ARE THE RISKS REAL?
Contemporary Opposition to the ICC

Holly Reid
Graduate of Norman Paterson School of International Affairs

Adam Chapnick
Department of History, University of Toronto

Abstract- In spite of the overwhelming global support for the international criminal court (ICC) upon its inception in July 1998, a significant number of states, led by the US, have hesitated in ratifying the Rome Statute. After reviewing the benefits and drawbacks of a fully-functioning ICC, this paper addresses the implications of the ICC in the context of global power politics. We conclude that, while accession to the ICC indeed affects state sovereignty, on the whole, the risks articulated by opponents in the US and elsewhere are more perceived than real. Accepting the ICC will have little to no impact on Great Power security or influence in the international arena.

In Rome, Italy, on July 17, 1998, in a vote of 120 in favour, 7 against and 21 abstentions, members of the United Nations agreed to establish an international criminal court (ICC).[1] The ICC created a new mechanism for prosecuting individuals accused of committing "the most serious crimes of concern to the international community as a whole"[2] . However, the vote did not bring an end to arguments against the ICC's ability to promote international peace and justice. States were slow to ratify the *Rome Statute*. At the time of writing, 4 years after signature, only 87 countries have done so[3]. Although the delay may be attributed partially to cumbersome domestic ratification processes, it seems that some signatories have also been having sober second thoughts about signing onto the ICC.[4]

The ICC is tasked with prosecuting genocide, crimes against humanity perpetrated as part of a widespread or systemic attack against civilian populations, and war crimes, such as those defined by the *Geneva Conventions*.[5] The *Rome Statute* also contemplates the ICC prosecuting crimes of aggression; however, the ICC will not have jurisdiction over such crimes until state parties agree on a definition of 'aggression' and the *Statute* is amended to include this definition.[6] For the ICC to have jurisdiction, the accused individual

1 Voting against were the US, Iran, Libya, Quatar, Yemen, China and Israel. Since then, the number of signatories has increased to 139, and now includes the US, Iran and Israel.

2 *Rome Statute*, Preamble.

3 For an updated version of state ratification, see http://www.un.org. Following the ratification of 60 states, in July 2002, the *Rome Statute* formally entered into force.

4 For example, the United States in "Sign on, Opt Out," The Economist (6 January 2001), 28.

5 *Rome Statute*, Article 5.

6 Amendment cannot take place until the *Statute* is reviewed in 2005. Rome Statute, Article 5(2), 121, 123.

must also be a national of a state that has ratified the *Rome Statute*, or have allegedly committed a crime in the territory of a state party.[7] ICC jurisdiction will be precluded if another state is willing and able to prosecute the crime domestically, or if the United Nations Security Council (UNSC) blocks ICC action.[8] The ICC is expected to be fully operational by early 2004.

Arguments in favour of the creation of the ICC have centred on a number of themes including the promotion of peace and justice through individual responsibility, and the organizational benefits of creating a permanent international body to deal with criminal offences. Opponents of the ICC have focused on the restriction of state sovereignty imposed by the *Rome Statute* and have questioned whether the ICC can deliver peace or justice. The United States, as the sole superpower, is particularly hostile to any real or perceived threat to its freedom to write its own script in foreign affairs.

Arguments against the ICC have been expressed largely in an emotional and rhetorical fashion. Although the long-term impact of the ICC on the international power structure, and particularly US power, has been alluded to, consideration has been insufficient. This paper seeks to address the implications of the ICC in the context of international power politics. After reviewing and evaluating the arguments in favour and against the ICC, the paper will consider the effect of the ICC on US power. We conclude that the creation of the ICC does in fact restrict the freedom of powerful states, such as the US, to act, or not act, in specific ways. However, given that the US has little interest in exercising any freedom of action that it is giving up by accepting the ICC, the Court will have little negative impact on US security or its power in the international arena.

