

University of Trento

School of International Studies

PhD Program in International Studies

Legitimate and Contested
How States Respond to International Norms

By

Andrea Betti

States often invoke international norms to justify their foreign policy-making. In the last twenty years, a large body of literature has shown that norms matter in international politics since they provide frameworks for legitimate international action. Nevertheless, it is often overlooked that the absence of a centralized authority capable of enforcing and providing unambiguous interpretations of norms leaves states, particularly great powers, free to decide whether to recognize or reject the legitimacy of norms. In specific instances of foreign policy-making, states take actions that cohere with norms, while at other times they contest them. Operating in a decentralized system, international norms crucially depend on state support for their legitimacy, prominence, and effectiveness. Variations in the way states respond to norms call for an investigation into the domestic conditions that lead states to recognize or reject their legitimacy.

These conditions will be investigated by comparing the attitudes of the United States and the United Kingdom towards the norms of humanitarian intervention and international criminal responsibility and by studying how these norms influence their policy-making. During the 1999 NATO intervention against the Federal Republic of Yugoslavia, both countries invoked the norm of humanitarian intervention. In contrast, during the 1998 Rome Conference for the adoption of the Statute of the International Criminal Court, their behavior diverged with the UK endorsing the Court and the US rejecting it. The analysis aims to discover the domestic actors that are responsible for how international norms are interpreted at the state level and the mechanisms and transmitters through which norms come to be viewed by states as legitimate or illegitimate frameworks of behavior.

Supervisor: Prof. Roberto Belloni

Academic Year 2010-11

ACKNOWLEDGEMENTS

I am grateful to the Center for the Study of Democracy at University of Westminster, London, for hosting me as a Visiting Scholar during my research on the British cases. In particular, I am thankful to Professor David Chandler and Professor Simon Joss.

I am equally thankful to the University of California, Washington Center, Washington, D.C., which hosted me as a Visiting Scholar during my research on the U.S. cases. I am especially grateful to the Director of the Center Professor Bruce Cain.

Thanks to my supervisor Professor Roberto Belloni for his invaluable advice and support.

Thanks to the members of my Advisory Committee Professor Vincent Della Sala and Emanuela Fronza.

Thanks to all the administrative and academic staff of the School of International Studies at University of Trento. In particular, I am grateful to Professor Sergio Fabbrini, Professor Mark Gilbert, Mark Beittel, Maria Rosaria Astarita, and Silvia Tomaselli.

This work is dedicated to my family and my girlfriend Gabriela.

Table of Contents

INTRODUCTION	6
1 INTERNATIONAL NORMS AND STATE SOVEREIGNTY The Case of Human Rights	
Doctrines	14
1.1 Recasting Sovereignty: From Control to Responsibility	15
1.1.1 Sovereignty as Responsibility	17
1.2 Humanitarian Intervention	20
1.2.1 The Evolution of Humanitarian Intervention: Past and Present	21
1.2.2 A Debate with Many Interpreters and Few Conclusions	22
1.2.3 Re-shaping Intervention: The Responsibility to Protect	26
1.2.4 Unresolved Issues	29
1.3 International Criminal Responsibility	34
1.3.1 Evolution and Development of International Criminal Responsibility	37
1.3.2 Debates and Intellectual Controversies	42
1.3.3 Unresolved Issues	44
1.4 State Response and Processes of Domestic Institutionalization	50
2 STUDYING INTERNATIONAL NORMS AND STATE RESPONSE	54
2.1 Traditional IR Approaches and International Norms	55
2.1.1 Taking Norms Seriously: Sociological Institutionalism and Social Constructivism	59
2.1.2 ‘Opening the ‘Black Box’ of States: The Domestic Sources of Foreign Policy	66
2.2 International Norms and Domestic Response: What actors?	75
2.2.1 Party Politics and Relationships between Legislative and Executive Powers	76
2.2.2 Civil Society	80
2.2.3 Executive Leadership	85
2.3 Research Question	87
2.4 Research Design	90
2.5 International Norms: Concepts and Definitions	92
2.5.1 Emerging and Institutionalized International Norms	95
2.5.2 Definition of Invocation and Contestation	96
2.6 Methodological Issues: Operationalization of Concepts and Analytical Approach	97
2.7 Case Selection	100
2.8 Data and Sources	102
3 DOMESTIC SYSTEMS AND FOREIGN POLICY	104
3.1 Executive Leadership in the UK and the U.S.	106
3.1.1 British Leadership and the Westminster System	106
3.1.2 The U.S. President in a Separated System	112
3.2 Prime Ministers and Presidents: Constraints and Opportunities	119
3.2.1 British Executive Leaders: Political Parties and Party Constraints	119
3.2.2 U.S. Presidents and Executive Leaders: Facing a Plurality of Constraints	124
3.3 Civil Society and Foreign Policy-Making	131
3.3.1 Civil Society under the Party Government System	132
3.3.2 Civil Society in a System of Separated Government	136
3.4 Institutional Settings and Interpretation of International Norms	138

4	“INVOKING HUMANITY” The UK and NATO Intervention in Kosovo	141
4.1	The UK And Humanitarian Intervention In Kosovo	141
4.2	Civil Society In Retreat: British Ngos And Intervention In Kosovo	143
4.2.1	Humanitarian Intervention and the Kosovo Crisis: British NGOs between Skepticism and Neutral Approaches	144
4.3	Party Politics And Intervention In Kosovo	148
4.3.1	Not a Partisan War: The Bipartisan Nature of UK’s Intervention in Kosovo	150
4.3.2	Invocation and Recognition of Humanitarian Intervention: An Intra-Party Debate	151
4.3.3	Contesting Humanitarian Intervention: Another Bipartisan Debate	157
4.4	Executive Leaders And Intervention In Kosovo	160
4.4.1	British Leadership and Humanitarian Intervention	161
4.4.2	Providing the Context: The New Labour Interpretation of the International System	163
4.4.3	“Simply the Right Thing to Do”: Interpretation and Invocation of Humanitarian Intervention by Labour Leaders	168
4.5	Conclusions	172
5	BETWEEN JUSTICE AND NATIONAL INTERESTS United States and NATO Intervention in Kosovo	174
5.1	The U.S. And Intervention In Kosovo	175
5.2	Disarmed Voices: U.S. Civil Society And Intervention In Kosovo	177
5.2.1	A Babel Tower of Opinions: the Irrelevance of U.S. NGOs and Think Tanks during the Kosovo crisis	178
5.3	Between Deference And Bipartisan Support: U.S. Party Politics And Legislative Actors During The Kosovo Crisis	184
5.3.1	The Confused Assembly: U.S. Congress and Intervention in Kosovo	185
5.3.2	A Bipartisan Debate	191
5.4	Shaping International Norms At Home: The Clinton Administration And The Kosovo Crisis	198
5.4.1	To Intervene or Not to Intervene: A Debate Inside the Administration	198
5.4.2	Constructing Humanitarianism for a New Century: U.S. Leadership and the Interpretation of Post-Cold War International System	202
5.4.3	Surpassing International and Domestic Law: U.S. Intervention in the Name of Humanity and National Interests	206
5.5	Conclusions	211
6	INVOKING INTERNATIONAL JUSTICE The UK and the Process of Ratification of the ICC Treaty	214
6.1	Fighting Against Impunity: Ratification Of The ICC Treaty In The UK	214
6.2	British Civil Society And The ICC	215
6.2.1	Campaigning for the ICC at the International Level	216
6.2.2	...and at the Domestic Level	217
6.3	British Political Leaders And The ICC	220
6.3.1	Ethical Foreign Policy and International Justice	221
6.3.2	Political Leaders between Entrepreneurship and Strategic Positions	223
6.3.3	Domestic Debate And Governmental Action	225
6.4	Invoking Responsibility: British Political Parties And The ICC	230
6.4.1	Justice and International Institutions: Political Partisanship and the Interpretation of the International System	232

6.4.2	British Parties and International Institutions.....	233
6.4.3	British Parties and International Justice.....	236
6.4.4	Support and Contestation of the ICC in British Party Politics.....	238
6.5	Conclusions.....	241
7	“SLAY THIS MONSTER!” United States and Rejection of the ICC Treaty.....	244
7.1	The United States And The Icc Controversy.....	246
7.2	The U.S. And The ICC: An Impossible Relationship?.....	248
7.3	Inefficient Advocates: U.S. Civil Society Movements And Domestic Debate On The ICC....	253
7.3.1	Attacking a ‘straw man’ I: U.S. Civil Society Movements in Support of the ICC.....	254
7.3.2	Attacking a ‘straw man’ II: U.S. Civil Society Movements Against the ICC.....	258
7.4	Walking Down The Middle-Of-The-Road: The Clinton Administration Between Endorsement And Opposition To The ICC.....	261
7.4.1	From Enthusiastic to Cautious Support: The Clinton Administration and the Road to Rome 262	
7.4.2	Commitment, Opposition, and Domestic Constraints: U.S. Diplomacy at the Rome Conference.....	265
7.4.3	“Staying the Course with the ICC”: Opposition and Commitment After Rome.....	270
7.5	Shaping U.S. Rejection Of The ICC: Bureaucratic Competition And Divided Government...277	
7.5.1	Tying the Hands of the Administration I: Department of Defense and Opposition to the ICC 278	
7.5.2	Tying the Hands of the Administration II: Divided Government and Dynamics of Party Politics.....	283
7.5.3	The U.S. and the ICC: A Partisan Debate.....	285
7.5.4	Dynamics of Divided Government as a Constraint on the Administration.....	294
7.6	Conclusions.....	298
8	CONCLUSIONS.....	303
9	BIBLIOGRAPHY.....	313

INTRODUCTION

At the end of March 1999, NATO countries started a bombing campaign against the Federal Republic of Yugoslavia in order to stop the ethnic cleansing perpetrated by Serbian militias against the Albanian population of the then autonomous province of Kosovo. U.S. Secretary of Defense William Cohen affirmed that “the appalling accounts of mass killing in Kosovo...makes it clear that this is a fight for justice over genocide.”¹ According to the U.S. Administration, the international community had the duty and the right to intervene in order to protect civilian populations from massive violations of human rights. This logic found the support of most Western states, most notably the UK under Tony Blair’s government. Few months later, while all European countries were in the process of ratifying the Statute of the International Criminal Court, U.S. President Bill Clinton was forced by domestic opposition not to submit the Rome Treaty to Senate for ratification. With this decision, the U.S. rejected a Court that aims to “exercise its jurisdictions over persons for the most serious crimes of international concern”² and that had obtained the endorsement of the almost totality of Western democracies.

These events illustrate how two important and often related international norms, such as humanitarian intervention and international criminal responsibility, can differently shape the interests of states that share most international and domestic values and usually take similar stances in terms of human rights enforcement. They emphasize how international norms are not equally successful at determining states’ foreign policy. Sometimes states recognize the legitimacy of norms and take actions that are consistent with them, while at other times they contest their normative content and refuse to act on their terms.

This observation touches upon the very nature of international norms and international legal arrangements and rests upon two main conditions that are still typical of today’s international system. First, despite several successful attempts to legalize behavior at the international level, such as the European Union, the Dispute Settlement Body of the World Trade Organization, or various human rights treaties, the international system is still fundamentally anarchic, meaning that there is no centralized authority capable of providing unambiguous interpretations of international norms and enforce their compliance. As is well known, the International Court of Justice, arguably one of the most

¹ Secretary Cohen’s Press Conference at NATO Headquarters, April 7, 1999, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=582>.

² Rome Statute of the International Criminal Court, Art. 1, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

developed examples of international jurisdiction, is entitled to produce binding rulings only between states that have previously agreed to submit to its authority. Its jurisdiction is permanent but not compulsory. Thus, states remain free to either recognize its jurisdiction on a case-by-case basis or simply ignore its rulings, as the U.S. famously did after the Nicaragua sentence in 1986.³

Second, international norms aspire by definition to be universal, meaning that they aim to regulate the behavior of a large number of international actors, most notably states. This universal nature clashes with the heterogeneity of the international system, which is characterized by states that pursue competing and not easily reconcilable foreign policy goals.

Lack of international authority and plurality of state preferences make it that response to international norms presents an almost innate tendency toward ambivalence. Sometimes states invoke and support international norms that are consistent with their interests, while at other times they can be considerably reluctant to accept regulations and limitations dictated by such norms. This is particularly true in case of norms that directly affect state sovereignty, intended as the capacity to control peoples and territories within their own borders.

The attempt to build an international community with the ability to make and enforce behavior has represented one of the most ambitious projects in the history of international relations. Its intellectual foundations can be found in the famous *To Perpetual Peace*, which was written by Immanuel Kant in 1795 and soon became a classic of modern and Western political thought⁴. In this small but controversial book, the German philosopher laid down the guidelines for an international community able to govern itself and overcome the anarchical structure of a world mostly composed by sovereign and self-interested states. Kant's theoretical proposal has constituted the privileged source of inspiration for generations of scholars, both in the field of political and juridical studies. For instance, most Hans Kelsen's works aimed at the construction of an international sphere in which peace could be established. Relying upon the maxim that "law is, essentially, an order for the promotion of peace,"⁵ Kelsen argued in favor of the juridification of relations among states, in particular regarding the practice of warfare. More recently, Peter Singer has emphasized the need to build an efficient and

³ International Court of Justice, "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)", 27 June 1986, available at <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>.

⁴ Immanuel Kant, *Perpetual Peace and Other Essays* (Indianapolis/Cambridge: Hackett Publishing Company, 1983).

⁵ Cit. in Carlo Nitsch, "La Teoria giuridica del conflitto come strategia politica della la pace. Un itinerario nella riflessione internazionalistica di Hans Kelsen" In *Conflitti* edited by Alessandro Arienzo and Dario Caruso (Napoli: Libreria Dante & Descartes, 2005): 303.

responsive “global ethical community.”⁶ At the basis of these theoretical constructs there is the attempt to theorize a depoliticized community in which legitimate and efficient institutional bodies are responsible for the maintenance of peace and the enforcement of normative behavior.

Nevertheless, the anarchy and diversity that characterize the international system create several problems in terms of support and consensus to international norms. Not only are states by and large free to decide what norms should be respected, ignored, or contested. International consensus is also lacking in terms of interpretation. Norms that dictate a duty to protect innocent civilians from human rights violations can, for example, trigger different responses by members of the international community. Western states often interpret this duty as justification for using force even across sovereign borders. By contrast, states that find their legitimacy in anti-colonial struggles have a tendency to view humanitarian intervention in terms of duty to provide assistance or to peacefully settle disputes. Historical experience usually makes them recalcitrant to endorse violations of sovereignty rights and interference in the affairs of other states. This is only an example of how processes of interpretation of international norms are unlikely to lead to univocal results capable of generating worldwide consensus.

When they consider the legitimacy of competing norms, states might privilege specific sets of international norms over others, emphasize some aspects, concentrate on regulations that most advance their interests while ignoring the others. Norms that are invoked today can become contested tomorrow. These processes produce different results that can favor recognition, rejection, or simply ignorance of international norms. The main aim of this study is to understand the conditions that determine this wavering behavior. How come states sometimes recognize norms as legitimate frameworks of behavior, while at other times they do not?

Investigating this problem is relevant in the light of the decentralized structure of international relations. Lacking a centralized authority for interpretation and execution, states are still the most responsible for how international norms are perceived and enforced. Invocation and contestation by members of the international community, especially the most powerful and influential ones, can largely affect the success of norms and their status as legitimate frameworks of behavior. Given the horizontal nature of the international legal system, norms can emerge, consolidate, and be enforced when a sufficient part of the international community agree. Understanding how states come to support or reject norms promises to augment our knowledge on processes of emergence and consolidation of international norms.

⁶ Peter Singer, *One World* (New Haven & London: Yale University Press, 2004): 149.

This question can be answered in several ways. State position as to international norms could depend on the distribution of power among the components of the system. Powerful states tend to support and promote the interpretation of norms that most fit their national and security interests. Ambivalent state responses toward international norms could be also explained by the structure of global economy. Norms would be the expression of the structure of interests that characterize international economy. Along these lines, invading a country that grossly abuse human rights would be motivated by the necessity to create new markets for goods and capitals. Considerations of justice and respect for universal standards of human rights, even when honestly put forward, would only be superstructures fabricated in order to provide controversial actions with more legitimacy. Finally, recent scholarship would rather focus on the ideational content of norms in order to show how considerations of justice and rule-oriented behavior constitute relevant reasons for states to sponsor international norms.

This study does not deny that international structures, such as power, capitalism, and justice can have considerable impact on the way states perceive and act upon international norms. The analysis will not ignore either the importance of the international dimension of norms, such as their formation, development, and consolidation, or the impact of materially and ideationally constructed interests on the way norms are enacted. Nevertheless, this study criticizes the diffuse attitude to treat norms as international phenomena that originate, become legitimate, and possibly die merely at the international level. The main goal is, rather, to bring the domestic agency back in and show how state response can vary as a function of factors that are located at the domestic level.

Nature of political and constitutional regimes, types of majorities dominating legislative assemblies and executive bodies, historical experiences, widely accepted cultural and political values, activism and organization of societal interests: these are all elements that can play an important role in the way states decide to interact with and respond to international normative frameworks. Analyses cannot afford underestimating these variables. The reason is not only the large interdependence between domestic and international structures that is often viewed as the main signpost of contemporary globalization processes. Also, the content of international norms, which mostly aim to regulate and enforce behavior, favors their interaction with actors and institutions that operate at the domestic level. Interpreting international norms usually requires additional foreign policy action that involves various domestic actors. Interpreting humanitarian intervention can imply the necessity to deploy military troops. Deciding what to make of international criminal responsibility can imply the necessity to ratify an international treaty. This generates domestic debates whose resolution can depend

on the type of relationships that exist between the executive and the legislative powers, electoral cycles, personality of Presidents and Prime Ministers, levels of civil society's access to public decision-making.

The interpretation of norms usually requires that specific foreign policy decisions be taken. The outcomes of such decisions depend on the array of actors that characterize domestic systems at particular points in time and, in particular, on the political, institutional, and societal settings that guarantee access or exclusion to the decision-making process and determine who is assigned the role of domestic gatekeeper. When they reach domestic contexts, international norms generate conflicts and debates whose resolution is often affected by cultural and institutional conditions. Norms might mostly emerge and develop within international forums. But their efficiency and legitimacy are largely dependent on what states want to make of them. Born in Geneva, The Hague, New York, or Brussels, the destiny of international norms is often decided in Washington, D.C., London, Beijing, or Brasilia.

Thus, this study aims to find the reasons for state support and rejection of international norms by analyzing domestic processes of decision-making. In particular, it focuses on three classes of actors. First, it analyzes the contribution of executive leaders, which are the most responsible for foreign policy-making process. Second, it focuses on legislative actors, such as parliaments and political parties, and on the domestic institutional arrangements that regulate the relationships between executives and legislatures. Finally, it focuses on civil society, especially on the action of campaigning and lobbying conducted by NGOs and interest groups.

The main argument that is developed through the chapters aims to locate the transmitters of the domestic legitimacy (or illegitimacy) of international norms. Civil society is, by and large, excluded from processes of norm interpretation or, at least, is not generally capable of producing interpretations that can win domestic support. The main competition for determining state positions toward international norms takes place between executive leaders and legislative actors. Depending on the type of norms at stake, leaders can prevail over legislative actors and vice versa. The study of the cases suggests that emerging norms tend to favor the prevalence of executive leaders. Since these norms have not reached high levels of international institutionalization, their invocation or contestation tends to be the result of arbitrary processes of interpretation mostly carried out by leaders. Vice versa, international norms that are highly institutionalized, for example by being part of an international custom or treaty, tend to trigger processes of domestic interpretation that require the involvement of legislative assemblies. In this case, characteristics of the political system, such as the type of party politics or the types of domestic rules that govern the relationships between the executive and the legislature, can

significantly constrain and orient the process of domestic interpretation.

This leaves open the debate on the pros and cons of international institutionalization of norms. Precise and detailed international legislation, such as international treaties and conventions, is likely to favor a legally more ordered and rational international system in which members can get to know in advance what is allowed and prohibited. This is the main aim of domestic political and legal systems too. Legislation generally means clear and stable rules and predictable normative behavior. By contrast, emerging norms can favor abusive processes of manipulation that aim to find normative interpretations that merely fit specific sets of interests.

Nevertheless, the international system is arguably more complex than domestic ones, especially in terms of diversity of legal, cultural, and political traditions. Highly institutionalized international norms can mean more precise and predictable international legislation. But they can also mean subjecting the recognition of such norms to domestic systems of ratification, constitutional conventions, and political practices that can considerably vary across regions and traditions. As will be shown, leaders arbitrariness at interpreting norms can mean manipulation of incomplete or emerging norms but can also allow for more rapid and efficient international decision-making, especially in cases of international crises that need to be solved through decisive and determinate action.

These arguments are developed through the analysis of the existing knowledge on processes of domestic diffusion of international norms and through the study of specific cases, namely UK and U.S. responses to norms of humanitarian intervention and international criminal responsibility.

In chapter 1, I outline the evolution and consolidation of the two norms that I take into account, humanitarian intervention and international criminal responsibility. I focus on the main debates that have concerned the two norms at the academic and policy levels. Both norms have caused several disagreements that involve their international legitimacy and application. When discussing their normative content at the domestic and international levels, states frequently provide competing interpretations that not only indicate the existence of a set of unresolved issues about their legitimacy, but also reflect different domestic ways of viewing the international system and its normative components. This calls for an analysis of the domestic actors and conditions that determine states' responses to international norms.

Chapter 2 contains a review of the main contributions to the study of international norms. The necessity to understand how norms are discussed and interpreted at the international and domestic levels requires the elaboration of a research design capable of taking into account the contributions of both the literature on processes of norm diffusion and socialization and the one on domestic sources of

foreign policy-making.

Chapter 3 describes the main characteristics of the U.S. and British political systems by explaining the peculiarities of the two states in terms of decision-making process. I outline, in particular, the role of executive leaders, most notably Presidents and Prime Ministers, and the constitutional and political conventions that regulate the relationships between governments and legislatures. This implies an outline of party systems, processes of government formation, electoral cycles, and constitutional provisions regulating foreign policy-making. Moreover, it provides an analysis of the structure of respective civil societies, with particular regards to their capacity of taking part to the decision-making process. This chapter provides a set of basic guidelines that can orient the reader through the complexities of U.S. and British decision-making. This knowledge is fundamental in order to understand how international norms are debated and interpreted at the domestic level.

Chapters 4 through 7 constitute the empirical part of this work. The first two focus on the invocation of the norm of humanitarian intervention by the UK and the U.S. during the 1998-9 Kosovo crisis. Given the emerging and highly contested nature of the norm, its interpretation as a viable framework for post-Cold War international system was mostly the result of executive leaders, especially in the Western world. The necessity to solve a new Balkans' crisis led a group of political leaders, most notably President Clinton and Prime Minister Tony Blair, to elaborate an interpretation that could make humanitarian intervention legitimate and feasible in an international legal system that does not provide adequate legal instruments for its implementation. This required an interpretation that partially moved away from existing international law and was, rather, based on the employment of moral considerations of justice and international legitimacy that could fill the gaps of a shaky legal basis.

Chapters 6 and 7 concern the debates that took place in the U.S. and the UK on the ratification of the ICC Treaty. This part shows the variation in the impact of one specific normative framework on the policies of two closed allies. In the UK, the advantages provided by the institutional system of party government facilitated the accession of the country into a Treaty that was considered consistent with the New Labour's foreign policy. By contrast, in the U.S., the high institutional constraints imposed on the Administration's foreign policy-making with regards to international treaties allowed Congress and its conservative majority to take the country down the road of an internationally troublesome rejection of the newly created Court.

In the conclusion, I review the most relevant empirical findings and provide examples on how theory and arguments could find further application to contemporary cases of norm interpretation. In

particular, I will briefly apply my theoretical framework on a notable case of non-intervention by the international community, such as the Darfur crisis. I conclude by sketching the main terms of the debate on institutionalization of international normative frameworks and review advantages and disadvantages of having norms in an emergent or highly institutionalized status.

Chapter 1

1 INTERNATIONAL NORMS AND STATE SOVEREIGNTY

The Case of Human Rights Doctrines

Especially after the end of the Cold War, norms that deal with the enforcement of universal human rights have been those that have produced the largest debates, disagreements, and conflicts of interpretation. The reason is that human rights doctrines have usually implied a redefinition of traditional understandings of sovereignty. Such a redefinition has consisted of a limitation of the authority of states to exert power and control over their own citizens, who have been progressively seen as holders of rights that go beyond the borders of modern nation-states. Along these lines, the legitimacy of states has been progressively subjected to the judgment and scrutiny of the international community. Massive violations perpetrated against civilian populations have become less and less tolerated and, when possible, have led to partial losses of sovereign prerogatives, in favor of international intervention to enforce basic human rights.

