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NAVIGATING INTERNATIONAL LAW: INTERPLAY BETWEEN LIBERALISM, REALISM, AND STATE BEHAVIOR

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Abstract: Within the realm of historical international relations, the principles of liberal theory find compelling expression through the collaborative endeavors of various actors, both state and non-state, aimed at codifying international laws. These laws, crafted to safeguard civilization against transgressive actions perpetrated by nations, organizations, or individuals, stand as poignant symbols of international cooperation. Throughout history, pivotal instances such as the Geneva Conventions, the Nuremberg Trials, the International Criminal Tribunals on Yugoslavia and Rwanda, and the establishment of the International Criminal Court (ICC) have epitomized the collective efforts towards legal codification and enforcement on the global stage.

This paper examines the historical trajectory of international cooperative efforts in codifying and enforcing international laws, with a particular emphasis on the manifestations of liberal theory within this context. Through an analysis of key historical milestones, including landmark trials and the establishment of international legal institutions, the study elucidates the evolution and significance of international cooperation in shaping the contemporary landscape of global governance.

Drawing upon insights from historical scholarship and theoretical frameworks, the paper explores the underlying principles that underpin international cooperative endeavors in the realm of legal codification. It highlights the role of collective action and multilateralism in addressing transnational challenges and upholding the principles of justice and accountability on the global stage.

The findings underscore the transformative impact of international cooperation in advancing the principles of liberal theory within the realm of international relations. Moreover, they emphasize the enduring relevance of collaborative efforts in promoting peace, justice, and the rule of law in an increasingly interconnected world.

In conclusion, this paper argues that historical examples of international cooperation in codifying and enforcing international laws serve as compelling illustrations of the efficacy and necessity of liberal principles in addressing global challenges and advancing collective interests.

Keywords: International Relations, Liberal Theory, International Law, International Cooperation, Global Governance

Introduction

In the study of historical international relations, few systems exemplify the arguments of liberal theory more than international cooperative efforts of actors, state and non-state, to codify any set of international laws. These types

of laws, designed to protect civilization from aberrant acts of nations, organizations or individuals, have been typified by international cooperation as historically exemplified in Geneva; the Nuremburg Trials; the International Criminal Tribunals on Yugoslavia and Rwanda; the Special Court for Sierra Leone; and ultimately, in the establishment of the International Criminal Court (ICC). While the structure of international law itself may be best examined through liberal theory, the motivation for participation among individual members may be better explained by international relations realist theory, or political realism. While liberal theory best describes the international organization, realist theory may best describe the motivation for or against participation from a respective state. For example, classical realist theory best explains the American refusal to ratify the Rome Statute and fully participate in the ICC. From a realist perspective, the ICC may be effective in creating some order among states, but some states will only comply with international law when it best serves their interest; most would prefer "self-help".

The U.S. dilemma with the ICC (as a relatively new formed institution) lies in determining just whose interest the ICC will serve; exactly who will "help themselves" through the ill-defined charter of the ICC; and what, if any, power or influence may be exerted by the U.S. in order to control situations or against the U.S. by opponents. This latter concern has only increased in the last decade, given strategic, military and foreign policy activities of the U.S. under the Bush and Obama Administrations, respectively. From a U.S. perspective, these questions represent fundamental and symbolic shortcomings within the charter of the ICC, which has made and continues to make U.S. support and full participation within the ICC incongruent with U.S. national interests – definitively based on a realist perception of the international system. By assessing the historical background of international law and the fundamental issues relevant to American opposition through a realist lens, it is possible to illustrate why the U.S. attitude toward the court should be considered neither arrogant nor paranoid, and some critics have stated. Instead, U.S. attitudes related to state power, security and sovereignty are simply aligned with classical realist concepts of national interests. Based on this philosophical alignment, it is unlikely that the U.S. will ever embrace the concept of a liberal, international organization responsible for international justice through a high level of jurisdiction.

Historical Background of Rome Statute

On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC adopted the "Rome Statute of the International Criminal Court."[4]

The statute passed with a vote of 120 to 7, with 21 countries abstaining. The U.S. voted against adoption of the statute, along with Israel, China, Libya, Iraq, Qatar and Yemen.

