

THE TRANSFORMATION OF STATE SOVEREIGN RIGHTS AND RESPONSIBILITIES UNDER THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

It has become popular in recent years to suggest that state sovereignty, as a phenomenon in the international legal system, is in decline.¹ One such challenge to state sovereignty is the empowerment of international organizations or institutions to make binding decisions in areas that historically have been the prerogative of sovereign states. A prime example of this phenomenon is the International Criminal Court (ICC). The states party to the ICC statute, also known as the Rome Statute, grant the court considerable authority over the prosecution of war crimes, crimes against humanity, and genocide, when those crimes are committed by the member state's citizens or on its territory.² It has been alleged by the United States that, in addition to the voluntary sacrifice of sovereign authority by states party to the ICC, the new ICC also infringes on the sovereign rights of non-state parties.³ This would occur if the establishment of the International Criminal Court modifies the sovereign rights of both state parties and non-state parties.

State sovereignty, however, remains a foundational norm of

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¹ JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* 40 (Princeton University Press 1990). See generally Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997).

² The Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

³ David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 533-34 (1999).

the international legal system. This article will examine the challenges to state sovereignty that are brought about under the Rome Statute of the International Criminal Court, but will argue that these are developments of the concept of state sovereignty and not a radical departure from it. Viewed from this perspective, arguments by the United States government that the Rome Statute violates the sovereign rights of non-state parties⁴ have little merit, as the principles of the ICC statute are well in line with the traditional state sovereignty norms that are the foundation of international law. The essential impact on non-state parties' sovereignty is that nationals of such states who commit crimes on the territory of states party to the ICC statute could potentially be punished for their crimes before the new international court. However, under the traditional rules of international law, nationals of a foreign state are normally subject to the laws of the state where they are traveling.⁵ Consequently, to the extent that the establishment of the International Criminal Court creates obligations for non-state parties, it does so in a way that is perfectly consistent with the foundational international law norm of state sovereignty. States that consent to become parties to the Rome Statute of the International Criminal Court do engage in a significant redefinition of their sovereign rights and responsibilities, but they do so in a way that is consistent with the gradual evolution of the concept of state sovereignty over the centuries. Therefore, the establishment of the International Criminal Court does not radically undermine the concept of state sovereignty; instead, it modifies sovereignty norms in a direction that promises to permit the continued utility of the concept for international law in the twenty-first century.

II. THE CONCEPT OF STATE SOVEREIGNTY

A. Sovereignty as a Social Construct

State sovereignty is a foundational legal concept of international law which holds that states should have autonomy to act, and be free from, unwanted intrusions by other states.⁶ However, the precise rule content of the sovereignty concept has changed a great deal over time. For instance, it was once

⁴ Pierre-Richard Prosper, Foreign Press Center Briefing (May 6, 2002), available at <http://fpc.state.gov/9965.htm>.

⁵ Covey T. Oliver, *The Jurisdiction (Competence) of States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 307, 309 (M. Bedjaoui ed. 1991).

⁶ State sovereignty is defined as "[t]he right of a state to self-government; the supreme authority exercised by each state." BLACK'S LAW DICTIONARY 1446 (8th ed. 2004).

accepted that one of the privileges of sovereign states was the right to use force in world politics. Today, in contrast, the concept of state sovereignty includes the right to be free from armed attack on a state's sovereign territory.⁷ I accept the notion articulated by Werner and others that sovereignty is a conceptual category of international law whose specific content changes over time through the discursive practices of states.⁸ As Werner puts clearly:

State sovereignty is not a descriptive concept which stands for ('mirrors') a pre-given state of affairs and which can be measured and counted in an objective way. The very fact that collapsed states still count as sovereign states in international law suggests otherwise. Rather than being a representation of a state of affairs, state sovereignty is a *claim to authority*; a claim which has been institutionalized, defined and redefined within the framework of international law.⁹

This perspective is at odds with the view that sovereignty is an actual political characteristic of independent political entities that have *de facto* political autonomy. In such a view, international law simply takes note of that empirical situation.¹⁰ I assume, instead, that the discourse of international law has substantiated the conceptual category of sovereignty. The existence of a body of law based on the principle of the independence of sovereign states has legitimized and institutionalized the existence of political forms that claim the status of sovereign states. Moreover, the particular bundle of rights and duties that sovereign states claim to possess as a result of qualifying for legal sovereign status has changed considerably over time.

Biersteker and Weber elaborate on the view that sovereignty is a socially constructed legal concept whose exact content changes considerably over time. They assert that:

Sovereignty provides the basis in international law for claims for state actions, and its violation is routinely invoked as a justification for the use of force in international relations. Sovereignty, therefore, is an inherently *social* concept. States' claims to sovereignty construct a social environment in which they can interact as an international society of states, while at the same time the mutual recognition of

⁷ Wouter Werner, *State Sovereignty and International Legal Discourse*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 127 (Wouter G. Werner & Ige F. Dekker eds., 2004).

⁸ *Id.* at 131-33.

⁹ *Id.* at 133 (emphasis added).

