and bargaining within the international realm. Less attention is placed on the domestic factors of the effectiveness of international law and international legal regimes in general. Much knowledge will be gained by unearthing the often neglected connections between the domestic and the international – as well as global – elements of international law.

In closing, the focus on the domestic sources of foreign policy is key to understanding the establishment of the ICC with an independent Prosecutor. An exclusive focus on international processes and negotiations only provides a partial

explanation. In more specific terms, the investigation of the ratification processes in individual states – although attempted in this work – is still very much wanting. These processes are critical to understanding international negotiation outcomes. As the research above shows, a different set of actors in power in key domestic legislatures could have in fact brought about a very different outcome. With respect to the ICC in particular, at the time of writing, there are 124 states that have ratified the RS. This number, although very encouraging – signifies a shortfall with respect to a key idea striven for by those involved in the negotiations and their supporters: universal jurisdiction. Apart from the legal understanding of this notion, the more states ratify the RS, the closer the global community will come to universal acceptance and perhaps even jurisdiction of the Court. Exploring the processes of ratification in the 122 states mentioned above can most certainly pave the way for future ratifications elsewhere as well.

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## APPENDIX I – STATES IN FAVOUR OF AN INDEPENDENT PROSECUTOR

| State <sup>113</sup> | Independence | Information      | Pre-Trial Chamber | Politicization | Safeguards      |
|----------------------|--------------|------------------|-------------------|----------------|-----------------|
| Andorra              |              |                  |                   |                |                 |
| Angola               |              |                  |                   |                |                 |
| Argentina            |              |                  | X                 |                |                 |
| Armenia              |              |                  |                   |                |                 |
| Australia            |              |                  | X                 |                | XX              |
| Austria              | X            |                  |                   |                |                 |
| Belgium              | X            | X                | X                 |                | X               |
| Benin                |              |                  |                   |                |                 |
| Bosnia and H.        |              |                  |                   |                | Present         |
| Bolivia              |              |                  | General Assembly  |                |                 |
| Botswana             |              |                  |                   |                |                 |
| Brazil               |              | X                | X                 |                | NO              |
| Burkina Faso         |              |                  | XX                | X              |                 |
| Burundi              |              |                  |                   |                |                 |
| Canada               |              |                  |                   |                | Already present |
| Chile                |              | Reliable sources |                   |                | Sufficient      |
| Columbia             |              |                  | X                 |                |                 |
| Congo                |              |                  | X                 |                |                 |
| Costa Rica           |              |                  | X                 |                |                 |
| Croatia              |              |                  |                   |                |                 |
| Czech R.             | X            | X                |                   |                |                 |
| Denmark              |              |                  | X                 |                | NO              |
| Djibouti             |              |                  | X                 |                |                 |
| Equador              |              |                  |                   |                |                 |
| Estonia              |              |                  |                   |                |                 |
| Finland              |              |                  |                   |                | X               |
| France               |              |                  | X                 |                |                 |
| Gabon                |              |                  |                   |                | X               |
| Germany              |              |                  |                   | X              |                 |
| Ghana                |              |                  |                   |                |                 |
| Greece               |              |                  | X                 |                | NO              |
| Guinea               |              |                  | X                 |                |                 |

<sup>113</sup> All the data appearing in this table was acquired from Bassiouni, M. Cherif. *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994 – 1998*. Volume 2. Ardsley, New York: Transnational Publishers, Inc., 2005.