In theory, most states approve of this redefinition. In practice, they tend to prefer situations in which this conceptual framework does not apply to them. The reason is that, in general, states tend to be jealous of their sovereignty and prefer applications of human rights norms that fit with their own interests and values. This is at the basis of most conflicts on how to interpret and implement human rights doctrines and policies.

This chapter provides an account of the evolution of the concept of state sovereignty as it has occurred in the last twenty years and the international normative frameworks on the protection of human rights that this redefinition has favored. Along these lines, it focuses on two particularly important human rights norms, such as humanitarian intervention and international criminal responsibility, by analyzing the conflicts that have emerged, both at the academic and political levels, as to their legitimacy and functioning. In particular, it clarifies the main issues at stake and the disagreements that such norms trigger at the domestic and international levels. These conflicts of interpretation are identified as the most important reasons for the ambivalent response by states, which sometimes recognize the legitimacy of norms, while at other times they contest it. The chapter concludes by emphasizing the necessity to 'open the box' of states and analyze the domestic components that determine state recognition or contestation. In an international system still mostly heterogeneous and characterized by a multiplicity of state interests, the impact of norms has to be

investigated through an understanding of the domestic conditions that determine state response. This is particularly relevant, if we want to improve the prospects for an international consensus on international responses to massive violations of human rights.

1.1 Recasting Sovereignty: From Control to Responsibility

Debates about the possibility to devise an international community capable of producing and enforcing universally shared norms for the protection of basic human rights have been often associated with theoretical and institutional attempts to reconsider the main signpost of modern international relations: the concept of state sovereignty. Since the 1648 Treaty of Westphalia, which conventionally represents the starting point of the modern state system, the independence of units from external intervention and the capacity of imposing authority within state borders have been the main features of political and legal sovereignty. States were considered the main actors of the international system and their relations were based on an idea of reciprocity according to which any sovereign unit was bound to refrain from intervening in the affairs of the others. Traditionally, state sovereignty “entails a presumption against external interference in their domestic affairs” on the basis that “people might choose to live and be governed in many different ways and outsiders have no right to impose their particular way of life on others.”⁷

Obviously, this is mostly an ideal-typical view in that sovereignty has never been conceived in such absolute terms. For example, since the beginning of modern international relations, states have been keen to recognize the immunities of foreign states from courts’ jurisdictions and, above all, the existence of foreign diplomatic missions within their territories.⁸ Other scholars have emphasized how sovereignty should not be treated as either fixed or constant across time and space. Rather, its definition has been socially constructed and subject to changing historical conditions.⁹ More explicitly, other scholars have correctly argued that, although the institution of sovereignty carries with it the principle of non-intervention in the affairs of the others, intervention has always been an almost normal feature of international affairs. History provides several examples of deviations from the ideal-type of Westphalian sovereignty. Colonies, empires, transitional administrations with complete foreign

⁷ Alex J. Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009): 15.

⁸ The Dutch jurist Hugo Grotius (1583-1645) defined diplomatic missions as “quasi extra territorium.” See Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005): 114.

⁹ Thomas J. Biersteker, Cynthia Weber (eds.), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996); Thomas J. Biersteker, “State, Sovereignty, and Territory” in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, Beth A. Simmons (London: Sage, 2002): 157-76.

executive authority, trusteeship, protectorates are all instances of how sovereignty should not be exaggerated, but considered as a concept that has always needed to balance against other interventionist norms.¹⁰

Nevertheless, it is a fact that, at least until the end of WWII, states enjoyed a considerable amount of independence and freedom of action. Things started to change with the ratification of the United Nations (UN) Charter and the rise of a number of international organizations, which challenged the monopoly of sovereign states as only actors of the international system, and introduced innovative normative frameworks, such as prohibition to use force except in case of self-defense.¹¹

The end of the Cold War and the collapse of the bipolar system made such changes even more evident. Interdependence and globalization became the main signposts of the post-Cold War era. The spread of international financial transactions, a new technological revolution that favored communication at any level, and the victory of liberal capitalism as the only legitimate way of organizing the relations between states and individuals, have been interpreted as phenomena that required the definition of new criteria for the international legitimacy of sovereign actors.

As the world was seen as more interdependent and connected, states have been increasingly bound to respect a set of fundamental human rights of individuals. Re-proposing liberal and Kantian models of international society, policy-makers and scholars alike have underscored the necessity to depart from a unitary and indivisible view of sovereignty. As Robert Keohane has argued, “in contemporary external sovereignty, there are gradations.”¹² The precondition for an international community able to defuse threats and guarantee peace and security is located in the limitation of the external sovereignty of states that can take different forms according to the necessities. Human rights monitors to prevent abuses against civilians, transboundary humanitarian interventions to stop ongoing mass atrocities, peace operations to favor post-conflict reconstruction, and international criminal

¹⁰ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); David A. Lake, “The New Sovereignty in International Relations” *International Studies Review*, 5, 3 (2003): 303-23; Stephen D. Krasner, “Sharing Sovereignty: New Institutions for Collapsed or Failed States” *International Security*, Vol. 29, No. 2 (Fall 2004): 85-120; John M. Hobson, J. C. Sharman, “The Enduring Place of Hierarchy in World Politics: Tracing the Social Logics of Hierarchy and Political Change” *European Journal of International Relations*, Vol. 11, No. 1 (March 2005): 63-98. Along these lines, see also Luke Glanville, “The Antecedents of ‘Sovereignty as Responsibility’” *European Journal of International Relations*, Vol. 17, No. 2 (2010): 233-55, in which the author has noticed that even an apparently brand new concept, such as the Responsibility to Protect, has important historical antecedents that date back from the writings of classic theorists of sovereignty, such as Jean Bodin and Thomas Hobbes.

¹¹ For example, consider the seminal sentence issued by the International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, 11 April 1949, ICJ Reports 1949 (available at www.icj.cij.org), which established the principle of international legal personality of International Organizations.

¹² Robert O. Keohane, “Political authority after intervention: gradations” in *Humanitarian Intervention Ethical, Legal, and Political Dilemmas* edited by J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003): 286.

jurisdictions to prosecute international crimes have started to be viewed as fundamental institutional solutions to enforce and protect human rights.

1.1.1 Sovereignty as Responsibility

This historical and conceptual redefinition has led to the reframing of traditional understandings of sovereignty in terms of responsibility. Its intellectual origins can be found in the works of former Sudanese diplomat and senior fellow at the Brookings Institution Francis Deng. Investigating possible institutional solutions for the issue of international displaced persons (IDPs), Deng provided that “national sovereignty carries with it responsibilities that if not met put a government at risk of forfeiting its legitimacy as the custodian of that sovereignty.”¹³ Among these responsibilities there is the fundamental one to “assist and protect persons residing in their territories.”¹⁴ This meant that the “obligation of the state to preserve life-sustaining standards for its citizens must be recognized as a necessary condition of sovereignty...If the obligation is not performed, the right to inviolability should be regarded as lost.”¹⁵ At the basis of this reasoning, there was an emerging doctrine of international affairs according to which “human rights violations transcend frontiers” and “when governments fail to meet their obligations under the UN Charter, they should be held accountable by the international community.”¹⁶

Without denying the centrality of state sovereignty as the most organizing principle of international relations, Deng and his collaborators aimed to devise a theory that, on the one hand, recognized human rights protection as the primary responsibility of states. On the other hand, it made clear that in case they are unable to meet the basic needs of their populations, states should be “expressly required to accept offers of humanitarian assistance.” In the unfortunate circumstance that states are found responsible for human rights violations, “they should expect calibrated actions that range from diplomatic demarches to political pressure, sanctions, or, as a last resort, military intervention.”¹⁷

In the intention of the authors this theory was devised specifically for IDPs and refugees. Nevertheless, it was soon adopted at the UN level to tackle other kinds of gross violations of human

¹³ Francis M. Deng, *Protecting the Disposed* (Washington, D.C.: The Brookings Institutions, 1993): 14.

¹⁴ Cit. 15.

¹⁵ Francis M. Deng (et. al.), *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: Brookings Institution Press, 1996): xviii.

¹⁶ Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution Press, 1998): 4.

¹⁷ Cit., 7.

rights. In some sense, it became the *Zeitgeist* of the 1990s and was invoked by a number of policy-makers worldwide, not only within UN circles but also in many Western democracies, most notably the U.S. and the UK.

The popularity of sovereignty as responsibility significantly augmented during the several humanitarian crises that characterized the decade, from Bosnia to Rwanda, and reached its peak with NATO intervention in Kosovo, whose controversial nature is analyzed in the next section. In a speech before the UN General Assembly in 1999, Secretary-General Kofi Annan famously provided a distinction between two concepts of sovereignty. On the one hand, state sovereignty needed to be refined in the sense that “states are now widely understood to be instruments at the service of their peoples, and not vice versa.” On the other hand, individual sovereignty, intended as “the fundamental freedom of each individual...has been enhanced by a renewed and spreading consciousness of individual rights.” A responsible international community is the one that aims “to protect individual human beings, not to protect those who abuse them.”¹⁸

The biggest push to this conceptual redefinition came from an independent Commission composed of experts from different countries and largely sponsored by the Canadian government. The Report of this International Commission on Intervention and State Sovereignty (ICISS), which was chaired by former Australian Minister for Foreign Affairs Gareth Evans and former Algerian diplomat Mohamed Sahoun, was published in December 2001 and stated an apparently simple, but in fact highly controversial, principle: “State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”¹⁹ The timing of the Report was not ideal, as it came out few weeks after 9/11 when the international debate was monopolized by the war on terrorism and the U.S.-led operation in Afghanistan. Nevertheless, it did not go unnoticed.

¹⁸ Secretary-General Kofi A. Annan, “Secretary-General Presents his Annual Report to the General Assembly”, United Nations General Assembly, 20 September 1999, available at <http://www.un.org/News/press/docs/1999/sgsm6220.sgsm6220.html>. For similar statements by Kofi Annan, see also United Nations General Assembly, “We the Peoples: The Role of the United Nations in the twenty-first century”, Report of the Secretary-General, Fifty-Fourth Session, 27 March 2000, UN Document A/54/2000; United Nations, “Report of the Secretary-General on the Work of the Organization, General Assembly, Official Records, Fifty-Fifth Session, Supplement No. 1 (A/55/1), 30 August 2000.

¹⁹ *The Responsibility to Protect: Report for the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center, 2001): XI. For a commentary of the Final Report, see Neil S. Macfarlane, Jennifer Welsh, Carolin Thielking, “The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty” *International Journal*, Vol. 57, No. 4 (Fall 2002): 489-502.

In 2004, the UN published a Report titled *A More Secure World: Our Shared Responsibility*. Starting from the assumption that “today’s threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels”²⁰, the Report of the High-Level Panel on Threats, Challenges, and Change importantly recognized the conclusions of the ICISS. Providing that “the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities”,²¹ the UN endorsed “the emerging norm that there is a collective international responsibility to intervene”²² in case states are unable or unwilling to protect their own citizens from “genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law.”²³ This principle found further resonance in the subsequent 2005 Secretary-General’s Report *In Larger Freedom*, which reaffirmed Kofi Annan’s support for this emerging doctrine.²⁴

These documents stand as evidence of the conceptual and normative evolution that characterized the international community as to the political and moral standing of states. This transformation from “sovereignty as authority”, intended as “control over territory”, to “sovereignty as responsibility”, intended as “respect for a minimum standard of human rights”²⁵ carried with it a fundamental redefinition of what is threat to peace and security. From that moment on, the prevalent idea, at least at the UN level, would be that mass atrocities and violations of human rights could no longer fall within the exclusive jurisdiction of a state. Rather, states were now thought to bear a dual responsibility: “externally to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all people within the state.”²⁶ In case of failure to do so, the international community, mostly encapsulated by the UN, had to bear this responsibility.

The process that has been briefly described has favored the emergence and consolidation of several international norms that aim to enforce basic human rights by protecting victims and punishing perpetrators in a, at least in the intentions, universal and impartial way. These norms are part of an

²⁰ *A More Secure World: Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges, and Change* (United Nations, 2004): available at <http://www.un.org/secureworld>, 1.

²¹ Cit. para. 200.

²² Cit. para. 203.

²³ Cit. para. 200.

²⁴ United Nations General Assembly, *In Larger Freedom: Towards Development, Security, and Human Rights for all*. Report of the Secretary-General, Fifty-Ninth Session, 21 March 2005, available at <http://www.un.org/largerfreedom/contents.htm>.

²⁵ Jennifer M. Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004): 2.

²⁶ Gareth Evans and Mohamed Sahoun, “The Responsibility to Protect”, *Foreign Affairs*, Vol. 81, No. 6 (November/December 2002): 102; on the same point, see also Alex J. Bellamy, *Responsibility to Protect*: chapter 1; Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca and London: Cornell University Press, 2011).

internationalist mindset, which was central to International Relations discourse during the 1990s and which is still able to exert considerable influence nowadays. This intellectual and political climate emerged from the long-standing idea of building a responsible international community capable of providing troubled populations with justice and protection.

This study focuses on two of these norms: humanitarian intervention (HI) and international criminal responsibility (ICR). Both find their origins in the redefinition of state sovereignty in terms of responsibility and aim to enforce basic human rights across borders through different but equally controversial instruments: armies and tribunals. Despite their relevance for today's international affairs and their stated objectives, these norms are still largely challenged and subject to constant processes of invocation and contestation. As with most international norms, states tend to interpret them according to established practices but also according to their own interests and values.

1.2 Humanitarian Intervention

After the end of the Cold War, HI has become one of the major issues in the study of international relations and has attracted the interest of a vast array of scholars from international lawyers to political theorists. Although it has been widely debated and investigated, HI has not found any concrete institutionalization and is still to be considered in an emergent status. The difficulty at formulating a definition on which most international community could agree can be partially explained by the highly controversial nature of a norm that dictates to carry out military intervention across the borders of sovereign states.

Given the difficulty to define a concept that tends to overlap with many other types of military intervention, it is necessary to rely on a definition of HI able to exclude other forms of forcible measures. I choose to rely on J. L. Holzgrefe's definition according to which HI is "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."²⁷ This definition proves useful for at least two reasons. First, it emphasizes how HI is essentially a forcible measure that touches upon the sovereignty of the state involved. HI is an infringement of one of the most relevant norms of international relations. Second, it is carried out without the consent of the state against which force is applied. The justification for this type of action is provided by its purpose, which is to end massive

²⁷ J.L. Holzgrefe, "The Humanitarian Intervention Debate" in *Humanitarian Intervention Ethical, Legal, and Political Dilemmas*, edited by J.L. Holzgrefe and Robert Keohane (Cambridge University Press, 2003): 18.

violations of fundamental human rights. Important is also that citizens to whom aid is provided are usually not the ones of the state that carries out the intervention. What makes HI particularly threatening is that it has been often interpreted as an exceptional measure that might act as derogation from existing international law on the basis of its ethical purpose.

In spite of recent attempts to make the concept less controversial by placing it in the broader context of the responsibility to protect, the use of force for humanitarian purposes is still highly contested and does not find the acceptance of a considerable part of the international community. Lack of precise institutionalization and incapacity of the international community to solve several questions related to its legitimacy render HI a norm that is still in search of a clear definition.

1.2.1 The Evolution of Humanitarian Intervention: Past and Present

HI is not to be considered as a novelty of the 1990s. As Martha Finnemore has observed, the idea of using force to save citizens of other states was already present in the 19th century. It was, however, a much more partial type of intervention, mostly triggered by an exclusivist logic of using force by European powers in order to protect the life of White Christians. Without such strong cultural identification between interveners and victims, inaction was the main pattern. The nature of HI started to change dramatically with the abolition of slavery in the 19th century and with the processes of decolonization and self-determination in the 20th century. From that moment on, intervention has started to be taken into account regardless of cultural or religious ties and has come to include, at least in theory, any human being whose basic rights are being infringed.²⁸

It was with the end of the bipolar confrontation that HI has come to dominate the international political discourse. Various scholars have emphasized how during the Cold War the use of force across state borders was mostly motivated by the pursuit of national interests. Although interests have not disappeared with the fall of the Berlin wall, post-Cold War use of force has shown a tendency to be more multilateral and motivated by the need to solve humanitarian crises. For many, this would constitute a remarkable normative shift in the way states decide to intervene. Considerations of international solidarity have become common arguments to support both UN-led and unauthorized HI.²⁹ A decisive push toward the necessity to institutionalize military response in case of massive

²⁸ Martha Finnemore, "Constructing Norms of Humanitarian Intervention" In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter J. Katzenstein, 153-185 (New York: Columbia University Press, 1996); Martha Finnemore, *The Purpose of Intervention* (Ithaca: Cornell University Press, 1996).

²⁹ S. Neil Macfarlane and Thomas Weiss, "Political Interests and Humanitarian Action", *Security Studies*, Vol. 10, No. 1 (Autumn 2000): 112-42; S. Neil Macfarlane, *Intervention in Contemporary World Politics* (Oxford: Oxford University

violations of human rights has also come from the memory of the several failures to intervene that characterized the early 1990s, most notably the almost complete inaction by the international community, and above all the UN, during the 1994 Rwandan genocide.³⁰

The debate reached its peak with 1999 NATO intervention in Kosovo. That event triggered many discussions on how to interpret a norm that implies an infringement of sovereignty for humanitarian reasons. The operation was particularly controversial since it was launched by a regional organization without prior authorization by the Security Council. Both at the academic and policy level, the international community has largely debated the legitimacy of NATO intervention and has deeply investigated whether the supposed legitimacy and justice of a military action can and should overcome its lack of legal basis. Various policy documents published by states and independent commissions reached the controversial, and for many unsatisfactory, conclusion that under exceptional circumstances, such as the necessity to stop an ongoing humanitarian crisis, the legitimacy of the action can and should trump its lack of legal basis.³¹ Legitimacy and legality are the main terms of a debate that has produced a large number of positions.

1.2.2 *A Debate with Many Interpreters and Few Conclusions*

The debate on HI has involved a large number of scholars from a wide range of disciplines and has roughly divided in two camps. On the one hand, there are those who have, fairly enthusiastically, endorsed the emerging doctrine and have searched for legal and moral arguments that could support its legitimacy and necessity. On the other hand, a relevant portion of the scientific and academic community has harshly criticized its legal and political content and has denounced its illegitimacy.

Within the supportive camp, many contributions have come from the legal doctrine. Already before the end of the Cold War, liberal scholars, such as Fernando Teson, had argued in favor of the changing notion of state legitimacy. If the state is unable to guarantee the fundamental rights of its citizens, “it forfeits its domestic and international legitimacy.”³² Consequently, its sovereignty ceases to

Press, 2002).

³⁰ Michael N. Barnett, “The UN Security Council, Indifference, and Genocide in Rwanda”, *Cultural Anthropology*, Vol. 12, No. 4 (1997): 551-578; Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).

³¹ This conclusion was reached by several official reports that were produced both at the governmental and non-governmental levels. See in particular, *Humanitarian Intervention: Legal and Political Aspects*, Danish Institute of International Affairs, 1999; *Humanitarian Intervention*, Report prepared by the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs, 2000; *The Report of the Independent International Commission on Kosovo* (Oxford: Oxford University Press, 2000).

³² Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers, 1988): 15.

be inviolable and other entities can intervene with force in its internal affairs. Those types of arguments have been re-proposed after NATO intervention in Kosovo by international lawyers, such as Antonio Cassese and Bruno Simma. Such scholars have admitted that unauthorized operation Allied Force was a breach to existing international law, which mandates the passing of a binding resolution by the Security Council. Nevertheless, this breach can be also interpreted as evidence of the emergence of a norm-in-progress according to which, in case of massive atrocities, the international community has a right to intervene as an *extrema ratio* based on moral imperatives that cannot find an obstacle in the bureaucratic inefficiency of the Security Council.³³

In a slightly different way other legal scholars have defended the legality of NATO intervention in Kosovo on the basis that it can be seen as an exception to the general prohibition to use force contained in Article 2(4) of the UN Charter. In particular, Thomas Franck has argued that the only way to bridge the gap between “what is requisite in strict legality and what is generally regarded as just and moral”³⁴ is to consider HI through the lenses of mitigation. This refers to a legal principle, which is typical of many domestic systems, according to which “an action may be regarded as illegal but the degree of that illegality should be determined with due regard for extenuating or mitigating factors.”³⁵ This is to say that under exceptional circumstances, “condoning a carefully calibrated and justifiable violation may do more to rescue the law’s legitimacy than would its rigorous implementation.”³⁶ If breaching the law on the use of force can avoid the massacre of innocent civilians, illegal interveners, such as NATO countries, can be partially excused by the morally higher purpose of the mission.³⁷

Scholars belonging to the realm of international political theory and social science have been less worried with the necessity to justify intervention in Kosovo through the lenses of contemporary international law and have rather committed themselves to searching the moral justifications for using force even when the UN is unable to reach a decision. Most theorists have heavily relied on the well-

³³ See for example, Antonio Cassese, “Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *European Journal of International Law* 10 (1999): 23-30; Michael J. Glennon, “The New Interventionism” *Foreign Affairs* 78 (1999); Bruno Simma, “NATO, the UN, and the Use of Force: Legal Aspects” *European Journal of International Law* 10 (1999): 1-22; Jane Stromseth, *Rethinking Humanitarian Intervention: the case for incremental change*, in J.L. Holzgrefe and Robert Keohane (eds.), *Humanitarian Intervention*, 232-272;

³⁴ Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002): 180.

³⁵ Cit., 179.

³⁶ Cit., 185.

³⁷ This argument has been put forward also by Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 2003) and Philip Alston and Euan MacDonald, “Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law”, in *Human Rights, Intervention, and the Use of Force*, edited by Philip Alston and Euan MacDonald (Oxford: Oxford University Press, 2008): 1-31.

known just war tradition in order to justify a military operation that did not rest on a solid legal basis. It is in this context that we can place the “solidarist theory” of HI put forward by Nicholas Wheeler or the search for “a politics of humanitarian ideas” proposed by Thomas Weiss. Following the paradigm of just war, HI is defined legitimate when it is able to meet the moral and political requirements of just cause, which means the presence of a supreme humanitarian emergency, last resort after all the other means have been exhausted, proportionality, and reasonable possibility to succeed.³⁸

Support and endorsement is not all HI has encountered. In particular after Kosovo, several theorists have utilized old and more recent arguments contesting the legitimacy of HI in contemporary international relations. International lawyers, such as Danilo Zolo, have questioned the notion of universal human rights to be enforced at the expense of the principle of non-intervention and sovereign equality of states. For Zolo, justifying the use of force by invoking exceptional circumstances and moral imperatives has to be regarded as an example of “subversion of international law.”³⁹ HI corresponds to nothing less than the attempt by a small group of Western powers to impose their will on the international community by resorting to a moralist rhetoric of just war that has no resonance with existing international law. In addition, arguments in favor of the emerging nature of the norm of HI completely ignored the lack of *opinio juris*. This absence was particularly evident during intervention in Kosovo, which found the opposition of countries, such as China, Russia, and India.⁴⁰

Other international lawyers have harshly criticized the idea that the legitimacy of military action should trump its legality. As Anthea Roberts has observed, the only way of considering HI as a new norm of international law would be through an international treaty or the development of a specific international custom. Merely relying on legitimacy as a justification is incredibly problematic as it

³⁸ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Thomas G. Weiss, “The Politics of Humanitarian Ideas” *Security Dialogue*, Vol. 31, No. 1 (2000): 11-23; Nicholas J. Wheeler, “The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society” in *Humanitarian Intervention and International Relations*, edited by Jennifer M. Welsh (Oxford: Oxford University Press): 29-51; moreover, other scholars have put forward similar arguments. See for example, Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Metropolitan Books, 1997); Jurgen Habermas, “Bestiality and Humanity: A War on the Border Between Law and Morality” *Die Zeit*, 29 April 1999, available at <http://www.theglobalsite.ac.uk/press/011habermas.htm>; Terry Nardin and Melissa S. Williams (eds.), *Humanitarian Intervention* (New York: New York University Press, 2006).

