

SOVEREIGNTY AND INTERNATIONAL CRIMINAL JUSTICE*

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The long-standing desire to create a permanent international criminal tribunal has finally materialized in the establishment of the International Criminal Court (“ICC”). The fact that it took this long for the court to come into being is testimony to the incongruence between the traditional notion that sovereign state conduct is generally not subject to enforceable rules and the perceived need to give force to the growing body of international criminal law.

The interactions of sovereign states have long been based on the “Westphalia” model. Although often differing as to its precise contours, political philosophers and international relations theorists generally trace the broad concept of sovereignty to the seventeenth century “peace of Westphalia” that ended religious wars in Europe¹.

1 See, e.g., CHRIS BROWN, *Sovereignty, Rights and Justice* (Polity Press 2002), and STEPHEN KRASNER, *Sovereignty, Organized Hypocrisy* (Princeton University Press, 1999).

The “Westphalia system” envisages autonomous states that possess absolute authority to regulate their domestic affairs and are subject, internationally, only to two broadly formulated duties. These are duties derived from “sovereign equality”, such as the duty of non-intervention in the internal affairs of other states, and duties that states accept through their treaties or their diplomatic practice, the latter giving rise to norms of customary international law.

The sovereign equality of states implied the legitimacy, or even the necessity, of maintaining a balance of power among states. An early legal philosopher and publicist, EMERIC DE VATTEL, contemplated that preservation of the sovereign equality of states not only required a balance of power, but legitimated “anti-hegemonic warfare”. As framed by the British philosopher CHRIS BROWN:

The principle of sovereign equality is preserved by prevention of the hegemony of any one state; hegemony is prevented by the balance of power and the balance of power may justly be preserved even by preventive war².

Professor BROWN usefully summarizes the norms of the Westphalia system:

[The rulers of sovereign states] acknowledge no equal at home, [and] no superior abroad. ... States are legally equal, differing in capabilities ... but with the same standing in international society, which means that non-intervention is central – no sovereign has the right to intervene in the internal affairs of another. Non-aggression is a norm of the system; states are, however, entitled to defend themselves directly and, by extension, to act collectively to prevent any one state from achieving dominance³.

As is implicit in the Westphalia system, sovereign states became accustomed to functioning within certain spheres without the possibility that international tribunals or the courts of other

2 BROWN, note 1 *supra*, at p. 33.

3 *Ibid.*, at p. 35.

sovereign states would judge their acts. The Nuremberg Tribunal, the developing theory of universal jurisdiction, and Security Council creation of international criminal tribunals for former Yugoslavia and Rwanda show that the presumption of unfettered spheres of action is no longer valid. These developments pose a challenge to one of the main Westphalia norms - that each sovereign has no superior abroad. At most, however, attempts at adjudicating international criminal liability were *ad hoc* solutions and have not fully tested the ability or the willingness of the Westphalia order to subject its members to a permanent tribunal. The ICC is such a body. The Rome Statute of the International Criminal Court⁴ gives the Court jurisdiction to determine as criminal under international law the acts of individuals and officials, and, by implication, acts of states themselves. Is the Westphalia system capable of supporting a permanent international criminal tribunal or does the ICC require a radical change that the system cannot structurally withstand?

At first glance, the ICC is a product of the Westphalia order: after all, 89⁵ states have ratified the Rome Statute without any indication on their part that radical change of the prevailing international order is necessary⁶. These states apparently do not consider the tribunal a threat to their sovereignty, or are willing to accept a redefined notion of sovereignty to the extent necessary to enable the functioning of the ICC. However, the world's most powerful states, most notably the United States, Russia, and China, have not accepted the ICC. Their dissatisfaction with the ICC is essentially sovereignty-based: a permanent criminal tribunal would restrict their actions in spheres that have, until now, been largely

4 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter cited "Rome Statute"].

5 On February 11, 2003, Afghanistan became the 89th state to ratify the Rome Statute.

6 The concept of a permanent international criminal tribunal is not new. It has had serious advocates at least since the end of World War I and the Treaty of Versailles, advocates who did not envision a fundamental clash between the Westphalia order of sovereign states and a permanent criminal tribunal.

free of any restrictions. These arguments may indicate that the Westphalia framework is structurally incapable of encompassing a permanent criminal tribunal that would have jurisdiction over all states that comprise that community.

To restate the controversy, while pro-ICC states seem to believe that a permanent criminal tribunal is fully compatible with the Westphalia order, anti-ICC states oppose a permanent tribunal, at least one organized in the manner of the ICC, as a threat to their sovereignty. Their dissent reflects a difference in assumptions about the defining features of the Westphalia order. If the opposition to the ICC about the capability of the Westphalia order to sustain a permanent criminal tribunal is correct, the tribunal is better put off until appropriate restructuring of the community of nations is achieved. However, if pro-ICC governments are correct, efforts to utilize the court as soon as possible may be well spent.

This paper consists of two parts. Part I examines the objections of the United States to the ICC. Even though U.S. objections are sovereignty-based, they are predicated on the desire to preserve the status quo where the United States is the dominant power with no equal. An authentic Westphalia system of sovereign states would afford equal legal status to each sovereign and ensure a balance of power that would preclude any single state from achieving dominance. Thus, in effect the U.S. arguments do not suggest that the ICC is incapable of functioning in a Westphalia system of sovereign states, but only that it is impossible in a world in which every state would possess the attributes of sovereignty to which the United States currently deems itself entitled⁷. Part II argues that the ICC is not incompatible with Westphalia notions of sovereignty and in fact may be desirable in bringing about a system

7 The official U.S. position is not that the ICC is impossible to reconcile with sovereignty; it is that the ICC is a threat to U.S. sovereignty, but that this fact does not necessarily make it a threat to the sovereignty of all other states. The U.S. has no objection to the ICC as long as it would be impossible for U.S. citizens to be subject to its jurisdiction absent U.S. consent on a case-by-case basis.

of truly sovereign states. The ICC affords each state party an equal role in the administration of international criminal justice. Further, including the crime of aggression in the jurisdiction of the ICC offers the potential for holding individuals accountable for their actions, regardless of the military, economic, or political might of their governments.