| State         | Independence | Information           | Pre-Trial Chamber | Politicization | Safeguards           |
|---------------|--------------|-----------------------|-------------------|----------------|----------------------|
| Guinea-Bissau |              |                       |                   |                |                      |
| Holy See      |              |                       |                   |                |                      |
| Hungary       |              |                       |                   |                |                      |
| Ireland       | XX           | X                     | X                 |                |                      |
| Italy         |              | XX                    | Possibly          |                |                      |
| Ivory Coast   |              |                       | X                 |                |                      |
| Jamaica       |              |                       |                   |                |                      |
| Jordan        |              | Credible sources      |                   |                | X                    |
| Kuwait        |              |                       |                   |                | X                    |
| Lesotho       | X            | XX                    | X                 |                | X                    |
| Liechtenstein |              | From reliable sources |                   |                |                      |
| Lithuania     |              |                       |                   |                | No                   |
| Madagascar    | X            |                       | X                 |                |                      |
| Mali          |              |                       |                   |                |                      |
| Malta         | X            |                       |                   |                | Only as a compromise |
| Morocco       |              |                       | X                 | No control     |                      |
| Mexico        |              |                       | X                 |                |                      |
| Mozambique    |              |                       |                   |                | Sufficient           |
| Namibia       |              | X                     |                   |                |                      |
| Netherlands   |              | X                     |                   |                | NO                   |
| Nicaragua     |              |                       |                   |                |                      |
| Norway        |              | X                     | XX                |                | Sufficient           |
| New Zealand   |              |                       |                   |                | X                    |
| Peru          |              |                       | X                 |                | No                   |
| Poland        |              |                       |                   |                | X                    |
| Portugal      | X            |                       | X                 |                | Already present      |
| ROK           |              | X                     |                   |                |                      |
| Romania       |              |                       | X                 |                |                      |
| San Marino    |              |                       | X                 |                |                      |
| Senegal       | X            | No                    | XX                |                |                      |
| Sierra Leone  |              | X                     |                   |                | XX                   |
| Slovenia      |              | X                     |                   |                | Sufficient           |
| Solomon Isl.  |              |                       |                   |                | Already present      |
| South Africa  |              | X                     | X                 |                |                      |
| Spain         |              |                       |                   |                |                      |
| Swaziland     |              |                       |                   |                | Already present      |

| <b>State</b>        | <b>Independence</b> | <b>Information</b> | <b>Pre-Trial Chamber</b> | <b>Politicization</b> | <b>Safeguards</b> |
|---------------------|---------------------|--------------------|--------------------------|-----------------------|-------------------|
| Sweden              |                     |                    | X                        |                       | X                 |
| Switzerland         |                     |                    | X                        |                       |                   |
| Tanzania            |                     |                    | X                        |                       |                   |
| Thailand            |                     | X                  |                          |                       |                   |
| Togo                |                     | X                  |                          |                       | X                 |
| Trinidad & T.       | X                   |                    | X                        |                       |                   |
| Uganda              |                     |                    |                          |                       |                   |
| UK                  | X                   |                    | X                        |                       |                   |
| Ukraine             |                     |                    | X                        |                       |                   |
| <b>TOTAL:</b><br>77 | <b>(8)</b>          | <b>(15)</b>        | <b>(31)</b>              | <b>(0)</b>            | <b>(7)</b>        |

### **Guide to APPENDIX I:**

The categories of comments made by state delegations appears on the top row of each page. The 'X' denotes the position argued by a particular state. Double 'X' mean that the same state spoke on the particular issue on one additional occasion. The category of arguments made are the need for an independent prosecutor for an independent court, information provision from any source, the need for a pre-trial chamber, the issue of politicization if not independent, and the need for additional safeguards, other than the oversight of the pre-trial chamber. Please note that the table does not account for variation in the positions states took throughout the conference.