Many of the abstentions and negative votes were due to the lack of clarity regarding ICC jurisdiction and its interpretation of law. As ratified, the jurisdiction of the ICC encompassed crimes of genocide, war crimes, crimes against humanity and crimes of aggression (the least well-defined crime). The major source of contention from the perception of the U.S., however, centered on "the point at which the international court takes over jurisdiction from national courts is a matter of interpretation on a case-by-case basis." It is the "interpretation" that troubles the United States. John R. Bolton, former U.S. ambassador to the United Nations and policy advisor, noted in 2002 that the court's flaws are: "… substantive and structural … [the court's] authority is vague and excessively elastic and [its] … discretion ranges far beyond the normal or acceptable judicial responsibilities, giving it broad an unacceptable powers of interpretation that are essentially political and legislative in nature. Despite this critical

assessment, U.S. policymakers did not imply that the concept of an ICC was unimportant; they simply wanted better legal definitions or to be able to sustain the status quo of pursuing matters of international justice through already established international organizations, e.g. the United Nations, the International Court of Justice at the Hague, etc. Even at present, in 2015, the U.S. Department of State webpage maintains a similar, if far less inflammatory perspective. It cites the 2010 National Security Strategy as the source of defining current U.S. policy toward the ICC, and defends the role of the U.S. as "a stabilizing force in international affairs".

It further states Although the United States is not at present a party to the Rome Statute of the International Criminal Court, and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the I.C.C.'s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law … Although the United States is not a party to the I.C.C.'s Statute, the Obama administration has been prepared to support the court's prosecutions and provide assistance in response to specific requests from the I.C.C. prosecutor and other court officials, consistent with U.S. law, *when it is in U.S. national interest to do so*.[11] Realism explains the U.S. position; states do not operate from a perception that international law or cooperation is unimportant or unlikely to occur, they simply take the position that cooperation occurs most often when state self-interests and power are affected. From a more negative perspective, the realist emphasis of the U.S. is also likely to include suspicion regarding the importance of establishing or maintaining ethical norms between states. As cited by W. Julian Korab-Karpowicz in his essay on political realism, "National politics is the realm of authority and law, whereas international politics … is a sphere without justice, characterized by active and potential conflict among states." Essentially, the concept of an international judiciary impacts the American political doctrine of self-governance, as well as American concepts of due process and individual rights; succinctly, the ICC is alien to American traditions and practices of governance and law.

As explained by realist theory, international rules and institutions are viewed less in terms of their influence on state behavior, and more in terms of how these rules and institutions reflect "underlying interest and power relationships."

Also of importance, national interests and power can be altered or ignored if international rules or institutions change the relationships between actors. Lastly, and most significantly, political realism illuminates the U.S. concerns that the ICC, as chartered, could threaten American concepts of self-governance as a republic; erode or over-ride American legal values as presented in the U.S. Bill of Rights and the 6th Amendment of the U.S.

Constitution, e.g. a right to trial by a jury of peers, etc.; and that the ICC could intentionally or inadvertently provide a forum for those actors (state or non-state) with an "underlying interest" against the U.S. or its strategic agenda/foreign policy. To date, although such concerns have yet to manifest, it still is not clear whether U.S. national interests and traditional relationships will eventually be undermined as international legal institutions and procedures change. The Rome Statute was entered into force on July 1st, 2002. In 2006, the ICC began begin its first case in The Hague, against Congolese war criminal Thomas Lubanga Dyilo. The selection of this first case was strategically sound; it placated some of the international anxiety over the jurisdiction of the court by bringing to trial an individual commonly acknowledged as a war criminal. By January 2015, with the acceptance of the "State of Palestine", the number of those ratifying the Rome Statute had grown to 123 countries. The move to accept the State of Palestine prompted the Obama Administration to oppose the action of the Palestinian

authority, stating that it was "technically flawed" because Palestine is not a state and therefore cannot be eligible for membership. The U.S. Department of State also questioned whether the membership jeopardized diplomacy efforts in the region. This most recent development illustrates the U.S. realist concerns regarding self-interests and state power. Realist interpretations of national interest drive American opposition to the Rome Statute and the ICC. The U.S. prefers to maintain the historical status quo of establishing war crimes tribunals under the auspices of the United Nations and The Hague. As stated by Abbott, "realists would … be deeply suspicious of efforts to establish customary law through mere … pronouncements of international institutions." The U.S. does not want to be told what to do or how to do it by a liberal, international organization and this resistance is based on realist concerns: power, security and sovereignty.

American Power

Realist theory views the state as "guided by a national interest defined in terms of power." The concept of tangible and intangible power is central to the realist perspective on the state and its national interests.[23] States translate power potential into effective power in order to influence events by using assorted techniques of statecraft; as stated previously, one of the primary concerns of the U.S. related to the ICC is the loss or diminishment of American power and affluence. At the foundation of the conflict between the U.S. and the ICC lie the concepts of American exceptionalism and realist explanations of power within international organizations. In the years following WWII, the U.S. established a relatively positive reputation for its efforts in implementing and defending international law and its associated institutions. This occurred during an era of bipolar balance of power, from World War II through the Cold War, and enhanced an already robust American self-perception that the U.S. had an exceptional destiny and provided a model for other states to emulate in terms of liberty. James Hathaway, a leading authority on international law and human rights, defined this sense of American exceptionalism as "a belief that the United States has a unique mission to lead the world, but ought logically to be exempt from the rules it promotes" and that America possesses the capacity "to rationalize self-interested American unilateralism as a noble act of international leadership." It may be assumed that at least part of the American power dilemma with the ICC lies in the theory of American exceptionalism.