PART I. UNITED STATES OBJECTIONS TO THE ROME STATUTE

The U.S. opposition to the Rome Statute is best understood from two distinct perspectives: that of a prospective party and that of a non-party. As a prospective party to the Rome Statute, the United States took an active part in the negotiations and (1) opposed the inclusion of the crime of aggression within the jurisdiction of the Court; (2) advocated that the Statute provide a possibility for state parties to opt out from the jurisdiction of the Court over crimes against humanity and war crimes; and (3) challenged the way in which the Statute allocates the power to refer cases to the ICC⁸. From the second perspective, that of a non-party to the Rome Statute, the United States has expressed concern that, under certain circumstances, the Statute operates to subject nationals of states that are not parties to the treaty to the jurisdiction of the ICC.

In light of the CLINTON administration's professed support for a permanent international criminal tribunal, the U.S. refusal to ratify the Statute must stem from a belief that the ICC is not properly constituted⁹. The U.S. objections warrant close analysis since the refusal of the world's dominant power to participate in the administration of international criminal justice will certainly

8 DAVID J. SCHEFFER, *The United States and the International Criminal Court*, 93 AM. J. INT'L. L. 12 (1999). The author was U.S. Ambassador-at-Large for War Crimes Issues in the CLINTON administration and led the U.S. delegation to the Rome Conference.

9 *Ibid.* (expressing U.S. support for a permanent tribunal); *see also id.* at 22 (stating that the United States would support a "properly constituted international criminal court.")

jeopardize the effectiveness of the tribunal. It may also indicate that such an institution is not compatible with the current international order. However, the basic principles of the international system are independent of any individual state's interpretation. Hence U.S. objections to the ICC have merit only if they give effect to those principles. If not, the ICC should proceed regardless of the reduced effectiveness flowing from the lack of U.S. participation.

U.S. objections show that, for the United States to become a party, the statute of a permanent international criminal tribunal would have to contain a mechanism to exempt U.S. nationals from ever being tried by the tribunal¹⁰. In order to achieve this goal the United States presented two sets of proposals in the negotiations that led to the Rome Statute. One sought to immunize U.S. nationals from responsibility for specific crimes while the other sought to limit the power of other states and of the prosecutor to initiate prosecutions in favor of an expansive role for the Security Council. Both of these devices, either alone or in concert with each other, would give the United States the political capital of being a party to the ICC and put the U.S. in a position to enforce international criminal law in respect to other states while keeping U.S. nationals beyond the reach of that same law.

A. THE UNITED STATES AS A PROSPECTIVE PARTY TO THE ROME STATUTE

1. THE POWER TO REFER "SITUATIONS" TO THE ICC

A primary objective of the United States was to ensure a "significant" role for the Security Council in referring cases to the ICC¹¹. In that

10 See KENNETH ROTH, *The Charade of US Ratification of International Human Rights Treaties*, CHI. J. INT'L. L. 347, 353 (2000).

11 SCHEFFER, note 8 *supra*, at 12.

vein, the United States advocated that the Security Council must act as a “preliminary reviewer” in all cases “pertaining to the work of the Council”, whether or not the matter arose under Chapter VII authority¹².

The Statute confers the power to refer an alleged crime to the ICC to three different actors: a state party, the Security Council, and the Prosecutor¹³. Of the three, the Security Council has by far the greatest latitude in this regard. While a state party and the Prosecutor may refer an alleged crime only if it occurred on the territory of a state party¹⁴ or if the suspected perpetrators are nationals of a state party, the Security Council is not so bound¹⁵. When acting pursuant to its Chapter VII power to maintain or restore international peace and security, the Security Council may refer any situation, regardless of whether the states involved are parties to the Statute. While this provision may raise legitimate questions about the jurisdictional reach of the ICC over non-parties, it demonstrates the belief of the delegates to the Rome Conference that such a power is consistent with the Security Council’s role as the keeper of world peace. Considering the fact that the Security Council has a broad power to *refer* a case to the Court, U.S. insistence for a “significant” Security Council role must refer to the power to *suppress* undesirable prosecutions that may be initiated by a state party or by the Prosecutor. The desire to have the Security Council act as a “preliminary reviewer” in all cases “pertaining to the work of the Council”, whether or not undertaken pursuant to Chapter VII authority is better understood in this light. The Security

12 *Id.* at 13. Under Chapter VII of the Charter of the United Nations, the Security Council’s role is to “maintain or restore international peace and security”. U.N. Charter Article 39.

13 ROME STATUTE, Articles 13 & 14.

14 Under Article 12 of the Rome Statute, a non-party may accept the exercise of the Court’s jurisdiction where the crime in question occurred on its territory; however the matter must still be referred to the Prosecutor by a state party or by the Security Council. *See* Rome Statute Article 13.

15 *Id.* Articles 12 and 13.

Council would have to declare only that a certain situation “pertains to its work” in order to effectively block the ability of a state party or the Prosecutor to independently bring the matter to the Court¹⁶.

The United States justified this initiative owing to its fear of “politically motivated” prosecutions¹⁷. While it is true that a party before any court, especially an international tribunal, bears a risk of prosecution for reasons other than promotion of justice and enforcement of law, that risk should be borne equally by every party to the Statute. Furthermore, the political might of the United States may cause other states to hesitate before initiating politically motivated prosecutions. And the United States fails to recognize that the Rome Statute contains significant structural safeguards against improper prosecutions.

