Department of Political Science

Bachelor Thesis

International Criminal Court
- A mechanism of enforcing international law -

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Abstract

Bachelor Thesis, Department of Political Science

Title: International Criminal Court – A Mechanism of enforcing international law -
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Introduction: The accomplishment in Rome in 1998, to create a treaty for a permanent International Criminal Court, is an event in a millennium. The twentieth century has been a bloody era, and only a trial can help teach respect for humanitarian standards. Human history has been witnessed with atrocities such as genocide, war crimes, and crimes against humanity. Human wrong have been pledged against fellow human beings, whether in times of peace or in times of war, and often in a widespread manner or in a systematic manner.

Problem: Why is enforcement of the international law necessary for efficiency? Does ICC meet the purpose of enforcing international law?

Purpose: The purpose of this research is to examine the effectiveness of the enforcement of international law, and to study ICC’s effectiveness to enforce international law.

Method: The study is built on a qualitative and case study. The reason why I have chosen the case study method is because it gave me new perspectives while I examined and analyzed the topic and got more detailed knowledge. The qualitative research method is based on semi-structured interviews with individuals who studies or works on this particular field.

Results and conclusions: The results present that obeying international law is the obligation of the agreement between states, and it saves the credibility that states have in the international affairs. In this case, even if the creation of the ICC was a historic achievement, the international society must continue its efforts to ensure that the court has the necessary support to distribute justice as efficiently and fairly as possible.

Keywords: ICC, International Law, Enforcement, Rome Statute, Legitimacy.
Abbreviations

AU - African Union
IHL - International Humanitarian Law
ICC - International Criminal Court
ICTY - International Criminal Tribunal for the former Yugoslavia
ICTR - International Criminal Tribunal for Rwanda
ICJ - International Court of Justice
ICL - International Law Commission
NGO - Non Governmental Organization
CIL - Customary International Law
RBH - Republic of Bosnia and Herzegovina
FRY - Former Republic of Yugoslavia
RPF - Rwandan Patriotic Front
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1 Introduction
1.1 Background

The international society has been penalized by the recent history of brutal civil wars, where the tactic of war includes the violation of humanitarian standards. The accomplishment in Rome in 1998, to create a treaty for a permanent International Criminal Court, is an event in a millennium. The twentieth century has been a bloody era, and only a trial can help teach respect for humanitarian standards. Human history has been witnessed with atrocities such as genocide, war crimes, and crimes against humanity. Human wrong have been pledged against fellow human beings, whether in times of peace or in times of war, and often in a widespread manner or in a systematic manner.

The basic role of international law is to organize for the cooperation most actors request to have most of the time. Modern international life would be impossible without the understanding and rules bound up in international law. Now, it is hard to imagine the world where diplomats are unable to represent their governments to other states, signals of radio and television jamming each other across borders, students is unable to go backpacking or study in other countries because they cannot take visas. 1

International law’s most ambitious and interesting role is the outlawry of war. If a war begins, international law is prepared so that if *jus ad bellum* (the law to begin the war) is violated, than *jus in bello* (law of war) goes into effect. This reform was to move political clash into diplomatic and judicial channels. 2

The reason behind the creation of International criminal tribunals were created for prosecuting individuals responsible for the heaviest violations of international humanitarian law illustrated in the Declaration of human rights, the Hague Conventions, Geneva Conventions, the International Covenant on Civil and Political Right, and the Convention against torture and Cruel. 3

The reason for international cooperation in law enforcement, during the last decade, is simple and had assumed an increasingly important role because of development in transportation, communication, and finance have increased international commerce and

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1 Conway W. Henderson, “Understanding international law”, 2010, Wiley-Blackwell s.6
2 Conway W. Henderson, “Understanding international law”, 2010, Wiley-Blackwell s.9
tourism, but have also increased criminal exploitation and illicit commerce of national boundaries. Frequency of international crime has grown speedily during the last fifteen years and poses considerable problems for law enforcement worldwide. 4

1.2 Purpose and Research questions

The study aims to examine the effectiveness of the enforcement of international law, study ICC's effectiveness to enforce international law, as well as the advantages and disadvantages brought by the ICC. Its primary objective is to obtain greater knowledge and understanding of the researchers' thoughts and theories about international law and the ICC as a mechanism with its pros and cons. In order to fulfill this purpose, the following questions need to be answered:

1. Why is enforcement of the international law necessary for efficiency?
2. Does ICC meet the purpose of enforcing international law?

1.3 Research Design

The study will be built on a qualitative and case study by analyzing the material with relevant theories (literature, articles, newspapers and so on), as well as interviewing two university lecturers who have researched the subject of international law, two officials who work in the Swedish Ministry of Foreign Affairs, and one journalist who has showed interest in this field.

The case method is constructed in that the researcher writes general questions that resonate the research objective and that these questions are asked of each case under research to make systematic comparison and cumulation of the findings of the possible cases by guiding and standardize data collection. 5

5 George, AL; Bennett, A. ”Case studies and theory development in the social sciences”. Cambridge, Mass.; London : MIT, cop. 2005, 2005 s.67
The case study is an empirical study that examines one or more phenomena that lends itself more to the why and how, as a descriptive and explanatory purposes. A case study using questions about how or why, provides an opportunity to have control over the substance being studied, and have detailed information, but one drawback of the case study method is that generalization is quite easy to occur and can be difficult to delimit the study area. The reason why I have chosen this method is that it will give me new perspectives on the big picture that will expand my and reader's understanding of my designated area of concern, and to examine and analyze the topic to get more detailed knowledge.

They are some requirements that case study must meet to conquer the difficulties such as: the cases in a given research must be instances, for instance, of only one phenomenon. Second, a well-marked research objective and appropriate research design to achieve that objective should guide the selection and analysis of a single case or several cases. Third, case studies need to employ theoretical interest for purposes of explanation. The method requires also that the research cases to be focused, which means that cases should be undertaken with a specific research objective in mind of a logical focus convenient for that objective.

Case study offers a rich picture with many kinds of observation coming from different intersection, from different kinds of information. What case study offers is a boundary to the research. And it offers to see something in its completeness, looking at it from many aspect and angels.

The meaning of qualitative questionnaire survey is to research material collected by asking or talking to people. It is one of the most used methods in the social studies.

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6 http://www.hsv.se/densvenskahogskolan/sveengordbok/terminer/f/fallstudie.4.7852b29111e5fd61e597ffe299.html
8 George, AL; Bennett, A. ‘Case studies and theory development in the social sciences’. Cambridge, Mass.: London : MIT, cop. 2005, 2005 s.69
9 George, AL; Bennett, A. ‘Case studies and theory development in the social sciences’. Cambridge, Mass.: London : MIT, cop. 2005, 2005 s.70
10 Thomas G. ‘How To Do Your Case Study : A Guide For Students And Researchers’ [e-book]. Thousand Oaks, Calif.: Sage, 2011 s.21
Qualitative studies help us to get a deeper insight into a problem area that is about describing how common are different responses in a particular population. It is a respondent investigation because lecturers own thoughts on international law is in focus. What respondent research based is that the researcher wants to know what each respondent think and feel about it being investigated and, therefore, the same questions basically the same questions to all respondents. Later, the researcher wants to find different patterns in responses and describe why or how different the answers are the same or different.\textsuperscript{13}

Qualitative interviewing is dynamic and flexible when it comes to contrast to structured interviewing.\textsuperscript{14} Interviewers, in each case, try to establish rapport with sources through repeated contacts over time and to establish a detailed understanding of their experiences and perspectives.\textsuperscript{15}

It is very important to identify the limitations of the interview. First of all, people say and do contrasting things in different situations. You cannot conclude that what an individual says during an interview is what that person believes or will say or do in other whereabouts, just because the interview is a particular kind of situation.\textsuperscript{16} Second, if the researchers do not precisely examine people in their everyday lives, they will be underprivileged of the context necessary to understand many of the aspect in which they are interested. Becker and Geer (1957), in their comparison of attendant observation and interviewing, listed a number of defect of interviewing in general point in aspect of that interviewers are in favor of to misunderstand informants’ language, informants are unable or unwilling to articulate many important things, and as a result of that, interviewers have to make assumptions about things that could be observed, and some of the expectations will be incorrect.\textsuperscript{17}

\textsuperscript{13} Essaiasson, Peter et al (2012) ‘‘\textit{Metodpraktikan}’’. Stockholm: Norstedts Juridik AB s.211-216
\textsuperscript{14}Taylor, S, & Bogdan, R. ‘‘\textit{Introduction to qualitative research methods : a guidebook and resource}’’. New York, N.Y. ; Chichester : Wiley, 1998. s.89
\textsuperscript{15}Taylor, S, & Bogdan, R. ‘‘\textit{Introduction to qualitative research methods : a guidebook and resource}’’. New York, N.Y. ; Chichester : Wiley, 1998. s.90
\textsuperscript{16}Taylor, S, & Bogdan, R. ‘‘\textit{Introduction to qualitative research methods : a guidebook and resource}’’. New York, N.Y. ; Chichester : Wiley, 1998. s.91
\textsuperscript{17}Taylor, S, & Bogdan, R. ‘‘\textit{Introduction to qualitative research methods : a guidebook and resource}’’. New York, N.Y. ; Chichester : Wiley, 1998. s.92
Despite these limitations, Becker and Geer state that interviewers can in fact benefit from an awareness of these limitations and maybe improve their batting average by taking explanation of them. 18

1.4 Research boundaries

One problem that can arise is that it becomes difficult to discern the material that I have founded. There is much information and research on the subject I have chosen, but it is easy to insert into too much. As a measure so I could focus on relevant data, and to define the material. A distinction which I have already done is to focus only on the executive mechanism (ICC) and to analyze the challenges the Court faces, and the actors influence around the Court.