## APPENDIX II – STATES NOT IN FAVOUR OF AN INDEPENDENT PROSECUTOR

| State <sup>114</sup> | State Refer. | UNSC | Political Infl. | Complement. | Info Prov. | Judicial Overs. | Pre-Trial | Indep. Pros. | Add. Safeguards | Effect. |
|----------------------|--------------|------|-----------------|-------------|------------|-----------------|-----------|--------------|-----------------|---------|
| Afghanistan          | nf           |      |                 |             |            |                 |           |              |                 | X       |
| Algeria              | nf           |      | X               | X           |            |                 | X         |              |                 | XX      |
| Azerbaijan           | fp           |      |                 | X           |            |                 |           |              |                 |         |
| Bahrain              | nf           |      |                 |             | Limited    | X               |           |              |                 |         |
| Bangladesh           | pf           |      |                 |             |            |                 | Enhanced  |              |                 |         |
| Cameroon             | nf           |      |                 |             |            |                 |           |              |                 |         |
| China                | nf           |      |                 |             |            |                 |           |              |                 |         |
| Cuba                 | nf           | X    |                 |             |            |                 |           |              |                 |         |
| Egypt                | nf           | X    |                 |             |            |                 |           |              |                 | X       |
| Ethiopia             | pf           | X    |                 |             |            |                 |           |              |                 |         |
| India                | f            | X    |                 | X           |            |                 |           |              |                 |         |
| Indo                 | pf           |      |                 | X           |            |                 |           |              |                 |         |
| Iran                 | nf           |      |                 |             |            |                 |           |              |                 |         |
| Iraq                 | nf           | X    | X               |             |            |                 |           |              |                 |         |
| Israel               | f            |      | X               | XX          |            |                 |           | Weaken       | X               |         |
| Japan                | f            | X    | X               |             |            |                 |           |              |                 |         |
| Kenya                | nf           | X    | X               |             |            |                 |           |              |                 |         |
| KSA                  |              | X    | X               |             | X          |                 |           |              |                 |         |

<sup>114</sup> All the data appearing in this table was acquired from Bassiouni, M. Cherif. *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994 – 1998*. Volume 2. Ardsley, New York: Transnational Publishers, Inc., 2005.

|                  |    |             |            |            |            |            |            |            |            |                             |            |
|------------------|----|-------------|------------|------------|------------|------------|------------|------------|------------|-----------------------------|------------|
| Libya            | nf | XX          |            |            |            |            |            |            |            |                             |            |
| Nigeria          | pf |             |            |            |            |            |            |            |            |                             |            |
| Oman             | nf |             |            | X          | X          |            |            | X          |            |                             |            |
| Oman             |    |             |            |            |            |            |            |            |            |                             |            |
| Pakistan         | pf | XX          |            |            | X          |            |            |            | X          |                             |            |
| Qatar            | nf |             |            |            |            |            |            |            |            |                             |            |
| Russia           | pf | XX          | XX         | X          |            |            |            |            |            |                             |            |
| Slovakia         | p  |             |            |            |            |            |            |            |            |                             |            |
| Sri Lanka        | pf |             |            |            | X          |            |            |            |            |                             |            |
|                  |    |             |            |            |            |            |            |            |            |                             |            |
| Sudan            | nf |             | GA         |            |            |            |            |            |            |                             |            |
| Tunisia          | nf | X           |            |            |            |            |            |            |            |                             |            |
| Turkey           | pf | X           |            | XX         | X          |            |            |            |            |                             | X          |
| UAE              | nf | X           |            |            |            |            |            |            |            |                             |            |
| Uruguay          | f  | X           | X          |            |            |            |            |            |            | More risks than<br>benefits |            |
| USA              | f  | X           | X          | X          |            | X          |            |            |            |                             |            |
| Venezuela        | f  | X           | X          |            |            |            |            |            |            |                             |            |
| Vietnam          | nf |             |            |            |            |            |            |            |            |                             |            |
| Yemen            | nf | X           |            |            |            |            |            |            |            |                             |            |
| <b>TOTAL: 36</b> |    | <b>(19)</b> | <b>(8)</b> | <b>(6)</b> | <b>(8)</b> | <b>(2)</b> | <b>(1)</b> | <b>(2)</b> | <b>(1)</b> | <b>(1)</b>                  | <b>(4)</b> |

\*For explanations on the contents of this table, please refer to the 'Guide to Appendix II' on page 281.



## Guide to Appendix II

The categories of comments made by state delegations appears on the top row of each page. The ‘X’s denote the position argued by a particular state. Double ‘X’ mean that the same state spoke on the particular issue on one additional occasion. The category of comments are state referral, UNSC referral, political influence if independent, issues of complementarity, information provision, the need for a judicial oversight, the need for a pre-trial chamber, need for an independent prosecutor other than fully independent, the need for additional safeguards, and the issue of not being effective if independent.. The totals are tabulated below the last state listed in the table. Please note that the table does not account for variation in the positions states took throughout the conference.