The Statute grants the Security Council the power to block any prosecution for twelve months, with the possibility of extension through a resolution adopted under Chapter VII of the U.N. Charter¹⁸. The explicit mention of Chapter VII authority indicates a belief of the delegates that under certain circumstances deferment of prosecution may be justified in order to maintain or restore international peace and security. However, any such action would require a consensus of the five permanent members. The danger to the U.S. interest in blocking the prosecution of its nationals is the

16 The 1994 Draft Statute adopted by the International Law Commission contained a provision that would require the Security Council’s authorization of any prosecution arising from a situation in which the Security Council is taking action pursuant to its Chapter VII powers. The provision would not allow the Security Council to veto prosecutions in cases where it has failed to act. See JAMES CRAWFORD, *The ILC Adopts a Statute For An International Criminal Court*, 89 AM. J. INT’L. L. 404, 413, (1995). On the other hand, the “preliminary reviewer” and “pertaining to its work regardless of whether it is pursuant to Chapter VII powers” language of the U.S. proposal indicates a desire for a much broader grant of power to the Security Council.

17 “If hostile countries gain control of the court, say the critics, then Americans may be prosecuted for actions such as the NATO bombing of Belgrade”. St. Louis Post-Dispatch.

18 Rome Statute Article 16.

real possibility that the U.S. may not be able to secure consent of all five permanent members in deferring such an ICC prosecution.

On a more fundamental level, the Statute affords every state party full participation in the election of judges and the prosecutor¹⁹. The United States may legitimately pursue its interests by nominating and voting for candidates that will fulfill its standards of impartiality and competency²⁰. Whenever a case is referred to the Court, the Prosecutor must determine that there is a reasonable basis to proceed²¹. In so doing, the Prosecutor may seek additional information from a variety of sources²². The Prosecutor has discretion to dismiss any request for an investigation. If the Prosecutor decides there is a reasonable basis to proceed with an investigation, the Prosecutor must apply to the Pre-Trial Chamber for authority to commence the investigation²³. These procedural requirements, coupled with the opportunity of the parties to nominate and vote for the judges and the prosecutor, provide adequate protection to any state party against baseless prosecutions.

Finally, the United States has advocated and succeeded in implementing a strong complementarity regime in the Statute²⁴. If a state that has jurisdiction over a crime has undertaken a genuine effort to investigate or prosecute the crime, the case is not admissible before the ICC²⁵. In cases where a U.S. national accused of a crime is in the custody of the state where the alleged crime was committed, the United States may negotiate bilaterally to have the individual extradited for trial in the United States. If the accused

19 *Id.* Articles 36 & 42.

20 The practice of the International Court of Justice indicates that the “composition of the Court reflects the voting strength and political alliances in the Security Council and General Assembly.” IAN BROWNLIE, *Principles of Public International Law* 712 (Oxford University Press, 5th edition, 1998).

21 *Id.* Article 16(3).

22 *Id.* Article 15(2).

23 *Id.* Article 16(4).

24 SCHEFFER, note 8 *supra*, at 15.

25 Rome Statute. Article 17(1)(a).

U.S. national is in the United States, he may be tried based on the nationality jurisdiction of the United States regardless of the location of the crime²⁶. The primacy that national courts enjoy under the Rome Statute goes a long way towards enabling the United States to try U.S. nationals in U.S. courts and thus to avoid trial before the ICC or a biased foreign court.

In the U.S. view, the deficiency of the complementarity regime, is that it may force the United States to conduct prosecutions that would question the legality of government actions that the U.S. considers to have been legitimate²⁷. In such a case, if the United States has investigated the crime and decided not to prosecute, the Court must find the case inadmissible unless the U.S. decision not to prosecute “resulted from the unwillingness or inability [of the U.S.] genuinely to prosecute”²⁸.

2. THE CRIME OF AGGRESSION

The crime of aggression is difficult to define. According to the United States, some of the definitions proposed at the Rome Conference were overly broad and would have encompassed almost any use of military force and reached even economic sanctions²⁹. In the U.S. view, broad definitions of aggression could restrict legitimate uses of military force³⁰. Since there was no consensus on the definition of aggression at the Rome conference,

26 The customary international law of criminal jurisdiction allows a state to punish its nationals for committing crimes in other states. *See* BROWNLIE, n° 20 *supra*, at 306.

27 The effect of the complementarity regime is that it may force the United States to “investigate the legality of humanitarian interventions or peacekeeping operation that they already regard as valid official actions to enforce international law”. SCHEFFER, note 8 *supra*, at 18.

28 Rome Statute. Article 17(1)(b).

29 SCHEFFER, note 8 *supra*, at 21.

30 *Ibid.*

it may have been best to exclude the crime of aggression from the Rome Statute³¹. In the alternative, the United States was willing to accept the inclusion of aggression provided that no prosecution is initiated until the Security Council makes the threshold finding that a state has committed an act of aggression³².

These concerns are well-founded since the inclusion of aggression within ICC crimes will introduce a legal definition of a crime that has yet to be governed by precise legal standards³³. State officials, especially those from powerful states, will be exposed to a risk of international criminal liability that will severely restrict their ability to act with impunity in the international arena. A novel legal standard with potentially far-reaching consequences will require careful consideration and explicit acceptance by states.

The U.S. “compromise” in offering to accept the inclusion of aggression only if the Security Council is granted the power to block any prosecution fails to address legitimate concerns posed by an inadequate definition. The proposal indicates that the United States would be willing to accept even a “bad” definition, so long as the U.S. can use the Security Council as a means of precluding any prosecution of U.S. nationals. Through the exercise of its veto power, any of the five permanent members can prevent the Security Council from making the required finding of “act of aggression” and thus preclude prosecution in any action in which its interests are implicated. The U.S. proposal would create two

31 *Ibid.* The Rome Statute leaves the question of the definition of the crime of aggression to the Assembly of States Parties. Once the definition is adopted, the ICC will gain jurisdiction over the crime of aggression. *See* Rome Statute Articles 5, 121 & 123.

32 SCHEFFER, note 8 *supra*, at 14.

33 Article 6(a) of the Charter of the Nuremberg Tribunal defined war of aggression against other nations in violation of treaties and principles of international law as a “crime against peace.” Even though the United States held this view for the purposes of the Nuremberg Charter, during the Cold War era the United States appears to have disputed that the crime of aggression exists in international law. *See* M. Cherif BASSIOUNI, *From Versailles to Rwanda in Seventy Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 26 (1997).

legal standards: effective immunity from the crime of “aggression” for the permanent members of the Security Council, and, given the difficulty of defining the crime of aggression, unpredictable criminal liability for nationals of all other states.