¹⁰ For an articulation of the view that sovereignty is an empirical phenomenon that is merely recognized by international law, see *generally* ALAN JAMES, SOVEREIGN STATEHOOD, THE BASIS OF INTERNATIONAL SOCIETY (Allen & Unwin 1986).

claims to sovereignty is an important element in the construction of states themselves.¹¹

Thus, sovereignty is a social fact. States exist as meaningful entities because they are constituted by international law rules of recognition. At the same time, states constitute those institutional rules of international law by interacting in ways that develop and modify the meaning of sovereignty over time. The relationship between states, as agents, and international law, as an institution, is mutually constitutive.¹² While the specific rules of conduct for sovereign states shift over time, the sovereignty idea always refers to some capacity of the state to act independently from other sources of authority.¹³

One consequence of the view that sovereignty is a socially constructed phenomenon is that it is no longer necessary to view the international norm of state sovereignty and the norm of individual human rights as existing in opposition to one another.¹⁴ Instead, constructivist scholars of international relations have argued that, since 1945, with the era of decolonization and self-determination, the obligation of sovereign states to protect the individual human rights of their citizens has become essential to legitimizing the existence of the international state system itself.¹⁵ The reason for the legitimacy of the state system in earlier centuries was the divine right of kings, but, since the middle of the twentieth century, the foundational reason for the existence of modern states is to protect the most basic human rights of their populations. As Reus-Smit puts it: "Far from being a categorical right with no strings attached, therefore, the post-1945 right to self-determination was deliberately and explicitly tied to the satisfaction of basic human rights."¹⁶

¹¹ Thomas J. Biersteker & Cynthia Weber, *The Social Construction of State Sovereignty*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1, 1-2 (Thomas J. Biersteker & Cynthia Weber eds. 1996) (emphasis in original) (footnote omitted).

¹² On the sociology of agents and structures, see generally ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (University of California Press 1984). With respect to states and international society, see ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 67 (1999).

¹³ Biersteker & Weber, *supra* note 11, at 14.

¹⁴ For the opposite view that the ICC is a challenge to states' sovereign rights, rather than a transformation of them, see Rod Jensen, *Globalization and the International Criminal Court: Accountability and a New Conception of State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 170-71 (Wouter G. Werner & Ige F. Dekker eds., 2004).

¹⁵ Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. OF INT'L STUD. 519, 519-20, 531-36 (2001).

¹⁶ *Id.* at 536.

B. Sovereignty and the Juridical Equality of States

Of course, a crucial aspect of the legal concept of state sovereignty is the juridical equality of the states in the international system. However, Michael Byers notes the fiction of legal equality masks significant differences in a state's actual power, and those power differences suggest that states have differing abilities to influence the content of international law.¹⁷ Byers argues that powerful states tend to be more engaged in the international system, and, therefore, their acts have a disproportionate impact on the evolution of customary international law. Additionally, they tend to maintain larger diplomatic corps that give them added influence in bilateral and multilateral treaty drafting. As I have argued elsewhere, one of the consequences of the establishment of the International Criminal Court is that it gives judges of that court substantial authority to direct the evolution of the practical application of the laws of war.¹⁸ I elaborate on this power of the ICC below. This power to define the law comes partly at the expense of powerful states that have historically determined the application of the rules of international humanitarian law through their own practices of discourse and prosecution.

Critical legal theorists have noted that international law, like virtually all legal orders, is not inherently fair in its application precisely because power plays a role in the development and application of the law.¹⁹ One important change in the legal rights of sovereign states that ratify the Rome Statute of the International Criminal Court is that they grant significant authority to the Court's prosecutor and judges to determine whether or not particular actions carried out by individuals constitute violations of international humanitarian law. As a consequence, the establishment of the Court shifts real legal control from the great powers towards this newly constituted international judiciary. Since military powers historically defined the application of international criminal law standards to their own soldiers, personnel, and citizens, they exercised enormous discretion over the practical definition of the crimes mentioned under the Geneva Protocols of 1949 or the

¹⁷ MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 35-40 (Cambridge University Press 1999).

¹⁸ Michael Struett, *NGOs, the International Criminal Court, and the Politics of Writing International Law*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 327-28 (Wouter G. Werner & Ige F. Dekker eds., 2004).

¹⁹ See generally DAVID KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (Basic Books 3d ed. 1998) (1982).

Genocide Convention.²⁰ If the judges of the ICC are fair and professional in their application of the standards, this development could weaken the argument that international law ultimately is a legal system that serves the interest of only the most powerful states that participate in the international legal system.

C. Sovereignty and Individuals as Subjects of International Law

Historically, individuals were not recognized as subjects of international law, and it was assumed that only states, not individuals, had rights and obligations under international criminal law.²¹ Chinese writers on international law have recently reiterated this view, claiming that international law gives no status to individuals on Chinese territory to claim rights against the state.²² However, this argument has been widely criticized as being the obvious manipulation of international law by totalitarian states to preserve its own absolute power.²³ Moreover, in the twentieth century, the view that individuals have both rights and obligations under international law has gained widespread acceptance.²⁴ Indeed, since international law, like any legal system, is ultimately a standard for human behavior, it would seem to be a logical necessity that it would regulate individual human conduct, even if the formal constitution of international law is premised on specific acts undertaken by states as corporate entities.²⁵

International Criminal Law as a field rests upon the reality that states have deliberately created rights and duties for individuals under international treaties and customs.²⁶ The International Criminal Court is a direct challenge to traditional conceptions of state sovereignty because it creates a supranational judicial authority with the power to rule whether

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res 260 (III), U.N. GAOR, 3rd Sess., at 174, U.N. Doc A/810, (Dec. 9, 1948), 78 U.N.T.S. 277, entered into force January 12, 1951.