### Guide to the abbreviations:

‘nf’ – ‘Not Free’

‘pf’ – ‘Partially Free’

‘f’ – ‘Free’

The above outlined classifications are those used by ‘Freedom House’, and are the aggregate ratings on countries’ civil and political rights indicators. For more information in regards to this methodology, please see ‘Methodology’ in *Methodology*. On-line. Freedom House. <https://freedomhouse.org/report/freedom-world-2015/methodology#.VQBXT47F-So> [Accessed: March 11<sup>th</sup>, 2015]

## APPENDIX III – STATES COMMENTING ON THE FIRST DRAFT OF THE ILC IN 1994

| <u>State</u> <sup>115</sup> | <u>Independent</u>                                     | <u>State</u> | <u>UNSC</u>                          | <u>Judicial Review</u>   |
|-----------------------------|--|--------------|--------------------------------------|--|
| Australia                   | Yes  |              |                                      | Only if not proceeding with an investigation   |
| Belarus                     |  |              |                                      | Court should oversee the work of the Prosecutor  |
| Nordics                     | Yes  |              |                                      |  |
| Switzerland                 |  | Yes          | Yes                                  |  |
| New Zealand                 | Yes, but only if no state referral                     |              |                                      |  |
| UK                          | Yes  |              | Only referral                        |  |
| Sri Lanka                   | Yes; investigative, but not prosecutorial independence |              |                                      |  |
| Yugoslavia                  | Yes  | Yes          | Yes                                  |  |
| Japan                       | Yes  |              |                                      |  |
| Czech Republic              |  |              | Yes                                  |  |
| Austria                     | Yes  |              |                                      |  |
| Hungary                     | Yes  |              |                                      |  |
| US                          | Yes  |              | Yes; up to the Prosecutor afterwards | Proceed if there is a 'good faith' reason that the indictment will stand. Operate only on an 'ad hoc' basis. |
| Kuwait                      | Yes  |              |                                      |  |

### **Guide to Appendix III:**

States commenting on the issue of the Prosecutor may be found on the top row of the table. The extent of the comments were if the Prosecutor should be independent, if states should be able to refer cases to the Court, if the UNSC should be able to refer cases to the Court, and what importance is given to a judicial review of a case pursued by an independent Prosecutor.

<sup>115</sup> Comments of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court, International Law Commission, United Nations General Assembly Records, Forty-sixth session, Additions 1 – 8, A/CN.4/458, 1 May – 22 July 1994.

## CURRICULUM VITAE

### Laszlo Sarkany, Ph.D.

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#### CITIZENSHIP – Canadian

#### SPECIALIZATION

- International relations
- International criminal justice
- Comparative politics

#### SUMMARY OF QUALIFICATIONS

- Extensive field research experience in international criminal justice scholarly and institutional research
- Experience teaching at the second year level at King’s University College, at Western University, and at a third year level at the University of Waterloo
- Completed the inaugural Professional Training Course on the Prevention of Mass Atrocities; Montreal Institute for Genocide and Human Rights Studies, Concordia University, Montreal, PQ, Canada
- Training in the use of the statistical software ‘STATA’, and social network analysis research methods at the Methods School of the European Consortium for Political Research (ECPR) held at the University of Vienna, in Vienna, Austria

#### TEACHING EXPERIENCE

##### Courses Taught:

**“Business and Government”** – Political Science 2211E; Department of Political Science, King’s University College, Western University, London, Ontario; Fall/Winter 2012 and 2013, Fall/Winter 2013 and 2014

- Teaches a two hour lecture once per week, and holds one tutorial per week for 49 students
- Lectures on such topics as the Canadian state and the Canadian economy, liberal and socialist conceptions of the role of the state in the economy, Canadian labour and Canadian capital, the Canadian economy in the North American context, global trade relations, development and inequality, and introduction to Canada’s Arctic policy.
- Received a score of 5.89 out of 7 on the overall course evaluation in 2012/2013
- Received a score of 6.03 out of 7 on the overall course evaluation in 2013/2014 (\*This score was higher than the departmental average.)

