The International Criminal Court: A Sociological History

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THE INTERNATIONAL CRIMINAL COURT:
A SOCIOLOGICAL HISTORY

by

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Dawn Rothe
The International Criminal Court (ICC) has been touted as a new international response to the worst atrocities of mankind: crimes against humanity, war crimes, and crimes of aggression. Indeed, the implementation of a permanent international court is a historical turn. However, the course to which an international criminal court transpired dates back to the late 1800's. One hundred years of political, economic, and social contradictions have aided and abated the process of what is now the International Criminal Court. However, the dialectics between actors and institutions has been neglected in historical and legal analysis. The purpose of this thesis is to take a sociological perspective to understand the historical contexts, the social actors, and the institutions involved in the development of the International Criminal Court.
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CHAPTER I:
INTRODUCTION

The Rome Statute of the International Criminal Court is hailed as the most significant development in international law to date. The development of the Rome Statute was a decade long process, eventually leading to official adoption in Rome on July 17, 1998. A permanent International Criminal Court became a reality on July 1, 2002.

Nevertheless, the “Road to Rome” was a lengthy and contentious one (CICC\(^1\), 2003). The effort to establish a permanent International Criminal Court (ICC) is often connected with the landmark decisions of the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the 1949 Geneva Conventions. Indeed, these Conventions and Declarations played a significant role in the development of an ICC. Yet the struggle to create a permanent international system of justice has deeper historical roots.

The purpose of this thesis is to present a socio-historical analysis of the attempts to establish an international criminal court. The analysis will show that the creation of the ICC was a response to conflicts that occurred within international society. This chapter presents a brief introduction to the development of an International Criminal Court. A literature review, the theoretical framework, and a section addressing the methodology that is used in this research will follow.

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\(^1\) The Coalition for an International Criminal Court is composed of governmental organizations, nongovernmental organizations, legal commissions, academics, and private citizens aiding the establishment of the ICC.
The second chapter provides a detailed history of the development of an International Criminal Court. This chapter is divided into specific historical periods: 1) 1872-1930; 2) 1931-1955; 3) 1974-1997 and; 4) 1998 development of the Rome Statute. These divisions are made according to the time period when a major proposal for an ICC was introduced and considered. Within this sociological history an effort is made to identify the formal and informal actors/ social agents involved in each stage, determine how and why the proposal for an ICC was made at that period, clarify the ideological orientation of the political leadership, and identify the political considerations that influenced the outcome of each attempt to establish the an ICC. These issues speak to the social and political dimensions of the development of the Court. They attempt to address the culturally embedded intentions of a group of actors in a specific historical/political/ and sociological setting.

The third chapter presents an analysis of the process of establishing an ICC, framed in the theoretical orientation of critical international law theory and Chambliss’ structural contradictions model of lawmaking. Due to the large number of actors, conflicts, and political interests involved, the analysis limits the focus to two key issues: jurisdiction and sovereignty. Jurisdiction and sovereignty are primary issues throughout the historical attempts to establish an ICC and the development of the Rome Statute. This chapter includes a section on the attempt of the US to undermine the ICC by weakening its Articles and negotiating bilateral agreements with other nation/states. An analysis of the potential of the ICC to be an effective tool for international criminal justice is then offered. In conclusion, a brief summary of the
The founder of the International Committee of the Red Cross, Gustave Moynier, was the first to formally propose an ICC in 1872 (Moynier, 1872). The Franco-Prussian war resulted in mass atrocities committed by both sides, despite their obligations under the first Geneva Convention of 1864. Moynier, distraught at the violations of international treaties, proposed an ICC to try persons accused of war crimes. The proposed international court never received any support from international lawyers or state parties; it was left a one-man utopian desire (Harris, 1954; 1982).

The concept of an ICC was not revisited again until 1919. After WWI, the framers of the 1919 Treaty of Versailles revived the endeavor to establish an ICC to try the Kaiser and German war criminals (Cassese, 2003). Regretfully, the call for an ICC was compromised: punishment for war crimes was to be handled by existing National Military Tribunals. The failure of the proposed court resulted in trials held in Lupzig, where 888 of the 901 persons accused of war crimes were acquitted, released, or not tried. The thirteen convicted all escaped serving any of their sentences (Bassiouni, 1973).

In 1937, the League of Nations attempted to establish an ICC. Two International Conventions were concluded in Geneva on November 16: the

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2 The Geneva Convention of 1864 was drafted to protect the wounded soldiers of battle. See UN Doc, A/CN.4/7/Rev. 1, 1949.
Prevention and Repression of Terrorism and the Creation of an International Criminal Court (League of Nations Document Archived C.547.m.384. 1937). A Diplomatic Conference was held for the proposed Charters that included 35 nation/state delegates. The Charter for the creation of an ICC required the ratification of the Prevention and Repression of Terrorism Treaty. However, neither convention obtained sufficient numbers for ratification; subsequently an ICC failed to come into existence (Bassiouni, 1975).

WWII consumed the energies of states, postponing any collective interest in an ICC. However, as the war was coming to an end, attention refocused to a call for an international institution to try individuals for the most heinous crimes of war. The general concepts of international justice resonated throughout the world. Some had hopes that with the end of the League of Nations and the development of the United Nations, the world was a step closer to instituting a permanent criminal court (CICC, 2003). The outcome however was not an ICC, but International Military Tribunals, instituted to address the crimes against humanity. This period of history proved to be fruitful in the development of customary and codified international law resulting in the Nuremberg Principles. However, the hope of a permanent ICC was again discouraged. Indeed, efforts to establish an ICC continued over the next several decades by institutional reformers and civil society actors (Hampson, 2002). Still, it was not until 1989 when the “international society” seriously reconsidered the establishment of an ICC.

The end of the Cold War brought increases in the number of UN peacekeeping
operations. In 1989, Trinidad and Tobago approached the UN with a proposal for an ICC as a device to address drug trafficking and terrorism (Sadat, 2002). An overwhelming number of nation/states appeared ready for the concept of an ICC. The following nine years proved to be challenging as the General Assembly of the UN, preparatory committees, and nongovernmental agencies worked on a proposal for an ICC: The Rome Statute. Finally, in 1998, member states overwhelmingly voted in favor of the Rome Statute of the International Criminal Court (CICC, 2003).

On July 1, 2002 the International Criminal Court became a reality with more than 120 nation/states attending the convention of the Rome Statute. Currently, 139 nation/states have endorsed the Rome Statute and 90 states have become ratified members of the ICC. A century long struggle to establish an international system of justice has been achieved.

Beginning with the earliest efforts through the final development, attempts to establish an ICC were fraught with, and hindered by, rivalries of competing political ideologies, power differentials, cultural and economic interests, and differing social systems. The basic tenet of “Shall the Court precede the Law, or the Law precede the Court?” was yet another key impediment to an earlier development of an ICC (Report of the 34th Conference, National Law Association, 1927). The development of international law constitutes significant turning points in the historical process; nonetheless, the historical journey to attain an international system of justice to implement the codified laws has been a contentious process.
This thesis is an attempt to illuminate the historical path of an International Criminal Court. From the earliest to the final attempts to employ an ICC, the underlying momentum was in response to conflicts (that had produced atrocities). However, the responses to conflict are both ideological and political in nature. They are social forces in a dynamic, dialectical process that is constrained but not determined by each historical period (Chambliss, 1993). Each step of the journey towards an ICC is built on existing political ideologies and institutions that are altered and shaped by the human agency or actors (ibid).

The socio/historical analysis of the journey leading to the establishment of an International Criminal Court is both, culturally and politically, significant today. Understanding the historical nature of a phenomenon is important in many ways. To evaluate changes made in the realm of international law, international relationships, and the newly developed institution (ICC), it is necessary to understand the circumstances within which these developments occurred. Often the lessons and stories from the past are discarded as no longer relevant in today’s society. However, knowing the struggles and journey of the newly developed ICC, can bring insight to the current structure and functions of the ICC, as well as the plausibility or potentiality for this new international body to be legitimate and fruitful in its endeavor to create an international codified set of standards for humanity based on justice versus impunity.
Structure and Function of the ICC

The ICC consists of 4 Chambers: (1) the Presidency; (2) Judicial Court (An Appeals Chamber, Trial Chamber, and a Pre-Trial Chamber); (3) Office of the Prosecutor; and (4) the Registry. The Presidency is an elected office serving terms of three years and holds responsibility for the administrative duties of the court, excluding the office of the Prosecutor. The functions of the Judicial Court are divided into Chambers, which allows the judges to be on more than one chamber if it serves the functioning of the court in a more efficient manner. The Appellate Chamber is exempt from this however, as an Appellate Judge is prohibited from serving on other chambers (Article 39, Rome Statute).

The office of the Prosecutor is a separate division of the Court that has the responsibility for the investigation of referrals on crimes covered by the ICC. The Prosecutor has full authority over the administration of the Prosecutorial Division (Article 42, Rome Statute). Cases brought to the ICC will be handled independently by this office, unlike the system used by the United Nations’ Security Council where there must be joint agreement to charges brought forth against individuals for crimes covered under international laws and treatises. A state may refer cases to the Prosecution, or the Prosecutor can initiate the investigation based on information of a crime being committed within the jurisdiction of the Court (Article 14 and 15 Rome Statute). The Assembly of State Parties (ASP) will further define the relationship agreement between the United Nations and the Court over disputes regarding how

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3 For a complete and descriptive account of the structure of the ICC see Sadat, 2002; Cassesse, 2003.
referrals will proceed and if the wording of the Rome Statute will allow an advisory opinion from the International Court of Justice, especially regarding the Acts of Aggression (Coalition for International Criminal Court- CICC 6, 2002).

The Registry is solely responsible for the administrative and non-judicial aspects of the Court and for creating a Victims and Witness Unit providing protective and security measures for witnesses, victims or others at risk due to testimony given to the court (Article 43 Rome Statute).

The intention of the ICC is to provide an international system of justice that would address heinous crimes against humanity when a state is unable or unwilling to investigate or prosecute any individual accused of the crimes specified in the Rome Statute (Mullins, Kauzlarich, and Rothe 2002). Crimes that are subject for prosecution under the Rome Statute are defined in Articles 5, 6, 7, and 8.

Article 5 of the Rome Statute lists the crimes within the jurisdiction of the ICC: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression still to be defined by the ASP (Article 5, paragraph 2, Rome Statute). Crimes of genocide refer to “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group” (Article 6, Rome Statute). Article 7 defines crimes against humanity as acts that are widespread or a systematic attack against a civilian population. This includes acts of torture, intentional causing of great suffering to body or mental health, murder, and attacks directed against a civilian population. Crimes against humanity are not as inclusive as previously recognized Human Rights Law (HRL). The HRL applies in times of peace or war but is
primarily conscious of protecting people against governmental violence against their recognized civil, political, economic, social, and cultural rights (Universal Declaration of Human Rights, GA. Res.217A (III0, UN Doc A/810 at 71 (1948)). War crimes are defined by breaches of the Geneva Conventions of 8/1949 (Article 8, Rome Statute). These include torture or inhumane treatment, biological experiments, extensive destruction and appropriation of property, and willfully denying a prisoner of war or other protected person the right to a fair and regular trial.

The ICC is limited in its investigative reach, being unable to subpoena any state or their records. While the Court may request a warrant or subpoena, the Prosecutor and the Court lack an empowered policing agency to ensure the fulfillment of either request (Article 54-58 Rome Statute). The Prosecutor is limited to requesting the presence of persons being investigated, victims, and witnesses. The Court must seek the cooperation of a state in fulfilling the Prosecutor’s requests. It must rely on the compliance of a state or state party to relinquish any evidence, suspects, or witnesses that are relevant to the ongoing investigations carried out by the Prosecutorial Branch. The Court is unable to enforce its decisions without voluntary state compliance.

The Court has limited jurisdiction, inclusive only of a state party to the treaty or by agreement of a state not a party to the Statute. The criteria listed in Article 12 for the exercise of jurisdiction requires a state to become a party to the statute or accept the jurisdiction of the Court if the crime occurred on the State territory, its vessel, or aircraft, or if the State of which a person accused is a national (Article 12,a-
b). No person can be held liable by the court unless the crime occurred within the jurisdiction of the court. Compliance by a non-party state is highly unlikely and non-compliance can act as a detriment to the ability of the ICC to be an effective measure of international justice (Mullins, Kauzlarich, and Rothe, 2002). This has already become an issue with the US at the forefront of an effort to challenge the validity and powers of the Court.

**Literature Review**

Literature focused on international institutions, law, treatises, and the ICC involves several different dimensions of information. This includes scholarly work by international lawyers, traditional international law models, and contemporary models of international law and international society. Therefore, this section is divided into three parts. The first part examines research by international lawyers that provide legalistic descriptive information on the establishment of an ICC. Part two focuses on traditional international law models. The final part provides the theoretical frame that is used in this thesis.

*Descriptive Research*

Much research on the development of international law, treatises, and charters has been undertaken by legal scholars (see Bassiouni, 1969, 1971, 1972, 1973, 1994, 1998, 1999; Cassesse, 2002; Falk, 1998; Ferencz, 1920, 1975, 1980; Harris, 1954; Hudson, 1943; Minnow, 1998; Sadat, 2002 and; Shelton, 2000). Indeed, there is a wealth of descriptive material on developments towards an ICC. However, the current research lacks a theoretical and sociological focus.
Benjamin Ferencz (1980) provides a collection of documents depicting the search for an international system of justice that prohibits and attempts to codify acts of aggression and offenses against peace. Ferencz traces the history of the establishment of various international systems of justice: Hague Peace Conference, International Court of Justice, International Military Tribunals of Nuremberg, and the International Military Tribunals for the Far East. Ferencz presents numerous international documents and a basic historical framework that can be utilized in an analysis of the sociological, political, and historical factors at work in the process of developing an ICC.

Judge Antonio Cassesse’s (2002) anthology with commentary provides a detailed description of the Rome Statute of the International Criminal Court. This source provides an analysis of the process by which the Rome Statute was created from 1994-1998, including a history of the drafting proposal by the Preparatory Commission as well as extensive details on the structure and proceedings of the ICC. Cassesse’s work provides an in-depth documentation of events in the development of the Rome Statute that is useful for defining the actors, conflicts, and resolutions for a sociological analysis of the progress towards an ICC.

M. Cherif Bassiouni was an active participant in the development of the Rome Statute and has actively supported an ICC for several decades. His most recent work (2002) is an anthology which provides basic descriptive details of preceding laws, commissions, and committees leading to the development of the ICC. Included in Bassiouni’s work are the main UN Conference Reports of 1994-1998. He (1975) has
also written a volume titled International Terrorism and Political Crimes as presented at the III International symposium in Syracuse, Sicily, 1973. This volume looks at the issues of international law in matters of jurisdiction, legal attempts for control, and methodological options for international legal control of terrorism (an ICC) which is useful in analyzing the progress towards the development of an ICC and a standard set of codified laws. Other works by Bassiouni (1973, 1997, 1998, 1999) complement each other with updated descriptive accounts of the Rome Statute and international criminal law.

Leila Sadat (2002) provides a synthesis of many of the major features of the Rome Statute including the ICC contribution toward transforming international law. She describes the preparatory work done by the Committee for the Establishment of an ICC (1995) and the General Assembly’s Committee for the Establishment of an ICC (thru 1998). Sadat provides an excellent critique and analysis of the potentiality of the ICC to be an effective tool of international justice based on the structure of each Article within the Rome Statute through the lens of international law. Sadat’s work will be helpful in providing further descriptive information on the structure of the ICC as it pertains to issues of jurisdiction.

Manley Hudson (1943) provides a detailed examination of the development of a Permanent Court of Justice. His historical analysis includes looking at the steps to a Permanent Court of Arbitration and the Prize Court. Hudson gives a detailed account of the legal basis and structure for these courts including a brief historical context. This is used to examine the conflicts of jurisdiction, which resulted in a non-criminal
court. He concludes with an in depth presentation of documents relevant to the
International Court of Justice. Hudson’s work will be utilized to attain information
necessary to analyze the outcome of a Permanent Court of Justice versus the proposed
Criminal Court.

Dinah Shelton (2000) is the editor of an anthology that provides explanatory
material on the ICC. This anthology explores the ICC potential to help implement
International Humanitarian Law, international peace, and human rights based on the
legal foundations of pertinent Articles within the ICC. This includes contributions by
authors examining the Tribunals that attempted to address atrocities against mankind,
women’s issues in international criminal law within the development of the ICC, and
the new relationship between international law and Human Rights Law as it pertains
to the ICC.

The aforementioned authors have contributed greatly to the understanding of
the development of international law and the legal position of the ICC. However,
what is lacking in this literature is a socio-historical analysis of the development of a
permanent international criminal court. Specifically, what is deficient is a detailed
account of the actors (and their political ideology) involved in each stage, the
underlying conflicts between actors that resulted in the outcome of the proposed ICC,
and a theoretical framework that provides a guide for analysis.

*Traditional Models of International Law*

International law is embedded within a complex mix of conflicting traditions,
social practices, political, and economic ideologies within particular historical
perspectives (Carty, 1991). Divergent theories have developed to explain the origin, meaning, purpose, and context of international law. This includes the positivist orientation, the naturalist orientation, the liberal/modernism orientation, the liberal orientation, the post-modernist orientation, and the critical law orientation.

Theoretical writing on international law has historically alternated between positivist sovereignty centered theories and naturalist law theories. Natural law has subsisted for 2,500 years in a variety of forms. This tradition dates back to the system of Roman law, the Court of Chancery, and to philosophers such as Aquinas, Grotius, Locke, and Hume (Friedmann, 1967). The philosophy of naturalism is founded on the ideal that there exists an objective natural law (not man invented) based on norms of conduct that are an essential part of human nature, thus, “existing in the reason and conscience of every human being” (Brown, 1960:VI). Natural law philosophy began to decline in the late 1800’s due to the rise of nationalism, capitalism, relativism, modern science, positivism (also known as utilitarianism and pragmatism), and the rise of the Austinian jurisprudence (Brown, 1960).