²¹ Jeremy Bentham, *Principles of International Law*, in 2 THE WORKS 537 (J. Bowring ed. 1843).

²² See generally Hungdah Chiu, *Guojifa Xin Lingyu Jianlun (A Concise Introduction to the New Areas of International Law)*, 82 AM. J. INT'L L. 892 (1988) (book review).

²³ See generally LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE (1989).

²⁴ See generally RICHARD A. FALK ET AL., INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE (Westview Press 1985).

²⁵ *Id.* at 205.

²⁶ See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (Kluwer Law International 2d ed. 1999); JORDAN J. PAUST, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (Carolina Academic Press 2d ed. 2000).

or not particular uses of force by state officials are criminal and sanctionable violations of international law.²⁷ This means that the court, and not states alone, will have the authority to help determine what constitutes a legal use of force. Of course, the notion that states have a monopoly on the legitimate use of force within their territory is central to the legal concept of sovereignty. That circumstance is not undermined by the establishment of the International Criminal Court, because the court does not constitute any new authority with police power. However, states that ratify the statute give the court a role in determining which particular uses of force are legitimate.²⁸ Consequently, the legal privileges of sovereignty are altered by the court's establishment. In effect, states that are parties to the ICC statute limit their own autonomy in determining whether or not the conduct of their public officials comports with obligations that states have adopted to limit their use of force.

D. Popular Sovereignty and the Legal Concept of State Sovereignty

State sovereignty is increasingly conceptualized as a phenomenon that creates both rights and responsibilities for governments.²⁹ In effect, there is an emerging norm in international law that States owe certain obligations to their own citizens, and to the international community.³⁰ The political liberty that comes with state sovereignty has to be tempered by a responsibility to exercise that liberty in a way that is not severely detrimental to people living inside or outside of the sovereign state's jurisdiction. For example, the emerging preference in the international legal system for democratic forms of government suggests that sovereign states have a legal obligation to consider the needs of the citizens of their state.³¹

In all the states where the United Nations has recently been involved in "state-building" exercises after a period of war or other upheaval, democracy has repeatedly been the form of government preferred by international organizations and their members.³² This pattern of state practice suggests an emerging

²⁷ Rome Statute, *supra* note 2.

²⁸ *Id.*

²⁹ See generally INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/commission-report.pdf>.

³⁰ See generally *id.*

³¹ See generally *id.*

³² See generally Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123 (Gregory H. Fox & Brad R. Roth eds., 2000).

standard that participatory forms of political organization are to be preferred over forms of government where a political elite is not accountable to the general populace.³³ This suggests that the legal concept of sovereignty in international law now focuses increasingly on the popular sovereignty of the citizenry rather than on the political sovereignty of the government. The now extensive pattern of international treaties that recognize participatory political rights means there has been a shift in the locus of sovereignty.³⁴ As Greg Fox writes, this “shift in the locus of sovereignty undermines arguments against participatory rights based on an infringement of sovereignty. For a non-democratic regime to claim that participatory rights violate its national sovereignty begs the question of whether that regime has legitimate authority to make such a statement.”³⁵

Another example of the increasing significance of the norm of state responsibility over taking the rights aspect of state sovereignty can be seen in the emergence of “The Guiding Principles on Internal Displacement” adopted by the UN Commission on Human Rights.³⁶ In this case, we are not dealing with legally binding law. Still the development of workable norms in this area, their adoption by a major UN body, and their use in the field by Non-Governmental Organizations (NGOs) and other actors, all serve to reinforce the notion that sovereign states have responsibilities and not just rights. The question of internally displaced persons is a classic example of a lacuna created in international law by the doctrine of absolute state sovereignty.³⁷ Of course, persons displaced across international boundaries now benefit from a number of international law rights and privileges. Conversely, persons displaced from their homes by armed conflict who remain within the boundaries of a sovereign state have more limited international legal rights because such persons are traditionally at the complete mercy of their sovereign state governments.³⁸

The development of the Guiding Principles for Internally Displaced Persons is a study in the growing recognition that states have obligations to their own citizens. Roberta Cohen

³³ Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, 48, 71-86 (Gregory H. Fox & Brad R. Roth eds., 2000).

³⁴ *Id.*

³⁵ *Id.* at 89.

³⁶ Guiding Principles on Internal Displacement, U.N. Commission Human Rights, 54th Sess., U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

³⁷ See generally Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, in 10 *GLOBAL GOVERNANCE* 459 (2004).

³⁸ *Id.*

writes: “[w]hile acknowledging that primary responsibility rests with national authorities, the Guiding Principles recast sovereignty as a form of national responsibility toward one’s vulnerable populations with a role provided for the international community when governments did not have the capacity or willingness to protect their uprooted populations.”³⁹ We are witnessing the gradual strengthening of the notion of popular sovereignty in the international political normative order, at the expense of strict privileges of state sovereignty. State sovereignty is increasingly only viewed as legitimate to the extent that it gives expression to the popular sovereignty rights of the people.