ARGUMENTS FOR THE ICC

Promoter of Peace

The ICC is often portrayed as a response to the unimaginable atrocities of the modern era.[9] Conflicts in Rwanda and Bosnia, for example, could not be resolved at the domestic level. The ICC is therefore viewed as providing the international community with a permanent body to enforce international law, avoiding the need to create ad hoc tribunals. The creation of a permanent international court also has strong symbolic significance. The ICC is a forum in which states can work together to strengthen international law and build norms against aggressive behaviour.[10] In sum, the ICC gives the international community a project that inspires cooperation and the building of peace. Proponents of this argument assume a strong relationship between the strengthening of the rule of law and the decrease of the use of force. For instance, Benjamin Ferencz notes that: "No one doubts that it would be desirable to have an enforceable code of conduct to govern relations among states and that the decision of an impartial body would be preferable to combat

7 *Rome Statute*, Article 12.
8 *Rome Statute*, Article 16, 17.
9 William N. Gianaris, "The New World Order and the Need for an International Criminal Court," *Fordham International Law Journal* 16,1 (1992), 88.
10 Gianaris, "The New World Order," 90.

as a means of settling disputes".[11] Shying away from considering the Court a panacea for violent conflict, many proponents characterize it as just "one more tool which the international community can bring to bear on situations of appalling suffering".[12]

The ICC has also been promoted as integral to preventing conflict, and therefore promoting peace.[13] The existence of the ICC may act as a deterrent to rogue states and international criminals. Future perpetrators of international crimes will have to take notice that they may be held accountable for their actions.[14] The ad hoc tribunals of the 1990s were created after conflict occurred and therefore could not serve to deter would-be criminals. In contrast, the ICC, because of its permanence, may provide a strong disincentive for law-breakers. Normatively, this argument is strong.[15] However, effective deterrence is inevitably tied to the effectiveness of the ICC. If criminals do not expect to be caught or punished, deterrence will not be achieved.

Promotion of Justice

Legal scholar M. Cherif Bassiouni has noted that: "Only after the present political culture realizes that justice is an indispensable component of peace will the establishment of a permanent international criminal court be possible".[16] Secretary General of the United Nations, Kofi Annan, has concurred, writing: "There can be no global justice... unless the worst of crimes against humanity – are subject to the law".[17] In addition to promoting peace, the ICC is viewed as facilitating international justice. Proponents maintain that civil society "no longer accepts the dissembling argument that to achieve peace, meaning political settlement, impunity is the justifiable quid pro quo that leaders exchange for cessation of conflict".[18] Failure to punish past violators of international law has encouraged belligerents to commit further atrocities, and has denied law its impact as a deterrent.[19] An effective ICC would end the culture of impunity that has pervaded international affairs, or at least stem the tide. In this vein, Chair of the American Branch of the International Law

11 Benjamin B. Ferencz, *An International Criminal Court: A Step Towards Peace*, (London: Oceana Publications, 1980), vol. 1, xi.

12 Felicity Wong and Russell McVeagh, "An International Criminal Court," *New Zealand Law Review* (June 1998), 220.

13 Leila Sadat Wexler, "The Proposed International Criminal Court: An Appraisal," *Cornell Journal of International Law* 29,3 (1996), 665-726; Dominic McGoldrick, "The Permanent International Criminal Court: An End to the Culture of Impunity?" *The Criminal Law Review* (August 1999), 627-55; The Stanley Foundation, "The UN Security Council and the International Criminal Court: How Should They Relate?" *Report of the Twenty-Ninth United Nations Issues Conference* (New York: 20-22 February 1998); and Young Sok Kim, "The Cooperation of a State to Establish an Effective Permanent International Criminal Court," *Journal of International Law and Practice* 6,1 (Spring 1997), 157-75.

14 Giulio M. Gallarotti and Arik Y. Preis, "Towards Universal Human Rights and the Role of Law: The Permanent International Criminal Court," *Australian Journal of International Law* 53,1 (April 1999), 109.