³⁹ Danilo Zolo, *Chi dice umanita': Guerra, diritto e ordine globale* (Torino: Einaudi, 2000): 83

⁴⁰ For similar arguments, see Kai Ambos, “Comment” on the articles by Bruno Simma, “Nato the UN and the Use of Force: Legal Aspects”; David Kennedy, “International Humanitarianism: The Dark Sides” *International Journal of Not-for-Profit Law* Vol. 6 No.3 (June 2004): available at http://www.icnl.org/knowledge/ijnl/vol6iss3/special_2.htm; David Kennedy, “Reassessing International Humanitarianism: The Dark Sides”, conference given at The Allen Hope Southey Memorial Lecture, University of Melbourne Law School (June 8, 2004): <http://www.law.harvard.edu/faculty/dkennedy/speeches/TheDarkSides.pdf>.

remains a rather “undefined” concept, “open to manipulation by powerful actors.”⁴¹

Political scientists subscribing to more recent and post-modern approaches have put forward similar arguments, in particular with regards to the assumption that universal human rights should be imposed by states with sufficient military capabilities on contexts that are characterized by internal strife. British scholars, such as David Chandler and Mark Duffield, have particularly criticized the attitude, which is typical of Western powers, consisting of selecting specific classes of victims and perpetrators at the borders or outside the Western world in order to impose supposedly universal values without consideration for the existing international legal framework.⁴²

Finally, scholars, such as Robert Jackson, have re-proposed the “pluralist” arguments of Hedley Bull and other English School theorists, in order to criticize the political and moral viability of HI. As Jackson has argued, contemporary international system is still mostly based on the ethics of state sovereignty, which finds in the principles of non-intervention and prohibition to use force against the territorial integrity of other states its most important corollaries. Affirming the right to HI would go against the normative structure that mostly constitutes international relations, even after Cold War. This could have deleterious consequences on the stability of the international society, which remains “more important than minority rights and humanitarian protections in Yugoslavia or any other country.”⁴³ States have to decide between competing sets of values. In a world that is always in the wake of a major war among great powers, stability and peace are more likely to be achieved by respecting the rules of sovereignty and non-intervention.

This was the result of a debate that dominated the field of social and legal sciences for several years.⁴⁴ Despite the incredible amount of literature on the topic, various issues relating to HI mostly remained unresolved. The difficulty at reaching safe conclusions on what to do in the event of Security

⁴¹ Anthea Roberts, “Legality Verses Legitimacy: Can Uses of Force be Illegal but Justified?” in *Human Rights, Intervention, and the Use of Force*, edited by Philip Alston and Euan MacDonald, 179-213. Carsten Stahn has put forward a similar critique in ““Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” *The American Journal of International Law*, Vol. 101, No. 1 (January 2007): 99-120.

⁴² Anne Orford, “Muscular Humanitarianism: Reading the Narratives of the New Interventionism” *European Journal of International Law*, Vol. 10, No. 4 (1999): 679-711; Mark Duffield, “Human Security: Linking Development and Security in the Age of Terror” (Paper prepared for the GDI Panel “New Interfaces between Security and Development” Eleventh General Conference of the EADI, Bonn 21-24 September 2005): available at http://eadi.org/gc2005/conweb/papersps/Mark_Duffield.pdf; Michael Dillon and Julian Reid. “Global Liberal Governance: Biopolitics, Security, and War” *Millennium: Journal of International Studies* 30 (2001): 41-66; David Chandler, *From Kosovo to Kabul (and Beyond): Human Rights and International Intervention* (London: Pluto, 2006).

⁴³ Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000): 291.

⁴⁴ For a good summary of this incredibly large debate, with a particular focus on its critiques, see Jennifer M. Welsh, “Taking Consequences Seriously: Objections to Humanitarian Intervention” in *Humanitarian Intervention and International Relations*, edited by Jennifer Welsh, 52-68.

Council paralysis, on the prospects for institutionalizing the norm, or on how to tackle the criticism of non-Western countries, led a group of scholars and policy-makers to devise a more complete and less controversial concept. This is the object of the next section.

1.2.3 *Re-shaping Intervention: The Responsibility to Protect*

The main attempt to give prominence to the idea that, under particularly serious circumstances, the international community needs to commit itself to solving humanitarian issues was represented by the already mentioned 2001 Report of the Commission on State Sovereignty and Intervention. The main goal was to devise a theory of international intervention that could be more in line with the existing normative framework of international relations. The responsibility to protect (RtoP) aspires to become a concept that is able to produce a new framework of action for enforcing human rights, without provoking the skepticism and resentment that were manifest in several regions of the world at the time of the debate on intervention in Kosovo.

Three are the main novelties introduced by the Report. First, the work of the Commission rested on the idea that international intervention and state sovereignty are complementary, rather than incompatible, concepts. This means that “the primary responsibility for the protection of its people lies with the state itself.”⁴⁵ Intervention by the international community is not ruled out but considered only as a residual possibility, in case “the state in question is unwilling or unable to halt or avert it.”⁴⁶ This is to say that states that after Kosovo strongly invoked the principles of non-intervention and state sovereignty as barriers against malicious external interference in their own affairs should have nothing to fear about RtoP. Protect the fundamental human rights of your own population and you’ll never be subject to external intervention. This aims to operate a shift away from the aggressive language that was typical of the “droit d’ingerence” and HI⁴⁷ and offer a less controversial instrument of intervention.

Second, the Report makes clear that coercive and military intervention is only the very last step of a process that in case of unwillingness and inability by a state to protect fundamental human rights of its population, first and foremost warrants prevention. The Report indicates various measures that the international community should take before consenting to the use of force. Moreover, in case the international community, through the Security Council, should decide for military intervention, this must be accompanied by an obligation to rebuild, which aims to make sure that the post-war issues of

⁴⁵ The Responsibility to Protect: Report for the International Commission on Intervention and State Sovereignty, XI.

⁴⁶ Cit., XI.

⁴⁷ Joelle Tanguy, “Redefining Sovereignty and Intervention” *Ethics and International Affairs*, Vol. 17, No. 1 (2003): 141-148.

the targeted country are adequately tackled and solved.

Third, the Report provides narrow and strict criteria on how to use force in case prevention and other non-coercive measures have proved insufficient to guarantee human rights protection. Such criteria, which mostly belong to the just war tradition, include a just cause threshold, according to which “military intervention...is an exceptional and extraordinary measure” to be carried out only in case of “large scale loss of life...with genocidal intent” or “large scale ethnic cleansing.”⁴⁸ Moreover, military intervention needs to be based on a right intention, which means “to halt or avert human suffering”, must be a last resort, be supported by proportional means, and launched with reasonable prospects of success.”⁴⁹

More problems arose as to the issue of authority. Who is to decide this type of intervention? The Report makes clear that “there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes.”⁵⁰ However, mindful of possible situations of decision-making paralysis, it also reminds that it is necessary to “make the Security Council work better than it has.” Permanent members should refrain from abusing their veto powers, and in case of failure to act, the Report indicates the Uniting for Peace Procedure by the General Assembly or intervention by regional organizations under Chapter VIII of the Charter as possible solutions. Due to the impossibility of completely solving the almost intractable issue of what kind of legal basis to provide in case of failure by the Security Council “to discharge its responsibility to protect”, the Report can only conclude with a generic admonition that “concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.”⁵¹ More than an indication of what to do in case of decisional paralysis, the Report warns about possible consequences for the Security Council in case of a new Kosovo scenario.⁵²

Despite the not particularly fortunate timing for publishing the Report, RtoP has been given attention and recognition both at the policy and academic level. The primary responsibility of governments to protect their own populations was contained, for example, in Security Council Resolution 1556 of 2004 on Sudan⁵³. References to this emerging notion were also present in the UN

⁴⁸ The Responsibility to Protect: Report for the International Commission on Intervention and State Sovereignty, XII.

⁴⁹ Cit., XII.

⁵⁰ Cit., XIII.

⁵¹ Cit., XIII.

⁵² On this points, see Gareth Evans and Mohamed Sahoun, “The Responsibility to Protect”, *Foreign Affairs*, Vol. 81, No. 6 (November/December 2002): 99-110.

⁵³ United Nations Security Council, Resolution 1556, S/RES/1556, 30 July 2004, available at <http://daccess-dds->

documents *Our Shared Responsibility* and *In Larger Freedom*.⁵⁴ Particularly important was the 2005 General Assembly Outcome Document that not only recognized states' responsibility to protect individuals living within their borders, but also provided "our shared responsibility to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII...and in cooperation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations."⁵⁵ A subsequent resolution by the General Assembly formally endorsed such principles by adding that decisions on how to carry out action should take place on a case-by-case basis.⁵⁶ Echoes of the RtoP can be also found in Security Council Resolution 1674 of 2006 on the protection of civilians in armed conflicts and the principle was fully endorsed by the actual Secretary-General Ban Ki-moon in a later report.⁵⁷ Finally, RtoP was present in the recent Security Council Resolution 1970 of 2010 that has practically authorized armed intervention in Libya.⁵⁸

RtoP has inspired a fairly large literature whose main aim has been to revitalize a debate on international intervention for humanitarian purposes. The legitimacy of HI had been deeply challenged by the widespread opposition against U.S.-led war on terror and the decision by the Bush Administration to wage war on Iraq without Security Council authorization for reasons that can be hardly associated with humanitarianism.⁵⁹ This literature is based on a rejection of narrow conceptions of HI and has proposed and endorsed a new normative framework in which actual use of military force constitutes only one, and not even the most important, dimension of human rights protection.⁶⁰ This is

ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement.

⁵⁴ A More Secure World: Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges, and Change (United Nations, 2004): paragraphs 199-203; United Nations General Assembly, *In Larger Freedom: Towards Development, Security, and Human Rights for all*. Report of the Secretary-General, Fifty-Ninth Session, 21 March 2005: paragraphs 132, 135.

⁵⁵ United Nations, "Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the Assembly", 5 August 2005, A/59/HLPM/CRP.1/Rev.2, para. 118.

⁵⁶ United Nations General Assembly, "Resolution Adopted by the General Assembly on the 2005 World Summit Outcome", 24 October 2005, Sixtieth Session, A/60.L.1, para. 139.

⁵⁷ United Nations Security Council, Resolution 1674, 28 April 2006, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>; United Nations Secretary-General, "Implementing the Responsibility to Protect: Report of the Secretary-General", 12 January 2009, UN A/63/677.

⁵⁸ United Nations Security Council, Resolution 1970, S/RES/1970, 26 February 2011, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>.

⁵⁹ On this point see, Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action* (Cambridge, UK and Malden, MA: Polity Press, 2007); Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C: Brookings Institution Press, 2008); "Implementing the Responsibility to Protect, the 2009 General Assembly Debate: An Assessment", August 2009, available at www.globalR2P.org; Alex J. Bellamy, *Global Responsibility to Protect: From Words to Deeds* (New York: Routledge, 2011).

⁶⁰ Gareth Evans and Mohamed Sahoun, "The Responsibility to Protect"; Leo Feinsein and Anne-Marie Slaughter, "A Duty to Prevent" *Foreign Affairs*, Vol. 83, No. 1 (January/February 2004): 136-150; Thomas G. Weiss, "The Sunset of

particularly evident in the writings of UN Special Adviser on the RtoP, Edward Luck. In some recent articles, Luck has aimed to go beyond the traditional distinction between old and new sovereignty in the attempt to soften the skepticism of several non-Western countries that are still highly unconvinced about the virtues of redefining the rules of non-intervention. As he has indicated, “the notion that sovereignty is less than absolute...is neither new nor the product of a single culture or region.”⁶¹ Even more relevant has been his critique of HI that is charged with the twofold accusation of being “based on the failure of prevention efforts” and posing “untenable choices for the international community.”⁶² Ineffective, sometimes harmful, and intractable from a legal point of view, HI needs to be overcome and substituted with a multi-layered approach in which use of force is conceived as a last resort and carried out in a less confrontational manner.⁶³

1.2.4 Unresolved Issues

The re-conceptualization of HI in terms of RtoP has certainly contributed to place the use of force for humanitarian purposes in a more complete and structured theoretical and policy framework. This has meant better prospects for a wider consensus that promises to disentangle international intervention from the narrow association with Western political and military values. This is particularly important if we want to institutionalize a series of international practices capable of dealing with the delicate issue of human rights enforcement. Broadening the margins of international support is a welcoming development. Things have changed since 1999, when the use of force to enforce human rights seemed to be a mere prerogative of NATO countries. The approval of the 2005 World Summit Outcome, which contains several principles of RtoP was encouraging since it saw the opposition of only a small group of countries.⁶⁴

However, various issues related to the legitimacy of humanitarian action still remain unresolved. As Weiss has argued, “the curve depicting the operational capacity and political will to engage in humanitarian intervention would resemble the path of a roller coaster.”⁶⁵ The popularity of

Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era” *Security Dialogue* Vol. 35, No. 2 (June 2004): 135-53; Alex B.J. Bellamy, “Whither the Responsibility to Protect?” *Humanitarian Intervention and the 2005 World Summit*” *Ethics and International Affairs*, Vol. 20, No. 2 (Summer 2006): 143-169.

⁶¹ Edward C. Luck, “The Responsible Sovereign and the Responsibility to Protect”, in *Annual Review of United Nations Affairs*, ed. by Joachim W. Muller and Karl P. Sauvart (Oxford: Oxford University Press, 2008): 7.

⁶² Cit., 11.

⁶³ For similar arguments, see also Edward C. Luck, “The United Nations and the Responsibility to Protect” Policy Analysis Brief, Stanley Foundation (August 2008): 1-11.

⁶⁴ Alex B.J. Bellamy, “Whither the Responsibility to Protect?” *Humanitarian Intervention and the 2005 World Summit*” *Ethics and International Affairs*, Vol. 20, No. 2 (Summer 2006): 143-169.

⁶⁵ Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 1.

the idea of using force to stop mass atrocities depends on the historical period and on the type of issue that characterizes international discourse at specific points in time. The legitimacy of HI depends on the balance that creates among three different sets of norms: peace preservation, human rights, and sovereignty. Depending on the historical period, one tends to prevail over the others and make HI perceived as a more or less viable possibility.⁶⁶ The post-9/11 era, with war on terror and military intervention in Afghanistan and Iraq, both diverted many intellectual and material resources away from human rights enforcement and, above all, gave HI a bad name, especially for the unfortunate strategy by George W. Bush and Tony Blair to utilize humanitarian arguments in support of the military campaign in the Middle East.⁶⁷

Nevertheless, since it is unfortunately reasonable to expect that HI will come again to occupy the international debate, as soon as a new humanitarian crisis erupts, it is necessary to focus on the issues that are still to be solved and identify the most pressing ones. For the purpose of this study, one of the most important is certainly related with the necessity to create an international debate capable of exiting the stuffy rooms of the UN and reaching domestic contexts. This is particularly relevant if we are really to create an international mobilization capable of avoiding ‘future Kosovos and future Rwandas.’ Reception and interpretation of HI by domestic systems constitutes the last point of this section. First, I will briefly tackle the other unresolved issues.

First, an important issue has to do with the possibility that HI, or its evolution of RtoP, can be considered as an institutionalized international norm or more simply as a principle to be applied on a case-by-case basis. Policy makers seem to prefer, for different reasons, the latter option. Secretary-General Ban Ki-moon has supported in several documents a flexible approach in the sense that “in dealing with the diverse circumstances in which crimes and violations...are planned, incited, and/or committed, there is no room for a rigidly sequenced strategy or for tightly defined triggers for action.”⁶⁸ The difficulty at reaching an ultimate consensus on when the use of force must be warranted seems to prevent a precise institutionalization of the norm. This position has been supported also by Special Representative for RtoP Luck who has suggested considering RtoP as just another way of using force. This is part of the tasks of the Security Council that has never felt the necessity to devise “guidelines,

⁶⁶ Miles Kahler, “Legitimacy, Humanitarian Intervention, and International Institutions” *Politics, Philosophy & Economics* (2010): 1-26.

⁶⁷ Alex J. Bellamy, “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq” *Ethics and International Affairs*, Vol. 19, Issue 2 (September 2005): 31-54; Thomas G. Weiss, “The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era”.

⁶⁸ United Nations Secretary-General, “Implementing the Responsibility to Protect: Report of the Secretary-General”, 12 January 2009, para. 50; see also, United Nations, “Early Warning, Assessment and the responsibility to protect”, Report of the Secretary General, 14 July 2010, para. 19.

principles, or limitations on [its] freedom to make political judgments on a case-by-case basis”⁶⁹ about when and how to use force. Treating the use of force for humanitarian purposes as a “soft-law”, providing only the broad framework through which to act and not as a strict legal norm, is likely to be more useful and practical. Interestingly enough, this has been also the view of two U.S. ambassadors at the UN, representatives of two different Administrations, such as the Bush and the Obama ones.⁷⁰

Along these lines, supporters of RtoP, such as Bellamy, has nicely suggested not considering the concept as a unitary one, but rather as a set of norms, principles, and guidelines. Disaggregating RtoP in three pillars allows to consider the principle that each state has the responsibility to protect its own population from mass atrocities as a ‘reaffirmation and codification of existing norms.’⁷¹ The other two pillars, dealing with preventive and coercive measures remain more indeterminate until further international consensus is reached. For the purpose of this study, HI will be treated as an emerging norm that is occasionally enforced by groups of states in a flexible manner and on a case-by-case basis.

Second, there is the issue of authorization, and in particular of what to do in case of inability by the Security Council to make a decision. The UN has obviously tended to privilege the centrality of the Security Council⁷², although various documents recognize the necessity to avoid failures as the Rwandan one.⁷³ If international lawyers have divided along the lines of legitimacy and legality, RtoP supporters have taken a different, and probably wiser, stance. Instead of looking for the legal arguments that can provide unauthorized military action with a legal basis, analysts, such as Evans, Luck, and Bellamy have preferred, once again, a more pragmatic approach. Diplomatic pressures on the Security

⁶⁹ Edward C. Luck, “The Responsible Sovereign and the Responsibility to Protect”, 11.

⁷⁰ See the views of these two ambassadors on the RtoP at “Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome Document Being Prepared for the High Level Event on Responsibility to Protect”, 30 August 2005, available at http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf; Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the UN Security Council and the Responsibility to Protect, at the International Peace Institute Vienna Seminar, June 15, 2009, available at http://www.usunewyork.usmission.gov/press_releases/20090615_126.html.

⁷¹ Alex Bellamy and Ruben Reike, “The Responsibility to Protect and International Law” in *The Responsibility to Protect and International Law*, edited by Alex J. Bellamy, Sara E. Davies, Luke Glanville ((Leiden, Boston: Martinus Nijhoff Publishers, 2011): 84; see also Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, 5-7.

⁷² United Nations General Assembly, *In Larger Freedom: Towards Development, Security, and Human Rights for all*, para. 135; United Nations, “Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the Assembly”, para. 54-6; United Nations General Assembly, “Resolution Adopted by the General Assembly on the 2005 World Summit Outcome”, 24 October 2005, para. 139.

⁷³ Secretary-General Kofi A. Annan, “Secretary-General Presents his Annual Report to the General Assembly”, United Nations General Assembly, 20 September 1999, available at http://www.un.org/News/press/docs/1999/sg/statements_search_full.asp?statID=28; *A More Secure World: Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges, and Change*, para. 204.

Council by the Secretary-General and commitment by permanent members to limit the recourse to veto power when vital national interests are not at stake have been identified as possible solutions.⁷⁴ In addition, Bellamy has suggested that states should be more careful when using the humanitarian rhetoric and make sure that their proposed action meets the just cause thresholds and precautionary principles provided by the ICISS Report.⁷⁵

Third, the scientific community has devoted considerable amount of research to the crucial issue of how to mobilize an international consensus on the use of force for humanitarian emergencies. This exigency has been particularly pressing in the years after 9/11 in which HI has progressively been identified by various developing countries as a masquerade for abusive interference in their own affairs, and in which Western states have mostly focused on other hot topics, such as terrorism and reconstruction of Afghanistan and Iraq. From an analytical point of view, this requires an investigation on the conditions that can determine recognition or rejection of HI discourse by single states.

From North to South, responses to past humanitarian crises show a pattern of large ambivalence. States sometimes enthusiastically advocate the necessity to use force to stop massive violations of human rights. At other times, they strongly reject it or maintain a mix of indifference and skepticism. This was clear, for example, in the case of Kosovo. If, on the one hand, NATO countries vehemently supported and performed military action, on the other, 78 countries, mostly members of the Non Aligned Movement issued a declaration that rejected “the so-called right of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”⁷⁶ The declaration concluded by reminding that “every state has the inalienable right to choose political, economic, and cultural systems of its own without interference in any form by other states.”⁷⁷ Similar debates among countries with different historical experiences, political cultures, and leadership took place during the negotiation for the 2005 World Summit Outcome.⁷⁸ The necessity to ‘open the box’ of states and see how domestic systems react to HI and RtoP has been recognized also by two of its founding fathers: “the key to mobilizing international support for intervention is to

⁷⁴ Gareth Evans and Mohamed Sahnoun, “The Responsibility to Protect”, 106-8; Alex J. Bellamy, “Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect After the 2005 World Summit” Carnegie Council, Policy Brief No. 1, 2006; Edward C. Luck, “The Responsible Sovereign and the Responsibility to Protect”, 12.

⁷⁵ Alex J. Bellamy, “Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect After the 2005 World Summit.

⁷⁶ Declaration of the South Summit, Havana 10-14 April 2000, para. 49, available at <http://www.nam.gov.za/documentation/southdecl.htm>.

⁷⁷ Cit., para. 49.

⁷⁸ Alex BJ. Bellamy, “Whither the Responsibility to Protect?” Humanitarian Intervention and the 2005 World Summit” *Ethics and International Affairs*, Vol. 20, No. 2 (Summer 2006): 143-169.

mobilize domestic support, or at least neutralize domestic opposition.”⁷⁹

For this reason, this study proposes to analyze how domestic systems react to debates on HI in order to understand what domestic actors are more responsible for its interpretation and for determining the general position of a country toward it. Although some studies have started to view the problem from this angle, empirical analyses are still few.⁸⁰

The debates that have been reported above not only take place at the international or UN level. They heavily involve domestic actors as well. Such debates, together with its highly contested nature, are at the basis of the variation in the way states respond to this norm. Moreover, they constitute explanations for the inconsistent and sometimes schizophrenic reactions of states to situations that could potentially call for HI. Legal interpretations of what is required to pursue a legitimate intervention, moral considerations of what a responsible international community should do, calculations of what constitutes the interest of a state: these are all issues that states take into account when they have to decide whether or not to intervene. The possibility that states invoke the existence of the norm of HI and support the legitimacy of a humanitarian war, thus, depends on how these debates are solved at the domestic level and what arguments are able to prevail.

If a state comes to believe that HI is consistent with its interests, or with its attempt to pursue an ethically informed foreign policy, or with its legal interpretation of the international system, HI is likely to be invoked and enforced. If, on the contrary, a state does not have any material interests or even contests the legitimacy of a humanitarian operation, indifference or open opposition is the expected result. What prevails between invocation and contestation depends on the type of actors that characterize the domestic debate and on their capacity to impose specific interpretations of the norm. States can sometimes decide to intervene (as occurred during the Kosovo crisis) or at other times reject any involvement (as for example during the genocide in Rwanda). For HI to be perceived as a viable

⁷⁹ Gareth Evans and Mohamed Sahoun, “The Responsibility to Protect”, 109.

⁸⁰ Although it does not focus specifically on HI but rather on intervention as a reprisal against violators of the territorial integrity of other states, an example of this attempt is represented by Eelco van der Maat, “Sleeping Hegemons: Third Party intervention following territorial integrity transgression” *Journal of Peace Research*, 48 (2) (2011): 201-15; other studies have provided quantitative analyses on the determinants that lead states and the UN to use force. See for example, Peter Viggo Jakobsen, “National Interest, Humanitarianism or CNN: What Triggers UN Peace Enforcement after the Cold War?” *Journal of Peace Research*, Vol. 33, No. 2 (1996): 205-215; Karin Von Hippel and Michael Clarke, “Something Must Be Done” *World Today*, Vol. 55, No. 3 (1999): 4-7; other contributions, such as Jean-Marc Coicaud and Nicholas J. Wheeler (eds.), *National Interest and International Solidarity: Particular and Universal Ethics in International Life* (New York: United Nations University Press, 2007), have attempted to analyze the motivations behind state decisions to intervene in area of crisis. However, the main weakness of this study is constituted by its reliance on the distinction between national interests and pure solidaristic purposes, which remains quite difficult to operationalize; finally, one of the few attempts to look into the domestic conditions that determine state response to this type of norms is constituted by Jochen Prantl, Ryoko Nakano, “Global Norm Diffusion in East Asia: How China and Japan Implement the Responsibility to Protect”, NTS Working Paper Series No. 5, Singapore: RSIS Centre for Non-Traditional Security (NTS) Studies, January 2011.

option, and for norms in general to be considered as legitimate frameworks of behavior, they need to resonate with the political, legal, and ethical components of a state at particular points in time. This calls for an investigation of the response of domestic systems to instances of HI in order to understand what conditions can determine its invocation or contestation.