3. PROPOSALS FOR “OPT OUT” PROVISIONS

A broad “opt out” provision would enable a state party to immunize its nationals from prosecution before the ICC for covered crimes. The United States proposed that states parties should be able to opt out from liability for war crimes and crimes against humanity³⁴. This option would not be available for the crime of genocide nor would it be effective in situations where the Security Council refers a case to the ICC. There was great opposition from the other participants to this idea. As a concession, the United States proposed to deny to any state that opts out the privilege of referring matters to the Court³⁵. An alternative proposal of the five permanent members of the Security Council contemplated a 10-year limit on the opt out period with the possibility of further extensions. The majority at the Rome conference rejected both proposals. As adopted, the Rome Statute permits only a seven-year “transitional” period during which a state party may preclude application of the war crimes provisions of the Statute “when a crime is alleged to have been committed by its nationals or on its territory”³⁶.

The United States argued that its proposed opt out provision would make it easier for states to join the Statute and would thereby increase support for the ICC. While the desire to encourage states to join the Statute is commendable, the incentives offered may go

34 SCHEFFER, note 8 *supra*, at 19.

35 This would prevent “rogue states” from becoming parties to the Statute, opting out, and then initiating politically motivated prosecutions of nationals of other states. *Ibid.*

36 Rome Statute Article 124.

only so far before the very purpose of the treaty becomes compromised. Under its Statute the ICC has jurisdiction over four crimes: war crimes, crimes against humanity, genocide, and aggression³⁷. Since aggression has not yet been defined, no person is currently exposed to criminal responsibility for that crime. A state accepting the U.S. proposal would thus exempt its nationals from two of the three crimes that currently fall within the Statute. Considering that the crime of genocide is very difficult to prove³⁸ and that most acts that may incur international criminal liability may fairly be categorized as either war crimes or crimes against humanity³⁹, the U.S. proposal renders the Statute practically ineffective in fulfilling its purpose — to ensure that the most serious crimes of concern to the international community not go unpunished⁴⁰. A common principle of treaty law is that a party may not insulate itself from obligations that constitute the very essence of the treaty⁴¹. The “object and purpose” of a treaty establishing a permanent criminal tribunal would be undermined by allowing states to become parties with broad exemptions from criminal responsibility. It is therefore reasonable to question the

37 Rome Statute Article 5.

38 As defined in Rome Statute Article 6, genocide requires the “*intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Rome Statute Article 6 (emphasis supplied).

39 For example, crimes against humanity include murder, deportation, apartheid, torture, enforced disappearance and other crimes committed as part of a systematic attack against a civilian population. Rome Statute Article 7. War crimes include extensive destruction of property, attacks on civilian objects, attacks on humanitarian personnel, killings of war prisoners and others. Rome Statute Article 8.

40 See Rome Statute, Preamble.

41 A state may not formulate a reservation if it is “incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties, 1980, Article 19, 1155 U.N.T.S. 331. More precisely, this principle applies when a party attempts to formulate reservations from a finalized version of the treaty text, while the United States was arguing in favor of including the opt out provision *before* the treaty text was finalized. Nevertheless, the principle reflects the idea that it does not make sense for a state to be deemed a party in name only and not be subject to obligations that make up the very reason for the treaty’s existence.

good faith of any state that needs to opt out from war crimes and crimes against humanity in order to become a party to the Rome Statute.

The U.S. proposal by which a party's choice to opt out would become ineffective if the Security Council refers a case to the ICC appears to be an attempt to insulate itself from responsibility in the same way as would be true in the case of aggression. Under this scheme, the United States could opt out from war crimes and crimes against humanity, and be secure that it could use its veto power to block any Security Council referral of a situation that involved U.S. action or actions by others that are congruent with U.S. interests.

B. THE UNITED STATES AS A NON-PARTY

1. PRECONDITIONS TO THE EXERCISE OF ICC JURISDICTION

Under the Rome Statute, the ICC may exercise jurisdiction if either the state on whose territory the crime was committed or the state of the nationality of the accused is a party to the Statute⁴². A non-party state may accept the jurisdiction of the ICC for a particular crime⁴³. The following example illustrates how the Statute may affect the United States as a non-party. Assume a U.S. national is accused of committing a crime in state A. If state A is a party to the Rome Statute, any other state party could refer the case to the Prosecutor pursuant to Article 13(a). Since the conduct occurred on the territory of state A, the precondition to the exercise of jurisdiction under Article 12(2)(a) is satisfied. If state A were a non-party, it

42 Rome Statute Article 12(2)(a) & (b).

43 *Id.* Article 12(3). In that case, either a state party may refer the situation to the Prosecutor or the Prosecutor may initiate an investigation *sua sponte*. *Id.* Articles 14(1) & 15(1).

could rely on Article 12(3) and accept the jurisdiction of the Court with respect to the crime in question. In that case, any state party or the Prosecutor could refer the case to the ICC. In both scenarios, the U.S. national would be subject to the jurisdiction of the ICC without the consent of the United States.

In the U.S. view, the operation of Article 12 contravenes a fundamental principle of treaty law by which only states that are parties to a treaty are bound by its terms⁴⁴. Some delegates at the Rome Conference sought to justify ICC jurisdiction over nationals of non-parties by reference to the principle of universal jurisdiction⁴⁵. The principle of universal jurisdiction in effect serves to authorize the extension of the jurisdiction of domestic courts to certain crimes that are prohibited by customary international law. In the U.S. view, although the principle of universal jurisdiction may legitimize domestic court jurisdiction over some crimes committed by nationals of other states, universal jurisdiction does not entitle the ICC to assert jurisdiction over nationals of non-parties⁴⁶. However, a state's participation in an international criminal tribunal is not regulated by custom, but exclusively by treaty.

The United States also argues that the Statute subjects non-parties to greater peril than state parties⁴⁷. The argument is as follows: The Rome Statute provides for jurisdiction over new crimes⁴⁸. In such a case, the Statute would afford states parties the opportunity to immunize themselves from any new crimes whereas nonparties would remain exposed by virtue of the Rome Statute's jurisdictional provisions.