15 Sandra L. Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," *Denver Journal of International Law and Politics* 23,2 (Spring 1995), 437.

16 M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* 10 (Spring 1997), 58.

17 Kofi Annan, "Advocating for an International Criminal Court," Fordham International Law Journal 21,2 (1997), 364.

18 M. Cherif Bassiouni, "Policy Responses Favouring the Establishment of the International Criminal Court," *Journal of International Affairs* 52,2 (Spring 1997), 797.

19 Jamison, "A Permanent International Criminal Court," 451, and Jelena Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness," *Columbia Human Rights Review* 29,2 (Spring 1998), 292; Ferencz, *An International Criminal Court*, vol.1; McGoldrick, "The Permanent International Criminal Court."; Kim, "The Cooperation of a State," and David Krieger, "Establishing a Permanent International Criminal Tribunal: Completing the Task," *The International Journal of Humanities and Peace* 11,1 (1995), 81-3.

Association's Committee on a Permanent ICC, Leila Sadat Wexler, has written: "Given the number of atrocities that are currently taking place without any provocation whatsoever, one could argue that the court should be given a try if it has any chance of success at all".[20]

Governor of the NGO coalition for an ICC, William Pace, calls the court "an insurance policy".[21] An international court punishes perpetrators of heinous crimes, creating a sense of justice for its victims that is crucial to national reconciliation.[22] Without justice, the delicate process of reconciliation is seriously threatened.[23] Similar to the deterrence argument, the veracity of the reconciliation argument is contingent upon the effectiveness of the court in achieving its goals.

Many insist that the only way to ensure justice is to develop and codify stronger and better laws.[24] Proponents of the ICC maintain that the ICC provides a forum for thedevelopment of international law. The ICC would also provide consistency in the application of law. After all, justice is only served when law is applied consistently. The ICC is therefore seen to rationalize the provision of global justice and to increase predictability. Thus, the ICC may limit state disputes over the content and application of international law.

When scholar Antoine Sottile wrote in favour of the creation of an ICC in the 1960s, he championed the importance of the "maintenance of public order among nations". To ensure domestic order, states had criminal laws and the ability to enforce these laws. It was therefore only logical that the international community be governed in a similar fashion. If justice in the domestic sphere creates domestic order, then justice in the international sphere should enhance international peace and security.

The ICC is often viewed as a model of justice for the future.[27] Proponents criticize the UNSC for its politicization of international aggression. Veto power at the UNSC allows five states to place their own interests above the law. UNSC ad hoc tribunals have dealt with selective tragedies, serving to some as "symbols of justice to achieve political ends".[28] In contrast, an independent ICC would be relatively free from the interference of great powers.[29] Its distance from political bodies would allow for application of international law defined collectively rather than based on narrow state interests.[30]

---

20 Wexler, "The Proposed International Criminal Court," 714.

21 William R. Pace, "Globalizing Justice: NGOs and the Need for an International Criminal Court," *Harvard International Review* 20,2 (Spring 1998), 29.

22 See Pejic, "Creating a Permanent International Criminal Court." The issue of redress is touched on briefly in Bassiouni, "Policy Responses"; Kim, "The Cooperation of a State"; and Wexler, "The Proposed International Criminal Court". They argue that victims who feel justice has been served are less likely to resort to potentially destabilizing acts of vengeance or political protest.

23 Stanley Foundation, *Report*, 12.

24 Gallarotti and Preis, "Towards Universal Human Rights," 103.

25 Agreement can be found in The Stanley Foundation Report; Bassiouni, "From Versailles to Rwanda"; and Gallarotti and Preis, "Towards Universal Human Rights."

26 Sottile, *The Problem of Creating an International Criminal Court*, 47.

27 Pejic, "Creating a Permanent International Criminal Court," Krieger, "Establishing a Permanent International Criminal Tribunal," and Kim, "The Cooperation of a State."