The Austinian philosophy (John Austin 1790-1859) accepted Bentham’s model in the field of law and Kantian models (rejection of identifying law with morals) (Friedmann, 1967; Koskeniemi, 2003). Austin founded the principle that supreme power (state) limited by positive law is contradictory as the sovereign (state) can impose positive law and morals on itself vis a vis treaties but the sovereign is not under obligation to be limited by these self-imposed limitations. Thus, the sovereign can abrogate these mutual agreements regardless of positive law. Austin then defines
law as “a rule laid down for the guidance of an intelligent being by an intellectual being having power over him” (Austin, 1867, in Friedmann, 1967:258). The Austinian philosophy became a part of the growing trend of positivism. At times the interjection between naturalism and positivism can be seen within the context of law itself. For example, current traces of naturalism can be detected in concepts such as human rights law, jus cogens or imperative norms, and rules valid in an erga omnes. Each presumes relationships of a normative hierarchy that connect some form of moral naturalism (Koskeniemi, 2003). However, they are combined within the legalistic and positivistic frame of absolute consensus and obligation.

Positivism continues to be the dominant legal theory used even today within domestic and international law. It has its foundations in the mid to late 1800’s with thinkers such as Austin, Dewey and modified later by Kelson and the Vienna School (Friedmann, 1967). Positivist international law is guided by the underlying assumption that international law is representative of a general consensus among nation/states (Carty, 1991). Laws are viewed as commands of human beings, not connected to morals, and the “legal system is a closed logical system” (Friedmann, 1967: 256).

Liberalism has also been influential within international law. Perhaps the most well-known and influential liberal theorists were Schumpeter, Machiavelli, Kant, and Montesquieu (Kegley, 1995). In general, the liberal/modernism paradigm assumes a natural, pre-existing normative code with free and equal individuals that have ends that differ and conflict. Social order can only be justified with reference to individual
ends. According to the Kantian tradition, legal order must combine moral autonomy, individualism, and political order. However, there exists great debate about what constitutes liberalism. Zachar states, “There is no canonical description of liberalism... liberalism is multifaceted and what is or is not at its core can be disputed” (Zachar, 1995 in Kegley, 1995:108). Therefore, liberalism is often intermingled with positivism or realism. The intermingling of these paradigmatic themes in praxis is illustrated by Carty (1991) as he states,

“The UN Charter is to be seen as a positivising of the Kantian ideal, that states recognize their security rests not on their own power or independent legal existence, but upon a great league which is a united power and upon the decision set by a law which expresses a united will (und von der Entscheidung nach Gesetzen des vereinigten Willens). This is positivised in the sense that it is not a mere idea but is actually recognized by states. Yet it is precisely this distinction between idea and positive law which remains elusive in such analysis and which it is a major part of the task of theorists of the ‘liberal tradition' to explore” (1991:21).

The postmodern approach assumes difference, heterogeneity and conflict as reality and this reality is subjective in nature for the actors within the social historical context (Carty, 1991). From a postmodern perspective, international law is not a system at all. Rather, it is better understood as a superstore, a warehouse of treaties, customs, institutions, and norms. The value of postmodern international theory is said to be the deconstruction of legal rhetoric, distinguishing the soft (normative laws) from the hard (concrete laws). However, postmodern theory is relatively new to international legal studies and takes on many forms, making it difficult to state any particular perspective associated with this paradigm or specific utilization of postmodernism and international legal research.
Theoretical Frames Utilized

Critical international law theory follows the post-modern approach to international law. It assumes the discipline of international law is governed by a particular, historically conditioned discourse that is the translation onto the international domain of some basic tenets of liberal political theory. The liberal law theory assumes the absence of a central international legal order that state actors can reference and it favors a “mature anarchy in international relations, the recognition of states as independent centres of legal culture and significance, which have to be understood, in relation to one another” (Carty, 1991:66).

Critical international law theory is relatively new to the paradigms of international law research. The limited usage of this model hinders the ability to show previous substantive research. However, the concepts created by Carty for international society and the views of international law in relation to international society is a fitting theoretical frame to address the development of the ICC. Simply stated, Critical International law theory provides the overarching system of international relations to analyze existing conditions. According to Carty (1991) Critical International Law Theory views international society as consisting of opposing and self-differentiating national and nation/state traditions that are intermingled with religious and economic systems, which can include transnational characteristics. Simply stated, international society is composed of sovereign states with divergent political interests, economic interests, cultural disparities, religions, state practices and traditions. These divergent attributes are also contingent upon the
historical and social milieu (Carty, 1991). Due to the diversity of interests, relations, and state systems, relations of the international society are embedded with conflicts. These conflicts are the result of a structural contradiction between an ideology of an international society (perceived society composed of a fixed and united body with similar values, ethos, and interests) and the composition of international relations (composed of self-differentiating states’ traditions).

The term “international society” implies an ideology of unity that exists at the international relations level. A consensus of values and interests is implied within this ideological and imagined society. Historically however, international relations and international law was founded on principles and rules that guide the relations of states with each other. Treaties and customary international laws were contracts between states that were founded on consent and derived from state practices. International law relied on national legal systems to govern themselves, international relations, and customary practices. The differential values and interests of these states resulted in conflicts such as WWI, WWII, Vietnam War, and other interstate disagreements. However, historically international relations were viewed as independent relations based on mutual interests. An overarching international ideology of one international society did not exist. The earliest international documents through the mid 1980’s never addressed international governmental organizations or international relations with a rhetoric of a “community”. As international relations expanded to include codified international law and expansions of states, an ideology of an international society began to surface. This included the language used by the United Nations,
Amnesty International, the International Red Cross, and other international organizations promoting the ideology of unification or consensus among states. The ideology of an international community thus served as an emerging value to coincide with new principles. Yet, International society (composed of sovereign states with differentiating traditions, political interests, economic interests, cultural disparities, religions, and state practices), governed by a system of international law, contradicts the existing make-up of international relations.

A critical theory of international law includes the system of international law that incorporates the broader political system. The link between international law and international politics is an inherently political and dialectic relationship (Scott, 1997). This does not presume that international law is not a system in and of itself; however, it is in a mutual interaction with the system of international society. The concepts behind international law are founded on consent and mutual agreement between states and by state practice within the international arena of relations; thus, international law is mutually interacting within international society. Since law is man-made, political in nature, and is the result of conflicts, further contradictions and conflicts within the legal system occur.

In international law, contradictions exist between general principles that can embody conflicting values. An example: contradictions between general principles of law, “jus cogens” which is “compelling law” and “erga omnes” which is “flowing to all” can lead to laws of clarification or compulsion that will lead to further
contradictions (Bassiouni, 1991; Danilenko, 1991). If a law is jus cogens it should follow that it is erga omnes (Bassiouni, 1991). When something is compelling to and for everyone, it would stand to reason that it should be expected for all. However, this is not always the case. International Human Rights Laws are compelling but not necessarily flowing to all. International law is based on a culmination of different systems of justice that include civil law systems (based on common law) and adversarial systems (such as the US legal system). It is also a culmination of philosophical paradigms; naturalism and positivism. International law consists of public international law (rights between states or the citizens of other states) and private international law (controversies between private actors that have situations having significant affect to more than one state) (Legal Information Institute, 2003). The fundamental principles (customary laws) that guide international law then are founded on willing state participation and acceptance. International law also has contradictions within its own body of customary, charter, treaties, and codifications. As international law is incorporated into the broader political system new conflicts arise. These conflicts (in international law and international society) are addressed, however, the fundamental structural contradiction within international society remains, which is its composition of existing relations and an ideology representing a unified system or society.

For the newly created ICC, the issue of jurisdiction is central to the structural contradiction of international law (see appendix). Jurisdiction refers to the territory

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4 For more information on the debate between jus cogens (implied as compelling and should therefore be erga omnes) and the tautological nature of the two legal concepts see Bassiouni, 1999; Danilenko,
over which authority to act is extended (Scott, at. Al 1985). It is a general principle based on jus cogens but it is embodied with conflicting values (it is structured by consent) resulting in an ideology of jus cogens but failing to attain erga omnes (universal jurisdiction). Another example of the contradiction between jus cogens and erga omnes (see previous example of HRL) is when political values and principles of justice are used as general rules (customary) in international law which can be in conflict or contradict specific rules of law that have not changed to correspond with new general principles (Carty, 1991). With change or development in international law, such as creating the ICC, new principles are adopted that reflect new values (e.g. ideology of an international society based on common goals, interests, and consensus). When these new principles lead to significant changes in the international legal system as a whole (instituting a new international system of justice) the more likely they will contradict extent rules such as existing international law based on sovereign state authority and jurisdiction. This lends to conflict between development, success, and legitimacy of the ICC (ibid).

The term international society is indeed, an imagined society, an ideology, to promote a unity at the international level and is often associated with international organizations representing civil actors as well as political institutions. This thesis uses the term international society to represent a collection of state and civil actors, active in the international political arena and in positions of power to impose or create international institutions or international laws that affect the existing international
political realm in its historical contexts. This definition is based on the concept of international society within the critical International Law model proposed by Carty. International law is operationalized as a system composed of customary law, charters, treaties, and resolutions, which is the format used by international legal scholars (Bassiouni, Sadat, Cassesse, and Carty). International law is being viewed as secondary and mutually interacting with international society. It is only from some form of unity at the international level that customary law, charters, treaties, or resolutions can occur: thus, the organization of international relations preceded international law. This is not to imply that the chronological origin of international society gives primacy over the system of international law. The two systems are interconnected and dialectic. However, as critical international law theory illustrates, this imagined society (united community) has contradictions based on the pre-existing political, economic, judicial, and religious identifications of the representing actors (states). Critical International Law Theory does not address how these contradictions lead to the conflicts within international society or what affects these conflicts then have. It is these structural contradictions that will be addressed using Chambliss’ (1993) model of structural contradictions to further expand the ability to analyze the structural contradiction in terms of resulting conflicts or attempts to resolve the contradiction.

The Critical International Law (CIL) theory provides the overarching system that is essential to understand the more immediate or pragmatic issue of “making law” and the development of a new international legal body by providing the structure
where the essential structural contradiction exists. Therefore, it is necessary to incorporate a theoretical model that addresses the structural contradictions themselves and what is done to attempt to resolve these contradictions if any. The theoretical model that is used in conjunction with CIL is Chambliss’ (1993) Structural Contradictions model. Together these theories provide the fundamental framework to analyze international labors to establish a permanent International Criminal Court.

The Structural Contradictions model is situated within a Marxist tradition of analyzing the state, law, and capitalism. Marx’s original conception of these institutions maintained that the core function of the state and law was to legitimate and facilitate the economic structure (Lynch & Michalowski, 2000). Traditionally, attempts to verify Marx’s perspective relied on either the instrumentalist or structuralist approach. The instrumentalist approach “holds that the state and law are tools used by powerful groups to secure and promote their political and economic concerns” (Lynch & Michalowski, 2000:44). The state, the ruling class, and law are one. The economic, political, and social interests of the ruling class are expressed within law that is created and used to the advantage of that class. The clearest example of instrumental Marxism is the early work of Richard Quinney. For structuralists, the state and law are expressions of the struggle between classes. This perspective views include the powerful having the advantage but they cannot win every conflict. Conflicts between social classes can also favor the non-ruling class. The structuralist moved beyond the limited instrumentalist approach to view the state
as a distinct factor of social organization. The state and law is an “outcome of the contradiction of capitalism” (Lynch & Michalowski, 2000:48).

Within a Marxist framework, Bill Chambliss went beyond the instrumentalist approach to examine the relations between the state structure and law. He views the law as a means to temporarily resolve conflicts and dilemmas that are rooted in the contradictions of capitalism. This moves from the conspiratorial view of the state as a tool of the ruling class to an analysis of the state as multifunctional, serving the interests of the ruling class and civil society in order to maintain itself (autonomy). The contradictions of capitalism create conflicts between groups (classes). The polity must contain or diffuse these conflicts. The process of containing one conflict can then lead to a second conflict. The polity is then focused on the most critical of these conflicts that would or could disrupt the social fabric. The legitimacy of the state and economic structure is protected in this process by not ignoring large class conflicts. The most often used resource to resolve these conflicts lies in the legal and legislative branches: creation of new laws. The laws only address the immediacy of a conflict and ignore the structural contradictions of the system itself. This results in a temporary resolution but allows the cyclic pattern of conflicts to continue.

Thus, Chambliss’ basis contention is that law creation is a process aimed at resolving conflicts and dilemmas that stem from underlying contradictions that are historically specific and inherently set in a structure of a particular political, economic, and social structure. Chambliss states, “Every society, nation, economic

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5 Chambliss argues that even under extreme conditions of revolutionary means of replacing capitalism with socialism, new contradictions would still arise (Chambliss, 1979).
system, and historical period contains contradictory elements which are the moving force behind social changes-including the creation of law” (Chambliss, 1979, Ed. Chambliss and Katz, 1993: 9). Chambliss believes that through a methodology of dialectic analysis, the context of these conflicts can best be understood. The dialectic methodology “takes the interaction of people and institutions as the starting point for an understanding of the social reactions” (Chambliss, 1993:8). It is also dialectic in the sense that social or political agents are creating their own history from the resources and constraints that they inherit from the past (ibid). This will allow an understanding of the response to a conflict and the contradictions (political and legal ideologies) that will affect the outcome for a proposed ICC. Although Chambliss’s model is directed at analyzing law formation within the context of nation/states, it can be used under the umbrella of an international society that is composed of a larger political and social structure that contains a structural contradiction. By using the umbrella of a system of international society and the system of international law (provided for in the critical international law model) Chambliss’ model fits well. Changes in the law do not necessarily mean changes in international societal relations, just as changes in the international societal views or relations do not always lead to changes in laws. These then can also produce conflict or further contradictions. The response to conflicts is not only political it is ideological (the promotion of an international system) and structural (within the system of international law). The underlying contradictions of an international society and system of international law remain unresolved. As the aforementioned theoretical paradigm of critical international law theory illustrates,
these contradictions are embedded in the composition of international society (independent states with differentiating traditions, cultures, religion, political and economic interests) and international law (rules and principles which govern the relations of states based on willing compliance). When conflicts occur, new laws, a new international system of justice, or a new international ideology is created to address these conflicts while ignoring the embedded contradictions.

Within the theoretical orientation of structural contradictions, the notion of symbolic use of politics can be a relevant concept. These are political “symbolic” gestures consciously designed to appease a conflicting force that was not ignorable (Chambliss and Katz, 1993). They can also be symbolic in the sense that they are conveying a cultural message even when not enforced in a legalistic sense (see jus cogens and erga omnes). This is illustrated by legitimacy, which in its simplest form implies conformity with law (as compelling or jus cogens). This is unlike legality, which denotes accordance to specific laws. When political symbolic gestures are conveyed as legitimate rules they do not necessarily imply that they are rules of law, thus, escaping the compulsion of law while portraying legitimacy. The other side to the symbolic use of politics is the alteration or adaptation of a proposed law that is made malleable to existing legal proposals and erroneously consecrated as a culmination of “shared interests”. The final key component of Chambliss’ model is the importance of historical contingencies. These are, “the points at which laws are produced (and or introduced\(^6\)) that provide a new approach to an existing problem, a

\(^6\) This is my emphasis/inclusion.
revision of the existing relationships between state, polity, and fundamental institutions” (Chambliss and Siedman, 1928:140).

Chambliss’ model has been incorporated into many research projects (Michalowski, 1993; Zatz and McDonald, 1993; Wonders and Frederic, 1993; Calavita, 1993; Chambliss, 1993; and Grattet, 1993). These works expand upon Chambliss’ original model to “emphasize the importance of contradictory structural and historical forces operating within and upon a given society” (Zatz, 1993:x) and particular conflicts and dilemmas that have occurred. This thesis also expands Chambliss’ original model to the international level of analysis versus the structure of capitalism within a state. It does so by emphasizing the contradiction within a structural frame of relations (international society). This includes the historical forces at work during conflicts that occurred due to the structural contradictions of international society.

In summary, the theoretical framework used in this thesis includes critical international law theory and the structural contradictions model. Critical international law theory provides the most appropriate umbrella to situate within it the structural contradictions model to address the social, historical, and political context of the conflicts that arose from the laborious attempts by international actors to implement an ICC. Utilizing Chambliss’s structural contradictions model within the paradigm of international society and international law illuminates the process used to resolve conflicts: creating laws and/or an international system of justice. Thus, international laws are created to resolve conflicts, however, the underlying contradictions of
international society are not addressed or resolved. The dialectic process illustrates
the relationship between international law and international society: laws meant to
resolve conflicts often result in creating new conflicts within international society. An
example of this can best be demonstrated by referring to the recent US war on Iraq.
International law was formed to address aggressive war over fifty years ago as a result
of WWI and WWII. The concept of enforcement for this international law however
was sidestepped due to the conflicts within international law (jus cogens or erga
omnes, issues of sovereignty, and jurisdiction) and conflicts within the system of
international society (differentiating traditions, political interests, ideologies,
economics, cultural and religious factors). The US’s actions resulted in further
conflicts within international society as well as illuminating the contradictions of
international law. Within the system of international law, contradictions exist within
laws, as they are historically specific as well as endeavors to address conflicts of the
international society. This results in quagmires of interpretation and application of
international law, most significantly so for the establishment of future laws or
innovative forms of justice such as the ICC.

Methodology

The research design for this thesis is a qualitative, socio/historical case study.
By combining both, the sociological and historical approach to the case study of a
developing international criminal court, obstacles of conventional methods of
historical case studies and sociological case studies are prevented. Simply stated, a
sociological analysis does not attempt to explain or describe history and a historical
case study can overlook the underlying process and meanings (sociological perspectives) as they may play a minor role in the succession of events (Wieviorka, 1992). What this requires is a research design that can oscillate between historical methods and sociological methods within a specific case study. Socio-historical research can address processes over time, identify the interplay of meaningful actions and structural contexts, and interpret the unintended and intended outcomes in social transformations (Skocpol, 1984). The combined research methods help to eliminate the risk of anachronism (analyzing events from a perspective that was unknown to the social actors and events that would not have been conceived in that particular historical context) (Wieviorka, 1992).