44 SCHEFFER, note 8 *supra*, at 18.

45 *Ibid.* The crimes currently within the court's jurisdiction do not go beyond crimes arguably covered by universal jurisdiction, but the Statute affords the possibility for the creation of new crimes. *See* Rome Statute Articles 121 & 123.

46 SCHEFFER, note 8 *supra*, at 18.

47 *Ibid.*

48 Seven years after the entry into force of the Rome Statute, the parties may convene and consider amendment to the list of crimes under the Court's jurisdiction. *See* Rome Statute Articles 121 & 123.

2. PROPOSALS TO CONFINE ICC JURISDICTION TO NATIONALS OF NON-PARTIES

In an attempt to curtail the reach of the ICC over nationals of non-parties, the United States initiated or participated in three different proposals to change Article 12⁴⁹. The first would require express consent of *both* the state on whose territory the crime was committed *and* the state of the nationality of the accused before the ICC may assert jurisdiction over a non-party⁵⁰. The second would allow a non-party to secure exemption from prosecution by acknowledging that the conduct that gave rise to the alleged crime was official state action⁵¹. In the third, the United States joined other permanent members of the Security Council in proposing that nationals of non-parties not be subject to jurisdiction unless the Security Council decides otherwise. The delegates at Rome rejected all three proposals⁵².

The United States' argument that universal jurisdiction may not be used to extend the jurisdiction of the ICC to non-parties is open to serious question. Under current customary international law, universal jurisdiction allows a *municipal*⁵³ court to invoke norms of international criminal law to punish suspects in its custody for conduct committed anywhere in the world⁵⁴. In the U.S. view,

49 At the time it made the proposal, the United States was aware that a significant period of time might elapse before it could ratify the treaty.

50 SCHEFFER, note 8 *supra*, at 20.

51 *Ibid.*

52 *Id.* at 19.

53 See KENNETH C. RANDALL, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988) (stating that the universality principle is a "basis of domestic jurisdiction under international law").

54 The justification for the extension of municipal court jurisdiction is that some crimes are crimes against all of mankind and may be punished by any national court, even though other, more traditional grounds for jurisdiction such as territoriality, nationality of the accused, passive personality or protective jurisdiction, are lacking. *Ibid.*

universal jurisdiction does not authorize such jurisdiction by an international tribunal but instead only extends the jurisdictional reach of national courts⁵⁵. Moreover, it can be argued that the doctrine of universal jurisdiction originated precisely because of the lack of permanent international criminal tribunals which would be the most appropriate fora to apply international criminal law. In the U.S. view, since the ICC is a treaty-based tribunal, its jurisdiction should be based on treaty law and consent of the parties.

Nevertheless, as a treaty-based tribunal, the ICC may be in the position of exercising the criminal jurisdiction that could otherwise be exercised by its member states. Sometimes termed “vicarious jurisdiction”, in some countries municipal courts will apply their own law to an offender who has committed an offense outside their national territorial jurisdiction provided that the act is criminal under the law of the place of the crime⁵⁶. Although such reasoning has yet to appear in the jurisprudence of international tribunals, the use by the ICC of such a theory would not be fundamentally at variance with its use in domestic law.

However, the jurisdictional reach of the ICC over nationals of non-parties need not be justified by the principle of universal jurisdiction. It may sufficiently rely on traditional doctrines of international criminal jurisdiction. An example may better illustrate this point. Assume that state A is a party to the Rome Statute and has accused a U.S. national held in its custody of committing a crime within the jurisdiction of the ICC. As a party, state A will have authority under Article 13 to refer the situation to the Prosecutor. Such a case would also satisfy the prerequisite to ICC jurisdiction under Article 12, where state A is the state on whose territory the alleged crime was committed. As a result, the national

55 Some commentators have asserted that the Nuremberg Tribunal relied on universal jurisdiction. The Charter of the Nuremberg Tribunal never uses the term explicitly.

56 See, e.g., *Universal Jurisdiction over Drug Offences Case*, Federal Supreme Court, Germany, 1976, 74 INT’L L. REPORTS 166 (1987); DANIEL PARTAN, *The International Law Process* 415-18 (1992).

of a non-party, the United States, would legitimately be tried before the ICC.

Such a result would plainly be obtained without resort to any claim of universal jurisdiction. State A would have full authority to punish crimes committed on its territory according to the jurisdictional principle of territoriality⁵⁷. By becoming a party to the Rome Statute and incorporating the Statute into its domestic law⁵⁸, state A would have the option to try the individual in its own courts or to send him off to be tried before the ICC⁵⁹. This result would obtain by the joint operation of the customary international law of criminal jurisdiction and the domestic law of state A.

From a practical point of view, the United States would surely prefer that the option of sending the accused to the ICC did not exist. In that case the United States could attempt to resolve the situation through bilateral negotiations with state A. Once the case is transferred to the ICC, any opportunity for an extra-judicial settlement would be lost, and the only way to avoid prosecution would be for the Prosecutor or the Pre-Trial Chamber to conclude that there is no reasonable basis to proceed. The loss of an opportunity to resolve such a situation by applying political pressure is not a principled argument against the existence of an international tribunal, nor is the United States formally making that argument.

The U.S proposal that jurisdiction over a situation should require the consent of the state of the nationality of the accused thus has no basis in international law. Once the suspect is in custody of the state where the crime was committed, the suspect is subject to the law of that sovereign. From the standpoint of assuring a fair trial, the United States should be pleased at the prospect of an ICC trial for its national.

57 “The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition...” BROWNLEE, note 20 *supra*, at 303.

58 “A number of countries adhere to the principle that treaties made in accordance with the constitution bind the courts without any specific act of incorporation”. *Id* at 50.