The topic of enforcing international law and the International Criminal Court as a mechanism of enforcing the international law is very broad. To get a much concrete answers to my research questions, I choose to set some boundaries, such as, in the part of the Ad Hoc Tribunals, I choose only three of them, because I have the perception, like many others, that these three Tribunals are the basis of the ICC establishment.

2 Previous Studies – Ad Hoc Tribunals

2.1 Nuremberg

The reason why the Allied forces were focused in the crime of aggression, was because they wanted to teach the Nazis a political lesson for having launched the war, but still they were not willing to investigate and if needed, to prosecute any of their own military personnel, which gave a controversial precedent for international justice. 19

The Allies affirmed their dedication to prosecute the Nazis for war crimes in the Moscow Declaration of November 1, 1943. The United Nations Commission of the Investigation of War Crimes was established to set the stage for post-war pursuance, which was consisted of representatives of most of the Allies and the Soviet Union, which laid the groundwork for the prosecution at Nuremberg.20

On August 8 1945, was the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis adopted, and was signed by representatives of the four powers. In October 1945, allegations were prepared on twenty-four Nazi leaders, and their trial began the following month. The jurisdiction of the Tribunal was confined to three sections of offense: war crimes, crimes against peace and crimes against humanity.21

Nazi war criminals were charged with genocide, but the phrase did not appear in the provisions of the Statue, but the Tribunal convicted them for crimes against humanity for the barbarity committed against the Jewish people in Europe. Weeks after the sentence, effort began in the General Assembly of the United Nations to push forward the law in this area. 22 A resolution was adopted in December 1946, declaring genocide a crime against international law and called for the preparation of a convention on this particular subject. Two year later the Convention of the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly, and the definition of genocide is incorporated unchanged in the Rome Statue of the International Criminal

Court (article 6), but despite that, Article 6 of the Convention claimed that trial for genocide was to take place before an adequate tribunal of the State in the territory in which the act was committed, or by an international penal tribunal. 

During World War II, more than sixty million people, primarily civilians, lost their lives. The German armed forces were charge with the premeditated murders of civilian population, and after the war, leaders of United States, Great Britain, France and the USSR - prepared the Nuremberg Charter which created the International Military Tribunal and was conducted in Nuremberg, Germany. The objective of this particular tribunal was the punishment of the major war criminals. The areas that the tribunal had jurisdiction was to adjudicate crimes against peace, crimes against humanity and war crimes. The establishment of the Nuremberg Tribunal was the jurisdiction over the person leading the indictment of twenty-four individuals. The argument of the defendants were that they were following the orders of the government, and in that case thus individual soldiers should not be held responsible of war crimes. The importance of the Nuremberg Tribunal as a part of the international law is significant because it established limits to State sovereignty and the principle of individual responsibility for inhuman military acts during wartime.

The Nuremberg Tribunal did not have any cooperation agreement because the Tribunal had its own police force and did not need to rely on other states to arrest the perpetrators, and it made the work of the Tribunal very easy compare to later Tribunals and the permanent ICC.

2.2 Yugoslavia

After the investigation of the UN, the Security Council, in 1993, established the International Criminal Tribunal for the former Yugoslavia (ICTY) in reply to Serious Violations of International Humanitarian Law committed in the territory of the former Yugoslavia as of 1991.

The federation of Yugoslavia comprised of diverse ethnic and religious groups, largely, Serbs, Croats and Muslims. The deaths of hundreds of thousands of person and

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23 Kastrup D, ''From Nuremberg to Rome and Beyond: The fight Against Genocide, War Cries, and Crimes Against Humanity”, Fordham International Law Journal, 1999
movement of millions, were a systematic acts of government-led violence by ethnic Serbs against Muslims and Croats. An investigation occurred during and after the war revealed violations of the humanitarian law and the Geneva Convention with the allegations of concentration camp, allegations of mass graves, torture, genocide and rape.

Many scholars argue to the fact that the ad hoc tribunals were used of the so called ’’Victors Justice’’. Victor Peskin argued that states uses tactics to limit a tribunal’s ability to realize justice in an evenhanded and fair manner. An example to this case is the delay of the state leaders to investigate into crimes that they are accused during a war, such as Franjo Tudjman, the former president of Croatia, who refused to cooperate with the ICTY and managed to escape prosecution. As a result, ICTY did not make any attempt to investigate his crimes until after his death. 25

The significance of the ICTY are that it is the first international war crimes tribunal since Nuremberg and Tokyo Tribunals, and it recognize rape as a crime of genocide and a war crime, and the governmental and military leaders can held responsible and individually liable for war crimes committed against civilian populations.26

### 2.3 Rwanda

The hostility between Rwanda’s majority Hutu and minority Tutsi rise to the surface in 1994, which led to the death of more than 800,000 Tutsis, between April and July by, Hutu civilians and military personnel. The government led by Hutu is charged with inciting Hutu civilians to rape, murder, torture and apply biological warfare in the form of HIV patient against the civilian Tutsis. After these actions, in 1994, the Security Council of the UN, created the International Criminal Tribunal for Rwanda (ICTR). On a request from Rwanda, in November 1994, the Security Council voted to establish a second ad hoc tribunal, charged with the pursuance of genocide and other serious violations of international humanitarian law that was committed in Rwanda and

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26 Naratajan, M. ’’ International crime and justice’’. New York ; Cambridge : Cambridge University Press, 2011., s.352
bordering countries during the year 1994.\(^{27}\) The resolution referred to the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights, and expressed the Council’s concern at the reports which indicated that genocide and other flagrant violations of international humanitarian law have been committed in Rwanda.\(^{28}\)

In the case of the ICTY and ICTR, both of the Tribunals have a mandatory cooperation arrangement with requires States to obey without improper delay with any request assistance, and unlike the ICC, the commitment to cooperate with the tribunals also extends to international organizations and their instruments that are able to executing the arrest warrants.\(^{29}\) For example, the case of Mrksic and Simic in the ICTY. In this case, it is worth to consider this possibility as an alternative enforcement measure to the ICC.

The Rwanda and Yugoslav Tribunals are basically joined at the hip, allocation not only practically identical statues but also some of their institutions. As a consequence, the uniformity of both prosecutorial policies occurred. These ad hoc tribunals encouraged the debates on the creation of an international criminal court, and the finding of the Tadic case, were incorporated into Article 8 of the Rome Statute of the International Criminal Court. But in Rome Statute was included the Article 7 also, declaring that crimes against humanity could be committed not just in wartime, but it can be committed in time of peace, such as the case at Nuremberg.\(^{30}\)

The establishment of ICTR as an ad hoc tribunal was to prosecute of person responsible for genocide and other violations of International Humanitarian Law Committed in the territory of Rwanda. What it is worth mentioning here is that the ICTR recognizes rape as both a genocide and as a war crime.\(^{31}\)

Same thing that happened in ICTY (Victor’s Justice) happened in Rwanda, when the Rwandan government limited the accountability of the state for barbarity committed


\(^{28}\) Kirsch Ph, ’’The Preparatory Commission For the international Criminal Court’’, Fordham International Law Journal, 2001


\(^{31}\) Naratajan, M.’’ International crime and justice’’. New York ; Cambridge : Cambridge University Press, 2011.,s.352-3
under the local justice project named gacaca, which was sponsored by the government, and was able to prevent investigations of the Rwandan Patriotic Front (RPF) soldiers, who killed thousands of people.  