Although the seeds of American exceptionalism were planted in the revolutionary origins of the U.S., the later Monroe Doctrine and Roosevelt Corollary, exceptionalism reached maturity during the latter portion of the 20th century, when the balance of power was defined as bipolar, with the U.S.S.R. on one ideological side and the U.S. on the other – as "superpowers." Actions taken by the U.S. were rationalized by American exceptionalism and as the U.S.S.R. waned in power, the U.S. increased in state credibility and influence within the international system. The U.S. felt that it had a moral duty to proselytize democratic processes, free the oppressed and punish the dictators of the world, and used its power to do so. It had no reason to support the creation of an ICC. In the recent unipolar world wherein the "superpower" U.S. was under constant scrutiny as a "declining hegemon", also provided no motivation for the U.S. to support an ICC. Instead, the U.S. became even more acutely attuned to any competition to undermine or replace American power and affluence in the world order. Finally, the emergence of a new bipolar world – with the U.S. and China in the balance of power, still has not diminished U.S. concerns over the ICC and neither the U.S. nor China have ratified the Rome Statute, presumably for the same realist reasons. In the 21st century, however, American exceptionalism may be more a liability than an asset. Perceived often as arrogance, the attitude of exceptionalism breeds hostility among America's enemies and causes the U.S.

to become a target of moral and ideological opponents. While this occurs predominantly within the realm of U.S. foreign relations and the opinions of non-state actors, U.S. concerns with the ICC include the prospect of an opponent – state or non-state - manifesting power over U.S. interests by means of this international institution of law.

Realist theory supports this U.S. perspective by positing that "international organizations provide a mechanism for great-power collusion." The concern of the U.S. is that the transfer of jurisdiction to the ICC and the vagueness of its charter could allow for legal collusion to occur not only between great powers (who could exclude the U.S. as they attempt higher footing on the power ladder), but between minor powers with an anti-U.S. agenda, as well. A second example of U.S. power concerns are rooted in the realist explanations of legitimate versus illegitimate power. The U.S. "demanded the most sweeping restrictions" against the ICC because of ambiguities in its political processes, particularly those potentially dangerous to the U.S. and its legitimacy. In assessing political power, realist theorist Hans J. Morgenthau draws a distinction between legitimate power and illegitimate power, stating that legitimate power is "morally or legally justified" (e.g., a policeman conducting a legal search at gunpoint), whereas illegitimate power is simply "naked power" (e.g., a gangster executing the same type of search but for illegal gain). The realist concept of legitimate power is a defining feature of the U.S. as a positive force in international law and also shapes a part of the perception of American exceptionalism. Morgenthau writes: "Power exercised in self-defense or in the name of the United Nations has a better chance to succeed than equivalent power exercised by an aggressor nation."[28]

Thus, the realist concepts of legitimate versus illegitimate power directly influence the U.S. aversion to the ICC and the Rome Statute. If one accepts the realist theory that the state is a rational and unitary actor, then the U.S. perception, influenced by exceptionalism, is that the U.S. agenda must be rational and therefore legitimate, while the same is not necessarily true of an opponent. The U.S., therefore, must be concerned that if opposition becomes increasingly frustrated by the American agenda or a perception of exceptionalism, such entities may seek legal recourse through the ICC on the grounds that U.S. application of power is NOT legitimate, thus undermining American authority and power internationally. As the world order transitions from the short, unipolar era to the new bipolar era, the U.S. remains the most likely target of this type of negative attention due to its expansive foreign relations, despite the fact that China, too, has chosen to eschew membership in the ICC.

Given the possibility that "aggression is in the eye of the beholder", there is a potential for perceived illegitimate power to become, ironically, legitimate through the ICC. The third and final application of realist theory to this relationship explains why the U.S prefers to exercise its national will and power via the status quo. Prior to the Rome Statute, the premiere tool of international law was the use of the UN Security Council (UNSC).