Discovering the domestic conditions that might favor one outcome or the other promises to better understand the modalities and the mechanisms through which to create a domestic and international political will on how to tackle humanitarian crises through forcible measures.

1.3 International Criminal Responsibility

The evolution of the norm of international criminal responsibility (ICR) has been often associated with the proliferation of international jurisdictions that characterized the post-Cold War era. The necessity to provide victims of mass atrocities with justice and punishment of the responsible has been given wide attention both at the UN and state level. ICR is a normative framework that aims to become an instrument for the enforcement of human rights by means of judicial prosecution. In this sense, it is somehow supposed to be less an intrusion in the internal affairs of states than HI, which is based on the use of military force across state borders.

In fact, states have not always welcomed such a normative framework. The reason is that, although a judicial prosecution is not perceived as large an aggression as bombing a city or invading a country, the concept itself of ICR implies an infringement of sovereignty. Starting an international prosecution against a citizen of another state means that the domestic jurisdiction in question is not believed to be effective or willing enough to give justice in an adequate and impartial way. As a result, the international community, either through the Security Council or an international treaty, has created supranational jurisdictions, which are not easily identifiable either with the victim, the perpetrator, or with the state itself.

These international tribunals infringe the sovereignty of states, conduct criminal proceedings in their place, and sentence defendants through judgments that are legally binding for the subjects involved. International jurisdictions substitute the domestic ones, which are, at least in theory, bound to accept this condition of things. Along these lines, ICR and the use of supranational jurisdictions are to be considered as products of that conceptual and political redefinition that has characterized state sovereignty especially in the last twenty years. It is a normative framework that limits some of the main tenets of international relations, such as sovereign equality and non-interference, in order to enforce values that are thought to be universal. This process is also largely associated with the evolution of

individuals as subjects of international law, which means holders of rights and responsibilities. As Patricia McNerney has noticed, international treaties establishing international tribunals “erode aspects of sovereignty by placing international legal obligations more directly on the citizens of nations...rather than governments.”⁸¹ As such, it would be difficult to expect that this norm does not trigger debates and conflicts about its legitimacy.

For the purpose of this study, I rely on a definition of the norm that can be derived from the Statute of the International Criminal Court (ICC), arguably the latest and most complete example of legal codification of principles of international criminal law. The Statute defines ICR as the personal liability of individuals for “the most serious crimes of concern to the international community as a whole.”⁸² This definition focuses on the individual as subject of international law. Holding international rights and responsibilities, individuals cannot hide any longer behind the walls of state sovereignty in order to justify their actions as to massive violations of human rights. Equally, states are not free to infringe fundamental human rights of people living within their borders by invoking the principle of non-interference. There are international crimes of massive scale that constitute an offense to the international community as a whole and, by definition, require international and concerted action.

As will be explained in the next sections, the norm of ICR has reached a higher level of institutionalization than HI, even if we consider the evolution of the latter in the form of the RtoP. ICR can already count on a fairly large history of codification of principles, norms, and rules. Establishment of tribunals, conclusion of international treaties, development of international customs, recognition by international organizations, most notable the UN: various events and historical developments have led to processes of institutionalization and codification that make ICR a reasonably determinate and precise norm. Nevertheless, this does not mean that the norm has not been subject to processes of contestation and that states’ response toward it has not been characterized by ambivalence. Its higher level of codification in the form of various international treaties and conventions is not *per se* a guarantee of widespread adherence to its normative imperatives, nor of uncontested legitimacy.

The ambivalent behavior of states toward the norm can be illustrated by focusing on the most important of these international arrangements, which is the 1998 Rome Statute establishing the ICC.

⁸¹ Patricia McNerney, “The International Criminal Court: Issues for Consideration by the United States Senate” *Law and Contemporary Problems* 181 (Winter 2001): available at [http://www.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Probs.+181+\(Winter+2001\)](http://www.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Probs.+181+(Winter+2001)), 182.

⁸² Rome Statute of the International Criminal Court Art. 5.1, available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm>.

First, some important states have opposed the Treaty since its inception in July 1998. Powerful state actors, such as the U.S., China, Russia, and Israel either have never completed the process of ratification, or have not even started it. This poses a problem of lack of support in an international system in which the credibility of a treaty likely depends on the number, but also on the relative power of state parties. Second, some recent experience teaches that being part and having ratified the Rome Treaty is no guarantee for subsequent and unconditional support to the Court. For example, at the time of the debate on the Rome Treaty, the UK was among the most supporters of a permanent criminal court. Its parliament promptly ratified the Treaty in May 2001.⁸³ Nevertheless, British support turned into skepticism few years after the entry into force of the Treaty in July 2002. During the Review Conference of the Rome Statute that took place in Kampala in May and June 2010, British diplomacy expressed large concerns on amending the Treaty to give the Court jurisdiction over the crime of aggression.⁸⁴

This example shows that being a member of the ICC Treaty does not completely solve the problem of the ambivalence of state response toward the Court. As most international treaties and organizations, the ICC can only work effectively in case states guarantee support and cooperation. This is even recognized by the Statute itself that in Article 86 provides that “states Parties shall...cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁸⁵ As various international lawyers have observed, “the principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that implementation of this method ultimately hinges on, and depends upon the goodwill of states.”⁸⁶

Notwithstanding its higher level of institutionalization, even the norm of ICR is subject to processes of invocation, recognition, and contestation that can only be partially explained by state membership. Even when they are already parts to the Treaty, states have a tendency to select their behavior toward its normative imperatives, depending on the historical and political conditions that characterize their own domestic systems and on the interests and values that dominate domestic political discourse at particular points in time. Although the level of determinacy and codification can help, highly institutionalized norms, such as ICR, are not exempted from this reality.

⁸³ See chapter 6.

⁸⁴ See for example, <http://iccreviewconference.blogspot.com/>; also, Claus Kreb and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression” *Journal of International Criminal Justice*, 8 (2010): 1179-1217.

⁸⁵ Rome Statute of the International Criminal Court, Article 86.

⁸⁶ Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” *European Journal of International Law*, 9 (1998): 4.

1.3.1 Evolution and Development of International Criminal Responsibility

The idea of ICR finds its origins in the attempt to criminalize war and make it an international crime for which individuals, such as political and military leaders, can be held accountable.⁸⁷ The first echoes of this exigency can be found in the writings of various Greek and Roman philosophers, most notably St. Augustine in the V century A.D. Considered as one of the founding fathers of the just war tradition, St. Augustine was one of the first to propose a “distinction between legitimate and illegitimate kinds of force.”⁸⁸

However, it was with the development of modern international humanitarian law that states started to think about possible ways of criminalizing individual conduct in war. In 1863, Swiss lawyer Gustave Moynier and businessman Henry Dunant created the conditions for the establishment of the International Committee of the Red Cross. Their ideas were at the basis of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.⁸⁹ By the end of the 19th century two more conventions (in 1899 and 1907) negotiated in The Hague provided new substance to the emerging doctrine of international humanitarian law, which aims to regulate human behavior during armed conflicts.

The first test for this new bulk of law materialized in 1919, when winning powers tried to prosecute the German Kaiser Wilhelm II for the start of WWI.⁹⁰ Nevertheless, the Kaiser managed to escape to The Netherlands, which never agreed to his extradition. The trial against the former German leader remained only an intention. The Treaty of Versailles, which concluded WWI in 1919, also contained Article 231 through which Germany “accepts the responsibility... for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected.”⁹¹ This authorized the Allied to set up military tribunals to prosecute German citizens accused of war crimes. Some trials were eventually held, although with disappointing results. Despite these failures, the idea of prosecuting individuals for war crimes started to spread.⁹²

After WWII, the Holocaust and the other tragedies related to the conflict led the UK, France,

⁸⁷ One of the most important theorists of the criminalization of war has been Hans Kelsen: for his analysis of the prospects for creating a permanent ICC in the early 1920s, see for example, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944): chapters 10-20 and annex II; for an analysis of Kelsen’s conceptualization of individual responsibility for international crimes, see Carlo Nitsch, “La teoria giuridica del conflitto come strategia politica della pace: Un itinerario nella riflessione internazionalistica di Hans Kelsen”, in *Conflitti*, ed. by Alessandro Arienzo and Dario Caruso, 289-338. Napoli: Libreria Dante & Descartes, 2005; also, D. Zolo, *Hans Kelsen: International Peace through International Law*, in *European Journal of International Law*, vol. 9 (1998): 306-324.

⁸⁸ Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008): 16.

⁸⁹ See <http://www.icrc.org/ihl.nsf/full/120?opendocument>.

⁹⁰ Benjamin N. Schiff, *Building the International Criminal Court*, 22.

⁹¹ See <http://www.fordham.edu/halsall/mod/1919versailles.html>, article 231.

⁹² Benjamin, N. Schiff, *Building the International Criminal Court*, 27.

the U.S. and Soviet Union to set up the International Military Tribunal of Nuremberg (1945) in order to prosecute Nazi criminals. Article 6 of the Tribunal's Charter provided that the Court had jurisdiction over "major war criminals of the European Axis countries" for "crimes against peace", "war crimes", and "crimes against humanity". The Charter invoked the principle of "individual responsibility"⁹³ and for the first time in history stated that "the official position of defendants, whether as Heads of State or responsible officials in Government Department, shall not be considered as freeing them from responsibility or as a ground for mitigating punishment."⁹⁴ The Allied also established the International Military Tribunal for the Far East with the aim of prosecuting Japanese war criminals.

The Nuremberg Tribunal concluded its work in 1946 after having condemned several individuals that had been found guilty of international crimes. On 21 November 1947, the UN General Assembly formally decided to "entrust the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" and directed the International Law Commission to "prepare a draft code of offenses against the peace and security of mankind."⁹⁵ This period of relative international interest for the issue of prosecuting international crimes concluded with the adoption by the General Assembly of the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted on 9 December 1948 and entered into force in January 1951, the Convention provided that "persons charged with genocide...shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted the jurisdiction."⁹⁶ The Convention referred to the possibility of creating an international tribunal for the prosecution of the crime of genocide but, once again, it was unclear how and when this would have been.

The start of the Cold War and the intense competition between the U.S. and USSR represented an abrupt stop for the evolution of ICR, with developments mostly limited to the controversial trial against Nazi criminal Adolf Eichman, which was held in Jerusalem in 1961 after his capture in Argentina by Mossad agents, and to the interesting experience of the Truth Commissions in various

⁹³ Charter of the International Military Tribunal, article 6, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

⁹⁴ *Cit.*, article 7.

⁹⁵ United Nations General Assembly, "Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal", Resolution 77, 21 November 1947, available at <http://www.un.org/documents/ga/res/2/ares2.htm>.

⁹⁶ UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide", adopted by Resolution 260 (III) of the UN General Assembly, 9 December 1948, available at <http://www.preventgenocide.org/law/convention/text.htm#VI>, article 6.

newly democratized countries, most notably South Africa.⁹⁷

Similarly to what happened with HI, it was the end of the Cold War that revitalized the debate on international justice and favored the development of new instruments to prosecute international crimes. On 25 May 1993, the Security Council established the International Criminal Tribunal for the Former Yugoslavia in order to prosecute responsible for atrocities committed in the territory of the Former Yugoslavia since 1991.⁹⁸ In November 1994, the Security Council established the International Tribunal for Rwanda, which had jurisdiction over genocide and other related crimes committed in the African country during the civil conflict between Hutu and Tutsi populations.⁹⁹ The Charter of the ICTY established the tribunal's competence over "grave breaches of the Geneva Convention" (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5) and introduced the important principle that "the International Tribunal shall have primacy over national courts."¹⁰⁰

Over the course of the years, the two tribunals prosecuted a large number of individuals but were also criticized for their inefficiency.¹⁰¹ However, the ICTY managed to develop a fairly rich jurisprudence that contributed to the affirmation of innovative principles of international criminal law, such as that the jurisdiction of the Tribunal over war crimes, crimes against humanity, and violations of the Geneva Conventions "apply both to internal and international armed conflict."¹⁰² This principle has now acquired the status of customary law and has been further codified by the Statute of the ICC.¹⁰³

The main step for the development of the norm of ICR was represented by the project of creation of a permanent international criminal court. The impulse was given by the necessity to get

⁹⁷ Benjamin N. Schiff, *Building the International Criminal Court*, 30.

⁹⁸ United Nations Security Council, S/Res/827/1993, 25 May 1993, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>.

⁹⁹ United Nations Security Council, S/Res/955/1994, 8 November 1994, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>.

¹⁰⁰ "Updated Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, September 2008, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf, Article 9.

¹⁰¹ Benjamin N. Schiff, *Building the International Criminal Court*, 48-58.

¹⁰² United Nations, ICTY, *Prosecutor v. Dusko Tadic*, 15 July 1999, available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>, para. 66.

¹⁰³ Statute of the International Criminal Court, Article 8 (a,b,c,d,e). For other analyses of the evolution of the norm of international criminal responsibility during the 1990s and for explanations of the ICTY and ICTR, see Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Branches of International Humanitarian Law", 7-10; M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" *Harvard Human Rights Journal*, Vol. 10 (Spring 1997): 11-62; Howard Ball, "Prosecuting War Crimes and Genocide. The Twentieth Century Experience" (Lawrence, Kansas: University Press of Kansas, 1999); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2000); Bryan F. MacPherson, "Building an International Criminal Court for the 21st Century" *Journal of International Law*, Vol. 13, No. 1 (Winter 1998): 1-60.

away from the experiences of the ad hoc jurisdictions, which could count on a limited authority in terms of crimes and territory, and provide the international community with a permanent instrument. The idea for an ICC first came from the government of Trinidad and Tobago, which proposed the establishment of a Court for the prosecution of the crime of drug trafficking. In 1994, the International Law Commission presented a draft Statute and submitted it to the General Assembly, which further established in 1995 a Preparatory Committee (PrepCom) to develop and discuss the work of the Commission. The PrepCom met several times between 1996 and 1997 and concluded its works by calling an international conference for the establishment of an ICC. The Conference convened in Rome between 15 June and 17 July 1998 with the participation of more than 160 state delegates.¹⁰⁴

One of the most important novelties of the Conference was the participation of 236 NGOs representing the interests of the emerging global civil society. Most NGOs had previously formed in February 1995 the Coalition for an International Criminal Court (CICC) whose main aim was to “foster awareness and support for the Court among a wide range of civil society organizations.”¹⁰⁵ The Coalition included a large number of NGOs and was led by a Steering Committee composed of Amnesty International, Federation Internationale des Liges des Droits de l’Homme, Human Rights Watch, No Peace Without Justice, Parliamentarians for Global Action, and the World Federalist Movement. Thanks to their efficient organization, NGOs were able to act in Rome as a common body. In order to be more effective, they created several working groups that “shadowed the working-groups of state representatives on different sets of articles of the draft statute, and made daily reports available to NGOs and state delegates.”¹⁰⁶

Among the main strategies of the Coalition, there were the lobbying of state representatives, the provision of legal experts, which was of great help for developing countries that could not afford a large delegation, and the dissemination of information about the Conference to a wider audience thanks to the publications of articles, newsletters, and magazines.¹⁰⁷ NGOs contribution to the adoption of the Rome Treaty was such that some scholars have not hesitated to define the ICC as a “global civil society achievement.”¹⁰⁸

A widespread galaxy of NGOs, advocacy movements, epistemic communities, non-profit

¹⁰⁴ Benjamin A. Schiff, *Building the International Criminal Court*, 70.

¹⁰⁵ William R. Pace and Mark Thieroff, “Participation of Non-Governmental Organizations” in *The International Criminal Court: The Making of the Rome Statute*, edited by Roy S. Lee (The Hague: Kluwer Law International, 1999): 392.

¹⁰⁶ Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London: Routledge, 2006): 27.

¹⁰⁷ Cit., see especially pp. 37-44; among the main magazines that provided daily news on the ICC Conference, see for example *Terra Viva* and *The ICC Monitor*, whose issues are available at www.iccnw.org.

¹⁰⁸ Cit.

organizations is often recognized as a decisive contributor to the campaigning process that led to the Rome Conference, to the negotiations of the Treaty, to the approval of the subsequent annexed documents, such as the Elements of Crimes and the Rules of Procedure and Evidence and, in general, to the prominence of the norms contained in the ICC system. Along these lines, William Pace defined NGOs action in Rome as an experiment of “new diplomacy.”¹⁰⁹ NGOs representatives at the Conference were able to establish an alliance with a core of supporters (usually referred to as ‘like-minded states’). This alliance was based on the idea that “it is better to have a workable, effective treaty regime which may initially not have the support of some very important countries than it is to have a broad, ineffective, and expensive treaty regime which has more universal support.”¹¹⁰ This strategy proved successful in Rome. The Treaty was eventually overwhelmingly approved with the opposition of a small group of seven countries.

Given the opposition of this group of states, most notably the U.S., the final package of the Treaty was subject to a vote by the Plenary Session of the Conference. 120 states voted in favor, with only 21 abstentions and 7 opposite votes, such as the U.S., Israel, China, Libya, Iraq, Qatar, and Yemen.¹¹¹ The Conference was dominated by the ‘like-minded states’ (LMS), which included most EU countries, and most notably the UK. The group put together the most vehement advocates of the Court and, together with NGOs, played a decisive role in the final adoption of the Statute.

The ICC Statute was the result of a compromise among a huge number of states and was generally considered a great achievement, although it also created disappointment. The main points of disagreement concerned three main areas. First, the nature of the jurisdiction of the Court, which LMS wanted automatic, meaning that states had to be subject to its jurisdiction immediately upon ratification. Particularly progressive states, such as Germany, would have also wanted a universal jurisdiction. The compromise was found around a Court with automatic but complementary jurisdiction. As a result, the ICC has jurisdiction only in case of inability or unwillingness of states to prosecute crimes through their own national judicial systems.¹¹² Moreover, the Court has jurisdiction over citizens of state parties and citizens of other states that had allegedly committed crimes in the territory of a state party. This constituted the main reason for U.S. opposition, which considered this

¹⁰⁹ William R. Pace, “The Relationship Between the International Criminal Court and Non-Governmental Organizations” in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1999): 205.

¹¹⁰ Cit. 207.

¹¹¹ Dominick McGoldrick, “Political and Legal Responses to the ICC” in *The Permanent International Criminal Court: Legal and Policy Issues*, edited by Dominick McGoldrick, Peter Rowe, and Eric Donnelly (Oxford and Portland: Hart Publishing, 2004): 389-449.

¹¹² Rome Statute of the International Criminal Court, Article 17.1 (b).

provision as going against the law on treaties, which limits the effects of an agreement only to contracting parties.¹¹³

Second, the role of the Prosecutor. States, such as China and the U.S. would have preferred a Prosecutor that could only be activated by the Security Council in order to enjoy the privilege of their veto power. In the end, the Conference reached an agreement that located the power to start a prosecution in the Security Council, in any member state, and most importantly, in a *proprio motu* action of the Prosecutor, which is consequently free to start its own prosecutions.¹¹⁴ Third, there was the definition of crimes, which most states wanted limited and with high thresholds. The Statute provided one of the best, to date, definition of war crimes, crimes against humanity, and genocide.¹¹⁵ A decisive contribution to this part was given by the U.S. delegation, which was the largest in number and one of the most competent in terms of legal expertise. The jurisdiction of the Court was excluded from the crime of aggression, contrary to the will of some LMS, and its introduction in the Statute was postponed and subjected to a subsequent agreement on the definition of the crime.

After the Conference, the PrepCom completed the job by drafting and adopting the Rules of Procedure and Evidence and the Elements of Crimes, which further contributed to the codification of important principles of international criminal law as to the definition of crimes and the execution of judgments.¹¹⁶ The ICC officially entered into force in July 2002 after the 60th state ratified the Statute. At the moment of this writing, the ICC is already investigating various situations, especially in several African countries. Nevertheless, its legitimacy and effectiveness are still to be considered at stake, since powerful and influential countries, such as China, Russia, the U.S., and India have so far not ratified the Treaty. The Court cannot consequently count on their invaluable assistance in terms of investigation and enforcement.

1.3.2 *Debates and Intellectual Controversies*

The literature on the norm of ICR is relatively more recent and less rich than the one on HI and has mostly focused on one specific issue, which is the drafting of the international treaty that created the ICC in July 1998. Most publications belong to the field of legal analysis and have concerned the

¹¹³ For an analysis of U.S. objections to the Treaty, see chapter chapter 7.

¹¹⁴ Rome Statute of the International Criminal Court, Article 13(c).

¹¹⁵ *Cit.*, Articles 5-9.

¹¹⁶ Christopher Keith Hall, "The First Five Sessions of the UN Preparatory Commission for the International Criminal Court", *The American Journal of International Law*, Vol. 94, No. 4 (October 2000): 773-789.

functioning of the newly created Court and its most important legal aspects.¹¹⁷

This literature has generated debates that include open manifestations of support for international criminal jurisdictions but also skepticism and critiques about their legitimacy. Already in the early 1990s, international lawyers, such as Cherif Bassiouni and David Scheffer expressed the necessity to create a permanent ICC on the basis that “individuals acting with impunity, sometime shielded by governments that embrace violations of international humanitarian law, are threats to peace and security of their own people and, inevitably, to the international community.”¹¹⁸ These types of arguments obviously increased in the aftermath of the Rome Conference, especially by scholars and practitioners that were directly involved in the negotiating process of the ICC.¹¹⁹ At that particular point in time, much effort was devoted to the analysis of the unfavorable position of the U.S. in the attempt to trigger a debate within the scientific community that could favor U.S. acceptance of the Rome agreement.¹²⁰ Finally, Kofi Annan praised the ICC as an example of how the international

¹¹⁷ Mahnoush H. Arsanjani, “The Rome Statute of the International Criminal Court” *American Journal of International Law*, Vol. 93, No. 1 (January 1999): 22-43; Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process”, *The American Journal of International Law*, Vol. 93, No. 1 (January 1999): 2-12.

“Developments in International Criminal Law” *American Journal of International Law*, Vol. 93, No. 1 (January 1999): 1-123; Leila Nadya Sadat and S. Richard Carden, “The New International Criminal Court: An Uneasy Revolution” *Georgetown Law Journal* Vol. 88, No. 3 (March 2000): 381-474; Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law Justice for the New Millennium* (New York: Transnational Publishers, 2002).

¹¹⁸ David J. Scheffer, “International Judicial Intervention”, *Foreign Policy*, No. 102 (Spring 1996): 35; see also M. Cherif Bassiouni, Christopher L. Blakesley, “The Need for an International Criminal Court in the New International World” *Vanderbilt Journal of International Law*, Vol. 25, No. 2 (1992): 151-182.

¹¹⁹ M. Cherif Bassiouni, “Policy Perspectives Favouring the Establishment of the International Criminal Court” *Journal of International Affairs* Vol. 52, No. 2 (Spring 1999): 795-810; William Pace, “The Relationship Between the International Criminal Court and Non-Governmental Organizations”.