3 Theory

3.1 Definition of International Law

The definition of international law is the collection of norms and rules that states and other actors feel a necessity to obey in their mutual relations and frequently do obey. Actors in international relations are the individuals and collective entities such as international organizations and states. Rules are often written and formal as a expectation of behavior, meanwhile norms are less formal expectations about appropriate behavior that are more often unwritten. Rabkin argues that international law is a very vague expression and people have different understanding of it, as the resent as 1970-es and certainly more than 100 years before that and if you read a book about the international law, it would say this is a law about relations between states, and they would often have the discussion that only states can be the subject of international law, and only state can assert rights under international law. The reason of that is because they didn’t want to interfere with other countries internal affairs, and what it means to enforce international law is that the state that feels injured by some other state doing something to it will complain and so you will have a state to state dispute. The injured state will maybe impose sanctions against the other state, or with military action. Article 38(1) of the Statue of the ICJ lists sources of international law such as international custom, international conventions either general or particular, general

33 Conway W. Henderson, “Understanding international law”, 2010, Wiley-Blackwell s.5
34 Interview with Jeremy Rabkin 2015.05.15
35 Interview with Jeremy Rabkin 2015.05.15
principles of law and juridical decisions. Such sources define how existing rules are repealed and how new rules are made.  

The international law is essential because it is also a mechanism to regulate the competing interests of the actors and bring their arrangement into the future. International law has a crucial role to identify the membership of an international society of states, where states are acknowledged recognition as members of the international society, which help states can engage other states over ambitious as well as bilateral interest through diplomacy and forums of numerous international conferences and organizations.  

Gerard Mangone wrote decades ago "The functions of international law, as in any system of law, are to assist in the maintenance of order and in the administration of justice". He believed that international law controls and channels the push and pull of politics, which can serve sometimes as an instrument to promote justice. Healey Bull believed likewise that international law provides justice for the international society as a whole, and it is not needed just as a support of major powers.  

Some theorist’s see international law as a primitive because international law has a deficit of a command feature, because sanctions are not available to punish lawbreakers, and that countries cannot be arrested and in a way, put in jail. Theorist like Thomas Hobbes stated that "where there is no common power, there is no law". Theorist of this alignment see the picture of the international law as step over international morality easily, that is actually ignored in the anarchical world.  

But reasons exist to reach a conclusion that international law is true law, because it is not based in commands back by sanctions byt instead comforts in voluntary compliance. International, similar to the domestic law counts in the cooperation of various citizenries to obey the law, because a government does not have enough police force to control every citizen, and in that matter the citizens obey the law because it is in their own
interest to do so. And international law is based in the exact logic as the domestic law. 40

States obey international law because it is in their interest of doing so, because it will make international law less costly critical. As the result of the international law, states can ship good across borders and expect payment, ships of one country will not be interfered from another country, or that states can send their ambassadors safely to foreign soil. 41

According to Baudet, international law should be ineffective. He don't trust international law because, according to him, international law is the result of the international interests of different countries. The challenge in theory is to develop international law to be above national interest. It is very difficult because we might agree in the principles, but then every international situation requires judgements, and that is very subjective, and there arises differences between national countries in the way in what way the questions are being viewed. 42

International law may be weak and imperfect if we compare to some national legal systems, in which case major powers, and in some occasions lesser powers, choose to use force which poses a problem for international law, but the development and influence are incontestable, with other ord, it is functionally useful. 43

The development of political science failed to give international law a framework for necessitate and channeling politics at the international level. Many international specialists prevents some imagining that international law could perform a similar role to law inside countries, especially considering the interactions among states over "who gets what, how, and when" which considers to be competitive, and in some cases conflictual. The realist political scientists which has a focus on dynamic international politics, has a pessimist way of thinking when it comes to international law and in a way either ignore international law or see it in an idealistic meaning. But E.H. Carr stated that law and politics, in practice may be different, but are binding intertwined. The meaning of the statement is that the interplay between law and politics at the

40 Conway W. Henderson, "Understanding international law", 2010, Wiley-Blackwell s.5
41 Conway W. Henderson, "Understanding international law", 2010, Wiley-Blackwell s.5
42 Interview with Thierry Baudet 2015.05.09
international horizon is a continuing process, with each assemble the meaning of the other. 44

Modern international law is inspired with the need to promote and protect human rights, to a mechanism of power. International lawyers should not protect the political space of brutal murderers, because it protects the perpetrator and not the victims. 45

International law is possible only by distinguishing that international law is created into the order of international relations. What we mean by order is the enduring pattern of behaviors and values which structures the relationships of actors over time. In this matter, the rules of international law help to create and perpetuate a world order. 46

3.2 Enforcement of International Law

Enforcement of international law, historically, was bilateral in that only persecuted state was designate to respond to a perceived breach if its rights. 47

The role of enforcement builds the effectiveness of international regimes, especially with the so called “trigger strategies” which can convince states to comply with international regimes although their lack of a higher authority to enforce those rules as long as the states cooperation are repeated indefinitely. 48

According to rational theory model, enforcement is considered as an unnecessary regime for efficacy because states comply with their international commitments even though the absence of international enforcement mechanism. In this model, states comply with their commitments because they are constrained to do so by powerful domestic electorate that prefers compliance.

Fortunately, the dialogue between political science and law professors is ongoing. The delay of acknowledgment of international law may have been as a result of a world government to develop and enforce the international law, because the acknowledgment and understanding of the international relations is not possible without distinguishing

44 Conway W. Henderson, “‘Understanding international law’’, 2010, Wiley-Blackwell s.3
46 Conway W. Henderson, “Understanding international law”, 2010, Wiley-Blackwell s. 6
that international rules actually exist and are very much essential. Argentina’s assault against the Falkland Island in 1982 and Iraq’s offensive against Kuwait in 1990 were defeated, partly, because other states saw these acts of force as illegal. In this course, Louise Henkin argued that law is a sizable force in international relations since states count on it, invoke it, and monitor it in every aspect of their foreign relations. 49

The description of enforcing international law begins with self-help, a practice of customary law that allows a state to enforce international law at its own desire, within certain restraint. Or using retorsion, a legal act by one state to challenge a wrongful act by another state, but not include armed force. the best known occurrence is the withdrawal of an ambassador for a time such as when the United Stated recalled its ambassador from Syria because of the interference of Syria in Lebanese affairs. 50

Reprisal is another tool of self-help enforcement, a disciplinary act that is normally illegal but considered justified under customary law by reason of another state’s prior offense. This kind of punishment must be similar to the harm experienced and balanced, such as the US seizure of Iranian gold in American banks in 1979. 51

Some of the muscle-flexing acts from states to enforce law are demonstrations and interventions. Interventions are a political concept rather than a legal one. Intervention is the domineering interference by one state in the affairs of another, sometimes containing the illegal use of force on the other states territory. And demonstrations are a display of military force to indicate a state is determine about its rights being respected, such as when a country blockades the ports of another country for various reasons. 52

The range of probability to enforce the international law has grown, because the self-help is no longer completely bilateral. International law today encompasses some obligations which entitle all states to take certain measures as a reply to a violation. 53 In some occasions, states are not entirely dependent upon self-help because international

49 Conway W. Henderson, "Understanding international law", 2010, Wiley-Blackwell s.4
51 Conway W. Henderson, "Understanding international law", 2010, Wiley-Blackwell s.91
institutions provide for a limited range of mutual enforcement mechanisms, such as UN Security Council.

The concept of sanctions includes a broad range of allowance that removes benefits and creates costs. However, sanctions are not always required to ensure cooperation, but only where they are needed where strong encouragement exists for non-compliance.\(^{54}\)

It is compelling how common it remains among observers of international law to draw assumption regarding its binding effectiveness from the vacancy of sanctions. Political scholars refer often to the lack of enforcement if international law to approve their view that international law is "epiphenomenal" which according to David Lederman "is a nice way of saying it is stupid".