28 Bassiouni, "From Versailles to Rwanda," 15.

29 The UNSC is able to defer investigations indefinitely.

30 See Wexler, "The Proposed International Criminal Court,"; Gallarotti and Preis, "Towards Universal Human Rights."

Organizational Benefits

While the success of the recent UNSC sponsored ad hoc tribunals has been viewed favourably, ICC proponents have not been satisfied.[31] Many view the ad hoc tribunals as arbitrary, selective and politically tainted.[32] Tribunals are also expensive to create and difficult to organize quickly.[33] The concept of "tribunal fatigue"[34] —the idea that establishing and operating tribunals can be taxing on the international community at large— largely spurred the creation of the ICC.

Ad hoc mechanisms include temporal and territorial limitations.[35] Restricted in scope, these tribunals cannot respond to unexpected events outside of their jurisdictions. By eliminating start-up costs, an ICC could be more cost effective than the tribunals.[36] An ICC would also relieve the UNSC of micro-management duties and promote the appearance of political independence.[37] Although a streamlined process for the creation and functioning of ad hoc tribunals could be designed to respond to "tribunal fatigue", the creation of a permanent court appears to be a more efficient and effective manner of dealing with international crimes.

Proponents argue that the ICC allows states to avoid the practical and political impediments to upholding international law. For instance, states might be "ill-equipped",[38] or "reluctant"[39] to extradite, or they might simply be unwilling to prosecute their most powerful citizens.[40] The court solves these problems by removing the burden of prosecution from national governments in cases in which they appear incapacitated or unwilling to do so. The principle of complementarity[41] —meaning that the court will only prosecute those cases that states cannot handle, or are unwilling to investigate—ensures that states remain in control of their own domestic powers. Proponents of the ICC argue that sovereignty is only moderately compromised.

ARGUMENTS AGAINST THE ICC

State Sovereignty and International Morality

The creation of an effective ICC implies the surrender of a degree of state sovereignty.[42] Proponents argue that sovereignty is decreased in all international agreements[43] and the Rome Statute is no different. However, the creation of an organization tasked with holding individuals accountable for international

31 McGoldrick, "The Permanent International Criminal Court," and Kim, "The Cooperation of a State."
32 Wexler, "The Proposed International Criminal Court," 712.
33 Jamison, "A Permanent International Criminal Court," 420.
34 Michael P. Scharf, "The Politics of Establishing an International Criminal Court," *Dickinson Journal of International Law* 6,1 (Fall 1995), 169.
35 Gerhard Hafner et. al., "A Response to the American View as Presented by Ruth Wedgwood," *European Journal of International Law* 10,1 (1999), 115.
36 McGoldrick, "The Permanent International Criminal Court," 629; McGrath, "Today's Transnational Epidemic," 150; Sottile, *The Problem of the Creation of a Permanent International Criminal Court; and Pejic*, "Creating a Permanent International Criminal Court."
37 Bassiouni, "From Versailles to Rwanda," 49.
38 Wexler, "The Proposed International Criminal Court," 709.
39 Gianaris, "The New World Order," 109.
40 Kim, "The Cooperation of a State," 162.
41 *Rome Statute*, Preamble, Articles 1, 12 and 17.
42 Ferencz, *An International Criminal Court*, vol. 2; Krieger, "Establishing a Permanent International Criminal Tribunal."
43 Krieger, "Establishing a Permanent International Criminal Tribunal," 82.

crimes is especially sensitive to arguments based on state sovereignty. ICC detractors note that the ICC may hinder states from pursuing their national interests. The ICC will penetrate the domestic sphere irrevocably and replace domestic legal systems. States, particularly the very weak and the very strong, are wary of such intrusions.

Further, if the ICC is to impose legal norms, how will these norms be agreed upon? Although much of the international law to be applied by the ICC has been accepted by the vast majority of states, there is fear of how exactly the law will be applied and how it will evolve. Particularly as it relates to aggression and human rights, the content of international criminal law is contentious.