The case study method incorporates a systematic gathering of information about specific phenomena to allow for an effective understanding of how or why the event(s) occurred. A case study method is not a style of data gathering or an analytical technique: it is a methodological approach to research. This research design utilized the spatiotemporal chronology strategy for organizing the archival data (Hill, 1993). This included separating and recording the archived records according to dates of events that documented proposals for an ICC, conventions or meetings discussing an ICC, historical events of that specific time era, associated actors, and changes or resolutions that occurred in that specified chronological timeframe. As new data was encountered it was also included in the spatiotemporal chronology. This, in effect, allowed a research design that would incorporate both primary and secondary data for analysis.
This research is archival in nature. Each specific time period within this case study consists of the development (or attempts) for an international criminal court. This is done in light of historical studies. The case study includes several data sources and a multi-faceted in-depth investigation into the social phenomenon of an ICC. The case study is intrinsic in nature: meaning the case of a developing ICC is itself of interest to the existing social order (Adler & Clark, 2003). The intrinsic nature of the case study is not to test abstract theories, or to illustrate a general statement, but rather to understand the intrinsic aspects of the process of establishing an ICC.

The data used in this research are broken down into historical timeframes relevant to the development of an ICC. They are then used to provide a descriptive analysis within a socio-historical context. An interpretation is then offered under the paradigm of the aforementioned theoretical orientations.

Data Sources

The data sources used for this research include primary and secondary data. The primary data consists of international documents. The strategy for obtaining the data was based on topical searches and name-oriented searches (Hill, 1993). This included searching for topical categories: international criminal court, Rome Statute, League of Nations, and international documents. The name oriented search involved searches from secondary source bibliographies to attain a triangulation for presented facts (these sources will be expanded on in the following secondary source section). The data that was found by utilizing this procedure includes the following documents; United Nations resolutions, United Nations General Assembly sessions’ reports,
United Nations supplements, The League of Nations reports, International Association of Penal Law reports, International Law Commission reports and summaries, reports of the Task Force of the American Bar Association, Prepatory Committee’s minutes, the Preparatory Commission reports, and International Treaties. The limitations of the data sources include availability as well as applicability for this case study.

The bulk of this primary data was accessed from three sources: the United Nations Library of Documents, the Yale Library of Law (Avalon Project) and the University of Michigan-Ann Arbor Library Department of Documents.

This research also draws from secondary data, comprised of secondary documents, other historical texts, international law books, European Journal of International Law, and legal scholars (see lit. review) revolving around specific time periods that formal proposals were made for an ICC. This data was obtained by utilizing a topic search and a name-oriented search. The primary search led to multiple sources of information that were analyzed for content, context, and potentiality for triangulation. This included double referencing events surrounding the development of an ICC by at least two authors or legal documentations. The secondary data was used only when at least two sources substantiated the descriptive information given.
Conclusion

The International Criminal Court (ICC) is a promising development for the potential control of the most heinous crimes against humanity. The ICC is the fruit of a long and often embittered battle to establish an international system of criminal justice. However, the process’s that led to the Rome Statute are as significant as the resultant ICC. Through the contradictions, conflicts, and resolutions that served as historical constraints to establish such a court, insight can be gained into future obstacles for the International Criminal Court and its ability to fulfill its stated mission: international law based on justice not impunity. The purpose of this thesis is to present a socio-historical analysis of the attempts to establish an international criminal court, the Rome statute, and the final product, the ICC. By analyzing the struggles and the journey to the newly developed ICC, sociologists and criminologists can gain insight into the plausibility or potentiality for this new international body to be legitimate and fruitful in its endeavor to create an international codified set of standards for humanity based on justice versus impunity.
CHAPTER II:

HISTORY OF DEVELOPING AN INTERNATIONAL CRIMINAL COURT

The history of proposals to establish an ICC to address conflicts within international society spans 126 years. Throughout that frame of time, several major conflicts occurred which resulted in different social relations and ideologies. The following chapter is divided according to the historical eras surrounding attempts to establish an ICC. The first section, 1872-1930 discusses the first formal attempt through WWI. The following section covers 1931-1955. This era focuses on the attempts to establish an ICC in response to WWI and as a result of WWII. From 1955-1974 the cold war era was the dominant factor in international relations and is addressed in the third section. This is followed with a section discussing the events from 1975-1997. This section is concluded with a brief summary of the historical attempts to establish an ICC.

1872 to 1930—The Seeds for an International Criminal Court Were Planted

The first formal international attempts to establish a permanent international criminal court date back to 1872. Prior to this time, many states had entered into bilateral and multilateral agreements based on violations of domestic laws (mainly extradition requests) and treaties to regulate relations for preventing war (1648 Treaty of Westphalia; Geneva Convention of 1864) (Bassiouni, 1980). However, prosecution and penalization of violations remained problematic. International state parties were intent on keeping the concept of sanctions and penalties at the domestic level of states.
After the Franco-Prussian war, the first attempts to establish an ICC (in 1872) by Moynier had proved futile. However, at the same time, the Peace Society in the United States developed an international criminal code that outlined the jurisdiction for an international criminal court (Hampson, 2002). Both attempts to establish an ICC failed, as states did not support the notion of criminal sanctions at the international level. International law had been established as a tool for defining inter-State relations. However, the growing concern over violations of the Laws and Customs of War began to generate requests by independent international actors to establish an institution for prosecution of individuals that committed heinous acts at the international level.

In response to the changing nature of warfare, especially its increasing mechanization and lethality, Emperor Alexander II of Russia convened a conference in Brussels in 1874, which resulted in an International Declaration Concerning the Laws and Customs of War. This remarkable document detailed rules for the treatment of civilians and civilian territory (occupied and unoccupied), the wounded, prisoners of war (combatants and spies), as well as the rules of surrender and treatment of those who have capitulated. Article VIII of the Declaration Concerning Laws and Customs of War provided for prosecution of violators of the Laws and Customs of War at the international level (Ferencz, 1980). The International Law Association submitted a report on the feasibility of such an International code of laws (2nd Report, Geneva ILA, 1874). State actors perceived the idea of international culpability with skepticism; International Law’s purview was limited to inter-State
relationships. The Declaration of 1874 never received enough support to be adopted. Just a few years later, General Ulysees Grant of the United States wrote to the Universal Peace Union requesting that an international court be established that “shall be recognized by all nations, which will take into consideration all differences between nations” (Grant, in Ferencz, 1980: 6). Just as previous proposals for international criminal liability were met with resistance, the suggestion by Grant failed to materialize.

In 1895, the International Red Cross again attempted to establish support for an ICC in Gêneva. However, the Institute of International Law rejected the formal proposal made at Geneva due to the proposal’s failure to contain any specificity for violations or the violators of the Rules of War (Ferencz, 1980). Nations continued to expand their military powers hoping to provide security against competing nations. However, the costs of not establishing an international criminal system of laws or justice led to calls for an international solution to the growing threats to sovereign nations by other sovereign nations. This brought about the first major treaty defining (though excluding punitive measures) international law: The Hague Conventions of 1899.

The Hague Conventions of 1899 establish non-binding mediation and arbitration as the key mechanisms of inter-state conflict resolution (Article 1-19). However, the agreement also calls for the establishment of a permanent Court of Arbitration (Article 20) that “shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal” (Article 21). Even though the agreement
was clear on the non-binding nature of the processes and nations had the right to select the judges to act as arbitrators, many nations in attendance adopted the principles under reservation. For example, the United States, in a sense establishing a future pattern, expressed general support for the Court and its processes, but declared that it would neither be compelled to intervene in any the affairs of any foreign nation nor relinquish sovereignty for domestic issues (Ferencz, 1980)

At this time the Law of Nations and International Law were viewed as conventional terms (Association for the Reform and Codification of the Law of Nations, 1882). They were viewed in the form of inter-State relations and within an international society of independent sovereign states. Chancellor Kent states:

“That collection of customary, conventional, and judicial, which independent States appeal to for the purpose of determining their rights, prescribing their duties and regulating their intercourse, in peace and war, imposed by opinion and based on the consent of nations” (Kent, 1882: 169).

The limited Treaties include the Maritime Law in Declaration of Paris (adopted by forty six States), which was seen as a uniform code of International law but with the hopes of it becoming a “permanence and fixity of principle to the Law of Nations” (Kent, 1882: 171).

During the Second Hague Conference of 1907, United States’ representative and Jurists, Joseph Choate and James Scott, brought forth a request to establish a permanent judicial court that would exclude national interests and be based on international law (Scott, 1908: UN Doc: P 35, 1920). Even though the US had made this proposal, it had done so with a set of exclusions based on its own national
interests, which included issues that involved vital interests and sovereignty. The proposal by the US Jurists, Project of a Permanent Court of International Justice and Resolution, was to be a non-criminal and non-universal court. In response to the US proposal, Jurist Mill stated: “Penal law is the essence of law: whereas the essence of Arbitration is compromise” (Utilaianism, Chapter IV, 24th Conf. ILA, 1907). The US proposal never attained any support and no other provisions for a criminal court were officially proposed (24th Conf. ILA, 1907). Nations still refused to be controlled or bound by decisions of a court that they could not direct.

The 1907 Hague Conventions resulted in the furtherance of international law and customs as they related to military affairs. It restated the 1899 agreements, expanding and refining them. However, no provisions were made for a permanent ICC or enforcement mechanisms. Nations were for prosecution of treaty violations, including their own citizens or captured belligerents from other nations. Issues of sovereignty, international law and the dominance of domestic law versus an overarching body of international law remained the custom for state practices. The concern for an international criminal court did not surface again until a retrospective evaluation of international events following WWI.

Nations soon found themselves in a decade of international battles and wars. In 1914 the Austrian Archduke Ferdinand and his wife were assassinated at Sarajevo (Ferencz, 1980). Europe was full of conflicting ethnic and national groups. Austria declared war on Serbia. Germany declared war on Russia and France intruded into

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7 It should be noted that the US did not become a signatory to this or participate in the process of the Maritime Paris Peace Treaty because of issues of sovereignty.
Belgium. England reacted to its commitment to protect Belgium borders and joined the conflicts. Other allies soon joined the three major powers (Russia, Germany, and France), which included Turkey, Bulgaria, Japan, Italy, Romania, Greece, and the United States (Ferencz, 1980). By 1914, twenty-three out of forty-eight nations were at war (Ferencz, 1980). Prior treaties and conventions were put to the wayside as the war progressed; the ‘rules’ of war were apparently deemed superfluous and flagrantly violated. November of 1918, the end of WWI, brought a time of devastation, death tolls, nation rebuilding, and a yearning for peace. Yet, this epoch of history brought a new chapter for the development of criminal responsibility of war crimes (Bassiouni, 1973). The interest in an ICC was embraced by some nations and once again put on the international forum for discussion.

The Paris Peace Conference convened in Versailles in January 1919. The victors of WWI first sought a peace treaty with the defeated Germany and established two Commissions (UN Doc. A/CN.4/7/Rev.1UN No. 1949. V. 8). One Commission was to report on the plausibility for a League of Nations and the other Commission was to report all violations of international law (limited to the defeated states) (Bassiouni, 1973; Ferencz, 1980). The Treaty of Versailles would become a historical frame for future international law violations.

The League of Nations was established in April of 1919. The atrocities and devastation of WWI prompted M. Leon Bourgeois of France to propose to the League of Nations the establishment of an ICC with an international Army to enforce the decisions of the court. The US delegates refused consent to create an ICC without a
precedence of international law and unknown to state practices (e.g. criminal prosecution of state leaders and expanding jurisdiction of international law beyond inter-State relations). The US favored national military tribunals that followed national court precedents or the Court of International Justice and Arbitration. The Netherlands favored a Permanent Court of International Justice (UN Doc, P: 35, Article 1,14: 1920). The proposed ICC by France failed to gain enough support and had overwhelming opposition. Thus, an International High Tribunal consisting of twenty-two members was formed to address the violations of international law that had been committed by Germany and its Allies. However, this era too was plagued by conflicts between national interests, sovereignty, and international law (especially the US and Japan, which opposed with reservations on what should constitute international law, limitations to jurisdiction, and what was to be considered violations of the Rules of War). In spite of US objections, the Commission on Responsibility of the Authors of War and Enforcement of Penalties proposed a special tribunal for the Emperor of Germany, for the “supreme offense against international morality and the sanctity of treaties” (Treaty of Peace, 1919: Article 227). The US opposed concepts of criminal liability imposed for war acts that included state leaders and the waging of unlawful war; however, the tribunal was still created but failed to be utilized as the Netherlands refused to extradite war criminals. The Germans had begun to embark on diplomatic efforts to prevent the extradition of listed war criminals. The Japanese did not concede that international law was founded on penal law and would have serious “consequences that would be created in the history
of international law by the prosecution for breaches of the laws and customs of war of enemy heads of states” (1973: 567). The internal conflicts that arose from the non-used military tribunals and the lack of prosecution continued to illustrate the contradictions between international law and nations. These conflicts would continue to be the center of debate with the upcoming Jurists Committee’s proposal.

Under Article 14 of the newly drafted Charter for the League of Nations, a permanent international court was to be created. In 1920, a Committee of Jurists was appointed to undertake the duty of attempting to fulfill Article 14 (Procès-Verbaux of Proceedings of Committee, The Hague 1920). The Advisory Committee submitted a Resolution to establish a high court of international justice to try crimes in breach of international public order or against the universal law of nations (Hudson, 1938). The concepts of international public order and a universal law of nations became highly debated and received little support from the parties to the League of Nations or the US (Minutes of the Council, 10th session 1920).

Baron Descamps of Belgium, Chair of the Committee of Jurists had remained in full support of creating an ICC. The notion of a court as a permanent international entity versus an *ex post facto* creation seemed to be the solution to the previous failings of the prosecution of German high officials. The Norwegian Jurist was adamantly opposed to an ICC and suggested the proposal fell out of the Committee’s authority. Japan’s member reiterated this objection. Holland’s member, Mr. Loder, wanted an agreed upon definition of international crimes before consenting to such a proposal. Member after member viewed the attempt to establish an ICC without the
definition and codification of international law as violating *nullem crimen sine lege*. Thus, an ICC was perceived as premature (Ferencz, 1980). Elihu Root, from the US, had participated in attempts to establish an ICC several years earlier. However, just as his previous proposals had reservations founded on the US concerns of its sovereignty and national interests, Root’s participation in the Committee of Jurists was a diplomatic maneuver. Root’s recommendation was to implement a High Court of Justice as a part of the League of Nations (Procès-Verbaux, 1920 The Hague). The First Assembly of the League of Nations accepted the outcome of the Committee of Jurists: an ICC was premature and the concept was again put on the shelf. As the world had entered a momentary phase of peace, public and political pressure for an ICC temporarily subsided.

While the concept of an ICC was met with little enthusiasm by many nations, the International Law Association (ILA founded in 1873) continued to promote the concept along with many scholars (ILA Report of 1873). In September 1924, the League of Nations resolved to create a special committee for codification of international law in attempt to halt many of the previous arguments against an ICC (Fifth Assembly Resolution, 1926). In Vienna, 1926, the ILA again met with Committee members appointed by the Executive Council of the League to discuss the matter of an ICC. The conclusion drawn was that a court was “not only expedient but also practicable” (International Law Report, 1926: 34: 109). In 1926 the ILA approved a plan for an ICC and proposed codification of international law. A draft by

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8 There can be no crime without a preceding law
Hugh Bellot, was used and modified as a premise for an ICC. Bellot had established himself as the leading proponent for an ICC; however, his efforts were not fulfilled within his life as he died at a Conference in Warsaw in 1928 (Ferencz, 1980). The Association recommended that the proposed court also be a penal court and be situated at the Hague; however, the concept of states being culpable for offenses outside of their territory was still at the center of controversy over issues of sovereignty and a court’s jurisdiction remained unresolved (International Law Report, 1926; 34: 106). The leading nations were not ready to comply with a court that demanded compulsory jurisdiction.

The underlying contradiction of an international system (an ideology of an international society) versus sovereign nations (existing international relations) remained a fixture of conflict for the next several decades. As an ICC failed to materialize, nations relied on conferences, treaties of non-aggression, conventions, and potential codification meetings as a medium for addressing international relations (e.g. Paris Pact of 1928; Kellogg-Briand Pact, 1928; Resolution of the Sixth Pan-American Conference, 1928; Convention on the definition of Aggressor, London 1933; Anti War Treaty of Non-aggression and Conciliation, Rio de Janeiro 1933; Geneva Conventions of 1925 and; International Conventions on Amelioration of the Wounded, Geneva 1929) (Bassiouni, 1973). These reinforced the common practice of international law as an inter-State tool versus a system of universality; essentially international law was operating as a system of diplomatic agreements, not a binding regulatory institution. Negotiations or discussions for an ICC would not arise again
until the next major international conflict occurred. However, the very existence of these accords served the purpose of continuing to build a framework for and a body of international law—the very existence of which enhanced the legitimacy of the ICC notion itself.

In summary, these initial attempts to create an ICC met with resistance. States held to the ideology of sovereignty and international law as a tool for inter-State relations all the while forming an alliance of an international society (League of Nations and International Law Association). As conflicts arose, international organizations, charters, and treaties were formed to try to resolve these. As will be discussed later, these issues are one of the primary conflicts and compromises of the ICC jurisdictional powers (a complimentary system of justice).