The International Criminal Court creates new norms that are of precisely this type. The primary effect of the ICC on member states’ sovereign rights is to create an important institutional incentive for member states to prosecute genocide, war crimes, or crimes against humanity when they occur on the states territory. Since the ICC only has jurisdiction if states fail to prosecute themselves,⁴⁰ the existence of the court puts pressure on states to exercise their own criminal jurisdiction over these crimes. In the absence of the ICC, other things being equal, states would have more latitude to decide for themselves whether or not it was politically desirable to prosecute these types of cases. Of course, states had already accepted the legal obligation to punish or extradite for genocide, if they ratified the 1948 Genocide Convention, and grave breaches of the war crimes law, if they ratified the Geneva Conventions of 1949.⁴¹

What is new about the ICC is that it threatens to proceed with international enforcement of these crimes if states fail to punish. In effect, the ICC promises to uphold a certain minimal standard of compliance with the requirement on states to punish violations of international criminal law. This can be viewed as recognizing the rights of the citizens of states to be free from victimization as a result of crimes recognized under international criminal law. As such, it is a modification of the meaning of state sovereignty. Of course, in some cases, states will be glad to shift

³⁹ *Id.* at 459.

⁴⁰ Rome Statute, *supra* note 2, art. 17.

⁴¹ Regarding the duty to prosecute war crimes, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 82 (Oxford University Press 2d ed. 2001). Regarding the duty to prosecute Genocide, see Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20, arts. 6-7; but be aware of numerous reservations to these provisions. See also STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 39-40 (2001).

the burden of prosecution to the ICC rather than undertake such prosecutions themselves. This possibility is discussed more below. But for the majority of states, the incentive will clearly be to handle such matters within their own legal systems.

III. BASIC POWERS OF THE INTERNATIONAL CRIMINAL COURT

By creating an individual standard of accountability for violations of the laws of war, the International Criminal Court potentially places meaningful restrictions on the way states can employ organized violence.⁴² The four classes of crimes over which the ICC will have jurisdiction all involve international norms that restrict the way in which states can exercise the use of force.⁴³ It does this by forcing state officials to consider the possible legal repercussions should the force be deemed inappropriate by outside legal authorities. Historically, this fact was seen as the major political stumbling block to the establishment of a permanent ICC.⁴⁴

The establishment of the International Criminal Court also places restrictions on a state's ability to determine for itself whether or not particular acts qualify as war crimes, crimes against humanity, or genocide. The absence of a clearly specified international criminal code has also been seen as a major stumbling block to prosecuting international crimes in a court of law.⁴⁵ Of course, there is no recognized legislative body in the international system. Both customary and treaty based international law criminalize specific acts, but whether or not those crimes were sufficiently specified so as to make them enforceable in a court of law was debated before the establishment of the ICC.⁴⁶ States have traditionally exercised a great deal of control over the content of international law,

⁴² Michael Struett, *The Meaning of the International Criminal Court*, 16 PEACE REVIEW 317, 319 (2004).

⁴³ The four crimes are genocide, crimes against humanity, war crimes, and aggression. Rome Statute, *supra* note 2, art. 5. Significantly, the court will not exercise its jurisdiction over the crime of aggression until the states who are parties to the Rome Statute agree on a definition of that crime. *Id.* Of course, non-state actors can also commit these crimes.

⁴⁴ BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE : A DOCUMENTARY HISTORY AND ANALYSIS, xii (Oceana Publications 1980). See generally Benjamin B. Ferencz, *An International Criminal Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 375-81, 84, (1992); Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103, 111-13 (1994). These works document the reluctance of states to define international law crimes with sufficient precision for an international criminal court to convict violators.

⁴⁵ Scharf, *Getting Serious About an International Criminal Court*, *supra* note 44.

⁴⁶ See generally Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121 (1994); FERENCZ, *supra* note 44.

including the ability to determine in large part through custom what is considered a war crime and what is not.

The traditional sources of international law are primarily controlled by state governments. Article 38 of the Statute of the International Court of Justice formally recognizes four sources of international law: treaties, custom, general principles of law, and the commentary of judicial decisions or leading publicists on international law.⁴⁷ Sovereign states have control over the first two sources, since states conclude treaties and custom refers explicitly to the practice of states. As a result, states have traditionally exercised a great deal of control over the content of international law, including the ability to determine in large part through custom what is considered a war crime and what is not. Since the general principles of law are essentially constant over time, and the role of commentary is a subsidiary one that is parasitic on the actual behavior of states, states historically have exercised a virtual monopoly on the actual legislation of international law.

Within the last century, the doctrine that only sovereign states can be the authors of international law has come under challenge.⁴⁸ To the extent that the resolutions of international organizations and decisions of international administrative bodies can have binding effects in law, at times by means of parliamentary style voting, as in the Security Council, or the General Assembly, or other international bodies, this introduces an element in the source of law that is not directly controlled by states.⁴⁹ Even so, states do exercise some influence here, because the state governments choose the representatives of such international organizations.⁵⁰ Judicial bodies can also play a role by offering authoritative interpretations on ill defined areas of the law. While the ICJ is limited in this respect by Article 59, which proscribes the precedential value for the World Court's decisions,⁵¹ other international and domestic courts, including Nuremberg, the ICTY and the ICTR are not so limited. The ICC, as a permanent judicial body, has the potential to exercise considerable influence over the content of international criminal law, and the ICC's decisions will have precedential value, at least for future cases heard under the statute itself.⁵²

⁴⁷ Statute of the International Court of Justice, June 26, 1946, 59 Stat. 1055, 8 U.N.T.S. 993.