59 The principle of complementarity assures the primacy of national courts.

C. THE RELATIONSHIP OF SOVEREIGNTY TO ICC JURISDICTION

U.S. arguments against the Rome Statute reveal U.S. assumptions about the entitlements of sovereignty. At least for the United States, sovereign status entails, first, that no U.S. nationals will be tried before an international tribunal without U.S. consent, and, second, that the U.S. will retain the right to make conclusive determinations as to the legality of its actions. At the same time, the U.S. considers that the Security Council has the authority to create *ad hoc* criminal tribunals that are competent to hold nationals of other states responsible for violating international law⁶⁰.

Were the U.S. view the prevailing understanding of the concept of sovereignty, no international criminal tribunal would be possible in a world of sovereign states. However, since the latter half of the nineteenth century, certain egregious acts have been understood to entail individual criminal responsibility under international law, and it has been broadly accepted that such acts may be punished in properly constituted international tribunals, in military tribunals, and in national courts⁶¹. Although great powers have often sought to avoid international legal accountability⁶², such evasions do not show that accountability would necessarily be foreign to the Westphalia system. Thus the U.S. understanding of its sovereign entitlements does not reflect the traditional Westphalia conception of sovereignty or sovereign rights, and runs the risk of alienating the United States from even its closest allies⁶³.

60 In spite of its rejection of the Rome Statute, the United States is seriously contemplating the formation of yet another *ad hoc* tribunal that would try Saddam Hussein and his close collaborators. See SUSAN DOMINUS, *Their Day in Court*, NY *Times Magazine*. March 30, 2003.

61 See BROWNLIE, note 20 *supra*, at 565.

62 See *id.* at 710 (stating that in 1920, the great powers succeeded in rejecting a draft statute for a permanent international court which would have provided for compulsory jurisdiction over states parties, whereas the neutral states supported such a court).

63 See FRANCES FUKUYAMA, *Opinion San Diego Union Tribune*, August 18, 2002 (stating that an “enormous gulf has opened up in American and European perceptions about

PART II. THE ICC AND THE WESTPHALIA ORDER

The existence of a permanent criminal tribunal will no doubt alter traditional interactions within the system of sovereign states. But, will the tribunal, to be effective, require that states relinquish sovereignty to the point of threatening the foundations of the Westphalia order?

“Sovereignty” forms the bedrock of contemporary international relations and of international law. The Charter of the United Nations identifies the “sovereign equality” of states as the first principle upon which the United Nations is based⁶⁴. In line with U.N. Charter principles, the renowned British commentator IAN BROWNLIE writes that “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations”⁶⁵. From this basic proposition Professor BROWNLIE derives three broadly stated fundamental rights and duties of states:

- (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there;
- (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and
- (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor⁶⁶.

the world, and the sense of shared values is increasingly frayed” and asking if “the fracture line over globalization actually a division not between the West and the Rest but between the United States and the Rest”). The author is a professor of international political economy at the School of Advanced International Studies of the Johns Hopkins University in Washington D.C.

64 Charter of the United Nations, Article 2(1).

65 BROWNLIE, note 20 *supra*, at 289.

66 *Ibid.* (footnotes omitted).

BROWNLIE's three components of state sovereignty are reflected in contemporary international law. In large measure, a sovereign state has exclusive jurisdiction over a territory and the population living there, a duty of non-intervention in matters within the exclusive jurisdiction of other states, and the duty to fulfill obligations arising from treaties and customary international law.

However, powerful countries, such as the United States, often understand their sovereign status as a basis for their entitlement to opt out of universally accepted international norms⁶⁷. Under this view, the United States can choose to respect international law when it serves U.S. interests, and to avoid or to change international law when it does not⁶⁸. United States objections to some of the provisions of the Rome Statute, and its insistence on being exempt from the reach of the ICC due to its world-wide military presence, seem based on such an understanding of sovereignty. By attempting to tailor the Rome Statute to this end, the United States sought the benefit of being a state party to the Court without undertaking the obligations that accompany that status. This expansive conception of sovereignty for a powerful state reflects the belief that international relations, and the obligation to abide by international law, are matters of might and not of right. Such a conception of sovereignty would render legitimate a world in which hegemonic states are at liberty to do as they please. In the U.S. view, the ICC poses a threat to U.S. sovereignty because subjecting U.S. nationals to ICC jurisdiction inevitably subjects the policies of the United States to the same standards that are applicable to all other states. This attitude, while perfectly rational for a hegemonic power, it is a distortion of Westphalia norms.

Under a strand of traditional Westphalia thinking, quoted earlier⁶⁹, sovereignty confers upon states legal equality and the

67 See PETER J. SPIRO, *The New Sovereignists; American Exceptionalism and Its False Prophets*, Foreign Affairs (November/December 2000).

68 *Ibid.*

69 BROWN, note 1 *supra*, at 35.

ability to act collectively so as to prevent any state from achieving dominance. The Westphalia legal equality and the “balance of power” norms, by which states seek to counter the hegemonic tendencies of other states, are interdependent - since true equality is not possible in a world of hegemonic powers. Westphalia thought derives the principle of state equality by drawing an analogy to the natural equality of human beings⁷⁰. The analogy to human relationships imputes a moral component to the Westphalia order of sovereign states: States have moral obligations to one another and do not relate exclusively as fellow power holders. This moral context makes it easier to comprehend the Westphalia rejection of hegemony. Just as it is wrong for one human being to subjugate another, it is wrong for one state to subjugate another and thereby abridge the subjugated state’s equal sovereign status⁷¹.

While the concept of balance of power is not clearly articulated in contemporary international instruments, the legal equality of sovereign states is one of the founding principles of the Charter of the United Nations⁷². The ICC framework endorses both of these ideals. In that sense, the ICC is not a departure from the traditional Westphalia order, but is an affirmation of some of its neglected principles.

A. THE ANTI-HEGEMONIC EFFECT OF THE ICC

The mere fact that the most powerful nations have refused to accept the Rome Statute provides some indication of its anti-hegemonic effect. The Rome Statute’s primary anti-hegemonic devices are: (1) jurisdiction over the crime of aggression; (2) the creation of an independent Prosecutor; and (3) the diminished role of the Security Council in the administration of international criminal justice.