The UNSC established *ad hoc* tribunals to try issues related to human rights and war crimes through a permanent criminal court. The ICC was implemented to replace these tribunals as their mandates expire. The loss of UNSC oversight on issues related to atrocities mitigates U.S. power within the institution of international law. If power is defined as "the ability of a person or group of persons so to affect outcomes so that their preferences take precedence over the preferences of others", then it is logical that the U.S. would prefer the established methods of international law vice those newly formed. The U.S. does not wish to lose the "structural advantage", i.e. power, that it had in regard to the UN system, i.e. where the Security Council referred cases to the tribunals, not a unilateral decision made by the ICC prosecutor. The U.S. wanted the prosecutions within the ICC to be subject

to approval through the UNSC and "subject to permanent member veto." Conversely, those opposed to the U.S. position want the great powers held to the same standard as every other state, as reported in Italy's *La Repubblica* in 1998: In reality, what is at stake here is the balance of power which emerged out of the second [sic] World War. As a matter of fact, the "no" alignment group is led by four of the five permanent UNSC members. More than a concern about the exploitation of the court, they seem concerned about a projected "revision" of the entity … There is also potential for the ICC and UNSC to have competing agenda. The UNSC has "primary responsibility for the maintenance of international peace and security" and whereas the UNSC is accountable to the UN, "the ICC's structure utterly fails to provide sufficient accountability to warrant vesting the Prosecutor with the Statute's enormous power of law enforcement."

Doyle and Ikenberry state that, from a realist perspective, "continuity is the dominant theme of realism as the state of war forces states to behave in similar, rational, power-maximizing ways, or fail and be conquered." The ICC represented and continues to represent a change in the continuity of power. The U.S. agenda is to preserve realist continuity by maintaining habitual efforts within well-established institutions are more historically accepting of American power and influence and more directly related to its own national interests. The U.S., exemplifying political realism, maintains the strategy that the state is more powerful when using the status quo institutions than by pursuing goals through ICC membership. For example, in April 1999, the Federal Republic of Yugoslavia (FRY) filed a case before the International Court of Justice (ICJ) against the U.S. regarding their military activities in the FRY. The application asserted that the U.S. had violated widely accepted legal norms during its 1998 air strikes, based on the 1948 Genocide Convention. The air strikes themselves were of questionable legality because they were a not sanctioned by the UN and were, instead, a U.S.-led, unilateral NATO action. The U.S. was able to argue and win its defense in this case because of "the clear terms of the United States reservation" to articles of the Genocide Convention.

In the anarchy of the Balkan civil wars, the U.S. stepped into a leadership role that none of the NATO partners desired and it must be conceded that the structural power of the U.S. that made the difference – whether the strategy and tactics were unilateral or exercised through NATO. While realist theory explains international cooperation as mutually beneficial to each respective state (depending on their goals), American leadership within the cooperation both sustained and enhanced an already existent U.S. attitude of exceptionalism and affluence within NATO and the international community – which supports the self-interest of the state, its security and ability to leverage power.

As for the FRY-U.S. suit, it exemplifies a portion of historical U.S. opposition to the ICC in realist terms. In black and white terms, the U.S. won the FRY case through the power of its original reservations to the Genocide Convention, a strong legal defense and its understanding and habitual relationship with international institutions. There is another side to this argument, however, that implies the U.S. won the case because it was the more powerful state and was the military victor over the FRY during the action that prompted the suit - what K.W. Abbott described as "victor's justice" in his discussion of the post-WWII trials at Nuremburg and Tokyo. Based on realist beliefs that international institutions are the tools of the powerful or potentially powerful, had this same case been brought to trial before the ICC instead of the ICJ, the opposite ruling might very well have occurred as a result of the ICC's vague definition of "aggression" and the perception of aggression in the NATO action. Former U.S. Secretary of State Madeleine Albright stated the following regarding the Balkan wars, which captures

the potential issues of the ICC application of international law and demonstrates how American exceptionalism influences decision-making: Since the province [Kosovo] was part of Serbia, Milosevic's crimes couldnot be characterized as international aggression. No member of NATO was under attack, so the alliance could not claim the right of self-defense. Serbia had not threatened to invade another country, so there was no rationale for a preventive strike. We did, however, have a duty "to defend the vulnerable other."

From a realist perspective, the U.S. was resistant to change within the existing system because of its position as hegemon within unipolar power system and remains in this position as the world enters a new era of bipolar power. The U.S. belief in exceptionalism and national history in "defending the vulnerable others", have codified political realist approaches to international situations – there is no higher authority than the U.S. in aspects of power within international organizations and the U.S. wants to keep its structural advantage. Forfeiting the level of power that best satisfies the state's national interest and ability to influence international affairs to best support the states' own interests to a relatively new, liberal organization with a vague charter, was simply not logical. Power forfeiture grants and empowers the new organization with a higher level of legitimacy; constrains the conventional source of power within habitual institutions, e.g., the UNSC, etc.; and potentially shifts power to aspirants and enemies, who may then pursue a hegemon through the liberal organization – in this case, the ICC. To the realist, the sum of the power in an international organization is derived from member states. The U.S. perceives the ICC, as ratified, to be a threat to its power.