After WWI, the League of Nations was formed to attempt to resolve the earlier conflicts of enforcing violations of inter-State relation treaties in the form of a system of universal international law. The unsuccessful outcome for an ICC and the end result of a non-materialized IMT was an example of how a conflict (between an ideology and need for universal international law) and the political cooperation of the international society (composed of different sovereign states) created further conflicts and resulted in new international laws proposed within a system of international justice. The ability for the Netherlands to refuse to extradite, thus harboring the German criminals, and Germany’s diplomatic maneuvers to use international law as complimentary to and within their domestic legal system were the result of these contradictions not being resolved. The establishment of a permanent ICC was
 unacceptable in the form of universality and the contradictions of international society and the growing body of international law remained. Laws continued to become *jus cogens* but the concept of *erga omnes* remained unfulfilled as law was still seen as inter-State, thus not flowing to all.

**1931 to 1955- Global Crisis and the Birth of the United Nations**

An economic crisis engulfed the world beginning in 1929; nations concentrated on their own affairs, ignoring existing concerns about an international court or the codification of international law. Nations focused on reducing expenditures in the form of limiting their military armaments. The Worldwide Disarmament Conference, convened in 1932, focused on economics and disarmament allowed some nations to briefly consider that the era might be ripe for the empowerment of the League of Nations. While this was met with less enthusiasm than previous attempts by some states, other states considered the empowerment of the League necessary due to the perceived vulnerability of nations at this time (Ferencz, 1980). Germany, a large source of opposition, walked out of the conference and abstained its membership in the League of Nations. The notions of disarmament and a permanent ICC were further limited by the existing major powers. Most were unwilling to define aggression or subjugate themselves to international constraints of their power. Rather, nations turned back to rebuilding their armaments, ending the brief period that was focused on reducing expenditures or attaining disarmament; violence again took center stage in 1934.
On October 9th, 1934, King Alexander of Yugoslavia and the Foreign Minister of France were assassinated while the King was on a visit to France (Ferencz, 1980). The Romanian Minister Duca and the Austrian Chancellor Dolfuss were assassinated. Just as the assassination of the Archduke Ferdinand in Sarajevo sparked international war, these unfortunate acts of terrorism (assassination) contributed to political destabilization; however, they sparked a renewed interest in establishing international justice. The French Government sent word to the League of Nations calling for a convention to elaborate on the repression of crimes (Bassiouni, 1975).

In December 1934, France submitted a memorandum supporting the condemnation of terrorism and for the establishment of an international penal court. The League responded and formulated a committee of eleven members to begin work on a draft that was proposed for the repression of terrorist acts. The eleven members represented Belgium, the United Kingdom, Chile, Spain, France, Hungary, Italy, Poland, Switzerland, and the USSR. This committee was referred to as the Terrorism Committee (Ferencz, 1980). The Commission proposed a resolution that defined terrorists’ acts and proposed punishment by an ICC. The first draft contained Articles 7, 8, and 9 which proposed an ICC (Committee for the International Repression of Terrorism, 1935). The second part of the draft included the structure and function of said court. Romania was one of the leading proponents of the Draft. The US diplomatically suggested the concept was a noble effort however; they had no need to consider or participate in this Draft (ibid). Guatemala gave its complete support for France’s proposal and the subsequent 1935 Draft. Other nations included their own
suggestions or technical changes suited to their nations interests and current judicial system.

The second session of the Committee on Terrorism met in 1936 to discuss observations, objections, and support of the proposed treaty. Egypt supported an ICC and the concept of compulsory jurisdiction of the court. The Netherlands refuted the jurisdiction, as its nations practice was to grant "hospitality to political refugees" (ibid). The Dutch contingently accepted the draft of jurisdiction but wanted clarification of "foreseen" problems. The Committee considered these responses and revised their original draft (Committee for the International Repression of Terrorism, 1936). Part of this revision was the separation of the Terrorism Treaty into two separate Treaties: (1) the Repression of Terrorism Convention and (2) a treaty for an ICC. This allowed any states that objected to an ICC to adopt the Terrorism Convention however; no state could adopt the ICC Treaty without adopting the Terrorism Prevention Treaty. Bolivia supported the final Drafts that were completed in 1936. However, Australia, Hungary, Norway, Venezuela, and Poland opposed the establishment of a permanent ICC (Ferencz, 1980). British India had problems with the geographic location of the court since it would be inaccessible for their representatives and domestic issues of coinciding legislation. Austria would only consider jurisdiction of said court if the laws broken fell under Austrian domestic law. The USSR believed the Draft should have been limited to terrorist acts that endangered the world as a whole. The United Kingdom wanted to abandon the idea of an ICC as premature and unnecessary at that time (Committee for the International
Repression of Terrorism, 1936). The eleven-member committee met again for its final session to modify their draft in response to the nations’ comments. The concept or mention of an ICC was vacated from the Terrorism Treaty: two separate treaties had been officially formed (Creation of an ICC and Repression of Terrorism).

In May of 1937, the Council convened a conference on the Repression of Terrorism. Thirty-six nations attended. The Final Act of the international conference was signed November 1937 (League of Nations Proceedings of the International Conference on the Repression of Terrorism, 1937). By May 1938, thirteen states had signed the Convention for the Creation of an International Criminal Court: Belgium, Bulgaria, Cuba, Spain, France, Greece, Monaco, Netherlands, Romania, and Czechoslovakia. However, no state ratified this Convention leaving it another unfulfilled attempt to establish an ICC (only one state ratified the Terrorism Convention: British/India) (League of Nations Proceedings of the International Conference on the Repression of Terrorism, 1937).

The underlying obstacles of the contradiction between an “international society”, sovereignty, and inter-state relations versus intra-state relations mediated by an ICC were still viewed as impermeable. Simply stated, states were unwilling to have any domestic interference by way of international jurisdiction. Nation-states would not submit themselves to the compulsory authority of another organization. The conflicts between different forms of judicial systems of states created yet another impasse for the potentiality of an ICC to be established. These conflicts, coupled with
the escalating violence and emergence of wars, again, tabled the establishment of an ICC.

During the 1930’s the Spanish Civil War broke out, Italy invaded Abyssinia (Ethiopia), and Germany had begun its aggressive and militaristic policies by 1938 (Bassiouni, 1999). The Rhineland had again come under German occupation. German troops invaded Austria, Czechoslovakia and Poland. Again, Britain and France declared war on Germany. The Soviet Union moved into the Eastern part of Poland. Russia invaded Finland. Finland in turn called upon the League of Nations for help (Ferencz, 1980). The Minister of France, Paul-Boncour, who had staunchly supported an ICC, believed the events in the world were a “tardy awakening of public conscience” (League of Nations Record, in Ferencz, 1980: 55). Ironically, the League of Nations that had been called upon for support was in the midst of disintegrating as its members were involved in mass world conflicts. By 1940, Germany invaded Denmark, Norway, the Netherlands, Belgium, Luxembourg, and France. By 1941, Germany had invaded Greece, Yugoslavia, and finally the Soviet Union. The Hitler regime had already begun its mission of genocide. Japan attacked the US. Germany (bound with Japan) declared war on the US. Nearly the entire world was involved in a WWII. Hindsight was becoming a vision of lost opportunity.

The response to a major conflict once again brought together another body to promote an ICC. While the war was occurring, state delegates met in London (Belgium, Czechoslovakia, France, Greece, the Netherlands, and Luxembourg) proclaiming a need for international prosecution for the atrocities being committed
that were in blatant violation of international treaties, charters, and customary law. In January of 1942, twenty-six nations that were at war with Germany and Japan signed a Declaration in Washington stating their allegiances and cooperation to not make peace with any of the German Axis (Italy, Japan, and Germany) (Ferencz, 1980). The title of this meeting was the Declaration by United Nations. In Moscow, 1943, the United Kingdom, Soviet Union, and the United States proclaimed to be the voices of thirty-three United Nations warning Germany that prosecution at the international level was imminent (Bassiouni, 1973).

During the world crisis, an unofficial group called, the London International Assembly (operating under the old auspices of the League of Nations), convened to discuss the punishment of war crimes and creation of an apparatus to do so (Ferencz, 1980). The members consisted of designated delegates in exile such as Dr. Benes of Czechoslovakia, René Cassin of France, and Dr. Marcel of Belgium. They began working on a proposal for codification of international law, as this was one of the major stumbling blocks to previous attempts to establish an ICC (UNWCC, 1942). In June 1943, the London International Assembly prepared a final convention proposing an ICC be created by the newly emerging United Nations to be empowered by an International Constabulary (Historical Survey of the Question of International Criminal Jurisdiction, UN 1949). Much of their work was incorporated into the future war crime trials of German’s military however, their proposals for an ICC did not proceed much further than the past attempts, except perhaps, to remind the
"international society" that the contradictions within "international society" and international law must be resolved, vis a vis a compulsory ICC.

Past attempts to resolve these conflicts had only successfully been addressed by settling conflicts temporarily via conventions, multilateral agreements, and treaties until the next major conflict occurred. The resolve to try German war criminals by an International Military Tribunal versus a permanent ICC was another reminder of the inability or unwillingness of state leaders to commit themselves to a higher legal authority as well as their unwillingness to submit their own ideology of sovereign nations to a system of universal international law.

The impetus for an International Military Tribunal (IMT) served three key functions: (1) bringing vindication for the atrocities of the Nazis, (2) establishing a thorough historical record of Nazi atrocities, and (3) to generate deterrence against future genocides and war crimes (Ferencz, 1980). Yet, even an ex post facto ad hoc form of international justice was ridden with conflicts over the technicalities of procedure and precedence of international law. Conflicts emerged over the contradictions of divergent national systems in this newly arranged international society. The drafting of the IMT Charter proved a difficult task. The contrasts between civil law, adversarial common law, and "Socialist Justice" brought about a mixture of processes. The problematical outcomes that arise from divergent systems of justice will again resurface in conflicts during the establishment of the Rome statute and the ICC. Once the procedural and legal issues were resolved, the charter of the IMT was appended to the London Agreement in August 1945.
At nearly the same time in 1945, representatives of fifty states assembled in San Francisco, US to agree on a charter for an international organization to maintain peace and security called the United Nations. This included the role of the Security Council in the UN and an bitter debate over an ICC (United Nations Conference on International Organization, 1945). The US and the Soviet Union led the opposition for an independent judicial organ with compulsory jurisdiction. Just as the US Senate had doused the US membership in the League of Nations, it also squashed the jurisdiction of the Court of Justice unless it was in the US interests (Ferencz, 1980). The result of this Conference led to the Ad hoc and International Court of Justice with limited powers.

At the end of the Nuremberg trials, October 1, 1946, a long effort to create an ICC began. The United Nations now replaced the League of Nations. The UN appointed the Economic and Social Council (ECOSOC) to report on the advisability of bringing under the UN all activities previously carried on by the League of Nations and activities carried on by the International Penal and Penitentiary Commission (ESC Res 7(1)). The UN Charter continued a precedent formulated by the League to develop international law and its codification. The first steps to codify international law and to establish a permanent ICC had begun. The stated vision was for a permanent, competent and empowered ICC to adjudicate war crimes and crimes against peace. Designed to remove the longstanding argument of \textit{ex post facto}, it was hoped a codified standard of international law would be developed (Harris, 1999).
The International Congress (IC) (composed of international lawyers from twenty-two states and the prosecuting powers of the IMT) convened in Paris to call for an ICC. Leading the initiation for an ICC was Judge Henri Donnedieu de Vabres, the French Judge on the IMT. He made two proposals. One was for a permanent ICC and the other was to establish a criminal chamber within the existing Court of Justice. The Dutch representative fully supported the French proposal for an ICC. However, Russia, Yugoslavia, Poland, and Egypt believed that an attempt to establish an ICC was out of the jurisdiction of the Committee's mandate and that it would be contrary to Article 7 of the UN Charter (the Court of Justice without mandatory jurisdiction is mentioned) (Ferencz, 1980). However, Article 7 states, “such subsidiary organs as may be found necessary may be established in accordance with the present Charter.” Since the US had reservations about the court, the US representative suggested the matter be transferred to a commission of experts.

In the wake of the holocaust, the Economic and Social Committee (ECOSOC) was also working on a mandate to study and formalize a convention dealing with Genocide. The Secretary General consulted with members of the International Penal Law Association and other international law experts (Ferencz, 1980). A first draft included the proposal for an ICC. The proposal provided for two types of courts: a permanent ICC or an ad hoc Tribunal to address crimes of genocide. This was submitted to states to choose the most acceptable form of court according to their interests and willingness to support (UN Doc A/332 and A/336 1947). State responses were both favorable and unfavorable to a permanent ICC. Many included their own
interests and suggestions to the proposal. Haiti favored the proposal but suggested the Court of Justice at The Hague be given mandatory jurisdiction over international crimes. Venezuela adamantly opposed any form of compulsory jurisdiction or extradition requirements. The US supported an International Court in the form of ad hoc Tribunals and recommended the matter be given to the International Law Association (ILA) for deliberation (Ferencz, 1980). France was in full support of a permanent ICC that would have mandatory jurisdiction. Other states including the USSR, Egypt, Brazil, and the United Kingdom failed to respond, as they believed the subject of an ICC required further study.

In the interim, the United Nations General Assembly considered the proposals made by the IC and the ECOSOC including transferring the proposal for an ICC to the ILA, when they convened for the drafting of the Convention on the Prevention and Punishment of Genocide (Harris, 1999). The Resolution on the prevention and punishment of the crime of genocide was coupled with another resolution by the US, Netherlands, and several other states that had been active in the aforementioned draft of genocide. The second resolution requested an International Law Commission study the desirability for a criminal chamber of the Court of Justice.

In December 1948, the General Assembly passed the proposal on and requested the International Law Commission (ILC) consider the possibility of creating a permanent ICC and/or creating a chamber within the Court of Justice, while they were formulating the principles of international law (Ferencz, 1980).
The efforts advanced by some international organizations to create an ICC as a part of the Genocide Convention ended in 1948. However, the hope for an ICC did not completely whither as the ILC would continue the battle to establish an ICC. The UN appeared to be fully committed to an international society, international law, and an ICC. This is traced with the attempts of codification of international crimes and with the draft statute for an ICC (Bassiouni, 1999). The UN Charter also institutionalized social representation and allowed NGO’s a consultative role (Hampson, 2002). This historic change to integrating civil society in a formal international institution would play a significant role in the future development of an ICC.

The International Law Commission (composed of fifteen members) convened their first annual session in April 1949 to tackle the responsibility the General Assembly had passed on to it (Ferencz, 1980). This included the formulation of the principles of international law, a code of offenses against peace and security, a code of international crimes, and a judicial organ. At the same time the Rapporteurs of the ILC were working on their agenda, several Conventions were signed in Geneva that would aid the ILC in attempts to carry out its mission: most significant was the acknowledgement of a foreign court having jurisdiction over war criminals of another state. This proposal cut right into the issue of state sovereignty. If a useful and independent ICC was to be established, states must transfer some of their autonomy to the body. A court, which cannot act on its own, which nations did not submit to
would have little ability to control or punish the actions of criminal individuals and organizations.

The ILC formed subcommittees to tackle the demands of the UN General Assembly. A special Rapporteur was appointed to prepare a draft Code of Offences Against the Peace and Security of Mankind and another Rapporteur was assigned to formulate a draft for an ICC (Bassiouni, 1999; UN Doc A/CN.4/15 (1950). The first report submitted to the ILC was a report on an ICC. This report condemned the separation of formulating a substantive criminal code and a statute for an ICC, as they were complimentary. A second Rapporteur was then appointed to develop a draft for an ICC. The two Rapporteurs were Jean Spiropoulos and Emil Sandstrom. They had separate agendas and ideologies, which not only conflicted but reflected two trends within the world: idealism and political realism (Bassiouni, 1999). The issues of national sovereignty, classical law of nations, and a general mistrust of any international constraints fueled conflicts for an ICC. The Soviet Union feared for its sovereignty upon the establishment of such a court, the US would not accept a court at the height of the cold war, France supported the concept of an ICC but did not attempt to use political weight to ensure its position, and the United Kingdom regarded the matter as politically premature (Bassiouni, 1999). These positions were not new in the bitter battle to establish an empowered ICC. One of the defining features of the classic nation-state is its right to self-regulate; making its own laws, establishing its own courts, determining its own foreign, economic and domestic policy agendas are all seen as the sole purview of a state itself. The existence of an
external legal body by its very nature limits a state’s liberty to pursue its interests in its own fashion.

The General Assembly formed another Special Committee in 1950 that was composed of seventeen states to draft a convention to establish an ICC. This Committee completed its first draft in 1951 that modeled the International Court of Justice (UN Doc A/2136, A/2186, A/2186/Add 1, November 1952). The Committee agreed, “the court should be a permanent body but should only function in case of need, and that it would be concerned with individuals, not bodies corporate” (UN Doc A/2136, A/2186, A/2186/Add 1, November 1952). The court should be conceived through a Convention but remain linked with the United Nations. There remained many objections to the clarifications of the role of the court. For example, the US wanted the court open only for signatory states and France wanted the court to address international crimes and lesser crimes involving states and crimes of international concern. Despite high hopes the Sixth Committee was not able to resolve the issue. The reference to the General Assemblies note in Resolution 489 (V) reminded all that the “General Assembly had stated that it had not yet been able to take a final decision regarding the setting up of such a court. It would remain a political decision” (UN Doc A/2186 Add.1: Article 46).

The Committee’s mandate was extended, memberships changed, and in 1953 it produced a revised text (Bassiouni, 1999). The revised text was even less optimistic and added provisions that limited jurisdiction and did not bind states. One provision also gave states the ability to withdraw jurisdiction when the court was conferred. The
Draft was submitted to the General Assembly. However, the General Assembly felt compelled to first consider the ILC’s Draft Code of Offences, which to date was not completed. The outcome of the 1953 Committee’s proposal put a damper on hope for an ICC that many held (Francis Biddle, Justice Jackson, Henri Donnedieu de Vabres, Sir Fyfe, and Telford Taylor). Many states had succeeded in again postponing accountability at the international level. Only three of the seventeen representatives (the Netherlands, France, and Israel) advocated a permanent empowered ICC (Bassiouni, 1973). The statute for an ICC was thus tabled again until the completion of the Code of Offences.