¹²⁰ Henry T. King and Theodore C. Theofrastous, “From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy” *Case Western Reserve Journal of International Law*, Vol. 31, No. 1 (Winter 1999): 47-106; Monroe Leigh, “The United States and the Statute of Rome”, *The American Journal of International Law*, Vol.95, No.1 (January 2001): 124-131; James M. Taulbee, “A Call to Arms Declined: The United States and the International Criminal Court” *Emory International Law Review*, Vol. 14, No. (2000): 105-57; Howard Ball, *Prosecuting War Crimes and Genocide. The Twentieth Century Experience*, 188-216; John F. Murphy, “The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court” *International Lawyer*, Vol. 34, No.1 (2000): 45-64; Bartram Brown, “U.S. Objections to the Statute of the International Criminal Court: A Brief Response”, *Journal of International Law and Politics*, Vol. 31 (1999): 854-891; Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, “The United States and the International Criminal Court: An Overview” in *The United States and the International Criminal Court. National Security and International Law*, edited by Sarah B. Sewall and Carl Kaysen (Lanham: Rowman & Littlefield Publishers, 2000): 1-27; Bartram S. Brown, “The Statute of the ICC: Past, Present, and Future” in *The United States and the International Criminal Court*, 61-84; Ruth Wedgwood, “The Constitution and the ICC” in *The United States and the International Criminal Court*, 119-36; William L. Nash, “The ICC and the Development of U.S. Armed Forces” in *The United States and the International Criminal Court*, 153-64; for more recent analysis, see Diane Marie Amann and M. N. S. Sellers, “The United States of America and the International Criminal Court”, *The American Journal of Comparative Law*, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002): 381-404; Bartram Brown, “Unilateralism, Multilateralism, and the International Criminal Court” in *Multilateralism and U.S. Foreign Policy. Ambivalent Engagement*, edited by Stewart Patrick and Shepard Foreman (Boulder, London: Lynne Rienner, 2002): 323-344; Lee Feinstein and Tod Lindberg, *Means to an End. U.S. Interest in the International Criminal Court* (Washington,

community “displayed their resolve that those whose deeds offend the conscience of humankind should no longer go unpunished.”¹²¹

Nevertheless, the scientific community has not unanimously endorsed international jurisdictions and ICR. International lawyers, such as Daniel Pastor, have not hesitated, for example, to define international criminal law as the instrument of an aggressive international power that is characterized by “euphoria of punishment.”¹²² According to this interpretation, international criminal law takes to the maximum extent the contamination between law and war, since the accused is almost always the enemy who has lost a war and has to be condemned through an international trial that is not characterized by a genuine commitment to verify facts and establish responsibilities. Its main aim is to eliminate the enemy through a methodology that can be perceived as more legitimate than a military intervention. The most examples of this hypocrisy are located in the ad hoc jurisdictions that constitute a self-designed system of justice, bearing only the façade of a real criminal law.¹²³ Principles, such as legality and proportionality of punishment, are explicitly violated and prosecution merely becomes a “fight against evil.”¹²⁴ At the basis, there is a critique of the doctrine of universal human rights, which is mostly used as cheap rhetoric to hide projects of political and cultural domination. Along these lines, ICR and HI would be nothing more than two faces of the same Western coin that aims at exerting global power through the sanction of law and justice.

These voices tend to remain a minority in the context of contemporary international criminal doctrine but their arguments still constitute important resources for state leaders and policy makers that want to express their opposition to the (ab)use of international justice. These ways of reasoning cyclically re-emerge whenever the norm of ICR clashes against the sovereignty of a targeted state. Both the arguments in favor and against international justice need to be taken into account when dealing with the issue of state response and domestic interpretation of the norm.

1.3.3 Unresolved Issues

ICR, as many other international norms, is still surrounded by controversies that concern the

D.C., Brookings Institution Press, 2009); David Scheffer and Ashley Cox, “The Constitutionality of the Rome Statute of the International Criminal Court” *The Journal of Criminal Law and Criminology*, Vol. 98, No. 3 (2008): 983-1068.

¹²¹ United Nations, “Report of the Secretary-General on the Work of the Organization, General Assembly, Official Records, Fifty-Fifth Session, Supplement No. 1 (A/55/1), 30 August 2000: para. 257.

¹²² Daniel Pastor, “Diritto penale del nemico e potere punitivo”, in *Diritto penale del nemico: Un dibattito internazionale*, edited by Massimo Donini and Michele Papa (Milano: Giuffrè, 2007): 204.

¹²³ On this point, see Danilo Zolo, *Invoking Humanity: War, Law, and Global Order* (London: Continuum, 2002): 99-132; and, Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad* (London, New York: Verso, 2009).

¹²⁴ Giovanni Fiandaca, “Diritto penale del nemico: Una teorizzazione da evitare, una realtà da non rimuovere” in *Delitto politico e diritto penale del nemico*, 190.

way states perceive the legitimacy of international criminal jurisdictions and instruments for the judicial enforcement of human rights. These mostly unresolved issues constitute the main reason for the ambivalent response by members of the international community. Jealous about their own sovereignty, and, at the same time, mindful of the importance of punishing responsible of mass atrocities, states tend to respond to this normative framework in an inconsistent way, sometimes invoking, while at other times contesting its legitimacy.

As reminded above, most publications on the issue come from the legal doctrine. Some authors have tried to investigate the question of state response and the reasons for support and/or opposition by domestic systems. For example, Dominick McGoldrick's *The Permanent International Criminal Court* contains chapters that analyze the legal processes through which various European countries have implemented the Rome Statute.¹²⁵ In a similar way, Roy Lee's *States' Responses to Issues Arising From the ICC Statute* explains how signatory states of the Rome Treaty incorporated the Statute into their domestic legal systems.¹²⁶ These studies are certainly relevant to understand the main legal issues at stake in the relationship between states and the ICC, in particular, because they clarify the main problems related to processes of adaptation of national legal systems to the Rome Statute. However, the analysis mostly remains on a descriptive level. This does not allow us to understand the political struggles that are at the basis of the acceptance or rejection of the norm of ICR.

A few studies have recently started to analyze the Court from a political viewpoint. Benjamin Schiff's *Building the International Criminal Court* constitutes an excellent account of the political conflicts triggered by the ICC Treaty, which is mostly described as a diplomatic compromise among the interests of different states. In addition to explaining its origins and its main characteristics, the author presents an original interpretation of the Court as an institution that operates both as a tribunal and as an international organization. Therefore, the Court's effectiveness mostly depends on the level of support by politically and militarily influential states. In particular, the author argues that "the conflict between the universal nature of the Statute's normative claims and the particularistic nature of state sovereignty is at the root of opposition to the Court."¹²⁷ Operating in a decentralized system that lacks powers of enforcement, the ICC and its underlying system of norms can be effective only if they are able to fit the ethical and political components internal to states and to accommodate their

¹²⁵ Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court Legal and Policy Issues*, see in particular chapters 13 and 14.

¹²⁶ Roy S. Lee (ed.), *States' Responses to Issues Arising From the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers, 2005).

¹²⁷ Benjamin N. Schiff, *Building the International Criminal Court*, 166.

interpretations of the international system.

Nevertheless, despite recognition of this problem, Schiff's analysis does not examine the domestic political process. The investigation of the political conflicts triggered by the Court is limited to the international level and does not take into account the relevance of domestic actors in the process of recognition or rejection of the ICC.

After the approval of the Treaty at the 1998 Rome Conference, the ICC Statute was open to signature and ratification. States were required to adopt appropriate legislation to incorporate the Statute into their domestic systems. In many cases, this process took several years and was characterized by a political struggle between domestic supporters and critics of the Court. Reception of ICR by single domestic systems constitutes one of the objects of this study. The remainder of this section analyzes the most important issues at stake in the relationship between ICR and domestic systems. It concludes by emphasizing the necessity to study domestic response through an investigation of the mechanisms by which domestic actors determine state positions as to the legitimacy of the norm.

When it comes to discussing the role of international criminal jurisdictions in international relations, one of the main issues at stake is the necessity to find a compromise between two colliding sets of interests: on the one hand, the reasons of law, and on the other, the reasons of politics. For some, the main aim of the ICC is precisely to "remove politics from justice."¹²⁸ Historically, the relationship between law and politics has never been unproblematic. In any political community, law tends to be identified as the realm of neutrality and impartiality, while politics is usually interpreted as the realm of partiality and conflict¹²⁹. The aim of any judicial institution is to 'legalize' the realm of politics, which means that conflicts are solved through laws implemented by legal systems and result of "legitimate political processes."¹³⁰ In spite of these attempts, the legalization of politics has been a difficult goal "often compromised by extralegal influences, by biased legal structures and by maladministration."¹³¹ In other words, justice and law can often be subject to phenomena of politicization. This is even more evident in the international system, which is composed of "sovereign states that recognize no consolidated authorities for enforcement."¹³²

The attempt to expunge politics from law and create a de-politicized institution constituted the

¹²⁸ Benjamin N. Schiff, *Building the International Criminal Court*, 1.

¹²⁹ Pier Paolo Portinaro, *Introduction to A. J. Demandt, Processare il Nemico. Da Socrate a Norimberga* (Einaudi: Torino, 1996): IX-XXVII.

¹³⁰ Benjamin N. Schiff, *Building the International Criminal Court*, 1.

¹³¹ *Cit.*

¹³² *Cit.*; on the same point, see also, Gerry Simpson, "Politics, Sovereignty, Remembrance" in *The Permanent International Criminal Court: Legal and Policy Issues*, edited by Dominick McGoldrick, Peter J. Rowe, Eric Donnelly, 47-62.

main object of debate both at the international level during the negotiation of the ICC Treaty and at the national level during the process of ratification and implementation of the ICC Statute by single states. Ironically, both supporters and critics of the Treaty aimed to find ways to make the Court as impartial as possible and to limit the impact of politics on its activities. Both were concerned with the risk to create an international organization subject to the influence of colliding political interests. Nevertheless, the two groups provided complete different solutions to limit this risk.

For supporters, the best way to avoid a politicized ICC was the creation of a universal or quasi-universal jurisdiction, characterized by a strong and independent prosecutor, and by a large degree of autonomy from the UN Security Council. In other words, supporters of the Court believed that the most effective way to reduce the risks of politicization was to establish a strong jurisdiction as independent as possible from the will of states. By contrast, critics were worried that a too strong and independent ICC would have been subject to the influences of ideologically oriented groups, such as developing countries, public opinion movements, and NGO campaigners, more interested in punishing rival states than in pursuing the interests of justice. For these reasons, states that were critical of the ICC and that eventually did not recognize it as legitimate, such as China, Israel and the U.S., argued that the best guarantee against politically motivated prosecutions was to limit the jurisdiction of the Court and the powers of the Prosecutor, and to subject its activation to a decision of the UN Security Council.¹³³

These were the main debates that characterized the 1998 Rome Conference that led to several compromises and to a substantial victory of the supporters of the Court. A minority of politically influential states rejected the Statute, maintaining that “it contained flaws that rendered it unacceptable.”¹³⁴ After the conclusion of the Rome Conference, the Statute was open to signature and ratification by single states. Many of the debates that had characterized the Rome Conference moved to the domestic level. Domestic supporters and opponents to the Court started a political struggle in which the former aimed to ratify the Statute and recognize the Court as a legitimate institution, while the latter worked for its rejection.

Powerful states are not the only ones that have expressed skepticism about the legitimacy of the ICC and in general about international instruments of judicial prosecution. One of the most criticism

¹³³ For an account of the main issues that were debated during the negotiating process of the ICC, see Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, in particular chapters 1,2,3,4,6,7,9; Fanny Benedetti, “A Report on the negotiations for the creation of an International Criminal Court”, available at <http://www.wcl.american.edu/hrbrief/v5i1/html/icc2.html>; Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Diplomatic Conference” *Global Governance* 5 (1999): 1-37;

¹³⁴ This was the view expressed by the U.S. Government at the end of the works of the Rome Conference; cit. in Roy S. Lee, *The International Criminal Court The Making of the Rome Statute*, 632.

against the newly created Court rests on the observation that, to date, all the proceedings initiated by the ICC have regarded developing countries, most notably in Africa.¹³⁵ The most recent example is represented by the Security Council's decision to give the ICC jurisdiction over crimes committed in Libya after 15 February 2011.¹³⁶ A recent literature has investigated the impact of international justice on developing countries with a special focus on post-conflict situations. The main goal of this research program has been to understand the actual contribution of international criminal jurisdictions to processes of peace building and reconstruction by investigating whether justice is more or less likely to favor peace and reconciliation in war-torn societies.¹³⁷ However, less attention has been devoted to the reasons for local resentment and to the investigation of the domestic actors that are responsible for how states view international criminal jurisdictions.

This leads to the last issue related to the norm of ICR, which is state response. Domestic political and societal mechanisms through which states react to the norm acquire particular importance, if we consider that international tribunals highly depend on states for "crucial assistance during all stages of its proceedings, particularly for the capture and extradition of indicted individuals."¹³⁸ For this reason, it is necessary to investigate the domestic actors that are more responsible for determining the general position of a state toward such a controversial norm.¹³⁹ This issue is particularly relevant in an international system that mostly leaves for states the responsibility of supporting and enforcing decisions of international tribunals. State cooperation with international criminal jurisdictions has been recognized as a crucial issue also by the legal doctrine.¹⁴⁰

Nevertheless, existing studies have mostly dealt with the issue by investigating the domestic determinants for ratification of the ICC Statute.¹⁴¹ This has produced a literature that re-proposes

¹³⁵ Benjamin N. Schiff, *Building the International Criminal Court*, 194-247.

¹³⁶ United Nations Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011.

¹³⁷ See for example, Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal" *Human Rights Quarterly*, Vol. 20, No. 4 (1998): 737-816; Payam Akhavan, "Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law*, Vol. 95, No. 1 (January 2001): 7-31; Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" *International Organization*, Vol. 55, No. 3 (Summer 2001): 655-691; James Meernik, "Victors' Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia" *The Journal of Conflict Resolution*, Vol. 47, No. 2 (April 2003): 140-162; James Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia" *Journal of Peace Research*, Vol. 42, No. 3 (2005): 271-289.

¹³⁸ Eric Neumayer, "A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court" *Journal of Peace Research*, Vol. 46, No. 5, 2009: 660.

¹³⁹ The relevance of this problem is recognized also by Joshua W. Busby, *Moral Movements and Foreign Policy* (Cambridge: Cambridge University Press, 2010). In chapter 6 (210-253), the author investigates the reasons why some countries ratified the Rome Statute establishing the ICC, while others did not.

¹⁴⁰ See Phakiso Mochochoko, "International Cooperation and Judicial Assistance" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 305-317.

¹⁴¹ In addition to the already cited works by Eric Neumayer, "A New Moral Hazard? Military Intervention, Peacekeeping

previous analyzes on the conditions for state ratification of international treaties.¹⁴² Although its contribution cannot be denied, I argue that processes of ratification, or in general processes of domestic institutionalization of international norms, do not completely solve the theoretical and political puzzle posed by the problem of domestic response.

As has been noticed at the beginning of this section, state ratification of an international treaty, and in particular of the ICC, does not constitute a guarantee for subsequent collaboration with the Tribunal. The example of UK's behavior from the ratification of the Rome Treaty to the skepticism toward its possible amendment illustrates this point. Being a member of the ICC has so far not always coincided with consistent and supportive behavior. Interestingly enough, the reverse can be also true. Being a non-member of the Treaty does not preclude the possibility for states of collaborating with the Court and facilitating its functioning. Recent U.S. attitude toward the ICC constitutes a good example. As will be showed in the empirical part, U.S. position on the ICC has been, for specific domestic reasons, one of opposition since its negotiation, at the time when the White House was occupied by the Democratic Administration of Bill Clinton. This position turned into open boycott during the Bush Administration, which favored Congressional approval of particularly aggressive anti-ICC legislation and concluded bilateral agreements with several members of the Treaty in order to prohibit possible extradition of U.S. personnel to the Court.¹⁴³ This position has started to change in March 2005, when the U.S. decided to abstain during the Security Council's vote that provided the ICC with the authority of investigating the Darfur situation. This sounded as a tacit recognition that "the Court might be useful and that there are diplomatic and practical costs to opposing it."¹⁴⁴ Further signs of thaw can be noticed in subsequent amendments to anti-ICC legislation by the U.S Congress.¹⁴⁵

These examples show that ratification of the Rome Treaty does not necessarily explain much of state response to the norm of ICR. International criminal jurisdictions certainly welcome states' basic

and Ratification of the International Criminal Court" and Joshua W. Busby, *Moral Movements and Foreign Policy*, see also Michael J. Struett and Steven A. Weldon, "Explaining State Decisions to Ratify the International Criminal Court, Paper presented at the American Political Science Association, Annual Meeting, September 2, 2006, Philadelphia, PA.

¹⁴² Some examples of this literature are: Steven P. Recchia, "International Environmental Treaty Engagement in 19 Democracies" *Policy Studies Journal*, Vol. 30, No. 4 (2002): 470-494; J. Timmons Roberts, Bradley C. Parks, and Alexis A. Vasquez, "Who Ratifies Environmental Treaties and Why? Institutionalism, Structuralism and Participation by 192 Nations in 2 Treaties" *Global Environmental Politics*, Vol. 4, No. 3 (August 2004): 22-64; Jeffrey S. Lantis, "Leadership Matters: International Treaty Ratification in Canada and the United States" *The American Review of Canadian Studies* (Autumn 2005): 383-421; Wade M. Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999" *American Sociological Review*, Vol. 70, No. 3 (June 2005): 472-495; Jon Hovi, Detlef F. Sprinz, and Guri Bang, "Why the United States did not become a party to the Kyoto protocol: German, Norwegian and U.S. Perspectives" *European Journal of International Relations*, published online 7 December 2010: 1-22.

¹⁴³ Benjamin N. Schiff, *Building the International Criminal Court*, 170-75.

¹⁴⁴ Cit. 175.

¹⁴⁵ Cit. 179.

support in the form of ratification. But this is not enough. State recognition of the legitimacy of international tribunals is an issue that produce consequences in the long term, and that is observable in the way states, both members and non-members of a Tribunal, decide to cooperate with or boycott its activities of prosecution and sentencing. State response to the activity of an international criminal jurisdiction can change depending on the type of political discourse developed by relevant actors at the domestic level. Change in attitude can depend on historical conditions, electoral majorities, foreign policy choices of executive leaders, or lobbying by civil society movements.

This poses the importance of state response well beyond the initial decision to submit to the jurisdiction of an international tribunal. Rather than studying domestic conditions that can favor ratification of the ICC Statute, I propose to focus on state response as broadly conceived. In particular, I focus on the identification of the domestic actors that determine state position as to an international criminal jurisdiction. Locating the domestic actors that determine recognition or rejection of the norm of ICR at particular points in time can provide guidelines for reasonable predictions on what the level of state support or opposition will be depending on the array of actors that find themselves dominating domestic political systems.

1.4 State Response and Processes of Domestic Institutionalization

International normative frameworks, such as HI and ICR, need states, and especially powerful states, in order to become effective instruments for the regulation of international behavior. This requires an investigation of why and how sometimes states recognize their legitimacy, while at other times they contest it, and of the domestic actors and mechanisms that determine state response. In short, it is necessary to understand what are the domestic transmitters of the legitimacy (or illegitimacy) of international norms. This is fundamental in order to produce conclusions on what makes states more or less likely to cooperate with international norms and contribute to their international legitimacy.

A growing literature has attempted to solve this theoretical and political puzzle by focusing on the study of processes of domestic institutionalization and internalization. One of the most significant contributions has come from an emerging theoretical strand that aims to study processes of legalization of international politics. A special issue of *International Organization*, published in 2000, was dedicated to this topic. The starting point of the contributors is that from environment to arms control, from tribunals to international trade, “in many issue-areas, the world is witnessing a move to law” in

the sense that “some international institutions are becoming increasingly legalized.”¹⁴⁶ As scholars have correctly noticed, institutions, such as the WTO or the EU, are progressively creating the conditions for spaces of international authority, embryonic but relevant examples of international rule of law. Normative imperatives, in the form of legislation, are progressively able to authoritatively impose international behavior. This is also made possible by the fundamental support of international judicial bodies, such as the European Court of Justice or the Dispute Settlement Body of the WTO, that are able to issue rulings that member states are bound to comply with.

This contribution has called for the development of research programs that can explain why and how states choose international legalization, the mechanisms through which international institutions constrain state behavior, how this favors state compliance with the agreed commitments, how this can favor processes of internalization of international law, and how this process can lead to domestic systems adapting their behavior to international established rules. The special issue has taken into account several issue areas, such as the EU legal system¹⁴⁷, NAFTA and international trade regimes¹⁴⁸, political relations among Asian countries¹⁴⁹, the International Monetary System¹⁵⁰, and internalization of human rights practices in several Latin American countries.¹⁵¹

Although they have not been directly part of this research program, other studies that go in this direction are Alec Stonewet’s (et al.) *The Institutionalization of Europe* and Thomas Risse’s (et al.) *The Power of Human Rights*¹⁵², which have investigated processes of domestic institutionalization respectively of EU regulation and human rights norms. This type of research has also stimulated an academic attempt to reach decision makers, as in the case of the 2006 Final Report of the Princeton Project on National Security. Co-chaired by Anne-Marie Slaughter and John Ikenberry, the project has ambitiously aimed to turn intellectual research on the issue of legalization into an attempt to influence U.S. foreign policy. The main goal has been to provide a series of policy recommendations for U.S. policy makers in order to “stand for, seek, and secure a world of liberty under law.” The most notable proposal is for democratic states to create a “concert of democracies”, capable of developing and

¹⁴⁶ Judith Goldstein, Miles Kahler, Robert O. Keohane, and Marie Slaughter, “Introduction: Legalization and World Politics” *International Organization*, Vol. 54, No. 3 (Summer 2000): 385-6.

¹⁴⁷ Karen Alter, “The European Union’s Legal System and Domestic Policy: Spillover or Backlash?” *International Organization*, Vol. 54, No. 3, (Summer 2000): 489-518.

¹⁴⁸ Frederick M. Abbott, “NAFTA and the Legalization of World Politics: A Case Study”, 519-547; Judith Goldstein, Lisa L. Martin, “Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note”, 603-632.

¹⁴⁹ Miles Kahler, “Legalization as Strategy: The Asia-Pacific Case”, 549-571.

¹⁵⁰ Beth A. Simmons, “The Legalization of International Monetary Affairs”, 573-602.

¹⁵¹ Ellen L. Lutz and Kathryn Sikkink, “International Human Rights Law and Practice in Latin America”, 633-659.

¹⁵² Alec Stonewet, Wayne Sandholtz, and Neil Fligstein (eds.), *The Institutionalization of Europe* (Oxford: Oxford University Press, 2001); Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

consolidating a set of international institutions that allow to deal with conflict in a more cooperative, legalized, and secure way.¹⁵³

This literature has aimed to investigate the mechanisms and conditions that can lead to the institutionalization of international norms located within specific international regimes. More importantly, these studies have taken into account the relevance of domestic actors and constituencies and have analyzed how international normative frameworks can be incorporated into domestic systems. Processes of formal acceptance and institutionalization constitute the main objects of analysis. However, what they have often neglected is that international norms trigger different reactions that can change over time. Invocation and acceptance of a particular norm at a specific point in time cannot be taken for granted, in the sense that they do not guarantee that such a norm will always be perceived as a legitimate and viable framework of behavior.

The inconsistent behavior of various members of the international community toward the norm of ICR is only one example of the difficulty at studying processes of institutionalization of international norms. Even in cases in which this institutionalization comes about through a process of formal recognition, such as the ratification of an international treaty or convention, states are still fundamentally free, although more constrained by being part of a piece of international legislation, to recognize or contest the legitimacy of a norm at a different point in time. As illustrated above, the ICC Treaty constitutes only one example of this political phenomenon. Even if it has ratified the Treaty and formally joined its Statute, a member state is still fundamentally free to support or refuse to cooperate with the Court during its activities. This is to say that studying the way international norms are institutionalized at the domestic level does not promise to exhaustively answer the question of how states deal with their legitimacy. Institutionalization and recognition are somehow ‘never-ending’ processes that can change over time and do not terminate with the ratification of a treaty or the endorsement of a normative framework during a humanitarian crisis.

Scholars of legalization have not been unaware of this problem. In the conclusion of the Special Issue, Miles Kahler has correctly observed that “legalization in world politics is a complex and varied mosaic rather than a universal and irreversible trend.”¹⁵⁴ On this point, he has also added that “legalized

¹⁵³ “Forging a World of Liberty Under Law: U.S. National Security in the 21st Century”, Final Report of the Princeton Project on National Security, The Princeton Project Papers, The Woodrow Wilson School of Public and International Affairs, Princeton University, September 27, 2006.

¹⁵⁴ Miles Kahler, “Conclusion: The Causes and Consequences of Legalization” *International Organization*, Vol. 54, No. 3 (Summer 2000): 661.

institutions cannot be designed to encompass all future political circumstances.”¹⁵⁵ This means that legalization is a process that can vary “over time” and “across issue-areas and regions.”¹⁵⁶ Legalization can equally spread or recede because it essentially depends on contingent conditions, such as “change in the resources or calculus of key actors” or “shifts in resources among domestic actors.”¹⁵⁷ This sounds as recognition that domestic actors can over time change their interests and values as to legalized institutions and choose to challenge the legitimacy of a normative framework that had been previously recognized.¹⁵⁸

Processes of legalization, institutionalization, and domestic internalization are not guarantee of a state response that is consistent with the imperatives of a given normative framework. Most still depends on the will of states, which results from the preferences expressed by key domestic actors, such as government leaders, legislative majorities, or campaigning groups. Acceptance of an international regime does not prevent states from taking ambivalent or mutable positions. This calls for an analysis that, rather than focusing on processes of legalization and institutionalization, explains individual instances in which states deal with international normative frameworks and discovers what actors have the resources to determine state position as to their legitimacy.