Some have suggested that, "it is better to do nothing in the international legal order than to confuse it with individuals' moral evaluations, and attempt to enforce their views of morality as if they were objective and binding on others under a hypothesized international criminal law".[44] The definition of key concepts and the application of these concepts will undoubtedly cause controversy. If international crimes are covered by domestic law, they should be handled in national jurisdictions, such that subjective evaluations are framed by the domestic context. Even if crimes cannot be prosecuted domestically, the international community's right and ability to enforce its subjective legal standards on sovereign states remains questionable.

Ineffectiveness

Distinguished American legal scholar Alfred P. Rubin has asked: "Is the object of the ICC to do justice or to help attain and preserve peace? ... Peace is not the result of justice; rather, it is the result of implied consent to a social structure".[45] The question becomes whether consent of the international community to the ICC can be achieved.

Ratification of the *Rome Statute* is voluntary.[46] It is therefore unlikely that states knowingly acting in violation of international law will ever submit to it.[47] Lacking unanimou consent, and attracting US hostility, much of the ICC's political credibility has been lost. Furthermore, courts are generally instruments of governance, created and maintained by an overarching political institution.[48] However, in the context of the ICC, there is no overarching international government capable of ensuring that states adhere to the *Rome Statute*. Although the existence of international institutions and regimes may promote state cooperation despite a lack of 'concrete' governance structures, the ratification process seems to indicate that cooperation is tenuous at best.

Even supporters of the Court admit that its functioning relies heavily on state cooperation.[49] These difficulties will likely cause prosecutors to struggle in

44 Rubin, "Challenging the Conventional Wisdom," 794.

45 Alfred P. Rubin, "Challenging the Conventional Wisdom: Another View of the International Criminal Court," Journal of International Affairs 52,2 (Spring 1999), 792.

46 Rome Statute, Articles 4, 12 and 127.

47 Aryeh Neier, "Waiting for Justice: The United States and the International Criminal Court," *World Policy Journal* 15,3 (Fall 1998), 33.

48 Lisa Hajjar, "Alternatives to an ICC." *Middle East Report* 28,2 (Summer 1998), 5.

49 Pejic, "Creating a Permanent International Criminal Court," 307.

performing their duties as against non-parties and therefore international law will not be applied effectively or consistently.[50] As such, the credibility of the ICC as an institution will be further lost. ICC detractors note that the impact of the ICC's norm-building function will decline with its credibility.

Further, the ICC is a product of intense negotiations within the international community. As such, the *Rome Statute* is replete with uneasy compromises which did not satisfy even the proponents of the ICC. Proponents admit that currently the ICC "does no more than what each and every state in the international community can do presently".[51] If this is so, perhaps smaller, regional systems of law would be more effective than an all-encompassing court.[52] The limitations of ad hoc tribunals, so criticized by ICC proponents, actually eliminate many of the problems that arise within a consensus-based international body. Difficulties with ad hoc tribunals might be overcome through long-term strategic planning.

These problems will need to be overcome in order to allow the effective functioning of the Court. The Court must prove itself as the preferable forum for adjudicating international crimes. This task will require a strong collective will to continue with the ICC project. Changes to domestic governments and international events alike will undoubtedly create further obstacles.

American Interests

ICC detractors insist that the ICC will be incapable of fulfilling its mandate without the ratification of the great powers.[53] They maintain that only the United States can exert the political influence needed to ensure the compliance of renegade state and non-state actors, contribute the economic resources to support the ICC's budget and provide the military resources needed to enforce its rulings. Continued American intransigence will not only result in the loss of credibility, it will ensure that the ICC ceases to function in any sustainable way.

Certain American domestic constituencies have consistently opposed the ICC on the grounds of national self-interest. The creation of the ICC has been denounced based on what many consider paranoia.[54] American opponents have foretold of the prosecution of American peacekeepers by vengeful states, and the conviction of American defendants by biased judges. Although American mistrust on this basis may be unfounded, such arguments have only been strengthened by 9/11 – the US clearly sees itself as an international target.