American Security

The realist tenet of security as a national interest also contributes to the U.S. opposition to the establishment of the ICC and lack of ratification of the Rome Statute. Realism views the state as constrained only by the anarchy of the international system; in matters of security, the lack of external constraints is important – only the state itself can assess its security needs. According to political realist theory, the state's participation in international law is built solely upon the concept of self-interest and in some cases, self-help. Many states choose not to use international organizations as "self-help" alternatives because of mistrust; they are "uncertain whether such institutions will function as planned … [and] are skeptical about whether long-term gains can be achieved."[44] This analysis directly applies to the U.S. unwillingness to participate in an ICC. As the recent hegemon in a unipolar system, the long wars in Afghanistan and Iraq, and the emerging challenges of balancing China in the emerging world order, self-help for the U.S. has occurred and will likely continue to occur through unilateral decisions and actions.

It could also occur, however, through participation in international organizations such as the ICC. The U.S., however, continues to have reservations that the ICC will be used as intended; there is little long-term gain to be garnered for the U.S. through participation because of shortcomings in the statute. There is, however, a paradox regarding the ICC's power of enforcement. In one argument, the ICC is typified by a lack of authority, practical impact and the absence of jurisdictional rules. Another criticism is that the ICC can ignore the crimes of the powerful while prosecuting "the vanquished" when "politically expedient." Certainly, the U.S. is not going to place itself into position to exemplify this criticism, particularly given the scope and duration of U.S. activities in Southwest Asia.

There are two realist assumptions that explain the U.S. security position as it relates to the ICC. The first is that conflict is an essential part of international relations and the international agenda is habitually dominated by "high

politics" related to geo-strategy and state security. In geostrategic security issues, the U.S. reserves the right to pursue its own security interests, whether that makes the United Kingdom, Saudi Arabia, Israel or even Iran an ally in any particular situation. The U.S reserves the right to choose its own dance partners, abiding by the realist tenets that security interests are shaped by national interests and goals, not by some sense of shared, international community regarding human rights violations. As stated in the potential challenges to American power, there also exists within liberal, international organizations the potential for political or ideological foes to conflict with or disempower the U.S. in terms of security interests. Within the ICC, this would occur by exploiting the court's jurisdictional vagaries. For example, in his essay "The Secret War in Central America and the Future of World Order", John Norton Moore extensively focused on the history and legal aspects of the Nicaraguan Revolution and the multi-pronged "secret war" that occurred among at least Nicaragua, Cuba, El Salvador, Honduras, Guatemala and Costa Rica. With the Cold War still on, the issue of security was the catalyst for U.S. support of multiple factions, as well as for the support of others by the Cubans and Russians. In April 1984, Nicaragua initiated proceedings before the International Court of Justice that the U.S. was allegedly using unlawful force against Nicaragua ad "intervening in its internal affairs." The U.S. lost the decision to Nicaragua. In his paper, Moore states: "I am convinced that Nicaragua's principal objective in going to the Court was to reap a propaganda victory and to move away from genuine, multi-faceted regional negotiations."

Realist theory explains that high-level, geostrategic politics drive cooperative security issues, which was the impetus for the U.S. to "intervene" in Central America. The U.S. reserves the right to pursue its own security interests, yet as the Nicaragua example illustrates, an unhappy partner in a cooperative effort might pursue action through an international organization, such as the ICC, in an effort to marginalize American credibility, influence and U.S. strategic goals. From the perspective of the U.S., the 2003 invasion of Iraq was a matter of security. It occurred without a UN resolution and although prominent members of the European Union participated in the invasion, the U.S. was vilified for unilateral and ostensibly an illegitimate use of power. This criticism of unilateral military action prompted noted American historian Robert Kagan to ask: "What magic number [of participants], if any, would have conferred legitimacy?" As stated previously, John R. Bolton similarly stated that "aggression can at times be something in the eye of the beholder"; from a political realist perspective, American security efforts – such as the invasion of Iraq - could be construed as contravening international norms – but remaining outside the jurisdiction of ICC enhances the ability of the state to protect its interests and power.

Based on U.S. foreign policy, strategies and international activities, the U.S. (like China) will simply never be able to endorse the Rome Statute. The historical tendency of the U.S. to intervene in international issues that jeopardize the balance of power and U.S. national security interests makes the potential too dangerous for the U.S. and runs afoul of realist practices. Hans Morgenthau portrayed international law as "a system seeking to constrain the powerful." In realist theory, the security of the state is paramount in national interest and the relationship between power and security is symbiotic. The U.S. reticence to participate in the ICC based on issues of security is an application of realism in policy: "States must not only seek to enhance their own power over other states but make sure that they are not vulnerable to others exercising power over them." Security or the lack thereof, is what decreases or increases the state's vulnerability. The U.S. never has and likely never will find any level of security within the ICC.