**“Public Administration”** – Political Science 2246E; Department of Political Science, King’s University College, Western University, London, Ontario; Winter, 2014 and Fall/Winter 2014-15.

- Teaches a two hour lecture once per week, and holds one tutorial per week for 28 students

- Lectures on such topics as the powers of the Prime Minister, organizational design and management, public finance, human resource issues, government and managerial reforms, and challenges to accountability

**“Globalization”** – Political Science 387; Department of Political Science, Faculty of Arts, University of Waterloo; Fall 2009 and Fall 2011

- Taught a three hour lecture once per week for 36 students
- Lectured on such topics as the history, definitions, explanation, and debates of globalization; the state and nation; security; international law and humanitarian intervention; the environment; terrorism; non-state actors; inequality and contestation; and the politics of development.
- Received a score of 4.2 out of 5 on the overall course evaluation in 2009
- Received a score of 4.36 out of 5 on the overall course evaluation in 2011

### **Teaching Assistant Experience:**

**“Introduction to International Relations”** – Political Science 2231E; Department of Political Science, King’ University College, Western University; Fall and Winter 2013 / 2014

- Lead tutorials for 40 students
- Marked the class essays
- Assigned a participation mark for each student, and held weekly office hours
- Lecture on certain topics such as multilevel analysis and the International Criminal Court

**“Introduction to Comparative Politics: Developed and Developing States”** – Political Science 2245E; Department of Political Science, Faculty of Social Science, University of Western Ontario; Fall 2007 – Fall 2010

- Lead tutorials for approximately 25 – 50 students
- Marked the class essays and the final exams
- Assigned a participation mark for each student, and held weekly office hours

**“International Human Rights”** - Political Science 3382E; Department of Political Science, Faculty of Social Science, University of Western Ontario; Fall 2006

- Marked the class essay and the midterm exams
- Assigned a participation mark for each student
- Held weekly office hours

**“Globalization”** - Political Science 110; Department of Political Science, University of Waterloo; Winter 2004

- Led three tutorial sessions for students enrolled in Political Science 110
- Corrected and marked the class essays, the midterm and the final exams
- Held office hours two times per week for those students who required extra help

**“Introduction to Political Ideas”** - Political Science 100; Department of Political Science, University of Waterloo; Fall 2003

- Led three tutorial sessions
- Corrected and marked the class essays
- Held office hours three times per week for those students who needed extra help

**“Introduction to Philosophy”** – Philosophy 100; Department of Philosophy, St. Jerome’s University, University of Waterloo; Fall, 2002

- Entrusted with marking and correcting the midterm and the final exams

**“Introduction to Croatian”** – Croatian 100; Department of Slavic and Germanic Languages, University of Waterloo; Fall, 1999

- Entrusted with administering a language laboratory for the students once per week

### **Guest Lectures:**

**“Multilateral Diplomacy and Assembly of States Parties Meeting of the International Criminal Court”**; guest lecture to 4<sup>th</sup> year undergraduate students enrolled in *PS 4457F/9712A Special Topics: Diplomacy and International Negotiations*, October 29<sup>th</sup>, 2013, Western University, London, Ontario, Canada, Fall 2013.

**“New Beginnings in a Time of Global Economic Volatility: The International Criminal Court at 10”**, presented as a part of the Department of Political Science Speaker Series 2011-2012, University of Waterloo, Waterloo, Ontario, Canada, Winter, 2012.