Former US Justice Department officials also remain adamant in their opposition: "the existence of a court that at any time can initiate investigations of US actions around the globe will almost certainly impose inhibitions on the conduct of foreign policy".[55] As the sole global superpower, the US desires to

50 Rubin, "Challenging the Conventional Wisdom," 789.

51 Bassiouni, "Policy Responses," 803.

52 Hajjar, "Alternatives to an International Criminal Court," 6.

53 Scharf, "The Politics of Establishing an International Criminal Court,"; Wedgwood, "An International Criminal Court."

54 William H. Jasper, and Ruth Wedgwood, "Fiddling in Rome: America and the International Criminal Court," *Foreign Affairs* 77,6 (November/December 1998), 20-4.

55 Lee A. Casey and David B. Rivkin, Jr., "Against an International Criminal Court," *Commentary* 105,5 (May 1998), 58.

retain its freedom in international affairs. In many ways it does have the most to lose from giving up any degree of sovereignty. The legislation of international 'morality' through the strengthening of international law will place constraints on the way the US conducts foreign policy.

Even though President Clinton signed the ICC during his final days in office, President Bush has made clear that his administration rejects the jurisdiction of the Court. On May 6, 2002, the US informed the UN Secretary-General that it had no intention of ratifying the Statute. Beyond non-participation, the Bush administration has taken other steps to protect itself from the ICC's jurisdiction. The US has 'coerced' a number of states to sign bilateral 'impunity' agreements. These agreements have the effect of granting impunity to all US nationals accused of genocide, crimes against humanity and war crimes in the territory of the state signing the agreement.[56]

ICC and State Power

To a large extent, the UNSC, holds international power on the world stage. Tasked itself with the prosecution of international crimes, the ICC may interfere with UNSC jurisdiction. Admittedly, safeguards have been put in place that many argue go so far as to allow the UNSC to control the ICC. For instance, Article 16 allows the UNSC to defer ICC action for six month periods which can be renewed indefinitely.[57] Nevertheless, the creation of the ICC does indicate normative change in the exercise of international power. To interfere with ICC proceedings, the UNSC must reveal its motivations, and justify its decision to the international community. As such, the UNSC is to become more accountable. Arguably, the US is concerned that the UNSC power as an arbitrator of global conflict will be decreased – along with its own.

Proponents applaud. Historically, the use of veto power by UNSC permanent members has been seen as preventing effective responses to conflict.[58] Complaints over the so-called "unwarranted inequality"[59] between permanent states members of the Council and non-members have abounded. The ICC is viewed by proponents as a forum in which states which are not members of the UNSC can collectively direct the means by which international conflict is played out.

Kofi Annan has described the fundamental basis of the ICC as a response to the problems at the UNSC: "It is the idea that the behaviour of states and the relations between them shall be governed by one law, equal and applicable to all".[60] Legal Director of the Lawyer's Committee for Human Rights, Elisa Massimono, calls this "equal footing".[61] Similarly, to scholar Christopher

56 For information regarding US attitudes towards the ICC see the American NGO Coalition for the International Criminal Court website at www.amicc.org.

57 *Rome Statute*, Article 16; David, "Grotius Repudiated,"; Wedgwood, "An International Criminal Court."

58 David, "Grotius Repudiated," 351.

59 Pejic, "Creating a Permanent International Criminal Court," 322.

60 Annan, "Advocating for an International Criminal Court," 363.

61 Elisa C. Massimono, "Prospects for the Establishment of an International Criminal Court," *Whittier Law Review* 19,2 (1997), 319.

McGrath, the Court creates "a level playing field".[62] The ideal long-term aim of many ICC proponents is an international system under which all states, and individuals within states, would be considered equal.