It is worth mentioning that international law’s community is now truly a global. The legal legitimacy is a key factor because of a system of rules is to be fair, it must be securely fixed in a framework of requirements about how those rules are made, explained and applied. The legitimacy of international law for enforcement and compliance are crucial. The promotion of conformity does not begin with mechanisms, but it is in the process through which norms are established that one must create the foundations for ultimate conformity.\(^{55}\)

The states are bound to the outcome of the arbitration and if the loosing state doesn’t come along, than the winning state can impose trade sanctions. And almost everybody comes along because you never hear a state saying that I’m not enforcing arbitration because I don’t like the other country.\(^{56}\)

According to Rabkin, most of the times, the human rights are violated by the state itself, and when the individuals complain to the UN or other states, they don’t do anything because they say it is not of their concern. Saudi Arabia is a signatory to the convention on the elimination of all forms of discrimination of women. When they sign it they declared that they will follow the agreement, but they will follow the sharia to. Women are not allow to drive or go to the park. Every said never mind, because of their political

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\(^{56}\) Interview with Jeremy Rabkin 2015.05.15
interest. Because their relations with Saudi Arabia are important, the human rights in Saudi Arabia is not a concern to other states.\textsuperscript{57}

To enforce the law can be difficult because the understanding of enforcement implies that some dimension of coercion may be necessary to make a legal system work properly. Weak states rely massively on using force since their governments faces most of the time restive or rebellious populations, but successful and strong states use force with their citizens only on some moments because their society are generally loyal to the government and continuing to obey the law.\textsuperscript{58}

We are in a spiritual way, for the enforcement of the international law, but in reality we are not concerned about it. The criminal courts are a first serious effort, such as European Human Rights Court. But the people are not very committed to it, and they don’t seem to be very troubled with it.\textsuperscript{59}

### 3.3 Customary Law

The conceptual problem of customary law is the international practice is frequently chaotic and contradictory, because you cannot infer rules from fact and practice a normative pattern such as a rule.\textsuperscript{60}

It is cells that the protection of individuals from violations of human rights and humanitarian law depends on the mechanisms to enforce the law, and for decades the international law was without sufficient mechanisms to hold individuals answerable for the most serious international crimes. The punishment of breaches of the Geneva conventions or the Genocide Conventions or the customary law, depended most of the time on national courts, and that made it very difficult to pursuit the perpetrators because national courts were not able or willing to act because of the systematic violence.\textsuperscript{61}

Customary international law include two segments: consistent state practice and \textit{opinion juris sive necessitatis (behavior is required by law)}. Both of these two requirements

\textsuperscript{57} Interview with Jeremy Rabkin 2015.05.15
\textsuperscript{58} Conway W. Henderson, “\textit{Understanding international law}”, 2010, Wiley-Blackwell s.90
\textsuperscript{59} Interview with Jeremy Rabkin 2015.05.15
\textsuperscript{61} Kirsch Ph, “\textit{The role of the International Criminal Court in enforcing international criminal law}”, Washington College of Law, 2006
engage at a high level of generality, and decision-makers identify the rules of customary international law has to choose from among the daily activities and statements are formed in the titled of states. 62

Even if customary international law and treaties are categorization in article 38(1), they don't operate in isolation from each other. The articulation of states positions in negotiations can commit to the generation of customary international law, even if it is not codified in the same manner as a negotiated treaty text. 63

3.4 Legitimacy Theory

The theory of legitimacy has become one of the most cited theories within environmental and social accounting. The theory deals with structures of organizations have gained acceptance as a whole from society at large. Some scholars argue that legitimacy and institutionalism are basically the same, and sometimes are called synonyms of each other, because both phenomena empower the organizations, first by making them seem meaningful and natural. 64

The advancement of the general theory of international law to the legitimacy theory is made by Thomas Franc. The central premise of the legitimacy theory is that states obey rules anticipated by the accordance with the right process. 65

The problem of legitimacy theory is that the term that it has been used in some occasions quite loosely. It is not a problem of the theory by definition. But Suchman argues that legitimation has been “a blind man’s hammer”, when it comes to the building or to elaborate theoretical structures.66

62 Charlesworth H., Chinkin Ch., (2000). "The boundaries of international law", Manchester University Press, Manchester, s.63
63 Charlesworth H., Chinkin Ch., (2000). "The boundaries of international law", Manchester University Press, Manchester, s.64
64 Tilling M, "Refinements to Legitimacy Theory in Social and Environmental Accounting", Flinders University.
66 Tilling M, "Refinements to Legitimacy Theory in Social and Environmental Accounting", Flinders University.
The legitimacy theory also fails to provide a model of compliance so much as an affirmation that nations obey the law, and fails to clarify why legitimacy leads to compliance, and why states violate the laws with which they had already complied.67

3.5 Genocide, Crimes against humanity, War crimes

What refers to war crimes is the serious violations of customary rules and treats applicable in situations of international and non-international armed conflict. The rules and customs that address issues common to those serious violations is known as the laws of war, or international humanitarian law (IHL). It cover the set of regulations and rules found in The Hague Conventions that includes issues and combatants relating to the methods and the means of warfare, as well to the treatment of civilians, or are hors de combat (prisoners, wounded and sick of war).68

What refers to crimes against humanity is the act that violate fundamental tenets of human dignity such as extermination, murder, deportation, enslavement, and that are committed as part of a systematic attack against civilians which are committed during peace or war.

The crimes against humanity are divided in two sections: ’’murder type’’ crimes that can be perpetrated against civilian population, and ’’persecution type’’ crimes which can be perpetrated against collectivities on ’’political, national, cultural, ethic, religious, gender or other grounds that are universal recognized as proscribed under international law’’ and are guaranteed in the statue of the International Criminal Court (ICC).69

The concept of crimes against humanity has undergone a considerable evolution since its appearance in the charter of the Nuremberg Tribunal. The charter considered the concept as a ’’war nexus requirement’’ which refers to crimes against the peace and war crimes, and that only those crimes against humanity resulted from interstate aggression would be punishable. Genocide, as a concept, was the fists come against humanity to be de-linked from the so called ’’war nexus requirement’’, but the recent jurisprudential

68 Naratajan, M. ‘’International crime and justice’’. New York ; Cambridge : Cambridge University Press, 2011., s.299
developments indicate that such de-linking now implements to all crimes against humanity. A perfect example to that is the ICTY appeals chamber noted in the Tadic case, that defined that genocide is a settled rule of customary law, and that crimes against humanity no longer require a connection to international armed conflicts, and may not require a connection between crimes against humanity and any conflicts at any moment.  

Genocide considered being the most hideous crime against humanity. What distinguishes genocide from other crimes against humanity is the intentionality, which indicates the existence of an aggravated criminal intention to commit this offense in order to damage and crush the target group. The definition was included in the statute of the ICC, with our any changes.

According to the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide, the term genocide indicates to any of the following acts committed with the intention of destroying a national, ethnical, religions or racial group in part or in whole. The convention also made incitement, conspiracy, attempt and complicity in genocide punishable under international law.

It is worth to mention that the Genocide Convention was first used in international dealings when the Republic of Bosnia and Herzegovina (RBH) initiated the proceedings against the then Federal Republic of Yugoslavia (FRY) before the International Court of Justice (ICJ) in 1993.

The argument of The Republic of Bosnia and Herzegovina against the FRY was that former members of the Yugoslav Peoples’ Army together with paramilitary forces and Serb military had committed the acts that amounted to breaches of the Genocide Convention. After fourteen years of the process, the ICJ rendered a decision that Serbia had not committed genocide, had not been complicit in genocide, had not conspired to commit genocide or violation of its obligations under the Convention. The decision stirred great controversy. However, ICJ also ruled that Serbia had disregarded the obligation to prevent genocide that had occurred in Srebrenica, and had disregarded the

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obligations under the Convention by failing to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia (ICTY). 71

4 ICC

The series of meetings held by the United Nations for many years, led to the establishment of independent and permanent structure, the International Criminal Court (ICC), as a mechanism to deal with the gravest violations of international humanitarian law and gross international crimes and This idea became a reality in 7 July, 1998, when 120 nations agreed to the Rome Statute, and four years later, the ICC was established on 1 July, 2002. By the 2010, already 111 states have ratified the Rome Statute. The ICC is a product of the ad hoc tribunals of former Yugoslavia (ICTY) and Rwanda (ICTR). Stationed in Hague, Netherlands, the ICC offers an equality, accountability and justice in dealing with the most serious crimes that concerns the mankind. 72

4.1 Rome Statute

The United General Assembly, in 1994, decided to badger the work towards the creation of an international criminal court, taking the International Law Commission’s draft statute as a ground. It assembled an Ad Hoc Committee, and the debates within the Ad Hoc Committee declare differences among States about the texture of the future court, and it went that far that some delegations even contested the feasibility of the project, even if their voices became more and more moderated as the negotiations advanced. 73

The ICC was founded in 2002 as a permanent international court, upon the achievement of the Rome Statute, that litigate individuals accused for perpetrating serious crimes at an international level. 74 The Rome Statue demonstrates the ICC to obligation that cause

71 Naratajan, M. ‘’International crime and justice’’. New York ; Cambridge : Cambridge University Press, 2011., s302
72 Naratajan, M. ‘’International crime and justice’’. New York ; Cambridge : Cambridge University Press, 2011., s.357
73 Schabas W.‘’ An Introduction To The International Criminal Court ‘’[e-book]. London : Cambridge University Press, 2007 s.16
74 Barnes G, ‘’The international Criminal Court's Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir’’, Fordham International Law, 2011
its enforcement instrument to be largely ineffective in the event of a member state breach.