In 1954, the ILC completed the draft Code of Crimes Against Peace and Security; however, a consensus could still not be reached on a draft for an ICC (Hampson, 2002). The Final Draft Code consisted of only four articles (UN Doc A/2693, 1954). Article Two of the draft code outlines 13 offences including unprovoked state aggression on another state, generating civil strife in another state, political or economic coercion, genocide and other human rights violations, and violations of the laws of war. Article Three refuses to excuse someone acting as Head of State from culpability. Article Four, in direct response to issues which arose in the Nuremberg trials, clearly states that:

The fact that a person charged with an offense defined in the Code acted in pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law, if the circumstances at the time, it was possible for him not to comply with that order.
Now, under international law, not only is a citizen theoretically or morally obligated to question orders to engage in aggression or illegal acts, but also they are legally responsible to do so if they want to protect themselves from prosecution. Such a condition greatly bothered many nations, like the United States, that continued to seek immunity from the culpability of their actions on the international stage.

Missing from this draft was any mention of an ICC as well as the controversial definition for aggression (UN Doc A/2693, 1954). What appeared as hope for the Committee for establishing an ICC would soon disintegrate. The Sixth Committee of the UN reviewed the Draft and the only consensus that could be reached was that no decision could be made on the Code of Offences. The Committee further requested that an enlarged Committee should be created to define aggression. This committee was composed of nineteen members who were to report back in 1956 (Ferencz, 1999). This further extended the 1953’s Committee’s draft for an ICC for consideration.

In summary, following WWII the “international society” became distended. International law was viewed as essential for more than inter-State relations. The realization that no court had been formed to penalize the mass atrocities and international violations of WWII due to previous conflicts between states over issues of international law and issues of sovereignty was more than evident for the “victor allies”. The position of the US on international law and penalization had taken a turn for the first time since the late 1800’s. The US Representative, Justice Robert Jackson, headed the IMT. Jackson believed fully in the rule of law and sought to
establish the same standard for international law through forming the Nuremberg Principles: universal international law that was viewed as both *jus cogens* and *erga omnes*. For the Victors, issues of sovereignty for Germany no longer were significant enough to allow Germany to prosecute their own under domestic law. An international body to penalize was viewed favorably. The form it was to take however, remained a topic of controversy and the result again was an *ad hoc* IMT.

The codification of the Nuremberg Principles reflected a changing ideology. International law was used and portrayed as universal. The ideology for an international society became more predominant. This included language used by non-governmental organizations that focused on international humanitarian laws perceived as an inherent right for all mankind. The Nuremberg Principles conveyed a cultural message even though there was not a permanent ICC for enforcement. The Nuremberg Trials and the creation of the United Nations brought with it the continuation of previous attempts to create an ICC and an enlargement of “international society” as NGO’s joined the political realm and membership in the UN expanded. The argument of international law as inter-State was no longer a prevailing ideology. However, issues of jurisdiction, sovereignty, and *erga omnes* remained sources of conflict for many states.

1956-1973-The Cold War Intermission

Although many other committees were formed every few years (1954-1957; 1959-1967; and 1967-1974) with the task of defining aggression and formatting a Draft of Offences, the political climate only hampered their success (Bassiouni,
1997). During this time the Draft for an ICC lay dormant. As different bodies worked separately at different venues (Geneva and New York), divergent texts were produced and submitted at different times. It became an easy solution for the General Assembly to table successive drafts as one or the other committees had not finished its task.

Another reason the Drafts were continually tabled was due to the political will of the five “superpowers” (e.g., China, France, the UK, the USA, and the USSR) that were in conflict and mostly in opposition to the establishment of an ICC as the world was at a position of division and at risk for war (Bassiouni, 1999). It was the era of the Cold War; mistrust ran rampant. The French were involved in a bitter conflict with Vietnam, which the US supported financially and militarily. Many states, the Soviet Union, Ukraine, United Kingdom, Venezuela, Poland, and Czechoslovakia were concerned that an ICC would interfere with their internal affairs.

"The chilling winds of the Cold War had placed the idea of an International Criminal Court into the deep freeze by the end of 1954. There it was to remain until the warming breeze of détente between the major powers would allow it to thaw, more than a century later” (Ferencz, 1999: 48).

International conflicts continued to erupt. War between the North and South Vietnam exploded. Soviet troops invaded Hungary. War broke out in the Middle East. The French sent troops to the Suez. The Cuban Missile Crisis occurred. Cyprus erupted in violence. The US invaded Cambodia. Pakistan and India were in conflict. The Six-day war occurred. Pakistan was involved in mass atrocities. Bangladesh suffered the loss of thousands that were massacred. It appeared that the last agenda for this epoch in history was to define aggression or establish an ICC, as so many states were busy committing aggression, ensuring their interests, and refusing to consider a
higher legal authority of constraint against them. In the interim, the UN consistently pointed to atrocities in the world that violated the Nuremberg Principles. However, due to their lack of enforcement power the UN was limited to symbolic gestures of vocal condemnation and patronizing the violators.

To sum up, during the cold war the US fell back on its earlier positions of self-interest, sovereignty, and inter-State international law (the role of the Security Council in the UN is an illustration of these concerns). The work toward an ICC continued in the Commissions set forth by the UN, which included the processes of codifying international law and defining the Crimes Against Humanity Offences over the next decade. However, the US remained adamant that it would not accept or support an empowered permanent ICC at the height of the cold war. In the interim conflicts arose and the international society again found itself in strife as states committed aggression on other states, pursued their interests, and invaded territories of others.

**1974-1997-International Ideology Begins to Shift**

With the end of the Vietnam War, some of the tensions between the major powers subsided; however, violence still erupted in the Middle East. Public outcries, involvement of NGO’s, and efforts by scholars and statesmen seemed to spark the movement of the Special Committee to define Aggression (Ferencz, 1999). On December 14th 1974, the definition of aggression made it to the UN General Assembly and was accepted by consensus. Although the definition was ambiguous and left itself open for individual state interpretation, the barrier to consider an ICC
had been “officially” removed. The Legal Counsel of the UN, Professor Suy, approached the delegates with the reminder that the time for considering the Draft Code (now over 20 years old) and an ICC was upon them. Many states responded. The US considered expanding the jurisdiction of the International Court of Justice in a Senate Resolution. The State Department recommended the US repeal the Connally Amendment and accept jurisdiction of the World Court (Ferencz, 1999). Of course, this would still fail to achieve what other states were attempting to establish: a permanent criminal court with compulsory jurisdiction and empowerment. Secretary General Waldheim presented a report to the Assembly for all states to accept compulsory jurisdiction and “to withdraw the extensive and self-defeating reservations” (Waldheim, 1974: in Ferencz, 1999: 77).

In July of 1977, the ILC reminded the General Assembly that Resolution 1186 (xii) of 1954 had been deferred until aggression had been defined and suggested it should review the topics for a Draft Code of Offences and a Draft for an ICC again (Ferencz, 1999). Several states, Mexico, Panama, Syria, Phillipines, Barbados, Fiji, Nigeria, and Cyprus agreed and pushed for the reopening of attempts to conclude the Drafts. The proposal sat until 1978 for reconsideration. The International Association of Penal Law continued to promote a criminal code and an ICC. Among its members, M. Cherif Bassiouni and Ved Nando, of the US were the strongest supporters to further the work that had began over twenty years ago. The General Assembly again tabled the suggestion to reopen the Committees work on a draft Code of Offences and an ICC due to the underlying controversy surrounding the growth of the UN (from
less than sixty members in the 1950’s to over 150 members in the late 1970’s) (UN Doc A/33/45 Supp No. 45, 1978/79).

In 1981, the General Assembly again formally requested that the ILC work on the Draft Code of Crimes. Members of the ILC reiterated the need to establish a mechanism to act as a constraint and enforcement of the upcoming implementations. Continuous appeals to the General Assembly were made by the ILC to consider again the Draft for an ICC. However, it would take several more years, filled with changes in geopolitical relations, before the GA reacts to the ILC’s requests. The 1980’s indicated a change in world attitudes among many states. The US-Soviet hostilities had declined. The USSR General Secretary Gorbechev sent a letter to the UN proposing the establishment of a global security plan that included strengthening enforcement of the rule of international law. Transnational Corporations were expanding at a rapid pace and many states felt a legal mechanism needed to be formed for constraint and control of transnational actors (Hampson, 2002). New forms of perceived security threats encouraged states to consider an ICC to control terrorism, drug trafficking, and hijacking. In December 1988, the General Assembly asked the ILC to consider the Code of Offences implementation. In 1989, a Coalition of sixteen Latin American and Caribbean states (headed by Trinidad and Tobago) requested the UN address the growing problem of drug trafficking (Bassiouni, 1999; Sadat, 2002). The General Assembly convened a special session addressing these problems. Trinidad and Tobago proposed that a specialized international criminal court be
created. The General Assembly made an official request for the ILC to prepare a report on establishing an ICC for drug trafficking offenders.

Contemporaneously, the International Institute of Higher Studies in Criminal Sciences in conjunction with the UN (Chaired by M. Cherif Bassiouni) prepared a draft statute for an ICC with jurisdiction over all international crimes. This draft was submitted to the Eight United Nations Congress on Crime Prevention and Treatment of Offenders in 1990 and further recommended that the ILC consider this draft (Bassiouni, 1999). The ILC had also completed their report that the General Assembly had assigned them in 1989 and submitted it to the forty-fifth session of the General Assembly. The report did not limit the concept of a court to drug trafficking, but was expanded to include a more universal criminal court that would cover other forms of international crimes (Bassiouni, 1999). The General Assembly requested the ILC continue to prepare a comprehensive statute for an ICC. The ILC had also adopted a Draft code of Crimes in 1991 (Sadat, 2002).

In 1992, the ILC created a working group, Chaired by Abdul Koroma of Sierra Leone, to specifically work on a statute for an ICC. The ILC working group submitted a report composed of several propositions which included: an ICC be established in the form of a treaty agreed upon by state parties; the court’s jurisdiction would only cover crimes defined by international treaties in force; should not be compulsory; should be in the form of an ad hoc body and; must guarantee due process, independence, and impartiality (Sadat, 2002). The proposals were primarily based on the work of the 1951 and 1953 committees and were later adopted into the 1994 Draft
statute issued by the ILC. The General Assembly received the 1992 recommendations of the ILC at its Forty-Seventh session. The General Assembly granted the ILC a mandate to elaborate the statute as “a matter of priority” (UN GA Res 47/33 in Sadat, 2002:39). The Draft Code of Crimes had met the usual support and resistance that was to coincide with the development of an ICC. The US was one of the objectors. The US dissatisfaction was centered on issues over the lack of a definition for aggression. Some revisions did occur between the 1992 draft and the 1994 draft (these revisions included jurisdiction limitations and other technical changes to suit political objections by the major world powers made at the General Assembly session) (Bassiouni, 1999).

During 1993 and 1995 the Security council was addressing atrocities and war crimes committed in the former Yugoslavia, mass genocide that occurred in Rwanda, and Iraq’s violations of International Humanitarian Law (IHL) which aided the sense of urgency for the General Assembly to create an ICC (Bassiouni, 1999). Ad hoc Tribunals were eventually established for Yugoslavia and Rwanda. This was the first time since WWII that the states came together as a body to provide investigations and prosecutions of violations of international law. However, the Security Council was becoming less willing to continue the processes of ad hoc Tribunals due to the complexities of reaching consensus on the procedures or desires for a IMT (International Military Tribunal) and because of the veto power of the Security Council which allowed the selectivity of cases that would be eligible for IMT

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9 Aggression had been defined by the Special Committee to Define Aggression in 1974 and was accepted with consensus by the UN. However, it remained vague and ambiguous. The definition for
Bassiouni, 1999). The growing concerns about creating IMTs brought many members of the United Nations to support a permanent ICC. Many states still held reservations on the plausibility for acceptance of an ICC without a universal desire of state leaders (especially since the US was reluctant to provide any support or leadership in the development or acceptance of an ICC). During George H. W. Bush’s Administration, such hesitancy was a matter of US Foreign Policy. The concern was intensified with the International Court of Justice’s adverse ruling in the Nicaragua case as well as the potential threat of undermining the State department’s existing international “law enforcements” (Bassiouni, 1999).

The Clinton Administration displayed a diplomatic interest in the development of an ICC by participating in the creation of an ICC that would also be suited to US interests (this entailed ensuring limitations on jurisdiction and the Security Council’s decisions for charges of crimes). Essentially, the US played a role to ensure it would not be subjected to the jurisdiction of the court’s power or authority without state consent to protect itself from prosecution against any violations of international law that occurred as the US pursued its economic and foreign policy interests. The insistence on the Security Council having a role in the cases to be tried under the ICC jurisdiction was to ensure veto power for the US to exercise if a case was brought forward against the US, its current allies, or foreign policy interests.

Two drafts for an ICC were drawn up by the ILC in 1994 addressing different political concerns. The final agreed upon report was ready to be submitted to the

aggression was not codified within international law, treaties, or a resolution.
General Assembly. However, the report remained ambiguous about certain controversial topics such as the financing of the court, definition of crimes to be covered by the court, jurisdictional matters, and the organizational structure (Sadat, 2002). The 1994 ILC’s final report on the statute for an ICC was submitted to the Forty-Ninth Session of the General Assembly (GA), which tabled consideration until the Fiftieth Session (Bassiouni, 1999). However, the GA did form an ad hoc committee to discuss the substantive and administrative issues of the ILC’s report: the 1995 Ad Hoc Committee for the Establishment of an International Criminal Court (chaired by the Ministry of foreign Affairs for the Netherlands) (Res 49/53). In the Resolution forming the Ad Hoc Committee, the GA separated the ILC’s 1994 Draft Statute for an ICC and it’s 1991 Draft Code of Crimes Against Peace and Security of Mankind. This was done in response to the amount of members working on each draft as well as the number of participants (NGO’s and GO’s not formally in committee membership but able to put forth proposals)

The Ad Hoc Committee met twice in 1995 (April thru August) to review the Commission’s report on the establishment of an ICC and rendered their report back to the GA (Sadat, 2002; Bassiouni, 1999). Upon receiving the results from the Ad Hoc Committee, the GA set forth to establish the 1996 Preparatory Committee on the Establishment of an International Criminal Court. The Ad Hoc committee continued to focus on the feasibility of establishing an ICC while the Preparatory Committee focused on the text of such a court.
The meetings held by the Preparatory Committee consisted of an open forum for all members of the United Nations, and for specialized agencies in international law or humanitarian efforts (Bassiouni, 1999). These groups consisted of the International Institute of Higher Studies, members of the Bureau and working group from the Netherlands, NGO’s (30 organizations began the Coalition for a Criminal Court in 1995 and grew to over 800 NGO’s within three years), Australia, Austria, Argentina, Belgium, Canada, Chili, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad, Tobago, Uruguay, and Venezuela (Bassiouni, 1999 Vol 3:623; Shelton, 2000). All of them played significant roles in advancing the concept for an ICC.

A preliminary report that compiled various proposals was submitted to the General Assembly at the Fifty-First session in 1996 requesting an extension for the Preparatory Committee to negotiate proposals made to them to consolidate into a text for a statute. The GA complied and extended the original date of 1996 to 1998 passing Resolution 51/207 for holding a diplomatic conference of plenipotentiaries in 1998 (Cooper, 2002). With the renewed mandate from the GA, the Prepatory Committee set about formulating the list and definitions of crimes, principles of law and penalties, court’s organization, procedures, trigger mechanisms, state cooperation, relationship of court to the UN, and financial matters. The potential for establishing an ICC was viewed in a more positive light, which sparked a stage of negotiations over the next two years. The Prepatory Committee had six official meetings between
those years. In April 1998, the Committee had finalized a draft statute to be considered at the convening 1998 Diplomatic conference (Cassesse, 2002).

The range of participation to establish an ICC by states, inter-governmental, and non-governmental organizations indicates the assortment of interests. The variety of interests from multiple actors will later result in lengthy and contentious discussions over the complexities involved in establishing an ICC in lieu of the existing conflicts contained within the realm of contradictions of an “international society”.

To sum up, by the 1970’s and 1980’s many of the conflicts of international society had lessoned and members of the international society continued to push for an empowered ICC. This included NGO’s, the ILC, International Institute of Higher Studies in Criminal Science, the USSR, Trinidad, and Tobago. However, the issues of a court with universality and an international society composed of sovereign states, (some) unwilling to relinquish their impermeable borders to a system of universal international law, remained a conflict and ensured major obstacles for the work on the ICC in the 1990’s.

The 1990’s represent a major historical contingency: new legal approaches to the conflicts of international society resurfaced with a renewed verve. During the 1996 PrepCom Reports, a large number of contending proposals were submitted. These contained various national positions regarding sovereignty, common law systems, civil law systems, divergent crimes to be covered, penalties applied by the Court, role of the Security Council, the role of the Prosecutor, and other major issues
that had divided earlier progress for an ICC (GA Fifty first session, 1996). These same controversial topics were again at the center of debate during the 1998 conference of plenipotentiaries. Although the US was an active participant in the negotiations and formation of proposals for an ICC in the 1990’s, the position of the US (during the Clinton Administration) remained intent on ensuring the ICC did not impede upon the sovereignty of the US or interfere with any US foreign policy or practices. Much of the US support could be viewed as self-interested or symbolic. Many of the political gestures that were made during the negotiations were designed to appease the conflicting LMS positions. The result of the six PrepCom meetings was the disaggregating of the former proposals into a workable set of compromises for the 1998 Plenipotentiaries Meeting.