American Sovereignty

Opposition to ratifying the Rome Statute and participation in the ICC is also supported by realist concepts of sovereignty. Sovereignty is a core concept of international relations, defined as the "absolute and perpetual power vested in a commonwealth," an essential component in the state as a sovereign, autonomous actor. An important aspect of the ICC is that it is supposed to function as a "court of last resort", an institution that hears cases related to atrocities that national courts are *unwilling* or unable to process. The supporters of the court see it as an essential step in establishing international law and "enforcing individual accountability" for actions taken during conflict. The U.S. in recent decades has had a higher degree of international responsibility in conflict and mediation than other states, largely because of its position in the past and present balance of power. This means, however, that if the U.S. acquiesced to the Rome Statute, they would place in jeopardy any person who has worked for the state in any of these conflicts or acts of mediation; the U.S. would forfeit aspects of responsibility for the citizenry. The relationship between sovereignty and international law is a challenge: "All states are legally equal (but some are more equal than others) … all states are juridically equal [but] nothing is distributed equally on the face of the earth." From a realist perspective, at inception of the Rome Statute, the U.S. believed that it has a larger international responsibility as the hegemon in a unipolar world and therefore could be at greater risk of legal censure in the ICC. That perception has not diminished as China has risen to the level of peer competitor.

Paul W. Kahn typified this conflict over potential ICC jurisdiction as "a symbolic battle between law and politics." The U.S. simply will not subordinate its sovereignty because the ICC is also at odds with American standards of liberty, as defined by the U.S. Constitution. John R. Bolton writes: The ICC does not, and cannot, fit into a coherent, international structural "constitutional" design that delineates clearly how laws are made, adjudicated or enforced, subject to popular accountability and structured to protect liberty … Never before has the United States been asked to place any of that [executive] power outside the complete control of our national government without our consent. Similarly, the late Senator Jesse Helms, then Chairman of the U.S. Senate Committee on Foreign Relations told the UNSC: Consider [that] the Rome treaty purports to hold U.S. citizens under its jurisdiction – even when the U.S. has neither signed nor ratified the treaty. In other words, it claims sovereign authority over American citizens without their consent. How can the nations of the world imagine for one instant that Americans will stand by and allow such a power-grab to take place?

These statements are powerful examples of the realist perspective of American foreign policy toward the ICC. So serious did the U.S. consider this issue that it passed the American Service members Protection Act (ASPA) of 2002, which prevents the ICC from indicting U.S. personnel, particularly military and political personnel, for the creation and implementation of American foreign policy. This law, a contravention to ICC jurisdiction, is also explainable by realist theory in that it ignores any authority above the state, going so far as to authorize the use of military force "to liberate any American of citizen of a U.S.-allied country being held by the court [the ICC], which is located at The Hague." The ASPA was hence dubbed the "Hague Invasion Act" by assorted human rights organizations around the world. The U.S. then undertook a policy of seeking Bilateral Immunity Agreements (BIAs) to protect U.S. personnel abroad from prosecution, another realist example of American efforts to ensure sovereignty, power and influence. The U.S. attempted to compel support for the immunity agreements from the signatories of the statute, under the threat of withholding economic aid, in order to prevent the prosecution of Americans should they be charged.[65]

The threat prompted some nations, such as Kenya, to accuse the U.S. of blackmail and others who originally signed an agreement, such as Nigeria, to rescind the immunity arrangement "as a way to poke a bully in the eye." The practice continues. In 2014, U.S. President Back Obama invoked the sovereignty of the U.S. as a realist actor when he issued a memorandum relative to the deployment of U.S. forces in Mali: By the authority vested in me as President by the Constitution and the laws of the United States of America, and consistent with section 2005 of the American Service-members' Protection Act of 2002 (22 U.S.C. 7424), concerning the participation of members of the Armed Forces of the United States in certain United Nations peacekeeping and peace enforcement operations, I hereby certify that members of the U.S. Armed Forces participating in the United Nations Multidimensional Integrated Stabilization Mission in Mali are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC) because the Republic of Mali has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the ICC from proceeding against members of the Armed Forces of the United States present in that country. Whether the memorandum was meant to address specifically Mali's participation in the ICC, a previous BIA or the 1997 Status of Forces Agreement (SOFA) between the U.S. and Mali, the Obama Administration was criticized for sustaining a policy of having "one foot in and one foot out" of the ICC. That being said, political realism again illustrates why both the previous and present U.S. administrations really have little flexibility in dealing with the ICC; the U.S. cannot forfeit or "outsource" its judiciary practices to an international organization without compromising sovereignty and power, which are essential to maintaining U.S. influence in the world order.