ICC, under the Rome Statute, can only act when a country is unable or unwilling to take up the case. Essentially, national and domestic courts have supremacy and jurisdiction over the cases before they are assigning to the ICC. States must cooperate with the ICC in matters of investigation, arrest, and transfer of the suspects because there is no international police force or other mechanism to apprehend war criminals.

What it is worth mentioning is that the ICC has jurisdiction or can address crimes committed only after 1 July, 2002, the entry into force of the Statute and the establishment of the court. 75

The ICC is capable to prosecute crimes against humanity even where they appear outside a state of war. The so called ''command responsibility’’ was broadened in the Rome negotiations to enclose civilian as well as military leaders, and holds public officials accountable for apparently criminal acts even if they have immunity. 76

The temporary, or ad hoc tribunals such as International Criminal Tribunals for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) are inspiring models of establishing the ICC because these ad hoc tribunals were established only to try crimes committed within a specific interval and during a specific conflict, and for this reason, a permanent criminal court was needed. 77

Crime against humanity is defined in the Rome Statute as a list of identified acts when committed as part of a systematic or widespread attack directed opposed to any civilian population, with awareness of the attack. But ICC has not yet apply jurisdiction over crime of aggression because the crime was not determine until May 2010 at the ICC Review Conference, and will not apply jurisdiction over crime of aggression until 2017, when the members can have a probability to expand the ICC’s jurisdiction over an amendment to the Rome Statute. 78

In this case the ICC include: to achieve justice for all, to help end conflict, to end impunity, to take over when national jurisdictions are unable and unwilling to act and to

75 Naratajan, M. ‘‘International crime and justice’’. New York : Cambridge : Cambridge University Press, 2011., s.357
77 Barnes G, ‘‘The international Criminal Court’s Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir’’, Fordham International Law, 2011
deter future war criminals. And it is evident that the Court’s action are changing the landscape the international criminal law.

The Rome Statue has led State Parties not only to inspect their domestic legislation handling with regulation of war crimes, genocide, an crimes against humanity but also to introduce changes to their current laws so that they are in conformity with the Rome Statue.

The Rome Statue is a particular apparatus that directs and governs the ICC and has jurisdiction over international crimes and genocide (art.6), crimes against humanity (art.7), and war crimes (art.8).

The Rome Statute consists of several loopholes that allow members wide extent as to whether they must comply with the Court’s request, and the ICC has no accurate enforcement provisions.

Rome Statues content means that prosecutors cannot be influenced political to a prosecutor has such a mandate of nine years and cannot be dismissed if she does not do so as a country want.

Even when the Security Council sent a case to the ICC, so they do not say who should be condemned, but they send the case as a whole, and then it's in the prosecutor's hands working independently. 79

The ICC cooperates with the UN, but still is independent from the UN. The ICC and the UN have a Relationship Agreement that recognize each other’s status and mandates and free to consult and cooperate with each other on matters of bilateral interest. Not only the UN, but member states are required to cooperate with the ICC in its prosecutions and investigations. 80 But the Rome Statue does not contain a specific repercussion for the outrage member; of a member state does not cooperate.

4.2 Jurisdiction and Legitimacy

The ICC has jurisdiction over individuals, not states, including heads of states and government officials, who commit crimes indirectly or directly. However, the Rome Statute does not specify in case of a charged individual’s status as a head of state is irrelevant only when the person is a head of a member state, of if it engage to all

79 Interview with Emil Johansson & Jon Eklund 2015.05.05
indicted heads of state. But the Rome Statue specifies that the ICC cannot prosecute an individual if the member state is already prosecuting said person, however it can prosecute when member state is unable or unwilling to prosecute the individual itself. If in the cast when the individual is from a non-member state, the nonmember state can agree to the jurisdiction of the ICC. 81

United Nations General Assembly named The International Commission with a body of experts and charged it with the codification and progressive advancement of international law. The General Assembly had asked the Commission, beside the authorization to draft the statue of an international criminal court, to assemble what are known as the ’’Nuremberg Principles’’, and the ’’Code of Crimes Against the Peace and Security of Mankind’’. 82

Alongside the work of the International Law Commission, the General Assembly also established a committee charged with the drafting of the statue of an international criminal court, which was composed of seventeen States, and the draft statue was finished in 1952. What is worth mentioning here is the role of the International Law Commission which made considerable development on its draft code and submitted a proposal in 1954, which was followed by the suspending of the mandates bu the General Assembly, pending the sensitive task of defining the atrocity of aggression. 83

Prevention factor or deterrence factor, according to Eklund & Johansson, is an important role that international law plays, and repair factor, to replace or restore those who have been affected by crime. The ICC is also to discourage people to commit crime (genocide, crimes against humanity, etc.). Many also have the right to compensation and damages. A fund has been set up for the damages. Enforcement of international law is essential for legitimacy.84

The national courts have in many cases unfair procedures which would put the offender at an extreme disadvantage. Even of a country have the legislation to prosecute individuals that are not citizens of their State, in some cases they may not be willing to prosecute the alleged perpetrator as in the case of Canada not litigating Pol Pot. If the

81 Barnes G, ’’The international Criminal Court’s Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir’’, Fordham International Law, 2011
82 Schabas W. An Introduction To The International Criminal Court [e-book]. London : Cambridge University Press, 2007 s.8
83 Schabas W. ’’An Introduction To The International Criminal Court’’ [e-book]. London : Cambridge University Press, 2007 s.9
84 Interview with Emil Johansson & Jon Eklund 2015.05.05
ICC was established by then, it would be the proper instrument to prosecute these individuals. 85

Baudet argues that the ICC should limit the scope of its jurisdiction to very well defined crimes such as the use of weapons of mass destruction and genocide. If you look at the range of crimes, it’s everything. Anything can count as a war crime, such as destroying a bridge for example. Is way too brought. Serious thought has to be devoted to who to prosecute, because now it is completely random. Because they have the power to prosecute basically anyone. 86

Other courts such as International Court of Justice don't have the jurisdiction that ICC have. ICJ only deals with disputes between States, and focuses more on civil or political issues. It does not have the jurisdiction to prosecute criminals of international crimes. The European Court of Human Rights have not either the jurisdiction of the ICC, instead it only adjudicates over State Parties that breach the European Convention of Human Rights. 87

ICC needs to be recognized as an important source of legitimacy of Security Council action, and the other way around. A coordinated relationship between the ICC and the Security Council, would engage mutual political and moral benefits for both governing institutions. The cooperating between these two institutions would create an effective response to humanitarian crises. 88

Watching each year in the form of how one can make the court more efficient, the Court itself works with the issues, a problem they have now is that the trials will take a very long time, talking about for years, and they sits the accused in custody also which is not good for their safety and witnesses, the longer it goes, the less one will remember. One thing that the ICC has to do is that it must be faster in their trials, and it must demonstrate tangible benefits of those affected. 89

It is important to investigate the ICC’s legitimacy as aggregate a political dimension and a procedural dimension. To be more specific, the ICC’s legal neutrality in this respect

85 Mutyaba R, ‘’The international Criminal Court- Its Impact and the Challenges It Faces in Fulfilling Its Mandate’’, independent, 2013
86 Interview with Thierry Baudet 2015.05.09
87 Mutyaba R, ‘’The international Criminal Court- Its Impact and the Challenges It Faces in Fulfilling Its Mandate’’, independent, 2013
88 Roach S, ‘’Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council’’, International Studies Perspectives, 2005
89 Interview with Emil Johansson & Jon Eklund 2015.05.05
depends mostly on the ability of the prosecutor to exercise his or her discretionary power in a dependable manner, and in this way, the ICC’s legitimacy lies in the effective and impartial application of the Statute of ICC.  

A fundamental point of the ICC is that even if the ICC has jurisdiction, it will not automatically act, because it is a court of last resort.

A feature of the ICC, which is different from ad hoc tribunals, is the treatment of the victims. In the case of the ICC, victims can partake in proceedings even when not called as witnesses, despite from other international proceedings where the victims are largely witnesses for the prosecutor or for the defense.

Besides of to set the legal precedent to guide the drafters of the Rome Statue, the Tribunals also provided a reassuring model of what an international criminal court might look like, which help in debates concerning the role of the Prosecutor. 

Legitimacy must be positioned on acceptance. Even if all states subject to ICTY have accepted the authority of Security Council to establish the ICTY, still the citizens of those states remain divided over the courts legality and it’s unfairness.