**Summary**

From the onset, attempts to establish an ICC were met with resistance. To relinquish territorial domestic law to a universality of international law would have required states to accept universal jurisdiction versus international law governing only inter-State issues. The result would have endangered the sovereignty that many states saw as essential for their safety, political interests, and political or national ideologies. The core element of this conflict arises from the contradiction of an “international society”. Territories, borders, government, and domestic judicial systems have fundamentally been viewed as the foundation of states. International law was founded on/and with acceptance of statehood and state sovereignty.
The earliest international treaties, charters, customs, and laws were based solely on inter-state relations (UN Doc, 2003). The attempt to create a universality of international common good, international common law, and an ICC with universal jurisdiction for an international society implied a need for porous state borders. The contradiction of sovereign of states structuring an international society versus the ideology of a unified international society has resulted in decades of conflicts over the attempts to establish an ICC.

These conflicts and the fundamental contradiction of international society led to *ad hoc* international systems of justice (IMT, World Court of Justice, Court of Arbitration, and non-empowered international organizations) rather than an empowered universal criminal court. All of these international organizations are the result of attempts to address specific conflicts (Franco-Prussian War, WWI, WWII, Assassination of Leaders, Terrorism, Drug Trafficking). Customary international law, treaties, and Charters have historically been viewed as *jus cogens*. However, international law was initiated and advanced under the premise of independent sovereign states and as a frame for inter-State relations. Thus, it often failed to achieve the level of *erga omnes*. This coupled with a non-empowered universal system of justice resulted in the failure of these organizations to constrain future conflicts.

Historical attempts to establish an international system of justice that is empowered and universalistic have illustrated how the contradictions of an international society constrain the potential outcome for such an institution. What has
resulted from the conflicts that arose as a result of these international contradictions are \textit{ad hoc} entities, non-empowered systems of justice, and the establishment of new international laws without a corresponding change in ideology within international society and/or international law (during the late 1800's through the 1930's).

As contemporary efforts were made to establish an ICC, the presence of a changing ideology yielded new principles used to guide international law. This change in values or principles is evident in the rhetoric used within international organizations such as the UN, Amnesty International, Human Rights Organizations, and the International Law Association, which refer to international society and existing relations as a community. This expresses a naturalistic view as well as common goals, interests, values, and ethos that are shared among all members. However, this new ideology (principle and value) remains in direct conflict with the composition of international society and the relations between states. At the base of the contradiction between international society and the ideal type or ideology of international society are the issues of sovereign rule (Austinian concept) and jurisdiction. Rather than attempting to resolve the underlying contradiction of the structure and ideology of international relations, the ideological principles and goals for a unified international society was injected into attempts to establish an ICC.
CHAPTER III:

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The previously discussed Prepatory Committee Meetings (held during 1995-1997) provided the frame for the Rome Statute Diplomatic Conference of 1998. This chapter begins with a discussion of the Rome Conference focusing on the contentious subject of jurisdiction and state sovereignty. This is followed by a section giving a descriptive account of the current status of the Rome Statute of the International Criminal Court. The following segment examines the US reaction to the ICC followed by a brief summary of the chapter.

**The Rome Conference**

June 15th 1998 marked the end of decades of work to establish an ICC and the commencement of a five week Diplomatic Conference that resulted in the Rome Statute of an International Criminal Court. The large number of delegates presented many difficulties for the process of the Conference. Informal working groups and "informal-informal working groups" were created to address various articles of the working draft statute (Bassiouni, 1999: 628). The piecemeal construction of these articles and working in six languages made it difficult for the Committee to maintain consistency and attain consensus. The most contentious subject matters (Part II, Articles 5-21) were not discussed until the final sessions. These included all the major political issues that created conflict: definition of crimes, jurisdiction, the role of the Security Council, and the role of the prosecutor (Bassiouni, 1999).
Significant conflicts occurred over resolving issues of the Court’s jurisdiction and its ability to exercise that jurisdiction (Cassesse, 2002). States held incompatible views regarding the role of the Court. As previously mentioned, the issue of jurisdiction was a major constraint that inhibited previous attempts to establish an ICC as well as a major contention in the development of the Rome Statute. This is due to several factors. From the theoretical frame of critical international law, jurisdiction symbolizes the root of the contradiction between international relations (international society as it is) and the ideology or ideal type of international society presented in principle (the ought, not the is, of international relations). This includes the current composition of international society (independent sovereign states based on self governing and ultimate authority: the Austinian model of positivism) and the principles that are portrayed as consensus, common values, goals, and interests (naturalism and the innate consciousness of absolute norms)\(^\text{10}\).

Many states supported universal jurisdiction of the Court, ensuring a universal justice while other states (mainly the US) insisted that the acceptance of the ICC’s jurisdiction by states was a necessary precondition to jurisdiction. These two positions were heavily debated and resulted in a compromise that was not fully satisfactory to either of the conflicting forces; the “like minded states” (LMS\(^\text{11}\)) that wanted universal jurisdiction and the US (the main challenger) that wanted a system based on compliance at will. The US was firmly grounded in the Austinian concept of

\(^{10}\) See appendix for chart.
\(^{11}\) Like Minded states include those states that want a court based on universal jurisdiction and have legal traditions based on civil law. This is discussed in greater detail in the following analysis regarding the debate and compromise of jurisdictional matters during the Rome Conference.
sovereignty, which holds to the traditional composition of international relations and international law. Although these research data do not provide the dialogues of debate surrounding this issue, the outcome reflects the compromises of the different positions. The result was Article 1, the court, which lays out the concept of jurisdiction in the form of a complimentary Court to national courts. It states,

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complimentary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

The idiom of this Article portrays how both sides of the underlying contradiction (between the tradition of sovereign state relations and the principles representing the ideology of a consensual society) can be represented within the creation of new laws which can then lead to further conflicts (Chambliss, 1993).

Although there was a general consensus that crimes of genocide, war crimes, and crimes against humanity should be covered by the court’s jurisdiction, there were conflicts over the scope of crimes covered under war crimes, crimes against humanity, and the definition for crimes of aggression. Despite the fact that precedence had been set for the definition of aggressive crimes during the IMT of the Nuremberg defendants and in the General Assembly Resolution 3314 (XXIX) of December 1974 (passed with a consensus for the definition of aggression) it remained an irresolvable issue for the Committee Meeting members. This precedent definition was "the use of armed force by a State against the sovereignty, territorial integrity or political
independence of another State, or in any other manner inconsistent with the United Nations (Quoted from Harris, 1999:579).

During the process of negotiations of the Rome Statute in June 1998, US Ambassador Bill Richardson reminded conference members that all though the US supported the IMT trials of Yugoslavia and Rwanda, the acceptance of any definitions or attempts to further define acts of aggression was premature for purposes of individual criminal responsibility (Harris, 1999). He suggested it be tabled and the court limited to jurisdiction for genocide, crimes against humanity, and war crimes to prevent reoccurrences of those crimes. Due to lack of compromise, jurisdiction over crimes of aggression was dismissed until a final provision is adopted that defines aggression, thus the Court’s jurisdiction (to date, this remains undefined). This declaration is included within Article 5 (2) (described below).

Crimes of aggression were not the only controversial crime debated during the Conference. The US Delegates insisted that the Court’s jurisdiction should only occur (if a state was signatory) when war crimes were committed on a large scale (Sadat, 2002). This would mean that war crimes would essentially also have to be crimes against humanity before the Court could interject its jurisdiction. The US was triumphant in this debate and the condition of jurisdiction over war crimes was included in Article 8 (1) as a part of Part 2 Jurisdiction, Admissibility and Applicable Law. Article 8 (1) states,
The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

The other crimes falling under the Court’s jurisdiction that were agreed to include genocide and crimes against humanity. These are included in Article 5, crimes within the jurisdiction of the court that states,

1. The jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (2) Crimes against humanity; (3) War crimes; and (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

These crimes are defined in Article 6 (genocide), Article 7 (crimes against humanity), and Article 8 (war crimes) of the Rome statute. Crimes against humanity are reinforcement to the ideological principles of inalienable rights (naturalism) and the ethos of an international society) while at the same time are limited by an “enforcement jurisdiction which is paltry at best” (Sadat, 2002:103). The weak enforcement jurisdiction is the result of the conflict between this ideology and the traditional structure of international relations and international law.12

Crimes listed within the Rome Statute specifically refer to individual culpability versus an organization or state. This is defined within Article 1 and Article

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12 This is the same ongoing philosophical and legal debate between naturalism and positivism that has occurred for centuries. Under international law, positivism has been the traditional form of
25 of the Rome Statute. However, the ability of a state or organizational entity to be prosecuted has been a long-standing point of debate going back to the Nuremberg IMTs where it was argued “international crimes are committed by men not by abstract entities” (Sadat, 2002:778). During the process of meetings the French delegate introduced a proposal for the inclusion of organizations. Thus, one Draft Statue contained an Article that would subject legal entities to the Court’s jurisdiction if the crimes were committed on behalf of such legal persons or their agencies or representatives. In the end this was dismissed as contradictory to the principle of a complimentary system (Sadat, 2002). The result is Article 25 (1,2,3, and 4) Individual Criminal Responsibility which states,

1. The court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Even though concerns regarding the contradiction of a complimentary system were addressed, part 4 of this Article does ensure that the Court’s exclusion of state responsibility is not precluded from customary international law or treaties obligations. Again, this represents the traditions of international law and international interpretation. However, the issue of jurisdiction remains at the heart of these conflicting paradigms and at the center of debate at each attempt to establish an ICC.
relations based on sovereign rule as the dominant principle guiding new laws while being placed within a system that represents the ideology of an international society with common ethos, goals, and principles.

Matters of jurisdiction regarding the role of the ICC and national prosecution for crimes were also a contentious subject as many states believed supporting national prosecution would enable impunity and shield perpetrators of crimes to protect their state interests (Cassesse, 2002). The US circulated an informal “paper” questioning whether the ICC should include domestic amnesty under jurisdiction (Meintjies, 1999). The issue of domestic amnesty was viewed by some as an opportunity for states to grant impunity to individuals that had committed heinous crimes and by others as a resource for healing the nation (Truth and Reconciliation Commissions held in South Africa). The inclusion of this would have further limited the jurisdiction of the Court and given greater powers to decisions of states regarding perpetrators of the most serious crimes listed in Article 5. Although the actual tête-à-tête of the debate is missing in this research, the outcome is clear as Domestic Amnesty was omitted from the Rome Statute. However, the concerns over misuse of domestic amnesty were indirectly covered under Article 17 (b) called Issues of Admissibility. It states,

The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from unwillingness or inability of the State genuinely to prosecute.
Other modifications entered into the Rome Statute as a result of the five weeks of meetings included providing a format for challenging jurisdiction of the Court or admissibility of a case. This is included in Article 19 (2). It states,

Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.

This Article ensures a state its rights of sovereignty for its domestic legal system and re-emphasizes the complimentary nature of the Court. This supports the tradition of international relations and sovereign determinism while negating the principle behind ensuring impunity does not occur.

The support for traditions of inter-state relations and international law that conflict with the ideological principles of universality and the mission of the Rome Statute is also evident in Article 98, The Cooperation with Respect to Waiver of Immunity and Consent to Surrender. Many of the delegates within the Prepatory Commission to the Rome Statute had apprehensions regarding conflicts between Article 98 of the Rome Statute with previous international agreements. It is for this reason Article 98 recognizes previously dated bilateral agreements concerning the surrender of an individual from a state party to an alternative third party. Article 98 of the Rome Statute states:

The court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that state to the Court (Rome Statute, Article 98).
The intention of Article 98 was to allow the court the attainment of waivers of immunity for prosecution *prior* to individuals being surrendered over to the ICC if that individual was covered under an existing international agreement (CICC Publication, 2002). The delegates intended to address any conflicts between the Rome Statute and pre-existing international agreements or new agreements based on ones with set precedence such as Status of Force Agreements (SOFA)\(^{13}\) or the Vienna Convention on Diplomatic Relations (UN Doc.A/CONF.20/13 1961).\(^{14}\) This Article later becomes the focus of debate for the international society (and will be discussed in the section of the US reactions to the ICC).

The position of the US for supporting the ICC was evident during the final days of the Rome Conference. On July 16th 1998 the US submitted a proposal, which would have further limited the Court’s jurisdiction “over all acts committed in the course of official duties and acknowledged by the State as such” (Scheffer, 1998 in Cassesse, 2002: V.I: 601). The US would not bend on its insistence that the acceptance of state nationality was a necessary pre-condition to the Court’s jurisdiction (Sadat, 2002). The final compromise was that the exercise of criminal jurisdiction be limited to territorial state signatories or state of nationality signatories. This compromise became Article 12 of the Rome Statute called the Precondition to the Exercise of Jurisdiction. Article 12 states,

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.

\(^{13}\) SOFA are jurisdictional agreements that give the sending state or receiving state a primary right to exercise its jurisdiction over certain crimes. If a state party would have an obligation to surrender an individual (e.g. US national) to the court the individual would be transferred to US jurisdiction versus an international World Court or third state.

\(^{14}\) For more detailed information on the Article 98 impunity agreements see the CICC. This includes states reactions and detailed analysis on the bilateral agreements.
2. In case of Article 13\textsuperscript{15}, paragraph (a) or (c), the court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the Territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

The only exception to this Article is when the Security Council, which then gives universality of jurisdiction, refers a case (Article 13 (b)). This compromise (at the insistence of the US) fulfilled two issues. One was the demand for the Security Council to have a role. This is a significant compromise when one considers the veto power of the “Five Members” of the Security Council in ensuring their interests or referral for a case that can be eliminated vis a vis veto power. It compromises the LMS’s desire for universal jurisdiction while at the same time satisfying the US with the second part of Article 12, which is the precondition of a state to consent to being a participant of the ICC (the complimentary court to national proceedings versus the universal court). Article 13 proclaims how the Court may exercise these jurisdictional rights on the territory of a State Party with four subsections. These include jurisdiction of the Court if a referral by a state party or the Prosecutor is made and/or the Security Council makes a referral. The second condition is for crimes committed on the territory of a non-State Party, which includes jurisdiction if a referral by a State Party or the Prosecutor is initiated and/or a referral from the Security Council.

\textsuperscript{15} Article 13 details the Court’s jurisdiction for prosecution of crimes under Article 5.
Article 12 is also a manifestation of the sovereignty principle. As a complimentary system, states have primacy over their own territories, which limit the territory of the Court’s jurisdiction. The aspect of a complimentary system will vastly restrain the Court’s jurisdiction and limits the authority and legitimacy\textsuperscript{16} of the Court. In effect, the Court has resulted in being a consent-based system versus a universal system based on \textit{jus cogens} and \textit{erga omnes}. The US was one of the greatest objectors to a universal court and had attained a portion of its interests by the compromises that resulted in Article 12. Yet, even with the concessions for the pre-condition of state consent regarding jurisdiction, Article 12 was still viewed as highly problematic for the US (this is discussed in greater detail in the following chapter). As previously stated, the compromises of jurisdiction have greatly weakened the jurisdictional powers of the Court and the US opposition is at best ill placed. This is stated well by Cassesse

Against this background it remains astonishing that the United States continues to oppose the weak compromise of Article 12 and has, since the Rome Conference, explored various ways and formulas to alter Article 12 or to make it inapplicable with regard to US Nationals” (Cassesse, 2002: VI: 614).

With jurisdiction, the concept of automatic authority for the Court upon signature remained an issue. The US (and a limited number of other states including France) wanted an opt-out option for the Court’s jurisdiction (Sadat, 2002). This would further limit the court’s jurisdiction and strengthen the position of sovereign

\textsuperscript{16} Legitimacy in its simplest form refers to conformity with the law. “Unlike legality, legitimacy refers to the ought and not just the is of law” (Carty, 1998). It also refers to the perceived view of an institution as valid and acceptable (Scott, et al 1986).
state determinism. The final outcome was a compromise promoted by Japan: Article 124 of the Rome Statute called the Transitional Provisions. It states,

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provision of this article shall be reviewed at the Review Conference in accordance with article 123, paragraph 1.

Although the conversations and debates were inaccessible for this research, the result of this appears to address both, the tradition of state sovereignty and international law as consensually based inter-state contracts.

Beyond the concerns for an opt in-opt out option, states were concerned about their past actions being subject to the Court’s jurisdiction. The concern over ex post facto is not a new trend. The claim to immunity for acts committed ex post facto was used as the defense for the Nazi war criminals during the IMTs. It is not surprising that these concerns resurface during the creation of an ICC. The concerns are addressed in Article 11, which limits the Court’s jurisdiction to crimes committed after the Statute enters into force (for the ratifying State Party). Article 11 states,

(1) The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

(2) If a state becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.
Many compromises had been made, however, this does not mean that these compromises were acceptable to the opposing actors. Instead many of these compromises represent Chambliss’ concept of symbolic politics which incorporates the adaptation of a proposed law by making it malleable to other proposals and erroneously consecrated as shared interests. This was manifested in the final hours of the Rome Conference.

Friday, July 17th 1998 was the final day for the delegates of the Committee of the Whole to finalize the most contentious articles. At the deadline hour, the US and India attempted to introduce amendments to the proposal which would have collapsed the Conference and ended the chance for an ICC (Bassiouni, 1999). India requested limitations on the role of the Security Council and a prohibition of all nuclear weapons. The US requested further limitations on the Court’s jurisdiction (which were only supported by China and Qatar) to restrict the compromises of jurisdiction already made and to call for unrecorded votes at the last minutes on July 17th (Cassesse, 2002). Had the US been successful in attaining action, the ICC conference would have been shut down and rescheduled for later. The last minute effort to thwart the establishment of an ICC by the US was only the first of many to come (Bassiouni, 1999).