International norms do not produce fixed results that can be isolated from time as a photograph. Depending on historical and domestic conditions, norms trigger different debates about their legitimacy and produce different state responses. Instead of studying how states come to accept or reject international regimes that could later trigger completely different reactions, it is better to focus on the different manifestations of norms across time and space and investigate what actors are able to provide interpretations that can win domestic support.

¹⁵⁵ Cit., 680.

¹⁵⁶ Cit., 682.

¹⁵⁷ Cit., 680.

¹⁵⁸ Another important contribution that has shown awareness of this problem is Saladin Meckled-Garcia and Basak Cali (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London and New York: Routledge, 2006). Far from taking for granted the legalization of international human rights regimes, the book collects the contributions of various scholars and stimulates an interesting debate on the likelihood and feasibility of legalization as to human rights practices. Several chapters express skepticism, such as Saladin Meckled-Garcia and Basak Cali's, “Lost in Translation: The Human Rights Ideal and International Human Rights Law”, 11-31; Anthony Woodiwiss, “The Law Cannot be Enough: Human Rights and the Limits of Legalism”, 32-48; and Michael Freeman, “Putting Law in its Place: An Interdisciplinary Evaluation of National Amnesty Law”, 49-64. Other chapters are relatively more optimistic, such as Jack Donnelly, “The Virtues of Legalization”, 67-80; and Richard Ashby Wilson, “Is the Legalization of Human Rights Really the Problem? Genocide in the Guatemalan Historical Clarification Commission”, 81-98.

Chapter 2

2 STUDYING INTERNATIONAL NORMS AND STATE RESPONSE

Whenever states come together to debate international normative frameworks, the main impression that any analyst would have is one of divergence and heterogeneity. This can be observed by simply looking at a meeting of the General Assembly or the Security Council. For example, when the former met in 2005 in order to discuss the adoption of the World Summit Outcome, various disagreements arose as to the analysis of the nascent notion of RtoP. What does the international community have to do when massive violations of human rights are taking place within the borders of a state? Countries with a long tradition of support for human rights enforcement, such as Canada and the UK, were in the forefront of recognizing the right of the international community to resort to military force in case of humanitarian crises. Countries that used to be more skeptical about this possibility, such as Peru, Colombia, and Argentina, endorsed this position. Powerful countries with very different records as to the use of force for humanitarian purposes, such as the U.S., China, and Russia, contested the possibility of attaching a right to intervention to the notion of RtoP because they saw it as a constraint on “the freedom of maneuver that they deemed essential for the maintenance of international order.”¹⁵⁹ Weaker countries, such as Cuba and Venezuela, feared that RtoP would become an excuse for legitimizing infringements of their own sovereignty and preferred to stick with a more traditional view of international law, as based on non-intervention and non-interference in the internal affairs of other states.

International normative frameworks trigger debates about their own legitimacy and produce a vast array of interpretations. Such interpretations can be motivated by material factors, such as the relative power of each state or its geographical position, and by immaterial factors, such as ideology, identity, or culture. Many factors concur to the definition of whether a certain international norm fits with the interests of a state. This definition cannot be easily separated from the characteristics of domestic political systems at specific points in time. The electoral victory of a political coalition that is driven by an isolationist view of international politics is likely to produce indifference toward the issue of human rights enforcement. The prevalence of a political discourse that is based on the legacy of Simon Bolivar and anti-colonization movements in South America is likely to cause states, such as Venezuela or Bolivia, to express resentment toward any normative framework that establishes a right to

¹⁵⁹ Alex B.J. Bellamy, “Whither the Responsibility to Protect?” *Humanitarian Intervention and the 2005 World Summit*, 153.

violate state borders in order to regulate issues that fall within the internal affairs of countries. The presence of a political system, which is characterized by the fusion of power between the executive and its parliamentary majority, can give considerable freedom of action to governments that base their foreign policy discourse on human rights protection and identification of armed intervention as a necessary instrument to tackle massive violations.

These examples illustrate that in an international system that is fundamentally anarchic and characterized by the absence of a centralized authority capable of imposing and enforcing unambiguous interpretations of norms, the search for the reasons for different state responses toward international normative frameworks cannot ignore what takes place at the domestic level. Domestic political traditions, institutional arrangements to regulate the relationship between constitutional powers, particularly charismatic political leaders, pugnacious civil society movements: these are all factors that at specific points in time can determine state response toward international norms.

The question of state response is particularly relevant in an international system in which the status of norms as legitimate frameworks of behavior largely depends on state reaction and interpretation. Invocation and recognition are likely to augment legitimacy and prestige of a norm as a viable framework of action. By contrast, indifference or contestation can cause norms to be ignored, put aside, or reconsidered. The main aim of this study is to investigate and locate the domestic mechanisms that determine the response of states toward international norms and to understand what key political and societal actors are responsible for their interpretation.

In this section, I provide an analysis of the literature on international norms by highlighting its strengths and weaknesses. This includes justification for the choice to study international norms and their legitimacy through an investigation of the domestic characteristics of political and societal systems. In this regard, I argue that the best approach to understand state response to international norms needs to take into account both the role of domestic agencies and the determinants of foreign policy.

2.1 Traditional IR Approaches and International Norms

Considering that the first attempts to theorize about norms in international politics date back to the period between the two World Wars, the problem of international norms is as old as the discipline of International Relations. In the 1930s and 1940s, idealist and liberal thinkers very much focused on the study of international norms, intended as institutional arrangements to prevent future wars after the tragedies of WWI and WWII. Re-proposition of Kantian models of international relations constituted

the main *raison d'être* of these scholars.¹⁶⁰ Subsequently, with the beginning of the Cold War, realism emerged as the dominant approach in the study of world politics. Although they were not indifferent to the implications of normative behavior in international relations¹⁶¹, realist scholars criticized liberal approaches and, in particular, their attempt to investigate the conditions for the creation of dispute settlement bodies equipped with compulsory jurisdictions. The theoretical enterprise of identifying legal arrangements as the most effective way of solving the problem of international conflict was soon labeled as “legalistic-moralistic approach”. Despite their differences, founding fathers of realism, such as E.H. Carr, Hans Morgenthau, George Kennan, and Raymond Aron, provided a number of arguments against the possibility of limiting war and state power through institutional and normative frameworks.¹⁶²

Structural and rationalist approaches, most notably neo-realism, went a step further and literally expunged norms and rules from the analysis. The necessity to speak the language of force in a divided world and the quest for scientific parsimony prevented norms, and in general immaterial factors, from being part of theoretical IR. Neo-realism has by and large underestimated the role of norms in international politics by considering them as epiphenomena of state power. Relying on the assumption that the outcomes of international politics mostly derive from the distribution of material capabilities,

¹⁶⁰ This tradition obviously includes thinkers operating in different political and historical contexts and investigating issues that cannot be easily associated. However, they were characterized by the attempt to find institutional solutions that could avoid the level of political and economic conflict that had been at the basis of WWI and WWII. In this respect, see for example, Norman Angell, *The Great Illusion A Study of the Relation of Military Power to National Advantage* (London: Heinemann, 1914). Particularly active were also international lawyers: see for example, Hans Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944; Hans Kelsen, *Il problema della sovranita' e la teoria del diritto internazionale. Contributo per una dottrina pura del diritto* (Milano: Giuffre', 1989). For an analysis of the main internationalist works of Kelsen, see also Danilo Zolo, “Hans Kelsen: International Peace through International Law” *European Journal of International Law* 9 (1998): 306-24.

¹⁶¹ For an analysis of the interest of classic realism for the moral and normative implications of political action, see Michael Williams, “Why Ideas Matter in International Relations: Hans Morgenthau, Classic Realism, and the Moral Construction of Power Politics” *International Organization*, 58 (Fall 2004): 633-665; and Richard K. Ashley, “The Poverty of Neorealism” in *Neorealism and Its Critics*, edited by Robert O. Keohane (New York: Columbia University Press, 1986): 255-290.

¹⁶² See for example, E.H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (London: Macmillan and Company, 2001): 159-166; George F. Kennan, *American Diplomacy* (Chicago: The University of Chicago Press, 1984): 95-101; “Morality and Foreign Policy” *Foreign Affairs*, Vol. 64, No. 2 (Winter 1985/86); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: McGraw-Hill, 1985): 4-10; “Another Great Debate: The National Interest of the U.S.” *American Political Science Review*, Vol. XLVI, No. 4 (December 1952); *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (New York: Knopf, 1952); “The Mainsprings of American Foreign Policy: The National Interest vs. Moral Abstractions” *American Political Science Review*, Vol. 44, No. 4 (1950): 833-854; *Scientific Man Versus Power Politics* (Chicago: University of Chicago Press, 1946); Raymond Aron, *Pace e Guerra fra le Nazioni* (Milano: Edizioni di Comunita', 1962); Kenneth N. Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 2001): 117-8; for a realist analysis of the irrelevance of norms in a world characterized by the lack of a centralized authority with the power and resources to enforce them, see also Kenneth N. Waltz, “Kant, Liberalism, and War” *American Political Science Review*, Vol. LVI, No. 2 (Summer 1962): 331-40.

norms tended to be treated as merely what powerful states assert them to be.¹⁶³ Moreover, states were essentially studied as rational actors that pursue a set of fixed interests, among which survival represents the top priority. Immaterial factors, such as ideas and norms, can count only as long as they do not conflict with fundamental national interests.

Neo-liberal institutionalism, especially in its attempt to explain the reasons for the persistence of economic interdependence after the decline of American hegemony, has accorded a greater role to rules, norms, and regimes in international politics. In particular, neo-liberal scholars have contributed to conceiving international institutions as arrangements that under specific conditions can facilitate cooperation among states even in an anarchical system.¹⁶⁴ Nevertheless, beyond this merit, neo-liberal institutionalism does not provide the most useful approach to the study of international norms. The main reason is that its starting assumptions do not significantly differ from the ones that have characterized the neo-realist traditions.

In particular, what has prevented neo-liberal institutionalism from taking norms into serious account has been the assumption of rationality of actors. States are treated as rational calculators that pursue a set of fixed interests.¹⁶⁵ These interests constitute the main causes of the emergence, change, and persistence of regimes. As Arthur Stein puts it, “regimes are maintained as long as the patterns of interests that gave rise to them remain.”¹⁶⁶ In the end, international institutions (and consequently the norms that constitute them) are still considered as mere epiphenomena of state power. The only autonomous impact of institutions is that they help states pursue their interests in a more rational and effective way. As Keohane has put it, “regimes provide information and reduce the costs of

¹⁶³ Kenneth N. Waltz, “Theory of International Relations” in *Handbook of Political Science*, ed. by Fred I. Greenstein and Nelson W. Polsby (Reading: Addison-Wesley Publishing Company, 1975): Vol. 8, 2-15; *Theory of International Politics* (Boston: McGraw-Hill, 1979); “Structural Realism After Cold War” *International Security*, Vol. 25, No.1 (Winter 1994/95): 5-41; John J. Mearsheimer, “The False Promise of International Institutions” *International Security*, Vol. 19, No. 3 (1994/95): 5-49.

¹⁶⁴ Robert O. Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984). By the same author see also *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989); “Theory of World Politics: Structural Realism and Beyond” in *Neorealism and Its Critics*, 158-202; For a more synthetic account of the neo-liberal approach to the study of institutions see Robert Keohane, “The Demand for International Regimes” *International Organization* Vol.36 No.2 (Spring 1982): 325-355; Stephen D. Krasner, “Structural Causes and Regimes Consequences: Regimes as Intervening Variables” *International Organization* Vol. 36 No. 2 (Spring 1982): 185-205; for applications of regime theory to specific issue areas see for example Robert Jervis “Security Regimes” *International Organization* Vol. 36 No.2 (Spring 1982): 357-78 and Benjamin J. Cohen, “Balance-of-Payments Financing: Evolution of a Regime” *International Organization* Vol.36 No.2 (Spring 1982): 457-478.

¹⁶⁵ For critiques of neo-liberal institutionalism on this point see for example Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996): chapter 5; Margaret E. Keck, Kathryn Sikkink, *Activists Beyond Borders Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998): 199-217.

¹⁶⁶ Arthur A. Stein, “Coordination and Collaboration: Regimes in an Anarchic World” *International Organization* Vol.36 No.2 (Spring 1982): 321.

transactions [...] thus facilitating interstate agreements.”¹⁶⁷ Relying on these rational assumptions, the neo-liberal approach to norms does not significantly differ from neo-realism. Interestingly enough, similarities between these two approaches were first recognized by a neo-liberal scholar. In the concluding essay of the special issue of *International Organization* on international regimes, Krasner spoke of neo-realism and neo-liberalism as two competing realist views, with the former mostly focused on the study of international relations as a zero-sum game, and the latter more optimistic about the possibility for states to cooperate.¹⁶⁸

Emphasizing its origins in a set of rational assumptions borrowed from microeconomic theory, Krasner did not hesitate to define neo-liberalism as “modified structural realism” and underscored the need to move forward. New research programs should have been conducted to show how “regimes alter not just calculations of interest and the weight of power, but also the interests and capabilities that underlie these calculations and weights.”¹⁶⁹ This sounds as explicit recognition that the most problematic aspect of the neo-liberal approach to the study of institutions is that it takes interests as exogenously given and not as the result of the interaction between states and the normative and cultural frameworks in which they operate. This is what has prevented these scholars from evaluating and understanding the way norms can affect the definition of state interests.

In sum, at least until the 1980s, international norms did not constitute the main interest of IR theorists. Analyses of the role of norms in international politics tended to be confined to the works of scholars that are usually identified as representatives of the English School. Thanks to their studies on the notion of international society, theorists, such as Hedley Bull and Adam Watson, were among the few that took into account immaterial factors, such as norms, ideologies, and cultures, as explanatory variables of international relations.¹⁷⁰ Despite these exceptions, IR theory was dominated by approaches that mostly relied on rational choice theories. For long, neo-realism and neo-liberalism were able to set the terms of a debate that was mostly limited to whether states pursue absolute or

¹⁶⁷ Robert Keohane, *After Hegemony*, 246.

¹⁶⁸ Stephen D. Krasner, “Regimes and the Limits of Realism: Regimes as Autonomous Variables” *International Organization* Vol.36 No.2 (Spring 1982): 497-510. This and other articles cited in this section have been published as contributions to the Special Issue that *International Organization* dedicated to international regimes in 1982. These contributions were later turned into *International Regimes*, edited by Stephen Krasner (Ithaca: Cornell University Press, 1983).

¹⁶⁹ Stephen Krasner, “Regimes and the Limits of Realism: Regimes as Autonomous Variables”, 509. The necessity to study the impact of norms, ideas, and other immaterial factors on the definition of state interests will be later recognized also by Keohane in “International Institutions: Two Approaches” *International Studies Quarterly* Vol.32 No.4 (December 1988): 379-396.

¹⁷⁰ Hedley Bull, Adam Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Palgrave, 2002).

relative gains and how much cooperation is possible under anarchy.¹⁷¹ Things have started to change with the emergence of approaches that systematized critiques to rationalist IR theory and contributed to a significant enrichment of the discipline by introducing explanatory factors that had long been neglected. This has been the case of sociological institutionalism and social constructivism.

2.1.1 *Taking Norms Seriously: Sociological Institutionalism and Social Constructivism*

Sociological institutionalism originally emerged within the debate on international regimes. In his introduction to the special issue on international regimes, Krasner praised the “Grotian” approach to the study of regimes for considering those “general and diffuse principles and norms that condition the principles and norms operative in a specific issue area.”¹⁷² Scholars, such as Donald Puchala, Raymond Hopkins, and Oran Young investigated the determinants of regimes, their development, and persistence¹⁷³ and found that most regimes are built upon “normative superstructures”¹⁷⁴ that change over time. Regimes were no longer merely conceived as institutional devices to solve problems of collective action, but also as the outcome of normative frameworks subject to historical evolution. This favored the emergence of an institutional tradition that has been significant for the study of norms in two respects.

First, sociological institutionalism has emphasized how state action is not only oriented toward the maximization of rationally calculated interests. In Friedrich Kratochwil’s terms, action is also “rule-governed.”¹⁷⁵ Both neo-realism and neo-liberalism have constituted limited approaches since they have conceived norms and regimes as merely having the function to “fortify socially optimal solutions against temptations of individually rational defections.”¹⁷⁶ Rather, for Kratochwil, norms are also useful to define situations and “thus in indicating to the other that one understands the nature of the ‘game’ in which one is involved.”¹⁷⁷ As a consequence, state interests are not fixed but constantly subject to redefinition. The international system is interpreted as composed of normative frameworks.

¹⁷¹ For a good account of these debates, see for example Robert Jervis, “Realism, Neoliberalism, and Cooperation: Understanding the Debate” *International Security*, Vol. 24, No. 1 (Summer 1999): 42-63; Joseph M. Grieco, “Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism” *International Organization*, Vol. 42, No. 3 (Summer 1988): 485-507.

¹⁷² Stephen D. Krasner, “Structural Causes and Regimes Consequences: Regimes as Intervening Variables, 201.

¹⁷³ Oran R. Young, “Regimes Dynamics: The Rise and Fall of International Regimes” *International Organization* Vol.36 No.2 (Spring 1982): 277-97.

¹⁷⁴ Donald J. Puchala, Raymond F. Hopkins, “International Regimes: Lessons from Inductive Analysis” *International Organization* Vol.36 No.2 (Spring 1982): 245-75.

¹⁷⁵ Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989): 43.

¹⁷⁶ Friedrich V. Kratochwil, *Rules, Norms, and Decisions*, 48.

¹⁷⁷ Cit.

Specific norms shape the way in which interests are calculated and provide grounds against which to test foreign policy actions¹⁷⁸. Along these lines, John Ruggie has argued that instrumental rationality, with its emphasis on fixed interests, is not particularly useful to study norms and institutions since it completely rules out how sometimes rules, norms, and procedures “fundamentally alter our conceptions of rational action.”¹⁷⁹

Second, sociological institutionalism has emphasized how traditional IR approaches were unable to take norms seriously since they tended to rely on the “negative analogy to domestic politics.”¹⁸⁰ For scholars subscribing to the sociological approach, the ‘idealists-realists’ debate was mostly the representation of a duel. On the one hand, there were the advocates of law in international politics for whom it was necessary to create a world government capable of enforcing legal commands. On the other, there were those who were skeptical about the possibility to build such an institutional framework in a context characterized by anarchy and self-interested states. Even though they reached different conclusions, both realists and idealists relied on the domestic analogy and on a conceptualization of norms in legal terms. The impact of norms at the international level was thought possible only in the presence of a central authority capable of legally enforcing them. This made both substantially unable to explain how norms emerge and shape state interests in an anarchical system.

Following this critique, Ruggie has showed how the passage from a certain type of international system to another is not simply the result of changes in the distribution of material capabilities. Rather, the reasons for the historical transformation from feudalism to the Westphalian state system have to be found in the emergence of normative structures, such as private property and sovereignty, that “established systems of social relations among [...] units.”¹⁸¹ The replication of the theoretical tools by which norms are studied at the domestic level prevents us from understanding the role of norms in contemporary international system. The anarchy of the international system does not render norms irrelevant in international politics. Even in an anarchical system, norms emerge and exercise impact on the life of states. In order to understand such an impact, norms cannot be only conceived in narrow legal terms, but as normative frameworks that create expectations for action.

¹⁷⁸ Friedrich V. Kratochwil, “On the Notion of Interest in International Relations” *International Organization* Vol.36, No.1 (Winter 1982): 1-30; see also “Norms vs. Numbers: Multilateralism and the Rationalist and Reflexivist Approaches to Institutions, A Unilateral Plea for Communicative Rationality” in *Multilateralism Matters*, ed. John G. Ruggie (New York: Columbia University Press, 1995): 443-474; Friedrich Kratochwil and John G. Ruggie, “International Organizations: A State of the Art on an Art of the State” *International Organization*, Vol. 40, No. 4 (Autumn 1986): 753-775.

¹⁷⁹ John Gerard Ruggie, *Multilateralism Matters*, 471; see also by the same author “Multilateralism: The Anatomy of an Institution” *International Organization* Vol. 46 No.3 (Summer 1992): 561-98.

¹⁸⁰ Friedrich V. Kratochwil, *Rules, Norms, and Decisions*, 45.

¹⁸¹ John Gerard Ruggie, “Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis” in Robert O. Keohane (ed.) *Neorealism and Its Critics* (New York: Columbia University Press, 1986): 145.

Born as a theory of regimes, sociological institutionalism ended up building arguments that would pave the way for the constructivist turn in international relations. Norms matter as they shape national interests that are not fixed and independent from the social context in which states are embedded. This is to say that norms do not only have an impact when they serve a certain purpose or fit a given material interest, but also when they are perceived as legitimate. Consequently, norms matter even in a context in which no authority can legally or morally enforce them in an impartial way.

Social constructivists have started from these premises to show the impact of norms on national preferences and international outcomes.¹⁸² The starting point of all constructivists is that not only material capabilities and distribution of power are able to produce observable outcomes in the international system, but also ideational structures, such as culture¹⁸³, identity¹⁸⁴, ideas¹⁸⁵, knowledge¹⁸⁶, and norms.

The main contribution of constructivism has been to re-conceptualize some of the most important assumptions on which IR theory has been long based: anarchy and state interest. In “Anarchy is what states make of it”¹⁸⁷, which will later become a more substantial book¹⁸⁸, Alexander Wendt has theorized a complex notion of anarchy, intended as the result of inter-subjective and mutually constitutive interactions among actors and structures. The neo-realist assumption of an anarchical structure that constrains state behavior does not allow us to understand the main elements of the structure itself and where state interests come from. Anarchy cannot be reified, as rational approaches have done, because it is an ever-changing process. Anarchy itself does not mean much since what matters is the meaning that anarchy is given to by actors on the basis of normative, cultural, and ideational factors.

This characterization of anarchy is related to the re-conceptualization of the notion of interest.

¹⁸² Jeffrey T. Checkel, “The Constructivist Turn in International Relations Theory” *World Politics* Vol. 50 No.2 (1998): 324-48; Ted Hopf, “The Promise of Constructivism in International Relations Theory” *International Security* Vol. 23 No. 1 (Summer 1998): 171-200.

¹⁸³ Yosef Lapid, Friedrich V. Kratochwil (eds.), *The Return of Culture and Identity in International Relations Theory* (Boulder: Lynne Rienner Publishers, 1996).

¹⁸⁴ Thomas Risse, “To Euro or Not to Euro? The EMU and Identity Politics in the European Union” *European Journal of International Relations* Vol. 5 No.2 (1999): 147-87.

¹⁸⁵ Kathleen McNamara, “Consensus and Constraint: Ideas and Capital Mobility in European Monetary Integration” *Journal of Common Market Studies* Vol. 37 No.3 (1999): 455-476.

¹⁸⁶ Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination” *International Organization*, Vol. 46, No. 1, Special Issue on Knowledge, Power, and International Policy Coordination (Winter 1992): 1-35; Emanuel Adler and Peter M. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program”, *International Organization*, 367-390; Peter M. Haas, “When does power listen to truth? A constructivist approach to the policy process” *Journal of European Public Policy* Vol.11 No.4 (2004): 569-92;

¹⁸⁷ Alexander Wendt, “Anarchy is what states make of it: the social construction of power politics” *International Organization* Vol. 46 No.2 (Spring 1992): 391-425.

¹⁸⁸ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

Contrary to what rational approaches have done, constructivists believe that interests and preferences cannot be taken for granted as they are constantly subject to redefinition. States are part of the social environment in which they operate: It is through processes of mutual interaction with such an environment that states make decisions about what to pursue at the international level. Contributions, such as *Activists Beyond Borders*¹⁸⁹ or *The Culture of National Security*¹⁹⁰, have aimed to challenge the notion of states as functionally undifferentiated units pursuing similar interests that are given by their position in the system. For these authors, state interests are constructed: They are the result of a process of mutual interaction with the normative and ideational structures in which states are embedded. Among those ideational structures that have a generative impact on state interests, international norms play a key role.