⁴⁸ FALK, *supra* note 24.

⁴⁹ U.N. CHARTER art. 24.

⁵⁰ The European Parliament is an important exception.

⁵¹ Statute of the International Court of Justice, *supra* note 47, art. 59.

⁵² Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 144, 157-158

The International Criminal Court was established by a multilateral treaty negotiated by the representatives of sovereign states.⁵³ As such, it is not an organ of the United Nations, nor is it functionally a part of any other international organization, but the statute does give particular privileges to various United Nations organs. The treaty, normally referred to as the Rome Statute for the International Criminal Court, like any treaty, is only binding on those states that have formally ratified it. The Rome Statute establishes the court and gives it jurisdiction over persons “for the most serious crimes of international concern” as provided for in Article 1 of the treaty.⁵⁴ It also gives the court “international legal personality.”⁵⁵

The Rome Statute gives the court jurisdiction over the crimes of Genocide, crimes against humanity, and war crimes, and it specifically defines those crimes in Articles 5-8.⁵⁶ The Rome Statute also gives the ICC jurisdiction over the crime of Aggression but only if and when the states agree to a definition of that crime via an amendment to Article 5 of the ICC statute.⁵⁷ Such an amendment would need to be ratified or accepted by seven-eighths of the states that are ICC members before it would come into effect, and cannot be formally considered until July 2009.⁵⁸ This procedure could also be used to add additional crimes to the jurisdiction of the court in the future. There are some very specific restrictions on when the ICC can exercise its jurisdiction, which will be discussed after the main structures of the court have been outlined.

Part IV of the Rome Statute, Articles 34-52, provide for the election of eighteen judges, a prosecutor and deputy prosecutor by the Assembly of States Party to the ICC.⁵⁹ The registrar of the court is elected by the judges.⁶⁰ The Assembly of States Parties is composed of a representative from each state that ratifies the Rome Statute. The Assemblies organization and administrative powers over the other organs of the court are described in Part 11 of the statute, Articles 112-118.⁶¹

The jurisdiction of the court is complementary to the

(1999) (stating that Article 10 of the Rome Statute, which stipulates that the Rome Statute is not intended to modify any existing provisions of international law for purposes other than those of the statute, does not block the ICC from following its own precedents).

⁵³ Rome Statute, *supra* note 2.

⁵⁴ *Id.* art. 1.

⁵⁵ *Id.* art. 4.

⁵⁶ *Id.* arts. 5-8.

⁵⁷ *Id.* art. 5.

⁵⁸ *Id.* arts. 121, 123.

⁵⁹ *Id.* arts. 34-52.

⁶⁰ *Id.* art. 43.

⁶¹ *Id.* arts.112-118.

jurisdiction of national courts, which also presumably have the authority to prosecute the international law crimes covered by the Rome Statute.⁶² This concept of concurrent jurisdiction was labeled “complementarity” during the ICC negotiations.⁶³ Complementarity means simply that the court’s jurisdiction overlaps without allowing the supranational court to act as an appellate court for domestic criminal trials. In general, a case is inadmissible before the ICC if it is being investigated or prosecuted by a State with jurisdiction “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”⁶⁴ In other words, the ICC is intended to defer to trials by states in their domestic legal systems. The jurisdiction of the ICC is limited to handling cases where national courts fail to prosecute. The ICC statute adopts the traditional legal norm against double jeopardy, so the ICC will not hear cases where a domestic court has already rendered a not guilty verdict, unless it can be shown that the domestic trial was a show-trial intended to shield the accused.⁶⁵ The statute does give the ICC judges the authority to determine whether or not a state is genuinely willing and able to prosecute, and therefore, whether or not the ICC prosecutor can investigate any particular case.⁶⁶

This feature does represent a significant change in the sovereign rights of states. For the first time, it allows for a supranational review of national judicial systems decisions. This feature was viewed as essential by advocates of a strong court, because otherwise, governments could always shield their citizens from prosecution by the ICC by holding a show trial.⁶⁷ Rod Jensen has commented that this feature of the court’s jurisdiction compels states that want to avoid the ICC prosecutor from intervening in events that take place on their territory to adopt criminal legislation to enable the prosecution of those crimes under their domestic law.⁶⁸ If ICC member states fail to adopt such legislation they invite a determination by the ICC prosecutor that the state is unable to prosecute.

While the ICC does have the authority to determine whether or not decisions taken in national courts were genuine

⁶² *Id.* art. 1, pmb.

⁶³ *Id.*

⁶⁴ *Id.* art. 17.

⁶⁵ *Id.* arts. 17, 20.

⁶⁶ *Id.* at arts. 18, 19.

⁶⁷ For an early example of a non-governmental organization’s policy paper arguing this point, see AMNESTY INTERNATIONAL, ESTABLISHING A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 14 (1994).