A no action vote was introduced and the US and India proposals were not addressed (out of 161 registered delegates 155 voted for the no action motion and acceptance of the proposed draft of the Committee). The Committee of the whole adjourned and the final session of the Plenary was convened for a quick formal
session to adopt the Rome Statute (Bassiouni, 1999). The US (David Scheffer, US Delegate) held to its opposition and requested another vote on the previous last minute proposals (Harris, 1999; Bassiouni, 1999). At the insistence of the US a final vote was taken and 120 delegations voted in favor of the Rome Statute (seven voted against and twenty one abstained from voting), the Final Act of the Diplomatic Conference, and to open for signature July 18th; (CICC, 2003). Those opposed to the Rome Statute included India, Iraq, Israel, Libyan Arab Jamchiriya, Qatar, China, and the US. The final vote represented the end of years of efforts to establish a Statute for an ICC.

The Rome Statute of the ICC: Descriptive Information

The Rome Statute required sixty states to become signatories by December 31st 2000 (Article 126) for the Statute to enter force. That goal was far exceeded with 139 state signatories at the closing date. The International Criminal Court became a reality on July 1, 2002 with more than 120 nations attending the final Prepatory Commission Meetings.

The ICC consists of 81 states forming the Assembly of States Parties (ASP) to the Rome Statue. The endorsement of the Rome Statute requires states to be signatories and ratified members. The ratification of a state’s signature varies with each state’s domestic legal system (e.g. the US would need the approval of the Senate for the international signature to be ratified). Support of the ICC stands to become stronger as the 139 states that have endorsed the Rome Statue with their signature become ratified members (90 states have become ratified members as of 5/2003) in
accordance with their domestic legal systems. This number excludes the two states that were signatories but withdrew all support for the ICC: the US and Israel. A few states have failed to become signatories due to domestic strife, but are willing to participate in the ICC, such as Kazakhstan, Indonesia, and Malaysia. Other states are adamantly opposed to the ICC such as the Libyan Arab Jamchiriya, India, Pakistan, Saudi Arabia, Turkey, Iraq, and Myanmar.

The Assembly of States Parties (ASP) met from September 3-10, 2002 to establish the ongoing agenda, Rules of Procedures, and to elect members of the Bureau Tasks. In February 2003, the Assembly of States Parties began their first session to elect the eighteen judges of the Court. The newly elected judges then appointed the first President of the ICC, the Vice-President, and the second Vice-President. The Prosecutor was sworn in on 16 June 2003 followed by the Registrar on 3 July 2003 (CICC, 2003). On the first year anniversary of the establishment of an ICC all Senior Officials had been elected. The court is currently near completion of staff and able to proceed as an international system of justice. The culmination of a century of aborted attempts and contentious efforts had finally been achieved. Albeit, the end result of an ICC is less than many states had once fought for (universal jurisdiction and empowerment) it nonetheless represents a significant change for international relations and international law. The Preamble to the Rome Statute states that it is:

Mindful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their
effective prosecution must be ensured by taking measures at the national level and enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court with jurisdiction over the most serious crimes of concern to the international community as a whole (Rome Statute, July 1999).

The mission statement of the Rome Statute personifies the new ideology of an international society (with common goals, values, and interests) and the ideological principle of universal jurisdiction (the Rome statute describes an ability to have jurisdiction over the most serious crimes but realistically has limited jurisdiction). Indeed, the ICC does represent a change in international relations and international law. The degree to which the ICC will affect international law is set within the treaty. However, the question remains to what extent the ICC will influence the relations of international society without addressing the underlying contradiction between the ideological international society and current trends of international relations. Simply stated, the potential for the ICC is reflected in the conflicts that arose in its establishment over issues of jurisdiction and state sovereignty (though not limited to these).

In summary, during the process of negotiations of the Plenipotentiaries Meeting no one state (including the US) was a monolithic obstacle. However, the proceedings were divided rather conspicuously among those “like minded states (LMS)” (over sixty states headed by Canada, Australia, and the United Kingdom and NGOs) who wanted universal jurisdiction, expanded definition of war crimes, an

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17 See appendix for graph of the contradiction of international society, its ideology and structure, and jurisdictions place within this system.
empowered prosecutor, and the exclusion of the Security Council in the Court’s
decision, versus the non-LMS such as the US (Iraq, Qatar, and China). One of the
major concessions made with the insistence of the US was the inclusion of a
complimentary court. This ensured that the concept of universality would be
diminished by the recognition of the primacy of domestic courts. Another major
compromise made at the insistence of the US was the need for a state to be a
signatory. This ensured state willingness to participate in the court versus a court
empowered under a universal system of international law governing all of
international society (universal jurisdiction). Again, this reiterates the contradiction of
an international society composed of sovereign states but guided by an ideology of
consensus as well as an international system of laws that are being viewed as both *jus
cogens* and *erga omnes*.

The Rome Conference was the result of compromises and efforts from the
PrepCom and Plenipotentiaries Meetings. However, the issues and conflicts remained
last minute battles as states attempted to form the ICC to their ideology and interests.
The same LMS held to their positions and the US continued to oppose many of the
Articles being formed that involved jurisdiction, empowerment, and universality. The
creation of the Rome Statute (in response to conflicts within international society)
was a step to address conflicts occurring between and within states. However, just as
the structural contradiction model illuminates, attempts to address conflicts vis a vis
law creation, can lead to further conflicts as they ignore the larger structural
contradictions.
As jurisdiction represents the core contradiction within international society and international law\textsuperscript{18}, it is often the central foci of further conflicts. This was the case with jurisdiction and sovereignty for the Rome Statute development and the ICC. As international law is a part of the international system, it reflects the fundamental contradiction, which then becomes inserted into charters, treaties, and resolutions. Simply stated, international law is the language that states use to attempt to resolve competing legal interests. This is further complicated with the distinction between law that finds its origin in a normative will (binding because it is imposed by that will) and positive law (multifaceted idealistic requirements that are asserted by social conscience) (Austin, J. 1867). Thus, the issue of jurisdiction is at the root of a contradiction within international law. For example, the notion of jus cogens and/or erga omnes represent the principles that there exists a set of norms or morals within humanity and should thus be represented as compelling. However, erga omnes or flowing to all contradicts the composition of international society and international agreements (consensual positivistic model of law).

According to Chambliss’s model, the passage of the Rome Statute displays the symbolic use of politics wherein proposed law (an entire legal institution) is made malleable to existing proposals and erroneously consecrated as a culmination of shared interests\textsuperscript{19}. This is done through consciously designing compromises that do not hold to the original intentions of the political or legal issue to appease the opposition. Simply stated, it is the alteration of a proposed law (legal system) that is

\textsuperscript{18} See Appendix for Chart illustrating this contradiction and the place of jurisdiction within this system.

\textsuperscript{19} To revisit Chambliss’ model see pages 21, 22, 23, and 24.
made malleable to opposing legal proposals and then consecrated as “shared interests” (Chambliss and Katz, 1993). The central compromise involved weakening the court’s jurisdiction to appease the US while maintaining a portion of the original principle and intention of the Rome Statute: an international criminal court with universality for the most serious crimes against humanity and those that threaten the very order of international society.

The passing of the Rome Statute does indeed signify a major change in political ideology of the international society and for international law. However, many of the same obstacles that blocked earlier attempts to establish a court were temporally resolved, not by addressing the contradiction of international society or international law, but by compromises and the creation of a new system of laws and justice that is only as strong as the compromises allow. The Rome Conference was a point in history that revised the existing relationships between states, political interests, and institutions such as the UN. However, the process of appeasing conflicts by making malleable the proposals for a universal Court does limit the potentiality of the ICC (all the while being conveyed as an institution that is a culmination of shared interests). This revision of political and state relationships has created conflicts due to the structure and ideology of the ICC in opposition to existing international law and international societal relations. Thus, new conflicts will and have arose that are centered on issues of sovereignty, jurisdiction, and erga omnes. These conflicts orbit around the US in particular.
The United State’s Position and Proceedings

A consistent pattern of US positions and objections subsist throughout the historical efforts to establish an ICC, the development of the Rome Statute, and recent US policies aimed at thwarting the efficacy of the ICC. Historically, the US maintained the position that an international system of justice was desirable. However, the ideology behind establishing an ICC for the US was not all-inclusive. The US wanted a court for the "others" but insisted the jurisdiction could not impinge on the US, its policies, or any state actor (see history chapter on WWII efforts to establish an ICC, Terrorism Treaty, Trinidad and Tobago’s call for an ICC, the development of the Rome Statute, and Congressional Hearings). The issue of sovereignty has served two primary functions for the US. It has served as an impetus of protection against being subjected to a universal system of international law and it has served as a tool for justification and neutralization for the recent US domestic and foreign policy legislation aimed to ensure the US would be free from prosecution for even the most heinous crimes against humanity.

The US withdrawal and legislative undermining of the ICC not only reflects the US ambiguous relationship with international law but also reveals some of the inherent limitations of the ICC as an international institution of formal social control that is to represent the common good of the international society vis a vis international law (e.g. limited jurisdiction). These limitations are reflected in the previous compromises that were made in the development of the Rome statute and are centered on the fundamental contradictions of international society (issues of
sovereignty) and international law (compelling and flowing to all). The position of the US towards the ICC is contentious at best. The US takes the dubious position that humanity is best served by the US remaining free from the limitations imposed by the Rome Statute. US Ambassador Scheffer argued at the international level that,

The consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions (Ambassador Scheffer, 1999)

On July 23 1998, the position of the US was boldly stated in the Committee on Foreign Relations of the One Hundred Fifth Congress Session. The members present included Senator Helms, Gramm, Ashcroft, Feinstein, and Biden and Ambassador Scheffer. The International Operations Committee began their deliberation of the ICC with a statement made by Senator Helms. In his opening proclamation Helms states:

Given this Court claims universal jurisdiction—in other words, the right to prosecute United States citizens even though the US is not a party to the treaty—it is important for Congress and the American people to become appraised of the details regarding the Court…Now, while I am relieved that the administration voted against the Treaty in Rome, I am convinced that it is not in itself sufficient to safeguard our Nation’s interests. The United States must aggressively oppose this court each step of the way, because the treaty establishing an international criminal court is not just bad, but I believe it is also dangerous. The fact remains the most effective deterrent is the threat of military action; and this court is undermining the ability of the United States to do that very thing (Senator Helms, 1998: 2-3).

This statement indeed reflects the conflict of jurisdiction within an international society composed of states with divergent political interests and agendas. It is this ideology displayed by Helms that illustrates the means that the US (Bush
Administration) will soon take to undermine the ICC and protect what the US believes its given right: sovereignty.

On December 31st, 2000 President Clinton, as a political gesture, signed the Rome Statute. However, this proved to be a façade as the former President claimed the treaty was “significantly flawed”, based on his ongoing concern over the court’s jurisdiction. Clinton de-legitimized his symbolic support further by recommending to his successor that the Senate not ratify the treaty (CICC). His actions reflect the use of symbolic political gestures, which are designed to appease a conflicting force that was not ignorable: the US Delegate (Scheffer) and members of Congress (such as Senator Helms and Senator Gramm) and members of international society (NGO’s, CICC, and allies that were in support of the court). President Clinton had originally intended on supporting the Rome Statute with a vote in favor on July 17th, 1998. However, the US Delegate and Ambassador Scheffer failed to do as the Administration wanted. This is revealed in the Congressional Hearings by Senator Gramm as he stated:

It is no secret that the United States walked away from this treaty negotiated in Rome to establish an permanent United Nations international criminal court. That was certainly the right thing for you to do. I appreciate you having done that. I am aware that the Administration was eager to sign that treaty, so the very fact that you, Mr. Ambassador, declined to do so speaks volumes about how unwise this treaty really is (Senator Gramm, 1998: 5).

The overwhelming non-support by the US Congress helps to explain Clinton’s last minute signatory to the Rome Statute with reservations. The presence of Senator Ashcroft and his position further displays the ideology behind the current Bush
Administration as well as the issues of the contradiction of an international society.

Ashcroft states:

If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats (Senator Ashcroft, 1998: 8).

The Bush Administration’s determination to undermine the ICC is demonstrated by the political and legislative maneuvering that has taken place during their term in office. The actions of the Bush Administration reflect the dialectic nature of international law (as a system that incorporates the broader political system). The establishment of the ICC hindered the political interests of the Administration, thus the US responded with a number of attempts to thwart the Court. In an effort to restrict cooperation with the Court, on 28 November 2001, President Bush signed into law H.R. 2500 (Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act) that contains amendment Section 630 which prohibits the use of appropriated funds for cooperation with, assistance, or other support to the International Criminal Court or its Preparatory Commission. The legislation of HR 2500 was a political move by the US to restrict the use of military finances that supported any action for the ICC. In March 2002, Pierre Prosper, US Ambassador at large for War Crimes, testified before the House International Relations Committee calling for abolishment of war crime tribunals in the Hague and Arusha by 2008 (CICC Monitor, 9-2002). The Bush Administration then submitted a letter to the UN on May 6th, 2002 that “formally declared US intention not to ratify the Rome Statute,
and renounced any legal obligations arising from its signature of the treaty” (CICC, Documents 2002).

The Bush administration attempted to exempt former US Ambassador to the UN, Richard Holbrooke, from testifying before the International Criminal Tribunal for the former Yugoslavia in the trial of Slobodan Milosevic. The Bush administration was reported as being “wary of setting any precedent of senior US officials testifying before international courts, particularly with regard to the International Criminal Court” (CICC Monitor 9-2002).

On 2 August 2002, President George W. Bush signed the supplemental appropriations bill, making the American Servicemembers’ Protection Act binding US national law. The American Servicemembers’ Protection Act (ASMPA) has been dubbed the “Hague Invasion Act” (CICC 2002, Documents). The ASMPA restricts: (1) US cooperation in any comportment with the ICC, (2) Participation in UN Peacekeeping, and (3) giving military assistance to most countries that ratify the Rome Statute. Section 2005 of the ASMPA restricting the US from UN Peacekeeping missions is broken into several aspects providing the US “legitimate legislation” for a coercive tool to de-legitimize the efficacy of the ICC. This includes (1) the UN Security Council exempting US armed forces from international prosecution, (2) US troops to only operate in non-party states of the ICC, or (3) a state wanting participation in peacekeeping efforts must enter into the US Article 98(2), or (4) US national interests supersede its opposition to the ICC. Section 2007 prohibits US military assistance unless that state would enter into a bilateral agreement, Article
The ASMPA had been in the works for nearly two years, as the US feared the jurisdiction of the ICC. On June 14 2000 in the US Senate the discussion of servicemen and issues of jurisdiction was opened. The opening statement made by Chairman Helms displays the concern over jurisdiction with:

Now then, with the establishment of a prominent International Criminal Court drawing nearer and nearer, the fact that American Servicemen and officials may one day be seized, extradited and prosecuted for war crimes is growing. And indeed, that day may have come (Chair, Senator Helms, 6/2000: 1).

The US did not stop at domestic maneuvering to suppress the efficacy of the ICC. The Bush Administration put substantial pressure on the UN to ensure immunity from the ICC’s jurisdiction by threatening to end all relief aid to Bosnia and Herzegovina. The timing of the US’s demands for immunity were enhanced by the costs of US aid withdrawal to the renewal of the United Nations Transitional Administration in East Timor (UNTAET). The result of the pressure put on the UN and the international community resulted in a controversial UN resolution. On 12 July 2002, the Security Council voted on resolution 1422 granting peacekeepers from non-State Parties a one-year immunity from prosecution by the ICC. Resolution 1422 has been viewed as an attempt by the US to undertake a multifaceted approach in its efforts to prevent the functioning of the ICC as it was intended (US Ambassador John Negroponte, 7-12-02). On June 12th 2003 Resolution 1422 was up for renewal at the UN. The proposed Resolution 1487 would offer the US the same privileges of impunity granted in 1422. Ambassador James Cunningham, Deputy United States Representative presented the US position (USUN Press Release # 85 (03) June 12,
The US concern over sovereignty, jurisdiction, and laws of jus cogens and erga omnes are evident in Cunningham’s speech to the UN. He states:

The resolution is consistent with the fundamental principle of international law, the need for a state to consent if it is to be bound, is respected by exempting from ICC jurisdiction personnel and forces of states that are not parties to the Rome Statute. It is worth noting that the resolution does not in any way affect parties to the Court, nor the Rome Statute itself. Nor does it, as some today suggested, elevate an entire category of people above the law. The ICC is not “the law” ... It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating... I would suggest that even one instance of the ICC attempting to exercise jurisdiction over those involved in a UN operation would have a seriously damaging impact on future UN operations... The US has been and will continue to be a strong supporter of the tribunals established under the aegis of this Council. But unlike the ICC, those tribunals are accountable to the Security Council (USUN Press Release # 85 (03) June 12, 2003).

The UN approved extending the US exemptions for another year in Resolution 1487. Kofi Annan warned that this should not become a yearly ritual for the US. Resolution 1422 and 1487 further weakens the jurisdictional powers of the ICC and ensures further conflicts within the international society.

The US established bilateral agreement known as Article 98(2) is a response by the US to Article 98 of the Rome Statute. The precautions taken by the Preparatory Commission to recognize pre-dated international agreements resulted in a perceived weakness within the text of the Rome Statute (Article 98). This resulted in the misuse and misinterpretation that the US seized to pursue US interests and to further the de-legitimization of the ICC and limits the Court’s already limited jurisdictional powers. The US has drafted and circulated to over 100 countries a version of Article 98 (98,2) that would literally render the ICC ineffective in attaining jurisdictional authority over
US nationals, military, peacekeepers abroad as well as any national the US allowed into its own territory.