Topic: **“Explaining the establishment of the International Criminal Court”**; guest lecture in a 4<sup>th</sup> year course on international relations theory, Department of Political Science, Wilfrid Laurier University, Spring, 2012

Topic: **“Religion, State Collapse and Security.”**  
*Introduction to Comparative Politics*, Political Science 2245E, University of Western Ontario; Winter 2010

Topic: **“Ethnic Conflict and the Second Economy of Zaire,”**  
*Introduction to Comparative Politics*, Political Science 2245E, University of Western Ontario; Winter 2009

Topic: **“Human Rights and Foreign Policy,”**  
*International Human Rights*, Political Science 3338E, University of Western Ontario; Fall 2006

## **EDUCATION**

**Training in quantitative research methods, and applied social network analysis;** Methods School of the European Consortium for Political Research (ECPR) at the University of Vienna, February, 2014.

**Professional Training Course on the Prevention of Mass Atrocities;** Montreal Institute for Genocide and Human Rights Studies, Concordia University, Montreal, PQ; June 12 – 14<sup>th</sup>, 2013

**Doctor of Philosophy Candidate** – Department of Political Science, Faculty of Social Science, University of Western Ontario; Fall 2006 – Present

- **Dissertation Topic:** “Why states established an independent Prosecutor of the International Criminal Court?”
- **Supervisors:** Dr. Adam Harmes, Dr. Bruce Morrison and Dr. Radoslav Dimitrov
- **Relevant Courses:** International Relations, Comparative Politics, Politics of Religion, Transitional Justice, Methodology in Political Science

**Master of Arts** – Political Science, University of Waterloo; Spring, 2006

- **Master’s Research Paper Topic:** The Relationship between the State of Serbia and Montenegro and the International Criminal Tribunal for the Former Yugoslavia.
- **Supervisors:** Dr. Andrew Cooper and Dr. Brian Orend
- **Relevant Courses:** Methodology, Qualitative Research Methods, Conflict and Conflict Resolution, Ethnic Conflict, International Political Economy, and Canadian Public Policy

**Bachelor of Arts** – Honours Political Science and Applied Studies, Philosophy Minor; Cooperative Program, University of Waterloo; Fall, 2003

## **PUBLICATIONS**

### **Policy-Related Publications:**

Sarkany, Laszlo, and Asim Ali. "Kenyatta's Challenge to the ICC." *Canadian International Council*. N.p., 22 Mar 2012. Web. 30 Apr 2013.  
<<http://opencanada.org/author/aali/>>.

### **Publications in the Media:**

Sarkany, Laszlo, and Asim A. Ali. "Pakistan and the IC[C]." *The News*, February 24, 2012. <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=94372&Cat=9>

Sarkany, Laszlo, and Asim Ali. "ICC and Syria." *The Express Tribune*, March 16, 2012. <http://tribune.com.pk/story/350491/icc-and-syria/> (accessed March 24, 2012).

## **CONFERENCE PRESENTATIONS**

“The Political Economy of Compliance: The International Criminal Court and Foreign Direct Investment,” **Annual Meeting of the International Studies Association, San Francisco, USA, April, 2013**

“Teaching International Relations Concepts to Kinaesthetic Learners: Widening Teaching Methodology in the IR Classroom via Recreational Activities and Games” – **Annual meeting of the Canadian Political Science Association, Edmonton, Alberta, Canada; June 2012**

“Does the work of the Prosecutor encourage state ratifications?” – Annual meeting of the **International Studies Association, San Diego, USA; April, 2012**

“The Independent Prosecutor of the International Criminal Court and the Continued Success of the Global Ratification Campaign,” – annual meeting of the **Canadian Political Science Association, Waterloo, Ontario, Canada; May, 2011**

“The Independent Prosecutor of the International Criminal Court: From Rome to Kampala and Beyond,” presented at the annual conference of the **International Studies Association, Montreal, Canada; March, 2011**

“Historical Institutionalism and International Relations Theory: The Case of the United States' Objections to the International Criminal Court,” presented at the **Northeastern Political Science Association Conference, Philadelphia, Pennsylvania, USA; November, 2009**

“Historical Institutionalism and the United States' Objections to the International Criminal Court: The Importance of the Post-Cold War Temporal Context,” presented at the **17<sup>th</sup> Annual Illinois State University Conference for Students of Political Science, Bloomington/Normal, Illinois, USA; March, 2009**