The big challenge of the ICC, according to Nillson, is to gain legitimacy in the world especially for its one-sided focus on African criminals, and an inability to get the big powers like the US, Russia, China, India. When it comes to Middle Eastern countries such as Israel, as the ICC has shown that they do not have as much power to act, but they must get used to the countries wanting to join the ICC. The great failure is prosecuting in Kenya; the ICC’s legitimacy is damaged very much. And their criticism of the ICC from the African Union in connection with this.

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91 Kirsch Ph, ''The role of the International Criminal Court in enforcing international criminal law'', Washington College of Law, 2006
94 Interview with Bengt Nilsson  2015.04.22
4.3 Complementary principle

The ICC operates on the principle of complementary, which it does not alternate the national jurisdiction, but enrichments it when cases are not addressed thoroughly nationally, by lack of will or capacity.\textsuperscript{95}

The complementary doctrine of the Rome Statue holds the nation-state primary responsible for enforcing the laws of armed conflict, and that the International Criminal Court should intrude only where national courts are weakened from action.\textsuperscript{96}

The problem of Rome Statue is the lack of attention to enforcement.\textsuperscript{97} The problem of enforcement from the ICC is connected with the Security Council, because the ICC has not have the authority to use force or any other instrument to obtain the custody of a defendant.

The nature of the complementary of the ICC is a source of extensive difficulties. Even if the Court’s jurisdiction has been established, many increased legal, factual, and exclusively political issues must be resolved in order to confirm whether its proceedings are ”justifiable”.

4.4 ICC and Security Council

The UN Security Council has presented a mixed willingness to respond to humanitarian compulsion. For instance the UN Security Council took the uncommon initiative to intervene militarily to stop the massacre of East Timorese in the spring of 2000, in East Timor. However it demonstrated a lack of willingness to take action against the Sudanese government to avoid ethnic cleansing in the Darfur region.\textsuperscript{98}

Member states of the Security Council will believable defer to regional authorities when their political interests are at stake, even if the circumstances tell you otherwise.\textsuperscript{99}

\textsuperscript{95} Pellegrino A, ”The International Criminal Court through the lens of International Relations: The politics of law”, CEDIN, 2012
\textsuperscript{96} Wedgwood R, ”The International Criminal Court: An American View”, EJIL, 1999.
\textsuperscript{97} Wedgwood R, ”The International Criminal Court: An American View”, EJIL, 1999.
\textsuperscript{98} Roach S, ”Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council”, International Studies Perspectives, 2005
\textsuperscript{99} Roach S, ”Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council”, International Studies Perspectives, 2005
The UN Secretary General, Kofi Annan, has frequently pressed member states to rethink the role of the Security Council in responding adequately to humanitarian emergencies, and recommended the creation of three councils, which would deal with international security and peace, and human rights.

Political determination is the key to effectively enforcing the work of a tribunal or a court. Members of the Security Council in particular and members of the United Nations in general must exercise political determination, national determination and in some occasions economic sacrifice to make the international enforcement actions work. It is worth mentioning that a closer ties between the Security Council and the ICC raises the concern of the politicization of the Court and the possibility of using the Court to serve the forced ends of the permanent members. 100

The ICC is based on cooperation between States. Looking at it from a historical perspective, it is not so long ago it was established. Hope that more states will join. But quality does matter, so as to employ the best lawyers and the best judges. 101

100 Roach S, ’’Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council’’, International Studies Perspectives, 2005
101 Interview with Emil Johansson & Jon Eklund 2015.05.05
5 Analysis and Discussion

5.1 Lack of enforcement

The challenges that the ICC faces is the lack of enforcement by the major powers such as the United States, Russia, China and India, even if some of the major powers such as United States played a leading role in the establishment of the Rome Statue, but still it opposes the ICC on grounds that it will be used as a mechanism against United States for politically motivated trials.

The lacks of enforcement mechanism of the ICC, and has to count on the cooperation of both State and non-pary States in the surrender and the arrest of the perpetrators of crimes under its authority. States, however, can refuse to adhere to the Court’s cooperation request when the cooperation request is restricted by the state’s national law, when the request make that the state acts against with its agreement under international law, concerns that suspect’s human rights can be breached when they are surrendered or arrested.  

102 The enforcing cooperation requests are crucial if the Court is to comprehend its objective in prosecuting individuals who perpetrate heinous crimes.  

103 The ICC must be self-enforced, as with any international institutions, because member states will only cooperate if they have the incentive to do so. The ICC, in that case, has no power to punish states that harbor barbarity committers, and states will refrain to do so when it arrange al least as high a reward as not doing so.  

104 Enforcement of the Tribunal’s memorandum means having a structure of pre-established risks to deal with violations of the Tribunal’s legal rules. In this case, the Tribunal would convince governments to comply with its agreed rules and laws by creating means to punish those governments which violate those laws and rules. Threats of punishment must be rational to prevent violations of the Tribunal’s rules. There must


be a sufficiently high degree of contingency that the Tribunal will impose punishment, if it is not adequate for punishment to appear serious. 105

Nilsson states that it is impossible to imagine that the ICC should have a police force that can go around and made the arrest of the criminals; it will never work without the ICC is a result of an idealized dream of Justice Victory over policy. But reality shows that the policy brakes law. ICC is an example of that.106

Nilsson states that we must be aware that the ICC has very limited possibilities to act at all. What ICC can do is to prosecute, investigate, and, at best, conduct a trial. More cannot the ICC do.107

Baudet claims that in order for the ICC to be effective, the ICC should have its own army and police force, which it is absurd and very bad for the international community.108

Eklund & Johansson states that we do not have sufficient mechanisms to enforce international law, such as national law, and it is a challenge to international law. It is important that when talking about international law, that it is coupled with diplomacy, and that if a state violates some statute, there are sanctions, they cannot do against a state as one does to a man. The sanctions are limited, and it is important to have a political and diplomatic pressure also complementing rules of international law, so that they may be able to do trade restriction. When a country violates international law, their legitimacy affected the international community as a good actor, you get problems, diplomatic, where the country and their economic relationship can suffer.109

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105 Joyner Ch, ‘‘Strengthening Enforcement of humanitarian Law’’, Georgetown University,
106 Interview with Bengt Nilsson 2015.04.22
107 Interview with Bengt Nilsson 2015.04.22
108 Interview with Thierry Baudet 2015.05.09
109 Interview with Emil Johansson & Jon Eklund 2015.05.05
5.2 US Opposition

It became clear that, even prior to entry into force, a showdown was emerging between the United States and the Court. United States had made many helpful and constructive contributions during the negotiations to create the Court. Yet, United States was unhappy with the final result. The position that United States held was to protect its own citizens from the jurisdiction of the Court. In fact, it was never policy objective of the United States to exclude the United States nationals from the jurisdiction of the Court when the Statue was being drafted.\textsuperscript{110}

In order to understand the logic behind the resistance of the United States towards the International Criminal Court, it is conductive to consider what the United States actually wanted. When the International Law Commission presented its report in 1994 on an international criminal court to the General Assembly, the United States was well minded to the proposal.\textsuperscript{111}

The bull’s eye of United States officials during the negotiations was the role of the Security Council, because of the centrality of the Security Council issue, such as the attempt of ICC to check the power of the Security Council.\textsuperscript{112}

The outcome of Rome Statue was a new international institution, and in a sight, the Rome Statue was an attempt by other states to effect discursively as a reform of the United Nations and amendment of the Charter, which could not be done directly. This unprecedented demanding to the Security Council explain the antagonism of the United States. If the Rome Statue had been more accommodating to the Security Council, the United States might be a State Party, but it would have a negative effect on other states, and it wouldn't be as many states as there are today.\textsuperscript{113}

The reason of this major opposition from the side of United States is because, according to its officials, it would be against American national interests and would violate the

\textsuperscript{110}Schabas W. \textit{An Introduction To The International Criminal Court} [e-book]. London : Cambridge University Press, 2007 s.24

\textsuperscript{111}Mundis D, ”Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?”, Fordham International Law Journal, 2004

\textsuperscript{112}Schabas W. \textit{An Introduction To The International Criminal Court} [e-book]. London : Cambridge University Press, 2007 s.26

\textsuperscript{113}Schabas W. \textit{An Introduction To The International Criminal Court} [e-book]. London : Cambridge University Press, 2007 s.26
Constitution. If United States ratified the Rome Statue, it would give superior authority to an institution which is not elected by the American people, and this particular institution would be in a position to arbitrate itself into the policymaking processes of the United States over the threat of criminal pursuit against American officials, soldiers and citizens, and in this matter, no American president could order the use of military force without the fear of being prosecuted by individuals with no allegiance to the United States.