The US Article 98 Agreements (98,2) begins with the US “Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes”. The Agreement continues with the affirmation by the US of its intention to investigate and prosecute “appropriate acts”. However, the US is unable to prosecute persons covered by immunity agreements for all crimes that are included in the Rome Statute and the second state is not obligated to prosecute in its own court persons covered by this agreement. Crimes against humanity committed abroad are not crimes under domestic Federal law. Federal courts have jurisdiction over genocide committed abroad if committed by US nationals, but not US members of the Armed Forces or persons not US nationals. Beyond the legalist jurisdiction that formulates a contradiction in the US’s statement of ability and willingness to prosecute, the wording of 98 (2) states “where appropriate”. Amnesty International claims this is “indicating the decision to investigate and prosecute is a matter solely within the discretion of the USA and not a matter of a law” (AI,8/2002). Additionally, Article 98 (2) prevents US nationals and others from voluntarily serving as a witness in cases of genocide, war crimes, and crimes against humanity (AI 8/2002). One of the larger points of concern in the text of this Agreement is E (1) which defines persons as former Government officials, employees (including contractors), military personnel, and nationals of one party. This expands Article 98 (2) to include individuals that would not fall under the agreement’s purview. The US Agreement
continues with E (a-b) by proclaiming no person present in the territory of the Party be surrendered to the ICC, a third country, or expelled to a third country for purpose of aiding the ICC in its proceedings. The Agreement has made provision that if one party terminates the agreement, the agreement would still be valid for 1 year. The US has clearly expanded the definition and attempted to enlarge the scope of persons covered under Article 98 of the Rome Statute. The CICC states the delegates’ choice of terminology regarding “Sending State” was to ensure a consensus that this terminology would limit the use of Article 98 to those states that sent someone to another country under international agreement such as SOFA or an extradition treaty.

Interestingly, the Statute specifically addresses competing requests for the surrender of a person in Article 90 (4) that states:

If the requesting State is a State not Party to this statute the requested State if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court.

The Bilateral Agreements, Article 98 (2) are also based on the US fears of being held accountable to the ICC even though the issues of Universal Jurisdiction were limited by compromises. The US’s political and military interests required impunity. The solution sought out of fear was the impetus for returning back to inter-State relations with bilateral agreements. The US fear of prosecution was reflected in the 2000 Senate Hearings:

The FBI has warned several former US officials not to travel to some countries, including some in Europe, where there is a risk of extradition to other nations interested in prosecuting them...Moreover, this year for the first time we have seen an international criminal tribunal investigate allegations that NATO committed war crimes during the Kosovo campaign. And a month ago, in May, NATO Secretary General Lord Robertson submitted to a
degrading written interrogation by a woman named Carla Del Ponte, chief
prosecutor of the Yugoslavia War Crimes Tribunal (Helms, 6/2000: 2).

The results of the US attempts to overshadow international law and sidestep
legal obligations to treaties, charters, and statutes reflect the potential ineffectiveness
of the ICC due to its limited power, authority, and legal reach. These same
limitations are reflected in the withdrawal of Israel from the Statute and their
affiliation with the US on Article 98 (2). The international community’s concern over
Israel’s occupation of Palestinian territory was probably Israel’s incentive to side with
US attempts to further weaken the powers of the ICC (CICC 2002). Indeed, the
political nature of international law coupled with the creation of new laws often
results in new international conflicts. Not only is the US pursuing immunity from the
ICC, but also it is assertively “persuading” other states to ignore the legitimacy and
jurisdiction of the ICC. The Bush administration has effectively circulated fifty-one
Bilateral Article 98 (2) Agreements. Of those, forty-eight States have signed
(including ten State Signatories of the ICC (s), twenty-two State Party Members of the
ICC (sp), and sixteen non State Parties (n)) (CICC, 2003). Currently the forty-eight
States that have signed these impunity agreements include: thirteen African States,
six Latin American States, thirteen Asian States, six Pacific States, six European
States, and four Middle Eastern States\(^21\) (CICC, 2003). The Bilateral Article 98 (2)
Agreements reflect the limited Jurisdiction of the ICC but it also reflects the larger

\(^{21}\) The list includes: (SP) Romania; East Timor; Tajikistan; Marshall Islands; Honduras; Gambia;
Djibouti; Nauru; Democratic Republic of Congo; Sierra Leone; Gabon; Ghana; Albania; Bosnia-
Herzegovina; Bolivia; Uganda; Mongolia; Togo; Mauritius; Panama; Cambodia; Macedonia; (S) Israel;
Dominican Republic; Palau; Uzbekistan; Bahrain; Georgia; Madagascar; Philippines; Egypt;
contradiction based on issues of sovereignty within the international society and the
contradiction of the system of international law. The contradictions have led to
conflicts that were addressed by establishing the ICC. However, the ICC was formed
through mass compromises without addressing the aforementioned structural
contradictions. The newly formed international system of justice and its
corresponding laws led to further conflicts which were attempted to be resolved (for
the US) with the creation of a Bilateral Agreement (Article 98 (2)). This in turn, has
led to further conflicts within the international society, as members disagree with the
US’s actions. The creation of the ICC, a culmination of divergent political interests,
principles of historic laws, and ideologies of the past confronted one another. The
question to be addressed regarding the compromises of jurisdiction, the US
withdrawal, and subsequent activities is how this all will affect the potentiality for the
ICC to be a proficient constraint or system of justice.
CHAPTER IV:

CONCLUSION

For a century, attempts to establish a permanent ICC were hindered by the contradictions of international law and international society. The first proposals by the International Law Association and the International Red Cross were vehemently opposed as the inherent political nature of international law and society held to the ideology that international law was founded on inter-State relations. The fundamental issues of sovereignty coupled with political and economic interests were in direct conflict with the proposals for a permanent internationally empowered criminal court. As international laws (treaties, charters, and resolutions) were formed under the ideology of an international society, conflicts continued to erupt: Franco-Prussian War, WWI, and other intra/inter state conflicts. States occupying other states, violating inter-State agreements, and competing economic interests failed to be constrained. Further conflicts arose. These were addressed by enhancing international law and by new proposals for an ICC. However, the political nature of international law, the contradictions of an international society, and the contradictions of customary law and existing codified laws limited the extent that an ICC would be considered. Instead, \textit{ad hoc} institutions were put in place. Again, the process of compromises and laws made malleable for the purpose of being presented as a consensus of interests failed to address the underlying contradictions of a growing international society and international law.
The atrocities and mass scope of WWII brought some ideological and substantive changes to the relations of international society and for international law. However, the concept of an ICC remained a distant hope as the primary contradictions of international society being composed of sovereign territorial states and the need for a universal international system of criminal justice remained. The *ad hoc* IMTs were the substitute for the proposed ICC. The Nuremberg Principles did indeed lead to a major ideological change for international law. However, this only reiterated the contradiction between the concept of customary law as *jus cogens* and the need for these Principles to be *erga omnes*. During the course of the “cold war”, international organizations contributed somewhat to the process of codification of international law for the development of an ICC. However, the political nature of international law and society within the historical context of a “cold war” and growing international conflicts hindered the furtherance of establishing such a court.

By the 1990’s the ideology of an “international community”, international law as universal, the end of the “cold war”, and growing concern over global relations, focused new attention on the concept of an ICC. However, as the preceding analysis illustrated, the underlying contradictions of international law and international society still impeded this process. Many divergent proposals and compromises led to the Rome Statute. This did not resolve the conflicts or contradictions but instead fueled the dialectic process. The result of attempts to resolve conflicts via new laws that conflict with existing laws and traditions can lead to new conflicts such as the US actions towards the ICC.
Fueled by hope and pessimism, the potential of the ICC to fulfill its mission to end impunity or to be seen as a legitimate body of justice remains. The hope lies in the potential for the ICC to be malleable (Article 123) and to eventually fulfill the role of a universal system of justice, free from the inherent political nature of international law and international society. The pessimism lies in understanding the fundamental contradictions of an international society with independent states, divergent political, economic, cultural, and religious diversity coupled with an ideology of one society standing united under the rule of law based on universality. The need to resolve these contradictions and conflicting concepts seems to be a necessary pre-condition for the ICC to fulfill the mission many hope for.

The Potential of the ICC

The ICC does represent a major social change in international society. All previous attempts to establish an ICC were met with enough political resistance to result in ad hoc and non-empowered organizations. The Rome statute does provide the first concrete manifestation of a universal system of justice to address the conflicts of an international society. However, the conflicts (of yesteryear and today) are the result of the much deeper contradiction of an international society composed of sovereign states with deviating political interests, economic interests, cultural variation, and religious foundations. Just as Chambliss’s model illustrates, the creation of laws (and in this case an entire legal system) to address conflicts are often established, yet they fail to address the underlying contradictions of a system (international system in this case). During the Rome Statute negotiations, the
underlying contradiction of international society was addressed vis a vis debates over a universal system with universal jurisdiction versus a Court that is complimentary and with limited jurisdiction. Far from resulting in a Court of consensus, the ICC remains a culmination of compromises. Yet, for the first time in over 100 years, the Rome Statute does provide a permanent Court that may be utilized as both universal and complimentary. Albeit, it still falls short of addressing or resolving the underlying contradictions. The divergent political interests of states (economic interests, foreign policy interests, issues of power, and military interests) coupled with deviating cultural and ideological positions of an international society still exist and could be seen throughout the negotiations. The result is an ICC that is not completely acceptable to either the LMGs or the opposition (mainly the US). This, along with the limitations of the ICC suggests a dismal picture for the immediate or near future of the Court as an effective constraint mechanism. However, the ICC does have the potential to become an empowered universal Court.

The ICC has the potential to change interstate power relations. The “weaker” states have for the first time a direct connection to the Court as a member for legal settlements or charges against more powerful states. The potential to balance the power differentials of the international society is a promising possibility for the Court.

The establishment of the ICC, regardless of its limited jurisdiction, presents another

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22 States’ cultural differences compose a small part of the larger contradiction of an international society. Some states are hyper-capitalistic within their ethos (US) while other states’ ethoses are more cultural-capital based (China). The contradicting ideologies correspond with three main themes: the ideological international society composed of united values, interests, and goals based on a agenda, the current state of international relations based on consensual agreements with international law as a guide
optimistic prospect: it can become a customary law to the echelon of erga omnes. A treaty (Rome Statute) can become a part of customary law according to previous precedence set by international law and the International Court of Justice. The International Court of Justice states:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable amount of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were especially affected (ICJ: Continental Shelf Case, 1969)

Therefore, the Rome Statute in the future may be conceived as general customary law (such as the Nuremberg Principles) and reach a level of universal jurisdiction regardless of the wording or limitations of jurisdiction. The phrasing of the Treaty can then be altered under Article 123 of the Rome Statute. This article calls for the review of the Statute and allows for changes deemed necessary by the international society.

Article 123 states:

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purpose set out in paragraph 1, the Secretary-General of the United Nations shall upon approval by a majority of State Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a review Conference. (Rome Statute, 1999: 59).

for inter-state relations only and, the division between civil legal systems as the frame for international relations versus adversarial systems or complimentary systems versus universal systems.
The potential for a treaty or practice to become customary law is also perceived as not being limited to state practice but that *opinio juris*\(^{23}\) is sufficient for instant customary law (Morris, 1999). This is founded on the principle that instant custom (customary law) can be considered with virtual consensus of a Treaty. The potential of the ICC to become universal would be the first of many steps necessary to resolve the contradiction of international society. A universalistic system of justice would help to remove the underlying contradiction of an international society composed of sovereign states without legal permeable borders. It may also allow the emerging ideology of an international society (with new values of a united system) to be articulated, accepted, and legitimized which could give further legitimacy to the ICC and its stated mission: an international system of justice to put an end to impunity and the most atrocious crimes against humanity.

On the other hand, the potential of the ICC is hindered by the limitations of jurisdiction based on issues of sovereignty. This was the case of the often-embittered negotiations of the Rome Statute and is evident by the US withdrawal, opposition, and flagrant actions aimed to impede the ICC. Due to the conflicts and the contradiction of an international society the ICC has limited ability to exercise jurisdiction. This can mean that many of the most heinous crimes will potentially not fall within the jurisdiction of the Court. These include the crimes of the past (Article 11), those committed in the territory of a non-party state or by a national of a non-state party (Article 12), and certain war crimes (Article 8 and Article 124). The

\(^{23}\) Of the opinion that it is necessary law by the majority of states or customary state practice used by the majority of states.
Articles as they stand are indeed limiting for the ICC however, had the US attained all of its positions the Court would only be empowered vis a vis the Security Council and would be no more than previous courts: symbolic and a tool for the victors and superpowers. Previous courts have had jurisdiction over state parties only. In general, states have not relinquished jurisdiction to these courts concerning themselves and were only utilized for the “others” or as *ad hoc*.

The “traditions” of individual states within an international system is manifest in the historical trends of the US position for establishing an ICC. With each formal proposal made for an ICC, the US has been opposed, claiming the dominance of state sovereignty over an international system of justice that it would be subject to. The proposal by France, after WWI, was met with reluctance and opposition by the US. The US also failed to become a member of the League of Nations at this time. In 1945, after WWII, the US held a momentary position of support for a universal system of justice (and jurisdiction). However, this support was limited to the German perpetrators of genocide and war crimes and was quickly retracted when the proposed court would pertain to the US. The US failed to support the establishment of an ICC throughout the “cold war era” as it pursued its own self-interests, economic gains, and strategic and military expenditures. Issues of sovereignty, universality of jurisdiction, a system of complimentary, and pre-conditions of consensus have been the political and ideological stand for the US’s previous objections and lack of support in establishing an ICC.
Considering these structural weaknesses of the ICC the stated mission of being “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” (Preamble Rome Statute) may be more ideological than pragmatic. Beyond the pragmatics of the ICC, the theoretical models suggest that as the underlying contradiction of an International Society goes unresolved, the temporal attempts to settle conflicts will continue through the generation of expanding or creating new laws\textsuperscript{24}. As the aforementioned Article 123 enables such change, it may well be the case that future conflicts will continue to be resolved by expanding the Rome Statute Articles at the expense of addressing the underlying contradiction of international society.

**Limitations**

As with any research, this thesis has limitations that must be stated. Qualitative methods are considerably more valid than some forms of quantitative methods but lack reliability due to the inherent danger of subjective and speculative interpretations that cannot be completely controlled for. Most researchers attempt objective and value free interpretations; however, the effects of individual values and views are still present in the researcher’s interpretations. Therefore, it must be understood that qualitative research does create the inherent danger of subjective interpretation. By acknowledging the inherent values and views a researcher brings with his/her interpretations, a safeguard has been established by proclaiming the theoretical notions and frameworks to be utilized in the process of interpretation for

\textsuperscript{24} Examples of this include the two UN Resolutions granting immunity for US “peacekeepers” from the Rome Statute jurisdiction and US Bilateral Agreements.
this research (Vaughn, 1992). Other limitations of this study include the inability to generalize. It is case specific and cannot be generalized to other socio-historical studies. With any historical study, serious errors are possible when archival data is utilized. However, the potential for errors of archival data can be controlled through data triangulation. Archival information contains several innate flaws (Berg, 1998). Examples of this include missing elements in official documents or missing portions of such documents. For this reason any research utilizing archival data is subject to receiving or attaining only partial information. This then limits what can be analyzed. The other side to this limitation is the researcher’s decision of what to analyze structures what is sought after in archival collections.

The process of sedimentation of archived information also limits this study. The sediment in archives is the result of people defining certain materials (and excluding other material) as “worth keeping” in archival situations (Hill, 1993). This includes primary sedimentation in which individuals or organization create, save, collect, or discard material. The deposit of archived information is then reliant on what becomes “deemed” as relevant information. This puts archival data at risk for incomplete or subjective access (Hill, 1993). This has been a problem with this study as many of the archived documents are no longer available due to being transferred to basements (Ann Arbor Library, University of Michigan) and have been damaged or lost. Other documents have been lost in the process of being transferred to microfesh and unable to be found.
Other limitations include the compartmentalization of social agencies and international organizations that contribute to the complex nature of assessing the intent, impact, and social context of the political decisions that created, administered, proposed, and/or ended the attempts to embody an ICC. Specifically, the multitudes of actors, agencies, and interdepartmental organizations, can contribute to an overwhelming and complex context that will leave some areas of analysis inaccessible or incomplete. The temporal nature of political representatives and active social agents will also be reflected in any analysis attempting to provide a heuristic case study. Finally, the recorded documentation within international documents will seldom reflect the political and conflicting activity that occurs “behind the political curtain”, shrouding the political deliberations that may have influenced the policy makers decision (Bassiouni, 1997). Specific commentaries and committee meetings dialogues were unattainable for this research. Documents attained for this research were limited to published formal documents by the United Nations and the League of Nations that lack the dialogue of members and specific details of debates surrounding key issues of this research (jurisdiction, compromise processes, and arguments of sovereign. Therefore, a “true” and complete history of the journey to an ICC cannot be written at this time.

**Future Research**

Due to the scope of this project, many unanswered questions and details remain for future research. Each historical contingency (attempt to establish an ICC) could be expanded on to create an exhaustive analysis for that specific historical
context. With the availability of time and funds, this thesis could be expanded to include interviews of participants in the Rome statute negotiations. In-depth searches for hidden agendas, memos and unpublished documentation of the conflicts that occurred during the negotiation process could provide more insights into the political ideologies and interests that influenced negotiations for the ICC.

New research opportunities will be available when the ICC begins to take cases. Research could also focus on the organizational structures of the bureaucratic system of the ICC. This could include research on the issues of prosecutorial discretion, the role of the Security Council, and or international support for the ICC. Another need for future research includes the concept of customary law regarding if/or when the ICC attains the level of jus cogens, expanding the jurisdictional territory of the ICC without a new treaty. These suggestions are but a few areas that future research on the ICC may take. However, as the ICC is a new international body, proposing a very different ideology to international society and for international law, the potential for future research is far-reaching.
APPENDIX:

**International Society**

Contradictions

<table>
<thead>
<tr>
<th>Ideology</th>
<th>Existing Relations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consensus</td>
<td>Independent Sovereign States</td>
</tr>
<tr>
<td>Shared Values</td>
<td>Self Governing</td>
</tr>
<tr>
<td>Shared Goals</td>
<td></td>
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<tr>
<td>Common Interests</td>
<td></td>
</tr>
</tbody>
</table>

**Conflicts**

Addressed by proposing court

Based on ideology of international society

Universal Jurisdiction

**Conflicts**

**Jurisdiction**

Universality

Issues of Sovereignty
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