70 *Id.* at 32.

71 *Ibid.*

72 “The Organization is based on the principle of the sovereign equality of all its Members”. U.N. Charter Article 2(1).

1. ICC JURISDICTION OVER THE CRIME OF AGGRESSION

Under Article 5 of the Rome Statute, the ICC has jurisdiction over the crime of aggression, but the exercise of that jurisdiction is postponed until the Assembly of States Parties adopts a definition of the crime consistent with the provisions of the U.N. Charter⁷³. Leaving aside serious unresolved issues as to the content of the crime of aggression, ICC prosecution of the crime of aggression would create practical problems of enforcement.

As with all ICC crimes, individuals would be held criminally responsible. But unlike other ICC crimes that do not, or at least do not explicitly, depend on the propriety of the state action to hold individuals responsible, the crime of aggression would require a threshold finding that a *state* acted criminally before individuals involved in the execution of the criminal act can be held accountable. Because of that fact, not every participant in an act of aggression should be held liable, from the soldier on the ground to the head of the state that has undertaken the act. The defense of superior orders is not available for existing ICC crimes because the accused is deemed to have the capacity to tell between right and wrong when ordered to kill civilians or perform other prohibited acts⁷⁴. That rationale is inadequate with respect to the crime of aggression since the wrongfulness of specific acts of aggression will be much less instinctive. Consequently, the only potential defendants should be those directly involved in planning the act – the head of state, military commanders, and the like. Problems of line drawing will arise even in this context. Should a commander who plans the military phase of an operation be held to the level of sophistication equal to that of an expert in international law so as to be held responsible to discern the likely criminality of the planned action? Additionally, the head of state and other high officials may enjoy immunity while in office, and trials may be delayed for a

73 Rome Statute Article 5.

74 *Id.* Article 33.

long time after the act complained of took place, thus reducing their effectiveness.

Notwithstanding such serious issues, the exercise of ICC jurisdiction over acts of aggression would make relevant the core Westphalia norm of non-intervention and the U.N. Charter norm of non-use of force, norms that have often been ignored in practice. The states most affected by the application of such legal standards would no doubt be states that have used power and influence to advance their interests. By extending criminal liability to nationals of such states, the ICC would tend to benefit weaker states that are normally on the receiving end of the exercise of hegemonic power.

2. THE INDEPENDENCE OF THE PROSECUTOR

The ability of the Prosecutor to initiate investigations on his or her own initiative will preclude states from using their power to prevent the initiation of investigations that may be contrary to their interests. Absent this provision, powerful states, either by threatening to withhold favors or by promising to confer new benefits, could exert pressure on other states not to refer such situations to the Court. Weaker states may be able to rely on the integrity of the Prosecutor to initiate investigations on his or her own authority (*proprio motu*)⁷⁵ without fearing the wrath of the powerful.

The influence of major powers over prosecutorial decisions will be limited to their participation in the election of the Prosecutor and the judges and in the general administration of the Court⁷⁶.

3. THE ROLE OF THE SECURITY COUNCIL

The Rome Statute recognizes the importance of the Security Council's role and provides numerous accommodations in that

75 See Rome Statute Article 15(1).

76 See *id.* Articles 36 & 42.

regard⁷⁷. However, the Statute stops short of awarding the Security Council the power to block prosecutions and to control which situations may or may not be referred to the Court.

B. SOVEREIGN EQUALITY

The Rome Statute affirms the principle that legal norms should apply equally to all members of the international community⁷⁸. As such, the Rome Statute marks a radical departure from the *ad hoc* manner in which international criminal law has been enforced in the past. *Ad hoc* tribunals, by their very definition, expose only some states to international criminal responsibility. They apply the law in an unequal manner which, regardless of whether the prosecution of the accused may be justified, creates an impression of unfairness⁷⁹. The authority of any tribunal is undermined by the realization of the accused that the tribunal is precluded from sitting in judgment of his accuser⁸⁰.

The jurisdiction of the two World War II tribunals, convened at Nuremberg and Tokyo, was based on the traditional notion that

77 The Security Council has the power to refer any situation to the Court, regardless of whether the states involved are state parties. ROME STATUTE, Article 13. The Security Council also may defer any prosecution for a year, with the possibility of further extensions. Rome Statute, Article 16. The permanent members of the Security Council were dissatisfied with Article 16 and wanted any permanent member to have the ability to prevent a prosecution. See BROWN, note 1 *supra*, at 220.

78 See BROWNLIE, note 20 *supra*, at 289 (stating that “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations”)

79 See *id.* at 60 (stating that *ad hoc* tribunals “create the appearance of uneven or unfair justice”).

80 See ALFRED P. RUBIN, *An International Criminal Tribunal for Former Yugoslavia?* 6 PACE INT’L. L. REV. 7, 11 (1994) (stating doubt that “any former Yugoslavians will be convinced of [the ICTY’s authority if it] is restricted to events in former Yugoslavia; if American leaders accused of ordering war crimes or “grave breaches” during the Gulf War (Captain Rogers of the Vincennes; General Schwarzkopf in connection with the bombing of what turned out to be a bomb shelter in Baghdad?) are not subjected to the same procedures and same laws as accused former Yugoslavs”).

every *belligerent* has the power to set up courts, civil or military, and try persons accused of war crimes committed within its jurisdiction⁸¹. The Nuremberg Tribunal reiterated this principle by stating that “any nation” has the right to set up special courts to administer law. Thus, the Allied Powers did jointly what each of them had the right to do separately. An additional basis of jurisdiction was the notion that by losing the war, Germany had surrendered its sovereignty to the Allied powers. The Allies thus assumed authority to carry out governmental functions within Germany, one of which was the prosecution of suspected war criminals⁸². Even though the work of the Nuremberg and Tokyo tribunals was essential to the restoration of peace, the tribunals did not examine acts of Allied forces that might have constituted breaches of the law that they were charged with applying to German and Japanese officers and officials⁸³.