Contrary from the WTO and the U.N, the ICC would have the legal authority to act directly upon individual American citizens, rather than to interact with United States national enforcement mechanisms.

The ICC would operate governmental power without the sanction of popular election of envy kind, and the judges selected would not represent the American people and their interests. Simply, the ICC will not be a component of an integrated governing structure that enjoy democratic legitimacy and it only limitation would be its own conscience.

The US has not acceded to the ICC, because they are afraid that their soldiers and official can be prosecuted by the ICC only as clean as propaganda, and it is quite possible. Israel is acting in the same way. They do not want to end up in such situations. The risk of this kind of thing to happen is obvious.

US opposition creates a political challenge to a cooperative relationship between the ICC and the Security Council.

The very first sign that United States opposition to the International Criminal Court came in June 2004, when it determined not to argue for renewal of the Security Council resolution 1422, which was adopted in harmony with Article 16 of the Rome Statue. However, the resolution passed unanimously. In March 2005, United States abstained.
when Security Council referred the situation in Darfur to the International Criminal Court.  
President Bill Clinton signed the Rome Statue of the ICC as one of his final acts in office, knowing that the senate would not approve the US ratification of that mechanism, and that many of the senators, including from his own party had doubts about the involving of the United States in this institution.

Even if the Clinton administration signed the Statue on 31 December 2000, the Bush administration, which took office a few weeks later, was against this decision, and on 8 May 2002, used the Article 18 of Vienna Convention which in a way allows a state to change its mind.

The decision of United States of opposition to the International Criminal Court, is seen as one of its great diplomatic defeats.

5.3 Other Opposition

It is considered that the ICC’s inquiry of justice in some states has made it more and more difficult to carry out the terms of peace agreements. Although, some maintain that there is no divergence between peace and justice. But others insist that the ICC’s intervention in Uganda have had a diminishing effect on state and regional politics.

The Court was never designed to serve a diplomatic function, that could compromise its neutrality, but it can only derive its respect, authority and trust from operations in harmony with the Rome Statue.

But what if the ICC developed a diplomatic capacity? It efficacy of its diplomacy could reflect its special role as an independent court in the interstate system, and would help

118 Schabas W. *An Introduction To The International Criminal Court* [e-book]. London: Cambridge University Press, 2007 s.31
121 Schabas W. *An Introduction To The International Criminal Court* [e-book]. London: Cambridge University Press, 2007 s.32
the resolve the inconsistencies between the ICC’s proactive complementary and the provision of partnership encoded in the Rome Statute.\textsuperscript{123}

Rabkin argues that the ICC covers a big range of crimes. The ICC was another aspirational thing and as a symbol of that the international community cares. But people don’t actually care and not of that there are mostly indifferent but in many circumstances they oppose to it, which makes the ICC not a serious mechanism. If we want the ICC to be fully effective, than we have to ask our self’s if we want a world authority, most people don’t want that, and most countries don’t want that. \textsuperscript{124}

According to Rabkin the central thing is that the ICC would be a world government if we enforce the ICC completely. And most countries don’t want it to be a world government. \textsuperscript{125}

It would also help to seek mutual accommodations between international justice and state politics, and it would promote its duties in the interests of international justice, and in a way would build a so called ”soft power”, a system of cultivation trust and the admiration of others in order to gain influence through means other than military force or coercion.\textsuperscript{126} The political value would help to attract states to cooperate with its request.

The problem with a politicized ICC is the role of politics it could get in the way of making decisions between ”the friend and enemies” of the international community, and it would be used of governments to conduct show trials or to use the ICC’s legitimacy to attack its political enemies.

The focus on Africa from the ICC, has led to assessment that the Court is conducting selective allegations and investigations. The Court has also been criticized regarding the lengthy proceeding court and the question rises if the ICC takes into consideration the operational costs.

Nilsson claims that the ICC needs to get more support from the UN, and with more countries to join, and to target other parts of the world and not just to target Africa. It is important. Such as Iraq, Syria and so on. It speaks clearly that if the ICC wants to have


\textsuperscript{124}Interview with Jeremy Rabkin 2015.05.15

\textsuperscript{125}Interview with Jeremy Rabkin 2015.05.15

an important role to be able to prosecute major criminals offenders against human rights, and if the ICC is to have any role to play at all today, they must show that they can act in these situations.\(^{127}\)

### 5.4 Case of President Omar Al Bashir

The UN Security Council, on March 31, 2005, referred the situation regarding Sudan which is a non-member state of the ICC, to the Luis Moreno-Ocampo, the ICC Prosecutor. The Prosecutor referred after the investigation to the Article 53 of the Rome Statue, and requested an arrest warrant for six individuals tangled in the Darfur situation, including the sitting president Al Bashir. The ICC found that it was enough evidence that president used the Sudanese military and government to execute criminal activity. And on March 5, 2009, the ICC requested the surrender or arrest of President Al Bashir, and that member states should do the same if presented with the opportunity to do so.\(^{128}\)

The prosecutor, according to Johansson & Eklund, has a duty to act if there is evidence of a crime, even if it comes against a sitting president such as Omar Al Bashir's case. Rome Statue is made to have the legitimacy to go against those responsible for the crimes.\(^{129}\)

Critics’ argument against the request to arrest President Al Bashir was the fear of the allegation would cause the government to be less likely to agree with peace agreement. Other concern was that the allegation interferes with Sudan’s national sovereignty, and in that matter the allegation has been called an attack against Africa by the west, because of the ICC has investigated situations only in Africa, which led to a conclusion by AU Chairman Jean Ping that Africa has become an experiment to test the new international law.

The indictment of Moammar Waddafì and Omar al Bashir caused many dissatisfaction in the AU, and the AU passed a motion requesting all member states to not recognize the arrest warrant Gaddafi, and declared that the ICC was inequitable against the African nations and had failed to investigate crimes that was committed in Iraq and

\(^{127}\) Interview with Bengt Nilsson 2015.04.22

\(^{128}\) Barnes G, ’’The international Criminal Court’s Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir’’, Fordham International Law, 2011

\(^{129}\) Interview with Emil Johansson & Jon Eklund 2015.05.05
Afghanistan. They also claimed that the Western countries exercised influence in the selection of ICC cases. Even the UN Secretary General Ban ki-Moon declared reservations about the indictment of the Al Bashir case, calling it as a rush of judgment.130

The ICC allegations against President Al Bashir raised extensive concern among the diplomats who argued that the timing of the allegations was improper and could encourage Al Bashir to get out of the peace agreement, which could lead to more political violence.

The ICC is in an impossible position, because if you prosecute a sitting president, many people would be angry at the ICC, and it affects the reputation of the ICC. 131 Rankin further argues that it could unleash tremendous instability in the conflict are if you accuse a sitting president. If you do it in the country like Sudan, you will have tremendous chaos, and a lot of people killed, because in a dictatorship, you don’t have a law that said to replace the dictator with another one. This could lead to a civil war. The idea that this would get started by a bureaucrat in The Hague. The ICC cannot handle the situation because they do not have mechanism to do so. If it leads to a bloodbath, the only thing they could do is to get more people indicted. And in the case of Sudan, nobody made an effort to arrest the president Al Bashir. 132

Nilsson claims that Omar Al Bashir should not be prosecuted, because he was needed as an actor for peace deal between Sudan and South Sudan. Even in the Darfur conflict. Many are critical of the ICC that they perform criminal prosecution in that way. ICC takes no political considerations, but they only act based on his legal perspective.133 The lack of guidance that Chad and Kenya received from the Rome Statute made it achievable for them to believe that there would be no residue upon a breach. In this case, the ICC has to adopt some repercussions for breaching the Rome Statute such as: suspension, explosion or United Nations Security Council sanctions. 134 The option of suspension could work like the OAS did Honduras, but still it would require the ICC to modify the Rome Statute.

131 Interview with Jeremy Rabkin 2015.05.15
132 Interview with Jeremy Rabkin 2015.05.15
133 Interview with Bengt Nilsson 2015.04.22

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The Rome Statue contains some weaknesses which make it easily to abuse with it. The first is the unclear provisions as regards of immunity and excusal to cooperate, and the repercussions on the Rome Statute for member states that are in discontinuity. This allowed states such as Chad and Kenya to not take it seriously to arrest President Al Bashir when he visited these states.

The selection of expulsion is in the other case more risky because it is extremely difficult to expel a country and it is only used for a repeated breach, and it still would require the ICC to modify the Rome Statue. The big problem, according to Nillson, is that the ICC is dependent on other countries. It is hard to Al Bashir is arrested or gives up.