⁶⁸ Jensen, *supra* note 14, at 181.

prosecutions, this is not nearly so broadly defined as a general appellate review power. This relationship between national courts and the ICC was critical to the willingness of States to establish a permanent international criminal court, and the exact specification of this relationship was a central issue in the negotiations.⁶⁹

The court can exercise its jurisdiction over the core crimes whenever they take place on the territory of a state that has ratified the statute, or when the perpetrator is the national of a state party.⁷⁰ Additionally, the ICC's statute allows the Security Council of the United Nations to refer cases when they take place anywhere in the world,⁷¹ using its powers to regulate international peace and security under Chapter 7 of the United Nations Charter.⁷² Significantly, the Rome Statute does not grant the ICC universal jurisdiction over Genocide, or any of the other crimes, even though the 1947 Genocide Convention does give municipal courts the authority to prosecute that crime regardless of where in the world it occurs.⁷³ The ICC can only exercise its jurisdiction if a state party or the Security Council refers a situation where crimes have allegedly occurred to the prosecutor, or if the prosecutor has information indicating that crimes within the jurisdiction of the court have been committed and he receives authorization from the pre-trial chamber of judges to open an investigation.⁷⁴ Finally, the ICC only has jurisdiction over crimes that were committed after the Rome Statute entered into force on July 1st, 2002.⁷⁵

IV. SOVEREIGNTY IMPLICATIONS OF THE ICC FOR STATE PARTIES

The International Criminal Court is dependent on sovereign states in order for it to function effectively. However, it also creates incentives that are likely to modify state behavior in significant ways. Over time, that modified behavior will likely change peoples' expectations around the world about the enforcement of criminal sanctions for gross human rights abuses. These changes will be brought about through the exercise of individual states' sovereign rights and privileges, not by undermining them.

⁶⁹ See, e.g., Press Release, USG for Legal Affairs and U.N. Legal Counsel, May 18, 1998, available at <http://www.un.org/icc/usgpress.htm>.

⁷⁰ Rome Statute, *supra* note 2, art. 12.

⁷¹ *Id.* art. 13 (b).

⁷² U.N. CHARTER arts. 39-51.

⁷³ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20.

⁷⁴ Rome Statute, *supra* note 2, arts. 13-15.

⁷⁵ *Id.* art. 11.

The ICC creates incentives in two different ways. First, as its founders intended, it creates an incentive for states to be more consistent in punishing violations of international criminal law that occur on their territory. However, the first few investigations that the ICC has undertaken in Uganda and the Congo, and the recent request for Court action in Burundi, suggest another dynamic that is likely to develop between states and the ICC.⁷⁶ Second, for weak states that have difficulty maintaining law and order in their own territory, the ICC creates a tremendous incentive and a standing mechanism to request international assistance in carrying out investigations and trials of gross human rights abusers. This is a type of burden shifting that transfers responsibility from the individual state to the International Criminal Court.

Of course, given its own resource constraints, the ICC will be tremendously limited in the number of cases it can take on this basis. To combat this problem, the ICC is permitted to take funding donations from private sources.⁷⁷ One hopes that a sufficient number of governments, foundations, and/or private individuals will be willing to donate funds to ensure that the most egregious cases of violations of international criminal law will be adequately investigated and prosecuted. However, it is far from certain that the potential donor pool is equal to the task of providing enough funds to deal with what may be an unfortunately large number of war crimes or crimes against humanity.

For state parties, the most intrusive changes in sovereignty norms will appear when the ICC prosecutes a case with respect to events that took place on that state's territory or involving its citizens. The power of the ICC prosecutor to conduct on site investigations under Part 9 of the ICC statute was an extremely contentious issue during the ICC negotiations.⁷⁸ The Rome Statute envisions two different scenarios for the capacity of the ICC prosecutor to conduct "on-site" investigations.⁷⁹ In the ideal situation, the state party on whose territory the investigation is being conducted will be willing to cooperate with the investigation. In that case, the Rome Statute provides for elaborate set of notification requirements designed to facilitate

⁷⁶ For more information on these ICC investigations, see <http://www.icc-cpi.int/cases.html> (discussing the investigation in Uganda and Congo); http://globalsolutions.org/programs/law_justice/news/burundi.html (discussing Burundi).

⁷⁷ Rome Statute, *supra* note 2, art. 116.

⁷⁸ Fabricio Guariglia, *International Law Criminal Procedures: Investigation and Prosecution*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS* 227, 231 (Roy S. Lee ed. 1999).

⁷⁹ *Id.*

close cooperation between the prosecutor's office and the relevant state party.⁸⁰

However, it was also felt that it would be important for the prosecutor to have some power to conduct interviews even when the state was either completely ineffective, and therefore unable to facilitate the ICC prosecutor's investigation, or in situations where the state was unwilling to cooperate.⁸¹ In those cases, the ICC statute gives the prosecutor's office some authority, in carefully limited circumstances, to conduct interviews of witnesses on the state's territory without the presence of state officials, but only under the close supervision of the judges of the ICC's pre-trial chamber.⁸² This power of the ICC prosecutor can only be exercised on the territory of state parties.

This later scenario is a substantial change from the normal sovereign prerogatives of states. Still, it is an arrangement that states only enter into by voluntarily ratifying the ICC statute. A state's willingness to do this can be understood when looked at in conjunction with the emerging standard of popular sovereignty discussed above. By ratifying the ICC statute, sovereign governments are attempting to ensure that if the rule of law should break down in their societies, resulting in massive violations of international criminal law, they, via the international community, have the capacity to bring the individual perpetrators to justice.