However, the ICC explicitly recognizes that the international community remains divided into geo-political state entities. Only states can sign and ratify the Statute. It also accepts the United Nations, an institution based on state sovereignty, as the overarching organization in the international system. While the preamble to the Rome Statute affirms, "the Purposes and Principles of the Charter of the United Nations",[63] drafters of the Statute seem to have downplayed a crucial component of the philosophy underlying the UN's creation –the need to both temper and recognize that some states are more powerful than other. In 1933, David Mitrany noted that equality before the law did not include "an equal share in formulating and applying the law, or what has been called an equal capacity for rights... States [were] neither equal nor immutable units, and to contend for executive equality among them [would have been] clearly unreasonable".[64] Some states were more powerful than others, and merited greater rights and responsibilities.

In a seminal study, Inis Claude argued that, "the veto provision was adopted with full awareness, and deliberate intent, that any of the major powers might use it to block collective action".[65] UN founders preferred international stalemates to action that might have caused the great powers to go to war. Claude concluded: "The security scheme of the Charter, then, was conceived as an arrangement for collective action against relatively minor disturbers of the peace, in cases when the great powers were united in the desire to permit or take action".[66] In essence, the UN Charter enshrined the permanent inequality of states in the international system.

International law expert Lassa Oppenheim agreed. He noted the "far-reaching derogations from the conception of equality of States in the accepted sense".[67] Permanent members of the UNSC were to be treated differently from other states.[68] Global governance was never meant to enshrine equality in real terms; its primary objective was international stability.

Thus, the guiding assumption of ICC proponents—that individuals in all states should be equally responsible under the law—contradicts the theoretical basis of the contemporary international system. If individuals in all states are to be treated equally, why should not states also be treated equally? After all, it is state officials, acting with the force of domestic political institutions, who are most vulnerable to ICC prosecutions. Arguably, the creation of the ICC does more than add a legal body to the international system, it pushes states closer to a re-conceptualization of the basis of global relations by deliberately questioning one of the most significant tenets of the UN.

63 *Rome Statute*, Preamble.

64 *Rome Statute*, 64, 65, 105.

65 Inis Claude, Jr., *Power and International Relations* (New York: Random House, 1967), 159.

66 Claude, Power and International Relations, 160, 162.

67 Lassa Oppenheim, *International Law: A Treatise*, ed. H. Lauterpacht, vol. 1, *Peace*, 8th ed. (London: Longmans, 1962), 23.

68 Oppenheim, *International Law*, 414.

Much of the traditional theory of international relations focuses on conduct between states in the context of an anarchical international society. States attempt to obtain and maintain their power in this system. Although increased state interdependence creates a need for an international manager, it does not itself produce the manager.[69] States are guided by self-interest, and they refuse to concede sovereignty to an international institution unless their own security is ensured.

The provision in the ICC protecting the power of the UNSC ensures that the UNSC's real power is not forfeited. What the ICC does, however, is force the UNSC to take positive action to oust the ICC's jurisdiction: the UNSC must justify itself publicly. This need for justification is viewed by the great powers, particularly the US, as an infringement on their right to act in accordance with national and international interests –both within and outside of the UN system. Further, the ICC restricts the sovereignty of the US by binding its citizens to the international criminal law under the ICC's jurisdiction.

Thus, it is clear that the creation of the ICC does in fact restrict the freedom of powerful states, such as the US, to act or not act in specific ways. It is this restriction of US freedom of action that is widely considered a loss of power. However, the loss of freedom of action does not necessarily equate to a loss of power. Given that the US has little interest in exercising any freedom of action that it is giving up by accepting the ICC, the Court does not effect the US's power or security in the international system in any significant way.

US Power and the ICC

Any perceived inability of the ICC to foster peace and justice in the long-term is largely based on the lack of credibility of the ICC as an effective institution. The reason that most ICC proponents and detractors worry about the ICC's institutional credibility is because the US has failed to buy into the Court. Given the relatively high level of acceptance of the Court in the international community, if the US were to ratify the *Rome Statute*, the ICC would gain increased acceptability. Similarly, if the US were involved in the cumbersome task of developing the ICC into a functioning institution, the legitimacy and resources brought by the US would enable the ICC to overcome a number of its practical problems. US participation would also allow the US more involvement in the direction of the ICC as its functions evolve. Thus, US participation could ensure that the ICC evolves in a manner that does not contrast with its own interests.