Along these lines, Peter Katzenstein has defined norms as “collective expectations for the proper behavior of actors with a given identity.” This means that norms not only matter because they “specify standards of proper behavior” but also because “they define the identity of an actor.”¹⁹¹ Consequently, norms are important especially for their constitutive effect as they define what states want. Following this logic, Martha Finnemore has shown how changes in the notion of who is entitled to human dignity have contributed to modify the target of humanitarian interventions.¹⁹² Similarly, in *National Interests in International Society*, Finnemore has provided examples of how institutions and normative structures, such as the Red Cross, UNESCO, and the World Bank have influenced the way states perceive specific issues of international politics. These are instances of how normative frameworks are capable of defining the interests of states.¹⁹³

Critics of this approach have praised social constructivism for problematizing the notion of interest and not taking it as a given. However, they have also emphasized how constructivists cannot afford to make the same mistake with norms. Jeffrey Legro and Paul Kowert have, for example, noted

¹⁸⁹ Margaret E. Keck, Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, 1998.

¹⁹⁰ Peter Katzenstein, *The Culture of National Security*, 1996.

¹⁹¹ Peter Katzenstein, *The Culture of National Security*, 5.

¹⁹² Martha Finnemore, *The Purpose of Intervention*, 1996; see also by the same author “Constructing Norms of Humanitarian Intervention” In Peter Katzenstein, *The Culture of National Security*, cit., 153-85.

¹⁹³ Martha Finnemore, *National Interests in International Society*, 1996; For examples of similar studies that have aimed to investigate the emergence, evolution, and consolidation of international norms, see Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995); Martha Finnemore, “Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism” *International Organization*, Vol. 50, No. 2 (Spring 1996): 325-47; Christian Reus-Smith, “The Constitutional Structure of International Society and the Nature of Fundamental Institutions” *International Organization*, Vol. 51, No. 4 (1997): 555-89; Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford: Oxford University Press, 2007); Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons* (Cambridge: Cambridge University Press, 2008); Diana Panke and Ulrich Peterson, “Why International Norms Disappear Sometimes” *European Journal of International Relations*, published online 14 June 2011: 1-24.

that constructivists show a tendency to “treat their own concepts as exogenously given.”¹⁹⁴ For this reason, they have called for further research to explain where norms come from and how they can be operationalized. As a response, Finnemore and Kathryn Sikkink have elaborated a model to explain the “life-cycle” of norms in order to answer the question of “how do we know a norm when we see one?”¹⁹⁵ This model provides a better understanding of how norms first emerge as the result of the actions of a “norm-entrepreneur” that can be a statesman or the leader of an international organization. Subsequently, norms enter a phase of acceptance during which pressure for conformity and desire to enhance self-esteem constitute powerful incentives to comply with norms. If these two phases are successful, norms start to be internalized, which means that their legitimacy is no longer in question.

In conclusion, constructivism has provided useful analytical tools for the study of international norms. In particular, it has provided convincing explanations of how state interests are not fixed but subject to redefinition. Constructivism has, in addition, provided models to investigate how norms emerge, develop, and consolidate.

Nevertheless, less research has been devoted to the study of the impact that norms have on states. Empirical evidence shows that not all norms are equally able to shape the interests of states. Depending on the historical context, some are more successful than others, meaning that sometimes norms are invoked and acted upon by states that want to take specific actions, while in other cases they trigger contestation and are eventually rejected.

Several scholars within the social constructivist strand have recognized this problem and have called for analyses that can explain differences in the way states react to similar international structures. Wendt has been among the first to recognize this problem. Referring in particular to world-system and neo-realist theories, he has highlighted a tendency of the discipline to focus almost exclusively on international structures, remaining “unable to explain the properties of the units that constitute such structures.”¹⁹⁶ A partial solution has been found in the ‘structuration theory’, which attempts to solve the “agent-structure” problem by emphasizing their being co-determined and mutually constituted. Agents, as for example states, and structures, as for example international norms, are deemed “mutually constitutive” in the sense that the latter “are the result of the intended and unintended consequences of

¹⁹⁴ Paul Kowert, Jeffrey Legro, “Norms, Identity, and their Limits: A Theoretical Reprise” in *The Culture of National Security*, 469.

¹⁹⁵ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” *International Organization* Vol. 52 No. 4 (1998): 892.

¹⁹⁶ Alexander Wendt, “The Agent-Structure Problem in International Relations Theory” *International Organization*, Vol. 41, No. 3 (Summer 1987): 349.

human actions” and the former are “mediated by an irreducible structural context.”¹⁹⁷ Along these lines, Wendt has called for explanations of state action that could take into account both agents’ components and the characteristics of the structure in which they operate.

Other scholars have been aware of this difficulty. Illustrating the evolution of constructivist approaches, Finnemore and Sikkink have noticed that “in an intellectual discourse where the causal status of social structures was widely questioned, simply establishing that these things matters was an important showing for constructivist scholars.” Nevertheless, “scholars were quick to notice that norms and social understandings often had different influences on different agents, and explaining these differences was soon identified as a crucial constructivist research task.”¹⁹⁸

Acknowledging the limited logic of primarily focusing on structural analyses, constructivist theorists have underscored the necessity to understand “how international norms influence different actors (usually states) differently.”¹⁹⁹ This has favored the emergence of studies that investigate the domestic conditions that are likely to cause state acceptance of norms. Andrew Cortell and James Doris have, for example, argued that in order to understand the way norms influence state behavior, it is crucial to look at “the actions of domestic political actors.”²⁰⁰ According to them, most studies have erroneously tried to explain the influence of norms on state behavior “by locating their causal significance at the level of state interaction.”²⁰¹ Such studies have mainly focused on the analysis of how norms emerge and evolve at the international level but have not provided any theory of domestic agency. Without such a theory, it is not possible to answer relevant questions, in particular why states’ responses to international norms change over time and why norms are sometimes recognized, while at other times contested or ignored.²⁰²

Along these lines, several other scholars have emphasized the need to study the impact of international norms by investigating the response of domestic actors. For example, Amy Gurowitz has provided that “we can understand the variation in the impact of international norms only by examining how these norms are mobilized by domestic actors and how their impact is mediated by specific state

¹⁹⁷ Cit., 360.

¹⁹⁸ Martha Finnemore and Kathryn Sikkink, “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics” *Annual Review of Political Science*, 4 (2001): 397.

¹⁹⁹ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, 397.

²⁰⁰ Andrew P. Cortell and James W. Davis, “How do Institutions Matter? The Domestic Impact of International Rules and Norms” *International Studies Quarterly*, 40 (1996): 451.

²⁰¹ Andrew P. Cortell and James Davis, 451.

²⁰² This problem has been also highlighted by scholars, such as Jeffrey Legro, who do not subscribe to the constructivist tradition. In a critical account of social constructivism, Legro has noticed that it is not sufficient to argue that norms matter in international politics, since this does not answer the important question of “why were some norms apparently influential and not others.” This can be found in Jeffrey W. Legro, “Which Norms Matter? Revisiting the Failure of Internationalism” *International Organization*, Vol. 51, No. 1 (Winter 1997): 32.

histories and identities.”²⁰³ In a similar way, Cortell and Davis have called for analyses capable of identifying the “mechanisms and conditions that may contribute to establishing the domestic salience of international norms.”²⁰⁴

In a slightly different fashion, Antje Wiener and Uwe Puetter have added an important variable to the study of norms. By testing the impact of specific norms on historical cases, such as protection of human rights and democracy in relation to the decision to invade Iraq, they have shown how contestation and opposition play a large role in the process of norm acceptance.²⁰⁵ In particular, the authors have noticed that for norms to be perceived as legitimate, it is not only a matter of social recognition or formal validation, but also and above all of “cultural validation.”²⁰⁶ When norms reach cultural contexts that are different from the ones of creation, they generate various interpretations. The reason is that “norms application and implementation is reviewed and discussed in the domestic context often following particular patterns which are inherent to these settings” and the way norms are interpreted and applied is essentially “context-related.”²⁰⁷ This paves the way for different state reactions that depend on the cultural and institutional characteristics of domestic contexts.²⁰⁸ Such a research program represents an invitation to focus on the receiving side of international norms. This mostly means a theoretical and empirical commitment to looking inside cultures and states in order to understand how international norms fit with different political and societal contexts, and the reasons for their acceptance or contestation.

Opening the ‘black box’ of states and explaining states’ reactions to international normative frameworks by focusing on their domestic components has become one of the most important concerns of social constructivism. It is the main concern of the present study too. For this reason, it can be located in that theoretical strand that aims to study normative and ideational structures from the point of view of agency by investigating how domestic systems determine their positions as to human rights norms. In this regard, the social constructivist literature certainly offers important insights, but it is not sufficient. An analysis of the conditions that can favor state invocation or rejection of international

²⁰³ Amy Gurowitz, “Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State” *World Politics*, 51, 3, (April 1999): 416.

²⁰⁴ Andrew P. Cortell and James Davis, “Understanding the Domestic Impact of International Norms: A Research Agenda” *International Studies Review*, Vol. 2, No. 1 (Spring 2000): 68.

²⁰⁵ Uwe Puetter, Antje Wiener, “Accommodating Normative Divergence in World Politics: European Foreign Policy Coordination” *Journal of Common Market Studies* Vol. 45 No. 5 (2007): 1063-86.

²⁰⁶ Antje Wiener, “The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms” *Journal of International Law and International Relations*, Vol. 5, No. 1 (2009): 15.

²⁰⁷ Cit., 13-4.

²⁰⁸ On this point, see also Antje Wiener, “Enacting meaning-in-use: Qualitative Research and International Relations” *Review of International Studies*, 35 (2009): 175-93.

norms requires the search of the domestic actors that are more influential during processes of norm interpretation. This necessitates the recuperation of an older literature, which grew out of the critiques toward structural approaches to the study of international affairs – the one on domestic sources of foreign policy. This bulk of knowledge has been specifically committed to the discovery and analysis of domestic actors that are capable of influencing processes of foreign policy-making and, consequently, provides an important source of inspiration for studies on the domestic transmitters of international norms.

2.1.2 *'Opening the 'Black Box' of States: The Domestic Sources of Foreign Policy*

The literature on domestic sources of foreign policy finds its origins and most significant developments in the U.S. academic context and, in particular, in the debate on whether liberal democracies are capable of efficient and viable foreign policy making²⁰⁹. In 1967, a famous book edited by James Rosenau attempted to devise a research program able to give theoretical dignity to the widespread “sense that the structure of a society is somehow related to the way in which its officials cope with the international environment.”²¹⁰ The book contained various essays from scholars belonging to different disciplines and aimed to discover possible domestic variables that can influence the foreign policy process: personality of individual officials and leaders, party politics, mass communication, voting behavior, interest groups, urbanization, and electoral politics were all identified as determinants of how U.S. foreign policy is conducted and implemented. This initial study provided important insights. The most important is that foreign policy, is often the result of “tensions between the interests of individuals or small groups and the interests of larger aggregates such as parties, communities, and societies.”²¹¹

At the basis of this theoretical enterprise there was a critique of structural theories that almost exclusively “view the conditions of the international system at any moment in time as stemming from properties of the system that requires conforming behavior on the part of its national components.”²¹² Scholars of domestic sources of foreign policy manifested a preference for focusing on the study of the “components of the system” with the aim of “discerning regularities in the behavior of actors, in the common goals that are sought, in the means and processes through which the goal-seeking behavior is

²⁰⁹ This debate originated in the famous critique of democratic foreign policy developed by Alexis de Tocqueville in *Democracy in America* (New York: Harper & Row Publishers, 2007): 213-17.

²¹⁰ James N. Rosenau, *Domestic Sources of Foreign Policy* (New York: The Free Press, 1967): 4.

²¹¹ Cit., 9.

²¹² James N. Rosenau, *International Politics and Foreign Policy: A Reader in Research and Theory* (New York: The Free Press, 1969): xviii.

sustained, and in the societal sources of the goals and means selected.”²¹³

Observing U.S. foreign policy raised a number of questions on the role of President and Congress, on the capacity of lobbies and societal groups to influence the process, and on the efficiency of a highly pluralist and dispersed decision-making system, especially at the time of the nuclear threat. As Henry Kissinger noted, the U.S. foreign policy process was working sufficiently well but had to face the influence of a number of domestic variables, such as “the domestic notions of what is just, the pressure produced by the decision-making process, and the experience which forms the leaders in their rise to eminence.”²¹⁴ U.S. complex domestic structure, characterized by separated government between the President and the legislature, by competition among executive bureaucracies, and by a relatively easy access of societal groups, could guarantee a more democratic and representative decision-making process but also implied several obstacles of institutional and administrative nature, such as stalemate and paralysis of decision.²¹⁵

Although they had a tendency to focus on a vast array of domestic actors, with problematic results in terms of scientific parsimony, these first studies paved the way for a particularly rich tradition of analysis in international politics. Seminal studies, such as Graham Allison’s *The Essence of Decision* or Peter Gourevitch’s *The Second Image Reversed*, contributed to opening various cracks in the dominance of structural theories, for example, by emphasizing that “international relations and domestic politics are...so interrelated that they should be analyzed simultaneously, as wholes.”²¹⁶ Equally important was the research program launched in 1988 by Robert Putnam on the relationship between diplomatic bargain and domestic factors. The main insight was represented by the conceptualization of international negotiations, whose analysis had been until then monopoly of structural theories, as the result of a complex mix of factors located both at the international (the moment of actual bargain among state leaders) and domestic (influence of parties, social classes, legislators, public opinion, electors, interest groups) levels. What state leaders can ultimately obtain from international negotiations is inevitably the result of a combination between the requests of foreign

²¹³ Cit., xviii. For an important clarification of the difference between levels of analysis, see David J. Singer, “The Level of Analysis Problem in International Relations” in *International Politics and Foreign Policy*, 20-9.

²¹⁴ Henry A. Kissinger, “Domestic Structure and Foreign Policy” in *International Politics and Foreign Policy*, 261-2.

²¹⁵ Another book that has analyzed the performance of democracies as to foreign policy by focusing on the U.S. and the UK has been: Kenneth N. Waltz, *Foreign Policy and Democratic Politics: The American and British Experience* (Boston: Little, Brown and Company, 1967). This is particularly interesting if we consider that only a decade later Waltz will become one of the founding fathers of structural approaches to IR theory thanks to the publication of his famous *Theory of International Politics* in 1979.

²¹⁶ Peter Gourevitch, “The Second Image Reversed: The International Sources of Domestic Politics” *International Organization*, Vol. 32, No. 4 (Autumn 1978): 911. For another particularly famous analysis of how domestic conditions can exert significant influence on the foreign policy-making process, see Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little, Brown and Company, 1971).

states and the exigencies of organized domestic constituencies.²¹⁷

These insights did not go unnoticed. The main result was the emergence of a new generation of scholars committed to challenging structural theories by producing analyses that could not only explain the causal impact of domestic factors on international affairs but also the conditions under which this is the case.²¹⁸ Although it has now become so popular to represent an independent theoretical tradition, even scholars subscribing to the ‘democratic peace theory’ can be included in the legacy of domestic sources of foreign policy. Being conceived as the attempt to show an intrinsically minor predisposition of liberal democracies to wage war against one another, democratic peace theory constitutes a challenge to those theories that have explained the causes of international conflict by mostly focusing on the structural components of the international system and by neglecting the relevance of the nature of domestic regimes and political institutions.²¹⁹

This emerging research program has produced followers but also various critics. Scholars from the structural tradition have criticized domestic approaches as not providing a relevant alternative to structural realism. As Ethan Kapstein has argued, the main problem is that none of these analyses “goes beyond its case study material to produce a generalizable alternative theory.”²²⁰ In particular, the difficulty at providing serious modifications to the main assumptions of structural theories, i.e. the primacy of states as most relevant international actors, anarchy as the main international condition, and rationality of actors, has not made this research program much more than a middle-of-the-road approach between neo-realism and theories of *innenpolitik*. The introduction of variables, such as leaders’ perception, incomplete freedom to extract resources from societies, and domestic institutional structures, has rendered these studies more similar to a modified version of realism, more sensitive to

²¹⁷ Robert D. Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Game” *International Organization*, Vol. 42, No. 3 (Summer 1988): 427-60.

²¹⁸ The literature on the issue is incredibly large. See for example, Ole R. Holsti and James N. Rosenau, “The Domestic and Foreign Policy Beliefs of American Leaders” *Journal of Conflict Resolution*, Vol. 32, No. 2 (June 1988): 248-94; Beth A. Simmons, *Who Adjust? Domestic Sources of Foreign Economic Policy During the Interwar Years* (Princeton, New Jersey: Princeton University Press, 1994); Melvin Small, *Democracy and Diplomacy: The Impact of Domestic Politics on U.S. Foreign Policy, 1789-1994* (Baltimore and London: The Johns Hopkins University Press, 1996); Miles Kahler, “Introduction: Liberalization and Foreign Policy” in *Liberalization and Foreign Policy* ed. Miles Kahler (New York: Columbia University Press, 1997): 1-23; Lisa L. Martin, “Legislative Influence and International Engagement” in *Liberalization and Foreign Policy*, 67-104; Matthew Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War* (Ithaca: Cornell University Press, 1999).

²¹⁹ For literature on the democratic peace theory, see for example, Michael W. Doyle, “Kant, Liberal Legacies, and Foreign Affairs” *Philosophy and Public Affairs*, Vol. 12, No. 3 (Summer/Autumn 1983): 203-235; “Kant, Liberal Legacies, and Foreign Affairs” *Philosophy and Public Affairs*, Vol. 12, No. 4 (Autumn 1983), pp. 323-53; “Liberalism and World Politics” *American Political Science Review*, Vol. 80, No. 4 (Summer/Autumn 1986): 1151-1169; Kurt T. Gaubatz, “Democratic States and Commitment in International Relations” in *Liberalization and Foreign Policy*, 27-65.

²²⁰ Ethan B. Kapstein, “Is Realism Dead? The Domestic Sources of International Politics” *International Organization*, Vol. 49, No. 4 (Autumn 1995): 753.

domestic variables.²²¹

These critiques have led a group of scholars, mostly represented by Andrew Moravcsik, to formulate a theory capable of moving away from single-case analyses and providing generalizable conclusions on the influence of domestic actors on international affairs. For Moravcsik it is necessary, first of all, to relax the assumptions of neo-realist theory. First, foreign policy makers cannot be assumed as rational calculators of what is best for their own states since this neglects the influence of psychological factors, such as the perception of leaders, and the obstacles posed by bureaucratic agencies during the policy-making process.²²² Second, domestic leaders cannot be assumed to be constantly able to extract from their societies the resources needed for the pursuit of national interests. This would be difficult even under non-democratic regimes, which constrain state leaders far less than democratic ones. Under democratic conditions, leaders “must make tradeoffs between domestic and international goals”²²³ including the opinion of legislative assemblies often representing the interests of powerful domestic constituencies, most notably capital and labor. Finally, state interests and preferences cannot be assumed as stable and fixed because they are subject to processes of formation that involve a vast array of domestic actors.²²⁴

The alternative has been found in an “interactive approach”, which is largely based on Putnam’s logic of ‘two-level game’. Diplomacy needs to be viewed as a “process of strategic interaction in which actors simultaneously try to take account of and, if possible, influence the expected reactions of other actors, both at home and abroad.”²²⁵ A richer understanding of international politics requires that both dimensions become part of the analysis because leaders are neither passive executors of the will of domestic actors, nor independent individuals that are able to devise sets of interests by ignoring the preferences of domestic economic and political constituencies.²²⁶

This approach has been labeled as “liberal intergovernmentalism” in order to highlight the attempt to keep the international and domestic dimensions together and move away from neo-realist assumptions. Moravcsik has famously applied it to the analysis of the process of European

²²¹ See also, Gideon Rose, “Neoclassical Realism and Theories of Foreign Policy” *World Politics*, Vol. 51, No. 1 (October 1998): 144-172.

²²² Andrew Moravcsik, “Integrating International and Domestic Theories of International Bargaining” in *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, ed. by Peter B. Evans, Harold K. Jacobson, Robert D. Putnam (Berkeley, Los Angeles, London: University of California Press, 1993): 9.

²²³ Cit., 12.

²²⁴ For a summary of Moravcsik’s critiques to neo-realism and structural approaches, see Jeffrey W. Legro and Andrew Moravcsik, “Is Anybody Still a Realist?” *International Security* Vol. 24, No. 2 (Fall 1999): 5-55.

²²⁵ Andrew Moravcsik, “Integrating International and Domestic Theories of International Bargaining”, 15.

²²⁶ For an explanation of Moravcsik’s theory and its main components, see Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics” *International Organization*, Vol. 51, No. 4 (Autumn 1997): 513-53.

integration.²²⁷

Some scholars have not ignored the strengths of liberal intergovernmentalism as an approach that can potentially enrich the constructivist research program, in particular with regards to the exigency of looking inside domestic systems and understanding the determinants of state reaction to ideational structures. For example, Keck and Sikkink have praised Moravcsik's approach for its capacity of analyzing governments and states as subsets of domestic societies in the sense that individuals and societal groups can exert considerable influence on processes of policy-making.²²⁸ In a similar way, Finnemore has underscored the liberal capacity of problematizing state preferences as result of the internal characteristics of domestic systems.²²⁹

Nevertheless, the same authors have also criticized this approach for remaining fundamentally attached to rationalist assumptions. On the one hand, it is good that the analysis of preferences is brought to the state level, instead of simply focusing on the structural constraints imposed by the anarchical system. On the other hand, liberal intergovernmentalism still assumes that domestic actors already know what they want. Its roots in the philosophical tradition of methodological individualism, which rests on a notion of actors as rational utility maximizers, prevents liberal intergovernmentalism from grasping that even preferences and interests of individuals are constructed and transformed through interactions with social structures, such as norms, ideas, and culture.²³⁰ Identities and interests of domestic actors are equally socially constructed and cannot be assumed as fixed. Liberal intergovernmentalism provides a good account of how preferences are aggregated. However, it does not explain how preferences are formed, where they come from, and how they can change over time.²³¹

Despite these theoretical disagreements, social constructivism has been particularly interested in the attempts to recuperate theories of domestic sources of foreign policy in order to understand the domestic determinants of state response to immaterial factors.

For example, Thomas Risse-Kappen has studied the influence of public opinion on foreign policy by conducting a comparative analysis of France, Germany, and Japan. His main conclusion has

²²⁷ Andrew Moravcsik, "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community" *International Organization*, Vol. 45, No. 1 (Winter 1991): 1-56; "Preferences and Power in the European Community: Towards A Liberal Intergovernmental Approach" *Journal of Common Market Studies*, 31 (1993): 473-524; *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, 1998); Andrew Moravcsik and Kalypso Nicolaidis, "Explaining the Treaty of Amsterdam: Interests, Influence, and Institutions" *Journal of Common Market Studies*, Vol. 37, No. 1 (March 1999): 59-95; for a good summary of the main theories that emerged within the domestic approach, see James A. Caporaso, "Across the Great Divide: Integrating Comparative and International Politics" *International Studies Quarterly*, Vol. 41, No. 4 (December 1997): 563-591.

²²⁸ Margaret E. Keck, Kathryn Sikkink, *Activists Beyond Borders*, 214.

²²⁹ Martha Finnemore, *National Interest in International Society*, chapter 5.

²³⁰ Martha Finnemore, 147.

²³¹ *Cit.*, 146-7.

been that the impact of public opinion on foreign policy has to be seen as a function of the type of domestic structure. Societies whose institutions allow the participation of a vast array of actors to the decision-making process provide more opportunity for influencing foreign policy as well.²³² On the contrary, in societies, such as the USSR, in which the decision-making process is more centralized and less open to democratic oversight, ideas need to reach the very top of policy-making in order to exert any influence on the final outcome.²³³

This analysis is highly relevant in its attempt to challenge structural explanations that almost completely rule out the role of agency as determinants of international political outcomes. Moreover, it is to be praised for its comparative nature, which aims to move away from single-case analyses and understand the variation through which states differently react to similar ideas and norms.

Nevertheless, the analysis tends to focus primarily on the institutional and societal mechanisms through which ideational frameworks influence the foreign policy of states and is not directed to understanding what domestic actors are more responsible for the acceptance or rejection of norms. It is useful in order to explain how norms reach domestic contexts and how they are internalized within domestic societies and political systems. It is an analysis that takes single cases of norms and aims to discover the types of societies that are more likely to accept them and the domestic mechanisms through which they become part of the domestic discourse. However, it does not explain what domestic actors are in the position of interpreting international normative frameworks and determining state reaction. It tends to focus especially on cases of domestic acceptance and explain the process through which this takes place. As such, it does not take into account the reasons why sometimes norms do not achieve to be accepted and invoked at the domestic level, and especially, it does not identify the

²³² Thomas Risse-Kappen, "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies" *World Politics*, Vol. 43, No. 4 (July 1991): 479-512.