While the World War II tribunals relied on the traditional authority of victors to form military courts, the Security Council’s tribunals for Yugoslavia and Rwanda are based on the controversial notion that the Security Council has authority to create tribunals pursuant to its Chapter VII mandate to take “measures” to maintain or restore international peace and security⁸⁴. The Security Council’s decision to create these two tribunals compromised the principle

81 This principle was articulated by the Commission of the Responsibility of the Authors of the War and on the Enforcement of Penalties. The Commission was formed pursuant to the Preliminary Peace Conference, 1919 and was made up of two members each of the five great Powers – the United States, the British Empire, France, Italy and Japan - and five members selected from the Powers with special interest – Belgium, Greece, Poland, Portugal, Romania, Serbia and Czechoslovakia. The Commission was to produce a report on the creation of a tribunal to try breaches of the laws and customs of war committed by the forces of the enemy.

82 See BASSIOUNI, note 33 *supra*, at 29.

83 See *id.* at 78 (stating that the German Army kept detailed records of war crimes committed by the Allied troops that were never pursued by the Nuremberg Tribunal).

84 See CRAWFORD, note 16 *supra*, at 415 (noting that “many commentators and not a few governments are concerned by the rather ad hoc character of the Security Council’s actions in establishing tribunals for the former Yugoslavia and Rwanda”).

of sovereign equality and is exposed to two avenues of attack. First, if the Security Council has overstepped its Chapter VII powers, its actions present a threat to all sovereign states by subjecting them to an exercise of authority to which they have not consented. Second, even if the Council's authority to create *ad hoc* tribunals is conceded, there is no justification for the Security Council's neglect to organize the tribunal with the goal of achieving maximum fairness and impartiality. By precluding the participation of the states where the conduct occurred and of the wider international community, the Security Council engaged in an unequal administration of international justice. In contrast to *ad hoc* tribunals created by the Security Council, the ICC draws its legitimacy from the consent-based jurisdictional principle of the ICJ. By respecting the will of the states, it upholds the principle of sovereign equality.

Some provisions in the Rome Statute allow the ICC, under certain circumstances, to exercise jurisdiction over states that are not parties to the Statute. When the Security Council refers a case to the Court, the national state of the accused need not be a state party nor must the conduct in question necessarily occur on the territory of a state party. In giving authority to the Security Council to refer cases without regard to the limitations that apply when a state party or the Prosecutor does so, the drafters of the Rome Statute gave deference to the Security Council's role in maintaining international peace and security. Even though the exercise of jurisdiction over non-parties subordinates the sovereign will of the state, an ICC breach of the state's sovereignty is mitigated by the fairness and legitimacy of the ICC. The accused is assured of the tribunal's fairness by the fact that the tribunal was not constructed solely for the purpose of his trial. The ICC is a permanent tribunal with an ever-increasing number of states that have consented to its jurisdiction.

C. IMPLICATIONS OF THE ICC FOR THE WESTPHALIA SYSTEM

Accepting the contention that the ICC reinforces Westphalia notions of sovereign equality and balance of power, the question of its place in the grand scheme of the Westphalia order still remains.

Since sovereign equality of states is the basic element of the Westphalia order, non-intervention or deference to the actions of states within their borders can be seen as the “natural law” or basic organizational principle of the Westphalia order. This concept invokes Aristotle’s understanding of natural law – as an expression of the inevitable functioning of forces of nature. As applied to the political domain, the natural law concept implies that there are rules, independent of human discretion, that explain the way in which a political community – *polis* – should be organized. Any attempt to depart from these rules will cause the political community to fail. Non-intervention as the natural law of the Westphalia community derives from the “practical needs of social interaction” among sovereign equal states⁸⁵. Thus, even though states may exercise their treaty powers to reorganize their relations as they see fit, the power of natural law may doom to failure any treaty that departs from its principles. It remains to be seen whether the transformation of relations between states represented by the ICC will be successful, that is, whether non-intervention or deference can be replaced as the reigning principle.

In examining the place of the ICC in the Westphalia order, the question to ask is whether a permanent international criminal tribunal such as the ICC would satisfy the “practical needs of social interaction” of sovereign states. Recognition of non-intervention or deference to the actions of states within their borders as an organizational principle of the Westphalia order does not mean that such non-intervention or deference is the only possible organizational principle. It means only that any significant departure from such a principle will require redefinition of the political order.

85 See RUBIN, note 79 *supra*, at 160.

One possible answer is that the Westphalia order has already incorporated the existence of an international criminal tribunal by choosing to define the interaction of its members in legal terms. As discussed above, the ICC has jurisdiction over a narrow segment of the most egregious crimes recognized by international law. The fact that these crimes entail individual criminal responsibility and have become part of customary international law indicates that states have, at least implicitly, accepted the possibility that an international judicial body would be competent to adjudicate such crimes. The United Nations convention that defined the crime of genocide, for example, contains an explicit provision that contemplates the creation of an international criminal tribunal⁸⁶. In that sense, the ICC is only the realization of what was made inevitable by the acceptance by states of genocide, war crimes, and crimes against humanity as crimes under customary international law.

The fact remains, however, that prior to the Rome Statute, the only attempts to enforce these crimes have been through *ad hoc* tribunals. As expressions of hegemonic power⁸⁷, *ad hoc* tribunals imply that international criminal law and its selective application is but a sword in the hands of powerful states. U.S. objections to the Rome Statute appear to reflect such thinking, and may indicate that the notion of “might is right” is the correct way to understand the workings of the international community. In that case, the ICC would be an anomaly, ultimately of little effect, as it would clash with the fundamental norm of the international system. But if unbridled hegemonic power is contrary to fundamental Westphalia principles, the anti-hegemonic thrust of the ICC may be an important step towards their realization.

86 The Genocide Convention contemplates that persons charged with the crime may be tried by an “international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. Article VI, Convention on the Prevention and Punishment of the Crime of Genocide (1951), 78 U.N.T.S. 277.

87 It is instructive to note that the recent *ad hoc* tribunals for former Yugoslavia and Rwanda were established after the end of the Cold War when Russia replaced the USSR as a permanent member of the Security Council.