## **AWARDS, FELLOWSHIPS, PRIZES, GRANTS**

**Nominee – Graduate Student Teaching Award**, Spring, 2010; Faculty of Graduate Studies, University of Western Ontario

**Recipient (\$19,500 per annum)** – Western Graduate Research Scholarship (WGRS) and Graduate Teaching Assistantship; Fall 2006 – Fall 2010

**Recipient (\$13,900)** – University of Waterloo Graduate Teaching and Research Assistantship, University of Waterloo; Fall 2003 – Fall 2004

**Research Grant (\$500)** – King’s University College at The University of Western Ontario; Fall 2014.

**Travel Grant (\$300)** to attend the International Studies Association annual conference in San Francisco, California, Spring 2013

**Travel Grant (\$194) provided by the Social Science and Humanities Research Council (SSHRC)** to attend the Canadian Political Science Association annual conference at the University of Alberta, June, 2012.

**Travel Grant (\$300)** to attend the International Studies Association annual conference in San Diego, California, Spring 2012

**Travel Grant (\$300)** to attend the International Studies Association annual conference in Montreal, March, 2011; Department of Political Science, The University of Western Ontario

**Travel Grant (\$300)** to attend the North Eastern Political Science Association Annual Meeting in Philadelphia, PA, Fall, 2009

## **PROFESSIONAL EXPERIENCE:**

**Representative** of the NGO 'No Peace Without Justice' at the 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Assembly of State Parties meeting of the International Criminal Court at the United Nations Headquarters in New York, in December, 2011 and December 2014, and in The Hague, The Netherlands, in November 2012 and November 2013

## **SERVICE**

**Part-Time Faculty Representative;** Department of Political Science, King's University College, Western University, Fall 2013.

**Political Science Representative,** Society of Graduate Students, University of Western Ontario, Summer 2009

**Chair Selection Committee, Graduate Student Representative (Alternate),** Department of Political Science, University of Waterloo, Winter 2004

## **COMMUNITY OUTREACH**



**Director of Referee Development**, South-West District Soccer Association, Fall 2014 - Present

**Secretary** of the South West Soccer Referees' Association, Fall 2005 – Present

**Vice-President** of the South West Soccer Referees' Association, Fall 2008

**Community Awards:**

**Recipient of the 'YMCA Canada Peace Award' – 'Strong Leader' category;** The YMCAs of Cambridge and Kitchener-Waterloo; Fall 2010

**Recipient of the 'YMCA Canada Peace Award' – 'Strong Leader' category;** The YMCAs of Cambridge and Kitchener-Waterloo; Fall 2003

**Recipient of the 15 Year Service Award;** The YMCAs of Cambridge and Kitchener-Waterloo; Winter, 2011

**Recipient of the 15 Year Service Award,** South West Soccer Referees' Association; Fall, 2010

## **PROFESSIONAL AFFILIATIONS**

*International Studies Association;* Member since fall of 2010

*Canadian Political Science Association;* Member since fall of 2006

## **LANGUAGES**

**Spoken Languages:** English, Hungarian, Serbo-Croatian

**Written Languages:** English, Hungarian, Serbo-Croatian – Latin and Cyrillic Scripts

## **HOBBIES, INTERESTS, LEISURE ACTIVITIES, TRAVEL**

- Attended a conference for journalists from the Vishegrad Countries (Czech Republic, Slovakia, Poland and Hungary) regarding the International Criminal Court in 2005. The conference was sponsored by the Foreign Ministries of Switzerland and Norway
- Attended a youth leadership conference in Prague, Czech Republic in the winter of 2002/2003
- Resided in Sweden and Hungary for approximately 1.5 years in each location at the beginning of the 1990s
- Travelled extensively in Europe
- Enjoys playing different sports, including soccer, basketball, and hockey

## **REFERENCES**

**Dr. Adam Harmes, CD; Graduate Chair**

**Dr. Bruce Morrison**

**Dr. Radoslav Dimitrov**