This international intervention could be interpreted as a step toward restoring the legitimate sovereignty of the people, since in a time of lawless conflict, the true sovereign authority of the people would be incapable of expression. Because of this, sovereign states feel a need to ratify the ICC statute, granting investigative powers to the ICC prosecutor and judges in advance.

V. SOVEREIGNTY IMPLICATIONS OF THE ICC FOR NON-STATE PARTIES

The central legal implication for states that have not ratified the Rome Statute is that their nationals could be tried by the ICC if they commit crimes encompassed by the ICC within the territory of a state that has ratified the Rome Statute.⁸³ Additionally, non-state parties' could be tried through the Security Council mechanism, even with respect to events that

⁸⁰ *Id.* at 231-32.

⁸¹ *Id.*

⁸² *Id.* at 232-33.

⁸³ Rome Statute, *supra* note 2, art. 12.

happen on the territory of a non-state party.⁸⁴ These developments, while significant, do not substantially change the *legal* situation that United Nations member states faced prior to the establishment of the ICC. As a matter of power politics, the ICC may command more authority to bring suspects to justice than would be the case with municipal legal systems of many less powerful states. As a result, the ICC may make deliberate political action by states to shield persons from accountability more difficult. However, the view that the ICC statute creates new legal obligations for non-state parties cannot be sustained. To the extent that the Court may have an impact on the exercise of non-state parties' sovereign rights, it does so in a way that is perfectly consistent with existing international law.

In the closing days of the Clinton Administration David Scheffer lobbied for states supporting the ICC to agree to limit the ability of the court to detain official personnel of non-state parties. He said, "we believe there should be a means to preclude the automatic surrender to the Court of official personnel of a non-party State that acts responsibly in the international community and is willing to exercise and capable of exercising complementarity with respect to its own personnel."⁸⁵ Scheffer referred to this as "a fundamental issue [that] needs to be resolved [whose] . . . outcome would open the door for the United States to become the good neighbor to the Court."⁸⁶ Of course, this issue was never resolved in a way that was satisfactory to the United States government.

According to a crucial rule of international law, states cannot be obligated to obey a treaty unless it agrees to so obligate itself.⁸⁷ Diane Amann has argued forcefully that the ICC creates "non-consensual" legal jurisdiction in a way that violates the principle that treaties are not binding on non-signatory states.⁸⁸ The governments of the United States, China, and India have also complained that the ICC Statute impinges unfairly on their sovereign rights. As Amann rightly points out, it is essential to the quasi- democratic legitimacy of international law that states cannot be made to accept international legal obligations except

⁸⁴ *Id.* art. 13.

⁸⁵ David Scheffer, *Statement Before the Sixth Committee of the 53rd General Assembly (U.N.): The International Criminal Court* (Oct. 18, 2000), available at http://www.un.int/usa/98_179.htm.

⁸⁶ *Id.*

⁸⁷ Vienna Convention on the Law of Treaties, May 23, 1968, arts. 34-38, 1155 U.N.T.S. 331, entered into force Jan. 27 1980, available at www.un.org/law/ilc/texts/treaties.htm.

⁸⁸ Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 187-98 (Wouter G. Werner & Ige F. Dekker eds., 2004).

through their own consent. Careful analysis shows however that the Rome Statute is not guilty of creating new legal obligations for non-state parties.

The legal impact of the ICC's establishment on the citizens of non-state parties is that there is one additional forum in which they may be tried for war crimes, crime against humanity, and genocide.⁸⁹ Such persons could already have been tried in the courts of a foreign state if they committed those crimes in that state before the establishment of the ICC. In many cases, they could have been subject to trial in a foreign state court even for acts committed in their home state under universal jurisdiction rules.⁹⁰ As a legal matter, it seems there is little difference between individuals being held responsible for violations of municipal law in states they visit versus being held responsible for violations of international law in states they visit. The traditional rules of international law have long maintained that states have the jurisdiction to prosecute foreigners for conduct on their territory.⁹¹ As many advocates of the ICC have pointed out, there is no logical reason why such states should be barred from cooperating by a multilateral treaty to punish conduct which each of them had a clear right to punish individually.

Amann argues that this transfer of jurisdiction from national legal systems to a supranational court is illegitimate.⁹² The central line of reasoning is that ICC jurisdiction is substantially different from one state transferring its territorial judicial authority to another state. Here the argument relies on the fact that many states have been reluctant to grant such authority in the context of European judicial cooperation.⁹³ However, arguing that states have been reluctant for political reasons to engage in this practice is not the same thing as arguing that there is a well recognized rule of international law that disallows the practice.

Amann goes on to argue that the ICC is different from states exercising jurisdiction over crimes on their territory individually because ICC decisions are much more likely to have precedent-setting effects.⁹⁴ She cites as evidence of this, the decision by the

⁸⁹ See, e.g., Jerry Fowler, *Not Fade Away: The International Criminal Court and the State of Sovereignty*, 2 SAN DIEGO INT'L J.L. 125 (2001) (book review); Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT'L & COMP. L. REV. 103 (2003).

⁹⁰ RATNER & ABRAMS, *supra* note 41.

⁹¹ Emer de Vattel, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Hein & Co., Inc. 1995) (1758).