The potential damage to American sovereignty is a powerful negation of U.S. involvement in the ICC. Realist theory aptly describes the American dilemma in its assessment of the state as a unitary actor, rational and sovereign. To the U.S., no international organization will ever supersede the American constitution: No one should underestimate the claim that the American Constitution makes upon the American citizen: it defines him as a political being; it is the object of his patriotism and the subject of profound reverence … The Constitution is at the very heart of this cult [of sacrifice]; in its name, Americans, for 200 years, have willingly taken up the burden of killing and being killed. The U.S. will never bend on the issue of sovereignty by recognizing an authority higher than its own. Ceding sovereignty to the ICC invokes a high philosophical and theoretical debt. What happens, for example, when a state says "no, thank you" or impedes an action sanctioned or demanded by the international community?

For example, there were historical allegations that the U.S. not only refused to commit troops to the UN operations in Rwanda, but that the U.S. actively worked to remove UN troops from Rwanda; blocked subsequent authorization of UN reinforcements; refused to use its technology to jam radio broadcasts that were crucial in coordinating the genocide by the Hutus and Tutsis; and resisted the employment of the word "genocide" by the UN and international community for concerns of being compelled to act, even as 8,000 people a day were being killed in horrible fashion. It is widely acknowledged that the loss of human life over a short, few months in Rwanda exceeded the death toll over years in the former Yugoslavia. Realist theory readily explains why the U.S. intervened in Yugoslavia and forsook Rwanda: differences in the level of national interest; aspects of power-brokering and credibility within Europe and NATO (Yugoslavia had far more powerful advocates than had Rwanda); and of course security – the war in Yugoslavia was greatly destabilizing southern Europe. The U.S. chose its actions based on sovereign decision-making processes. In light of the criticism of U.S. actions in

Rwanda, however, could the ICC - with unchecked power over the sovereign state - theoretically charge the U.S. with criminal activity or complicity for turning its back on Rwanda? For the U.S., ceding sovereignty and vague jurisdiction to a power outside the state poses is simply too dangerous.

Conclusion

Noam Chomsky wrote, "Since WWII, the U.S. government has adopted the standard practice of powerful states, regularly choosing force over law when that was considered 'expedient' for the national interest." American exceptionalism demands the promotion of democracy and historically, the U.S. has chosen force over law in order to secure a strategic goal relative to democracy. Often, however, the U.S. has also made an effort to maintain a policy of assisting other nations to secure rule of law; the U.S. maintains its level of power and influence abroad as a "friend" to many while also sustaining its contemporary national security agenda. The conclusion of the Cold War and the shift toward a more unipolar balance of power system reinforced political realism for the U.S. and enhanced the American perception of exceptionalism. This, in turn, influenced the American decision to deny ratification of the Rome Statute and the creation of the ICC - a direct result of historical and evolving dynamics in global relationships and their influence on U.S. power and security. In the last decade, the U.S. has firmly continued to avoid ratification of the Rome Statute. This does not mean, however, that the U.S. has not worked in concert with the ICC and vice versa, in a grudging bur effective relationship. Within four years of the Rome Statute being entered into force, Chief Prosecutor Luis Moreno-Ocampo had dismissed "hundreds of petitions" against the U.S. due to "lack of evidence, lack of jurisdiction, or because of the United States' ability to conduct its *own* investigations and trials." Realism is theory for the tough-minded. It explains why the U.S. balks at the superimposition of ICC jurisdiction over the sovereignty of the state. National interests and the basic tenets of political realism– power, security and sovereignty, particularly in the potential prosecution of U.S. citizens - are the key points of contention between the U.S. and the ICC. For the present, there is no indication that the U.S. will ever fully endorse the court by joining the signatories of the Rome Statute. Should the U.S. join, however, it will undoubtedly occur because it is in the best interests of the state.

Bibliography

Abbott, KennethW. "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts." In The American Journal of International Law, 93(2) (1999): 261-279.

Albright, Madeline. The Mighty and the Almighty. New York, NY. Harper-Collins Publishers, 2006.

Bennett, A. Leroy and James K. Oliver. International Organizations: Principles and Issues. Upper Saddle River, NJ. Prentice-Hall, Inc., 2002.

Bolton, John R. "The United States and the International Criminal Court." In Remarks to the Federalist Society (November 2002). http://www.state.gov/t/us/rm/15158.htm.

Boustany, Nora. "Tribunal to Debut with Congo Case." In Washington Post Foreign Service (November 2006). http://www.washingtonpost.com/wp-

dyn/content/article/2006/11/04/AR20061100400947_pf.html. ___. "A Shift in the Debate on International Court." In Washington Post Foreign Service (November 2006).

http://www.washingtonpost.com/wp-dyn/content/article/2006/11/06/AR2006110601269_pf.html.

Chomsky, Noam. Hegemony or Survival: America's Quest for Global Dominance. New York NY. Henry Holt and Company, LLC., 2003.