The US concern that the ICC will be used as a tool by its political foes is largely reactionary. The ICC is an institution with significant safeguards to protect against its abuse. ICC staff will no doubt be wary of states using ICC processes for political reasons in unsubstantiated cases. Overt political manipulation of the Court would risk the Court's legitimacy and support for its continuance. US participation would allow it to better defend itself against legal attacks. The US could also use the ICC to bring its own concerns to the

69 Waltz, *Theory of International Relations*, 210.

collective attention of the international community.

Underlying American concerns with respect to the ICC is a fear that American foreign policy actions may actually contravene international law under ICC jurisdiction. In this respect, it is important to note that the ICC subject-matter jurisdiction was significantly curtailed during the course of the Rome negotiations, largely to gain American support. The international criminal law included in the ICC's jurisdiction is generally well accepted by the international community, including the US. The US has paid more than lip-service to the international law in question. Legal scholar Marcella David notes that: "the objections of the U.S. seem to embody the concept of absolute immunity—that is to say the U.S. objects to the possibility of being subjected to the Court's jurisdiction at all, and not the eventual vindication at later stages of the proceedings".[70] Any notion of absolute legal immunity is contrary to modern international law and the values of the international community. The US, despite its global power, has committed itself to a number of international institutions and agreements that allow its actions to be questioned by other states.

Further, in the event that a particular issue involving the US becomes particularly contentious, the US can invoke its power in the UNSC to ensure that ICC jurisdiction is precluded. Given US power in the international community, there is little doubt that US positions in the UNSC hold considerably sway. It is for this reason that many parties in the Rome negotiations considered the addition of the UNSC 'deferral' provision a significant concession in favour of the US. As such, the structure of the ICC clearly recognizes that not all states are created equal. Similarly, the notion of complementarity also allows the US a practical method of protecting its nationals from ICC prosecution.

US arguments against the ICC also discount any benefits that the Court may bring to US foreign policy. The strengthening of international law which regulates conduct in a manner that the US considers acceptable will benefit an international community which is largely led by the US. The ICC may also become a collective, non-politicized forum in which the US can bring forward legitimate concerns about the treatment of its nationals without being considered heavy-handed. As the US becomes increasingly responsible for keeping the peace in the international community, the ICC may dispense justice efficiently and in a manner conducive to US interests.

The Court will not have an effect on major US foreign policy decisions involving the use of force. The Rome Statute does not outlaw the use of force or impact how decisions are made regarding the use of force. What the ICC does is ensure that the use of force in the international community is implemented in a way that respects the laws relating to war, crimes against humanity and genocide as they have been defined by international law. The US cannot be prosecuted simply because it chooses to use force without UNSC sanction.

---

[70] Marcella David, "Grotius Repudiated: The American Objectives to the International Criminal Court and the Commitment to International Law," *Michigan Journal of International Law* 20,2 (Winter 1999), 373.

The ICC, like all international institutions, will largely become what its state parties choose to make it. The US may find that, although sitting on the sidelines as the ICC is developed may weaken the Court, it may be more beneficial to become involved to ensure that the Court reflects its long-term interests. This opportunity is particularly important as state parties struggle to define aggression.

Conclusion

There is risk to any state that chooses to relinquish its freedom to act—its sovereignty—to become part of an international institution. This risk is heightened by the power of the state in question to act unilaterally. It is therefore not surprising that strong states, and particularly the US, have viewed the ICC with hostility. However, in assessing its position, the US must seriously consider if any power or freedom to act it is relinquishing to the ICC creates a serious threat to its security or international position. Further, the US cannot be blind to any benefits that may accrue to it because of its participation in the ICC. Although buying into the Court has been considered a threat to US power, the risks that the US has articulated may be more perceived than real.