⁹² Amann, *supra* note 88, at 194.

⁹³ *Id.*

⁹⁴ *Id.*

Court of Appeals for the Ninth Circuit in *Doe I v. Unocal*,⁹⁵ wherein the judges relied in part on a legal standard developed by the UN *ad hoc* criminal tribunals.⁹⁶ However, it is simply incorrect to consider this as an imposition on American sovereignty. The judges in the American court were not compelled to follow the international precedent in this case. Instead, they *chose* to do so. In so doing, they were exercising U.S. sovereign rights, by voluntarily complying with emerging international standards. This is a consensual acceptance of the legitimacy of international norms, not an imposition by a supranational court that is compelled against the will of a state sovereign.

If the ICC develops into a globally respected judicial institution, there is every reason to believe it will issue decisions interpreting the laws of war in ways that diverse legal scholars will find persuasive. The ICC may indeed have a definitive impact on shaping the legal enforcement norms concerning these international crimes. Politically, this undoubtedly weakens the ability of the United States and other great powers to shape the development of these international norms to their own liking. This fact is at the core of some of the opposition to the court within the US Government. Of course, the United States can resist normative developments that occur at the ICC and limit their tendency to be enshrined in Customary International Law by consistently objecting to the ICC's practice. This is undoubtedly part of the unstated logic behind the campaign of the Bush Administration to belittle the ICC at every available turn. But the precedent setting effects of the ICC could always be resisted by US judges if they desire. The Rome Statute clearly states that its contents cannot "be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute."⁹⁷ This gives sufficient latitude to municipal judges to reach their own interpretations of provisions of international humanitarian law even if they are at odds with rulings by ICC judges.

All of this means that the complaints that the ICC creates unfair legal effects on non-state parties, through precedent or some other mechanism, are really not substantial.

A. The ICC and the Relationship Between Law and War

Since 2001, the policy of the United States government has

⁹⁵ 395 F.3d 932 (9th Cir. 2002).

⁹⁶ *Id.* at 948.

⁹⁷ Rome Statute, *supra* note 2, art. 10.

been to defend the idea that the United States is entitled to use force preemptively as an extension of the traditional right to self-defense enshrined in Article 51 of the UN Charter.⁹⁸ A number of American legal scholars have perplexingly defended the legality of this proposition.⁹⁹ The American position does not recognize a similar right on the part of other states to use force against the United States if they feel similarly threatened. This lack of reciprocity will ultimately undermine the credibility of international law itself if the United States continues to pursue this route.

Curtis Doebbler and Maha Eid argue persuasively that, at best, the legal reasoning behind these arguments involves a selective interpretation of existing law, while, at worst, an attempt by respected scholars to ensure their own access to the corridors of power by saying what powerful government officials want to hear.¹⁰⁰ This issue is relevant here because it is essential to understand the legal debate about the impact of the ICC statute on non-state parties in the context of this larger political question regarding the relationship between US national security strategy and international law. Much of the world is now quite convinced that the United States aims to exempt itself entirely from compliance with the rules of international humanitarian law. The U.S. need not accede to the ICC Statute if it does not believe it is in U.S. interests to do so. Still, it is unnecessary for the United States to complain that the establishment of the ICC unfairly impinges on U.S. sovereignty. The U.S. may not like the existence of the court, but it has no legal right to prevent other states from establishing it and attempting to develop the ICC into an effective institution.

VI. CONCLUSION

Others have argued that the debate between the United States and supporters of the ICC about the effect of the Court's statute is, in effect, a conflict between two differently valued positions: preserving traditional sovereignty rules of international law versus ensuring an end to impunity for the

⁹⁸ See, e.g., Letter from John Negroponte, the Permanent Representative of the United States of America to the United Nations to the President of the United Nations Security Council (Oct. 7, 2001), available at <http://www.un.int/usa/s-2001-946.htm>.

⁹⁹ See, e.g., William C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365 (2004); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (2002).

¹⁰⁰ Curtis F.J. Doebbler & Maha W. Eid, *American International Lawyers and the Use of Force*, 16 PEACE REVIEW 279, 284 (2004).

perpetrators of severe international crimes.¹⁰¹

However, I would argue that the Rome Statute was actually careful to balance these values. As we have seen, it is true that the existence of the Court potentially impacts the citizens of non-state parties. However, it does so in a way that does not substantially change their legal rights. As a practical matter however, it increases the likelihood of prosecution because it establishes a court with considerable independence from outside political forces. Because the ICC is a supranational institution, it will not be subject to the same diplomatic pressures as the courts of less-powerful states. This is the real source of the hostility toward the ICC's impact on non-state parties and it really is not a legal complaint. Rather, it is a political one. The establishment of the ICC may very well lessen the capacity of powerful states to use extra-legal political pressure to block the prosecution of persons accused of ICC crimes when they see such prosecutions as contrary to their national interests. This is an objection to the ICC's political impact on (some) sovereign states *de facto* autonomy. It is not a reasonable legal objection to the ICC's impact on transforming the legal concept of state sovereignty.

¹⁰¹ See generally Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27-28 (2001) (describing the views of the proponents of the International Criminal Court that state sovereignty should be subordinated to the greater good of the world community). *But see* Scheffer, *supra* note 85 (describing the United State's position that the ICC interferes with state sovereignty).