Citizens for Global Solutions. U.S. Recognizes Counter-Productive Foreign Policy: Bush Waives Aid Cuts for ICC Member States (February 2006).

http://www.globalsolutions.org/press_room/press_releases/press_releases06/counterprod_foreign_policy.html. ___. International Criminal Court Takes a Pass on Iraq Allegations: Prosecutor Decision Demonstrates that Court Safeguards Work (n.d.).

http://globalsolutions.org/press_room/press_releases/press_releases05/icc_iraq.html.

Doyle, Michael W. & G. John Ikenberry. New Thinking in International Relations Theory. Boulder, CO. Westview Press, 1997.

Ferroggiaro, William, (Ed.). "The U.S. and the Genocide in Rwanda: Evidence of Inaction." In The National Security Archive (August 2001). http://www.gwu.edu/-nsarchiv/NSAEBB/NSAEBB53/index.html. Helms, Jesse. Address by Senator Jesse Helms, Chairman, US Senate Committee on Foreign Relations before the United Nations Security Council (January 1999). http://www.senate.gov/foreign/2000/pr012000.cfm.

I_think_hell_be_to_Rome_As_is. Dictionary.com. Columbia World of Quotations. Columbia University Press, 1996. http://quotes.dictionary.com/I_think_hell_be_to_Rome_As_is

Kagan, Robert. "America's Crisis of Legitimacy." In Foreign Affairs, 83(2) (March/April 2004): 65-87.

Kahn, Paul W. (2004, December). "The International Criminal Court: An End to Impunity? Why the United States is So Opposed." In Crimes of War Project Magazine (December 2004). http://www.crimesofwar.org/print/icc/icc-kahn-print.html.

Kaufman, Daniel J., Jay M. Parker, Patrick V. Howell, and Grant R. Doty. Understanding International Relations: The Value of Alternative Lenses. Boston, MA. McGraw-Hill Companies, Inc., 2004.

Kersten, Marc. "Unfortunate but Unsurprising? Obama Undermines the ICC." In Justice in Conflict (Feb. 4, 2014). http://justiceinconflict.org/2014/02/04/unfortunate-but-unsurprising-obama-undermines-the-icc/

Korab-Karpowicz, W. Julian. "Political Realism in International Relations." In The Stanford Encyclopedia of Philosophy (2013). http://plato.stanford.edu/entries/realism-intl-relations/

Kristof, Nicholas D. "Schoolyard Bully Diplomacy." In New York Times (October 2005). http://www.globalpolicy.ord/intljustice/icc/2005/1016schoolyard.htm.

Mahle, Anne E. (1997). The International Criminal Court (1997). http://www.pbs.org/wnet/justice/world_issues_int.html.

Mingst, Karen.A. Essentials of International Relations (3rd ed). New York, NY. W.W. Norton & Company, Inc., 2004.

Moore, John N. "The Secret War in Central America and the Future of World Order." In The American Journal of International Law, 80(1) (1986): 43-127.

Murphy, Sean D. (Ed.). "Contemporary Practice of the United States Relating to International Law." In The American Journal of International Law, 93(3) (1986): 628-667.

Pease, Kelly-Kate. International Organizations: Perspectives on Governance in the Twenty-First Century. Upper Saddle River, NJ. Prentice-Hall, Inc., 2000.

Power, Samantha. (2001, September). Bystanders to Genocide. The Atlantic Monthly (September 2001).

http://www.theatlantic.com/doc/200109/power-genocide.

Scott, Shirley V. (2004). "Is There Room for International Law in Realpolitik?: Accounting for the US 'Attitude' towards International Law." In Review of International Studies, 30 (2004): 71-88.

Shah, Apu. (2005). "The International Criminal Court." In Global Issues (2005). http://www.globalissues.org/Geopolotics/ICC.asp. Strange, Susan. (1996). The Retreat of the State: The Diffusion of Power in the World Economy.

Cambridge, UK. Cambridge University Press, 1996.

United Nations. "Chapter XVIII, Penal Matters, 10. Rome Statute of the International Criminal Court, Rome, 17 July 1998." In United Nations Treaty Collection (2015).

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

United States Congress (2002, Jan. 23). "Title II – American Service-members' Act." In Supplemental Appropriations, Second Session (January 2002). http://www.jura.uni-muenchen.de/einrichtungen/Is/simma/Dokumente%20Andreas/ASPA.htm.

United States Department of State. "International Criminal Court." In Diplomacy in Action (n.d.). http://www.state.gov/j/gcj/icc/index.htm

Wilner, Michael, Herb Keinon and Yonah Jeremy Bob. "US: Palestine not a State, Does not Qualify for ICC Membership." In Arab-Israeli Conflict, The Jerusalem Post (January 2015). http://www.jpost.com/Arab-Israeli-Conflict/US-Palestinenot-a-state-does-not-qualify-for-ICC-membership-387031