The option of UN Security Council sanctions is more tempting because it is already in the Rome Statue. But the ICC still has to modify the Rome Statute to avoid so that members breach the Rome Statute, and to have consequences such as suspension and/or expulsion of the member states.

Other counties, member states of the ICC, started to warn the president Al Bashir that they will arrest him if he visited those countries, which made President Al Bashir more isolated.

Rabkin argues that maybe we do need to punish some people, but if the choice is amnesty or justice, almost everyone would prefer amnesty, if amnesty is tied to peace. And no one would say that justice is so important that we do not care if more people get killed. This regards the case of Syria, case of Crime, the case of Iraq, and many other cases.

According to Rabkin, it is very hard to implement an arrest. It is likely to have more negative effect than positive effects because in an active conflict, you do not need outsiders to disturb things up. Because the do not know anything about the country they go to, they just lawyers.

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135 Barnes G, "The international Criminal Court’s Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir", Fordham International Law, 2011
137 Interview with Bengt Nilsson 2015.04.22
139 Interview with Jeremy Rabkin 2015.05.15
140 Interview with Jeremy Rabkin 2015.05.15
5.5 ICC Challenges

The Courts faces some challenges. Since its creation, the effectiveness of the Court has been called into inquiry. But there are other factors that have contributed to the ineffectiveness of the Court, such as the lack of an police force, the difficulty of allegation and lack of diplomatic and financial support for the Court. The obtaining of evidence is also a difficulty in the courts proceeding. To gather evidence is often complex and to operate in dangerous and in some times insecure areas. Such as the case of the DRC, Darfur and Central African Republic, when the Court faces many difficulties in obtaining evidence. 141

The state leaders may see the ICC as a strategic instrument to eliminate their political rivals, such as the case of the Democratic Republic of Congo (DRC) the Joseph Kabila referred the atrocities committed by his political rivals after the operationalization of the ICC in 2002. The ICC started trying one of these former rivals, Jean-Pierre Bemba. 142

Other challenges that ICC faces is the UN Security Council. Only two of the member of the Security Council has ratified the Rome Statute: Japan and the United Kingdom. The ratification of the Rome Statue from other states of the Security Council would reinforce the credibility of the Court, and to strengthen the legitimacy of the ICC worldwide. 143

Other challenges are the lack of international prisons and police, which poses a dominant problem for the ICC by cause of it has to depend on volunteering states to execute the arrest and imprisoning the prisoners, and a result it causes delays to negotiate these services.

The ICC received many critics especially after all of the cases related to countries in Africa, which might suggest that ICC is able to intervene only in cases where governments are disorganized or week. 144

141 Mutyaba R, ”The international Criminal Court- Its Impact and the Challenges It Faces in Fulfilling Its Mandate”, independent, 2013
143 Mutyaba R, ”The international Criminal Court- Its Impact and the Challenges It Faces in Fulfilling Its Mandate”, independent, 2013
144 Naratajan, M.” International crime and justice”. New York ; Cambridge : Cambridge University Press, 2011., s.363
In that matter the IICC should cooperate more with the African Union, especially to the apprehension and surrender of the perpetrators of crimes that fall within the jurisdiction of the Court. However the AU has decided to establish the African Court of justice of Human Rights as a result of mistrust in the Court, which have jurisdiction over crimes committed on the African Continent. 145

The signed a cooperation agreement with INTERPOL is an agreement that the ICC can capitalize to ensure the arrest of elusive, and it is a valuable resource for their Court in arresting the persons wanted from the Court.

Rabkin argues that the ICC constitutes a challenge to the national sovereignty, because it is in the hand of a bureaucrat of an ICC. 146

145 Mutyaba R, ’’The international Criminal Court- Its Impact and the Challenges It Faces in Fulfilling Its Mandate’’, independent, 2013
146 Interview with Jeremy Rabkin 2015.05.15
6 Conclusion

Why states obey international law is a question that gives many answers. One of the reasons that states obey international law is because it is in their self-interest of doing so. States gain economically and security support from each other and it makes those states feel that they are not alone. Many states follow the international law because many international laws are made for the greater god, international laws such as laws for human rights, laws against torture, and laws for refugees, are to make world a decent society to live in, and to make world a society that doesn’t vary that much between the states. Of course, we can’t make the world with same mentality, but we can agree in many thinks, which we can put them on paper.

Another reason of obeying international law is the obligations of the agreement between states. The obligations are not strict as the national laws, but there are some obligations and maybe punishments to that states that doesn’t obey international law, such as sanctions to the states from other signing states of the international law. In this matter, the states obey the international law, because they want to send a message that they are to take serious, and to save the credibility that they have in the international affairs. If a state doesn’t obey the laws, than the state loses the potential of being part of an international law that it is in there one interest.

These tribunals were very imports because they were first of all pioneers, and they showed that the international justice could work.

The ICC has a long way to achieve its goal and to prevent fully the perpetration of international crimes under the jurisdiction of the Rome Statute, and it is still struggles with it. This does not mean that the work up till now is not important. Despite the short time of 12 year of history, the ICC has accomplished great results, and first and foremost, it is starting to devise its own strategies for collaborating with other actors in the international arena in order to forward the construction of a establishment of international criminal law.

The creation of the ICC was a historic achievement, but the establishment of the the court was only the beginning, and to be fully effective, the international society must continue its efforts to ensure that the Court has the necessary support to distribute justice as efficiently and fairly as possible.
The extinct of the ICC grant foreign countries to reject requests for asylum in these cases, because autocrats will voluntarily step down and surrender to the ICC.

Enforcing international law is very important in today’s society because of the benefits we can get from international laws. The mechanisms of enforcing the international law such as International Criminal Court helps to bring to justice individuals who committed crimes, and in other way enforce the international law by making examples and showing that there will be consequences of the international law isn’t obeyed.

The creation of the ICC is in fact a historic achievement for human kind because now it stands as a permanent institution which is capable to punish the worst criminals or perpetrators. This made a statement that violators of human right for example, they cant get immunity assured to them and that they, sooner or later, will face justice.

The ICC has some downsize, and not all those who deserves to face justice, are in fact facing it, but this gives as more responsibility to ensure that the ICC has the necessary support it needs to dispense justice as efficiency and as fairly as possible. In this way the effectiveness of enforcement of international law gets in that point that we feel satisfied.

In this matter, not only the states which are developing democracy, but the states that not only has developed the democracy in their own backyard, but those who tries to develop it in other parts of the world, have much to work on, because of the lack of experience of handling situations without taking consideration only in their self-interest, but thinking wider.
7 Sources

Books and articles


Conway W. Henderson, "Understanding international law", 2010, Wiley-Blackwell

Charlesworth H., Chinkin Ch., (2000). "The boundaries of international law", Manchester University Press, Manchester,


George, AL; Bennett, A. "Case studies and theory development in the social sciences", Cambridge, Mass. ; London : MIT, cop. 2005, 2005


Joyner Ch, ’’Strengthening Enforcement of humanitarian Law’’, Georgetown University,

http://www.hsv.se/densvenskahogskolan/sveengordbok/termer/f/fallstudie.4.7852b29111e5fd61e597ffe299.html

Kastrup D, ’’From Nuremberg to Rome and Beyond: The fight Against Genocide, War Cries, and Crimes Against Humanity’’, Fordham International Law Journal, 1999


Kirsch Ph, ’’The Preparatory Commission For the international Criminal Court’’, Fordham International Law Journal, 2001

Kirsch Ph, ’’The role of the International Criminal Court in enforcing international criminal law’’, Washington College of Law, 2006


Pellegrino A, ''The International Criminal Court through the lens of International Relations: The politics of law”, CEDIN, 2012

Roach S, ”Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council”, International Studies Perspectives, 2005


Tilling M, ‘‘Refinements to Legitimacy Theory in Social and Environmental Accounting’’, Flinders University.

8 Interviews

Jeremy A. Rabkin - Professor of Law in George Mason University School of Law
Thierry Baudet - Analyst and Columnist
Bengt Nilsson - Journalist
Jon Eklund - Deputy Director of the Department for International Law, Human Rights and Treaty Law from the Swedish Ministry for Foreign Affairs
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9 Annex

Interview questions:
Is enforcement of international law necessary of effectiveness?
What are the challenges of enforcing international law?
What are the challenges of the ICC?
Does the establishment of the ICC constitute a challenge to national sovereignty?
What should the ICC do to get a better reputation?
What problems arise in the respect of sovereignty, when the ICC prosecutes a sitting president?
Can the ICC be used for other states political interests?
Should the ICC impose justice?
Does the ICC meet the purpose of enforcing international law?
What are the opportunities of the ICC?