²³³ Thomas Risse-Kappen, "Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" *International Organization*, Vol. 48, No. 2 (Spring 1994): 185-214; see also, Thomas Risse-Kappen (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995). In this book, the author has convincingly shown that the impact of civil society and transnational movements often depends on the way domestic societies are organized in terms of openness of and access to the policy-process. Moreover, by analyzing the case of the Soviet Union, he has also shown how the degree of permeability of states to the ideas and campaigns of civil society movements is related to the level of international institutionalization of the specific issue-area (see p. 6-7). Along these lines, Matthew Evangelista has superbly analyzed changing policies by the Soviet Union with regards to nuclear weapons as an effect of the ability of transnational societal ideas, mostly sponsored by communities of experts and scientists, to reach the top of the decision-making process. The paradoxical and highly relevant conclusion is that in societies in which decision-making is centralized around few decision-makers, once ideas reach the top, it is difficult that they will not be listened. On the contrary, in democratic systems in which decisions are made through much more open and fragmented processes, the formation of foreign policy is subject to competition among such a vast array of actors that reaching the top of the decision-making process might not be enough to have ideas and normative frameworks implemented and acted upon. For this analysis, see Matthew Evangelista, *Unarmed Forces*, cit.

domestic actors that are more responsible for providing interpretations of the international system that can lead to acceptance or rejection of norms and ideas.

Along similar lines, Jeffrey Checkel has analyzed the impact of international norms on domestic politics by arguing that “mechanisms of norm diffusion vary as a function of domestic structures.”²³⁴ In order to understand the modalities through which international norms are internalized by domestic systems, Checkel has added a further variable. Two are the mechanisms through which norms are usually accepted domestically: “norm compliance” and “norm empowerment”. The former depicts a situation in which states comply with a norm because it is in their interest, while the latter explains that states not only comply with the norm but also internalize it as part of their identity.

To put it in other words, sometimes norms have a regulative effect, while in other cases they constitute the identity of actors. What effect prevails depends on the domestic structure of states. This conclusion is analytically useful, in that domestic conditions are taken as the explanatory factors for norm compliance or norm empowerment. Nevertheless, this explanation relies on a distinction between compliance and empowerment, which poses the difficult task to distinguish them in practice. In many cases, it can be difficult to assess whether a state has complied with a norm because it was in its interests or rather because it was consistent with its own perception of legitimacy and obligation. Moreover, similarly to Risse-Kappen’s analyses, Checkel’s study does not provide indications on what domestic actors have the largest say in the process of norm acceptance and interpretation.

A study that has moved away from this distinction between logic of compliance and empowerment is *The Power of Human Rights* published in 1999. The impact of human rights norms is analyzed with reference to ten countries in order to understand the variation in the way norms influence state interests. Through the analysis of the cases, the editors have devised a “spiral model”²³⁵ of norm socialization that explains the way states accept and internalize human rights norms. According to this model, states first adapt to norms for strategic reasons and then internalize them through a process of habitualization and institutionalization. Usually states start by denying the validity of a certain norm, but sooner or later they are forced to make concessions for tactical reasons, for example the necessity to receive foreign aid. According to this logic, the more a state is internationally vulnerable, the more is likely that it will overcome the initial phase of denial and start the process of norm internalization.

To date, this seems to be the best contribution to explain the conditions under which norms are

²³⁴ Jeffrey T. Checkel, “International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide” *European Journal of International Relations* Vol. 3, No.4 (1997): 477.

²³⁵ Thomas Risse, Stephen C. Ropp, and Kathrin Sikkink, *The Power of Human Rights International Norms and Domestic Change*, 17.

likely to define the interests of states. The book brings the domestic agency back in by showing how different countries react to norms. This allows us to understand the reactions of different states toward a certain international norm. It is, in other words, an example of those “longitudinal studies that investigate the variation in the salience of a given norm over time.”²³⁶ Nonetheless, the research design shows some limitations.

First, instead of focusing on one type of norm and see how states react to it, it is better to consider two or more cases of norms and analyze how they differently shape state interests. Given the decentralized structure of the system, the main problem is not only that states react differently to norms, but also that norms are not equally able to define state interests: some are more effective than others. A common tendency of these types of studies is to focus on one case of norm that was successfully able to influence the behavior of one or more states.²³⁷ Except for few cases²³⁸, these authors have privileged the analyses of the domestic mechanisms through which one norm was recognized as a legitimate framework of behavior. Nevertheless, in order to understand the way states react to different norms, it is necessary “to consider cases when the ‘dog doesn’t bark’, that is, where state identity/interests, in the presence of a norm, do not change.”²³⁹ This is particularly important in a system in which states, especially powerful states, are still mostly free to decide whether or not to recognize the legitimacy of norms and to take stances that are not always consistent over time. For this reason, analyses should also include cases where norms have been subject to processes of contestation and rejection.

Second, the choice of cases is sometimes problematic. In particular, in Risse and Sikkink’s book, all the countries under analysis reflect situations in which the actors involved had a compelling reason to accept human rights norms. The threat to terminate programs of economic assistance or foreign aid is taken as one of the major factors that led these countries to change their attitude toward norms. Not surprisingly, the initial step of the norm internalization model is “adaptation and strategic bargaining.” Acceptance of norms is, thus, first and foremost a matter of survival. Rather, in a world still characterized by disparities in the distribution of power and resources, it is analytically more useful to test the impact of norms on powerful states for which there is no compelling reason to accept them.

²³⁶ Andrew Cortell and James Doris, “Understanding the Domestic Impact of International Norms”, 85.

²³⁷ See for example, Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY: Cornell University Press, 1995); also, Kathryn Sikkink, “Human Rights, Principled Issue-Networks, and Sovereignty in Latin America” *International Organization* 47, 3 (Summer 1993): 411-41.

²³⁸ Jeffrey T. Checkel, “Norms, Institutions, and National Identity in Contemporary Europe” *International Studies Quarterly*, 43 (1999): 83-114.

²³⁹ Jeffrey T. Checkel, “International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide”, 339.

Moreover, in an international system that mostly lacks enforcement mechanisms, powerful states still play a key role in the interpretation of international norms. Given the horizontal and mostly cooperative nature of international law, whether or not powerful members of the international community recognizes the legitimacy of a norm can have large implications for its prominence and effectiveness.

Finally, one of the main purposes of this literature has been the investigation of the mechanisms and conditions that can lead to the institutionalization of international norms within domestic systems. These studies have tended to analyze how international norms influence state behavior and how they are incorporated into domestic contexts. Processes of formal acceptance and institutionalization constitute the main objects of analysis. What they have often neglected is that international norms trigger different reactions that can change over time. As has been observed at the end of the first chapter, invocation and acceptance of a particular norm at a specific point in time cannot be taken for granted, in the sense that they do not guarantee that such a norm will be consistently perceived as a legitimate and viable framework of behavior. Studying processes of domestic institutionalization and acceptance of international norms has high analytical significance but does not solve the issue of why sometimes states decide to recognize, while at other times reject, the legitimacy of similar international norms.

To conclude, these studies have improved the general understanding of how states respond to international norms. They have done so by integrating two different literatures. On the one hand, they have relied on social constructivist approaches in order to enrich the analysis with the study of immaterial factors, such as norms and ideas. On the other hand, they have moved away from the long-standing tendency to explain state behavior by merely focusing on structural factors, most notably the relative power of each state and its position in the international system. Nonetheless, they have mostly focused on the domestic mechanisms that can facilitate norm acceptance. Consequently, they have overlooked how state internalization is not the necessary destiny of international norms.

Sometimes states provide interpretations of international norms that cause indifference or rejection. International norms find the acceptance and recognition of states in case they fit with dominant interpretations provided by key domestic actors. For this reason, this study focuses on instances of both invocation and contestation. It searches the domestic actors and mechanisms responsible for interpretations of international norms that are able to win sufficient consensus to determine general state responses. The goal is a set of generalizable conclusions able to locate the domestic actors that generate state recognition and rejection of international normative imperatives.

2.2 International Norms and Domestic Response: What actors?

Both constructivism and domestic approaches to international relations provide insights on the domestic actors that are capable of exerting influence on the way states operate as to international affairs. These two literatures have different origins and interpreters but would mostly agree with Christopher Hill when he notices that foreign policy-makers “must face the fact that policy outcomes are vulnerable to events which are primarily ‘domestic’, and conversely, that foreign policy impacts upon domestic politics.”²⁴⁰ Domestic systems impose considerable constraints on foreign policy-makers, “in the sense of fairly stable and known limits to their freedom of maneuver.”²⁴¹ Various examples, from compliance with international agreements to acceptance of international institutions, can be made to show that often “domestic institutions determine how states behave internationally.”²⁴²

The goal of this study is to understand what domestic actors exert the most influence in the determination of state positions toward international normative frameworks. This requires an analysis of the main hypotheses that can be drawn from the literature as to the actors that have been generally considered capable of influencing foreign policy-making and the ones that have been identified as particularly relevant during processes of norm creation, evolution, and interpretation.

As will be shown, most studies on the impact of domestic actors on foreign policy have concerned the American system but provide insights that can be useful also for the analysis of other states, most notably Western ones. This search has been sometimes confusing in the sense that a large quantity of actors has been identified to the point that almost any domestic actor has come to be considered as potentially determining foreign policy. Many actors are thought to be involved at any level: government, legislature, executive bureaucracies, presidents, civil society. Nevertheless, some guidelines and common features can still be highlighted. In the following sections, I analyze the main contributions of the literature in terms of domestic determinants of foreign policy and response to international norms and I explain the hypotheses that will be tested in the empirical part in order to understand processes of domestic interpretation of international norms. The following analysis contains both the justification for my choice of hypotheses and the explanation of the reasons for ruling out alternative ones.

²⁴⁰ Christopher Hill, *The Changing Politics of Foreign Policy* (New York: Palgrave, 2003): 219.

²⁴¹ *Cit.*, 222.

²⁴² John Peterson, “In Defence of Inelegance: IR Theory and Transatlantic Practice” *International Relations*, Vol. 20, No. 1 (March 2006): 8. For similar points, see also James N. Rosenau, *Along the Domestic Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997): especially part IV on actors.

2.2.1 Party Politics and Relationships between Legislative and Executive Powers

Hypothesis No. 1: Political parties and institutional arrangements regulating the relationships between the executive and the legislative powers are the main determinants of state response to international norms.

According to a significant part of the literature on international norms and domestic systems, invocation and contestation of international norms are mostly determined by the characteristics of domestic normative frameworks. In order for norms to be socialized and legitimized within domestic systems, they need to fit with the main political, ideological, and institutional components of a country at specific points in time.

For example Cortell and Davis have argued that “if international norms are to become salient domestically, they need to resonate with domestic norms, widely held domestic understandings, beliefs, and obligations.”²⁴³ If this match between international norms and domestic understandings of the international system exists, norms are likely to gain prominence and recognition. The notion of cultural match has been further developed by Checkel. In an article published in 1999, he has defined it as “a situation in which the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures).”²⁴⁴ For norms to become legitimate, they need to resonate with domestic normative frameworks.

The main problem here is that the notion of domestic normative framework refers to a rather indeterminate concept that is not easy to be defined and operationalized. What do we mean when we say that norms have to resonate with domestic normative frameworks?

Several authors subscribing to the domestic approach to foreign policy seem to refer to this notion when investigating the role of domestic political cultures as determinants of foreign policy-making. For example, Hill has noticed that “once certain social attitudes and political forces are established they feed back to affect future foreign policy choices.” In this respect, he has provided the example of anti-Americanism as a determinant of the national interests of various states, even within the Western camp.²⁴⁵ With respect to the American context, Samuel Huntington has isolated four characteristics of U.S. political culture, such as liberalism, democracy, individualism, and egalitarianism, as the main sources of foreign policy ideas. Depending on the historical periods and the

²⁴³ Andrew P. Cortell and James W. Davis, “Understanding the Domestic Impact of International Norms”, 73.

²⁴⁴ Jeffrey T. Checkel, “Norms, Institutions, and National Identity in Contemporary Europe”, 87.

²⁴⁵ Christopher Hill, *The Changing Politics of Foreign Policy*, 227.

policy-makers in charge, these values are interpreted in different ways but they still remain the main elements to be taken into account when analyzing U.S. foreign policy choices.²⁴⁶ Along these lines, Walter Russell Mead has provided an analysis of U.S. foreign policy as determined by four domestic political cultures, corresponding to the legacies of four particularly relevant Presidents, such as Hamilton, Jefferson, Jackson, and Wilson.²⁴⁷ The way these traditions interact decisively contributes to the definition of U.S. national interests and is able to structure the relationships between administrations and congresses along the lines of nationalism and internationalism. In a similar way, James McCormick has identified U.S. liberal values as sources of inspiration for both isolationist and moralistic approaches to foreign policy. The explanation of U.S. foreign policy is conducted “by relying on the national character (or more generally the political culture) explanation of behavior.”²⁴⁸

Important scholars have made the choice to focus on political culture as a domestic determinant of state behavior at the international level. Nevertheless, this choice poses various problems especially in terms of operationalization and search of data. Political culture refers to a set of values that is precedent to the ideologies of political parties or societal groups. It concerns something that exists in a political society regardless of the policies and goals put forward at the level of party politics or interest groups. Political culture encapsulates the dominant values of a political society.²⁴⁹ In a democratic society, such values are even more difficult to identify given the possibility for almost any ideas and political projects to compete for and participate to the general interest.

This implies problems of measurement and identification and, depending on the sources selected, it risks leading to controversial conclusions that are particularly difficult to prove. For instance, that the U.S. and the UK strongly advocated the norm of humanitarian intervention because their societies tend to be characterized by a preference for internationalist and solidarist solutions to international crises is a conclusion that clashes against the evidence of several non-interventions and various instances in which more isolationist policies have been prioritized over others. The same could be counter-argued if we referred to widespread beliefs in inalienable natural rights, usually identified as one of the main elements of Western societies, as trigger for military intervention with humanitarian

²⁴⁶ Samuel P. Huntington, “American Ideals Versus American Institutions” in *American Foreign Policy: Theoretical Essays*, ed. John G. Ikenberry, 214-47.

²⁴⁷ Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Alfred A. Knopf, 2001).

²⁴⁸ James M. McCormick, *American Foreign Policy and Process* (Toronto: Wadsworth, 2005): 8.

²⁴⁹ With reference to the U.S. system, Eugene R. Wittkopf and James M. McCormick define political culture as “the basic needs, values, beliefs, and self-images widely shared by Americans about their political system”, as for example democracy, capitalism, limited government, individual liberty, due process, self-determination, free enterprise, equality before the law, majority rule, minority rights, federalism, separation of powers. This can be found in *The Domestic Sources of American Foreign Policy: Insights and Evidence*, 2004, 6-7.

purposes. Political culture refers to a static view of domestic politics and political change that can be extremely difficult to operationalize. The aim of this study is to identify determinants of state reaction to international norms and not to establish relationship between general domestic political philosophies and international norms. For this reason, I prefer to analyze the response of domestic normative frameworks to international norms by investigating the role of political parties and domestic institutional settings.

The role of political parties as vehicles of ideologies that can determine international positions has been explored for example by Brian Rathbun. Starting from the assumption that parties often “become the domestic vehicles of international norms,”²⁵⁰ Rathbun has concluded that what makes a difference in the way states respond to international norms is the domestic political ideology of a country as encapsulated in the structure of its party politics. In order to show how party politics can be able to determine foreign policy choices, he has provided a comparative analysis of the UK during two different international crises.

The difference between the substantial inaction during the Bosnian crisis and the proactive stance taken during the Kosovo crisis would lie in the different political ideologies of the parties that characterized the structure of party government. The Conservative party was driven by an “exclusive” ideology, according to which the defense of the British interest had to take precedence over any other consideration. The New Labour was, instead, characterized by an “inclusive” ideology according to which the national interest of Britain needed to go along with the interest of other peoples whose human rights should be of concern for the international community as a whole²⁵¹. Following this logic, British reluctance to intervene in Bosnia in 1992 was motivated by the presence of the Conservative Party in power, while the decision to wage war against the Federal Republic of Yugoslavia in 1999 was driven by the dominant political ideology of the New Labour, which was in power and implemented the decision to intervene, consistently with its internationalist mindset.

Political parties operating at the legislative level and participating in foreign policy debates fundamentally shape the position of a country toward international norms.²⁵² Political majorities within legislative assemblies certainly do not express the general political culture of a country but they can determine contingent state responses to international affairs, such as international normative

²⁵⁰ Brian C. Rathbun, *Partisan Interventions European Party Politics and Peace Enforcement in the Balkans* (Ithaca and London: Cornell University Press, 2004): 7.

²⁵¹ *Cit.* p. 29.

²⁵² For similar arguments, see also Thomas Risse, “To Euro or Not to Euro? The EMU and Identity Politics in the European Union”, 1999.

frameworks.²⁵³

Moreover, the analysis of the role of political parties in processes of norm interpretation cannot ignore the influence of the institutional structure in which parties themselves, and in general foreign policy-makers, operate. The type of institutional setting defining the relationships between governments and legislatures can become a decisive domestic condition in the determination of state positions as to foreign policy and international norms.²⁵⁴ Whether a political system provides separation of power between the President and the legislature or a fusion of power between the Prime minister and the parliamentary majority promises to have different impacts on the conduct of foreign policy and on the process of interpretation of an international norm. In the former case, executive leaders have to take into serious account the role of the legislature, with which there is no relationship of confidence. This expects to seriously limit the room of maneuver of the executive. In the latter, executive leaders still require the support of the legislature in order to implement their foreign policy aims but the relationship of confidence with the parliamentary majority promises to guarantee more freedom of action and stability.

The choice to focus on party politics and institutional settings aims to solve the problems of operationalisation and measurement that are posed by more indeterminate concepts, most notably political culture and identity. Political parties are the most visible representatives of the main political ideas that characterize domestic normative systems at particular points in time. Electoral cycles, change of legislative majorities, and debates among the main parties are expected to shape state positions as to international norms. However, the role of parties cannot be separated from the institutional setting in which foreign policy debates take place. The institutional arrangements that regulate the relationships between executives and legislatures can determine the room of maneuver of governments and

²⁵³ The role of political parties in foreign policy-making processes has been recognized by a large number of authors. See for example, Miroslav Nincic, "Elections and U.S. Foreign Policy" in *The Domestic Sources of American Foreign Policy: Insights and Evidence*, 117-27; John Peterson, "In Defence of Inelegance: IR Theory and Transatlantic Practice" (March 2006); David W. Rhode, "Partisan Leadership and Congressional Assertiveness in Foreign and Defense Policy" in *The New Politics of American Foreign Policy*, 76-101; James M. McCormick, "Clinton and Foreign Policy: Some Legacies for a New Century" in *The Postmodern Presidency: Bill Clinton's Legacy in U.S. Politics*, ed. Steven E. Schier (2000): 60-83; Stephen Schlesinger, "The End of Idealism: Foreign Policy in the Clinton Years", *World Policy Journal*, Winter (1998-99): 36-40.

²⁵⁴ Michael Mastanduno, "The United States Political System and International Leadership: A "Decidedly Inferior" Form of Government" in *American Foreign Policy* ed. John G. Ikenberry, 248-68; Charles O. Jones., *The Presidency in a Separated System* (Washington, D.C: Brookings Institution, 1994); Sergio Fabbrini, "A Single Western State Model? Differential Development and Constrained Convergence of Public Authority Organization in Europe and America" *Comparative Political Studies*, 36, 6, p. 653-678; Robert A. Pastor, "The President Versus Congress" in *U.S. Foreign Policy: The Search for a New Role*, ed. Robert J. Art and Seyom Brown (New York: Macmillan, 1993): 11-31; James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System* (Baltimore and London: The Johns Hopkins University Press, 1994): chapters 5-8.

legislative assemblies and also what actors have the most say in processes of norm interpretation. For this reason, their impact on processes of interpretation of international norms needs to be tested through the study of the cases.

2.2.2 *Civil Society*

Hypothesis No. 2: Civil society actors are the main domestic determinants of state response to international norms

The literature on domestic sources of foreign policy has traditionally been particularly interested in the role of civil society during processes of foreign policy-making. Civil society has been often interpreted as a broad concept within which a vast array of different actors can be included. Born in the U.S. context within the debate on the efficiency of foreign policy in democratic regimes, this literature has initially devoted particular attention to the role of public opinion.²⁵⁵ Several scholars were quick to recognize that, especially after the Vietnam War and the Watergate scandal, “public opinion has played an important but not adequately recognized, role in U.S. foreign policy decision-making.”²⁵⁶ Risse-Kappen has contributed to this issue by highlighting how “the nature of the political institutions as well as the character of the state-society relationship determine to what degree decision makers have to take the public opinion into account.”²⁵⁷ In particular, liberal societies, which allow a sufficient degree of societal participation to the public debate and whose leaderships are subjected to regular electoral cycles, tend to favor the influence of public opinion to decision-making processes. Political leaders are increasingly forced to take into account the opinions of their public.²⁵⁸

The difficulty at measuring the impact of a concept, such as public opinion, that is by definition volatile and subject to rapid change has led various scholars to focus on more observable civil society actors, most notably media and interest groups. The former has become particularly popular in the last twenty years. Especially during humanitarian crises, scholars have emphasized the importance of the so-called ‘CNN-effect’, intended as the capacity of major networks to broadcast particularly shocking images that shape public opinion down the road of accepting deployments of troops abroad. Sometimes, such as in the case of Somali humanitarian emergency in 1994, this effect can put

²⁵⁵ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, chapter 9-11.

²⁵⁶ Thomas W. Graham, “Public Opinion and U.S. Foreign Policy Decision Making”, 190-215; Robert Y. Shapiro and Benjamin I. Page, “Foreign Policy and Public Opinion”, 216-235 in *The New Politics of American Foreign Policy*.

²⁵⁷ Thomas Risse-Kappen, “Masses and Leaders: Public Opinion, Domestic Structures, and Foreign Policy”, in *The Politics of American Foreign Policy*, 238-261.

²⁵⁸ John Peterson, “In Defence of Inelegance”.

considerable pressure on governments to resort to the use of force.²⁵⁹ In general, media are often referred to as domestic constraints that are acquiring relevance in a world that is increasingly based on mass communication technology.

Focusing on media or public opinion certainly promises to add an important variable to the study of foreign policy-making and has the potential for augmenting our understanding of processes of state interpretation of international norms. However, this study does not take into account either media or public opinion as possible determinants of state response to norms. Assessing the impact of such volatile domestic factors would not be easy in the sense that the analysis should be based on opinion polls that pose the problem of reliability. The opinion of the public on a vast array of issues is almost constantly monitored in democratic societies. Data tend to change very rapidly and this does not promise to provide reliable information on what public opinion think about specific issues. Moreover, public opinion remains an indeterminate concept that is not easily interpretable since the value of any investigation is strictly related to the institution conducting it, to the type of question, and to the specific moment in which it takes place.

For example, there are some polls available that have tested the opinion of the U.S. public as to intervention in Kosovo and the ICC Treaty. As to the former case, opinion polls were mostly conducted at the end of military action and consequently present data that can hardly be used to establish a causal relationship between the decision to wage war and the opinion of people.²⁶⁰ In a similar way, opinion polls on the ICC were conducted between 1999 and 2000, several months after the negotiation at the Rome Conference. Moreover, they tended to be based on very direct and univocal questions, such as “should the U.S. support such an emerging international court”, or “do you agree with the establishment of such a Court”. Answers to such direct and simple questions do not seem to provide much analytical content and evidence is too scant to demonstrate that they had any impact on the debate or decision-making process.²⁶¹

In sum, problems of data availability and reliability suggest that investigating media and public opinion as sources of domestic interpretation of international norms is likely to establish weak relationships between such societal factors and the issues under analysis. Interpretation of international norms implies consideration of a vast array of legal and political elements that do not go along with univocal ‘yes-or-no’ questions. In general, no study that I know of has taken these variables into serious consideration when analyzing processes of domestic socialization and internalization of

²⁵⁹ See Michael Mastanduno, “The United States Political System and International Leadership”, 253-7.

²⁶⁰ Program on International Policy Attitudes, “Americans on Kosovo: A Study of Public Attitudes”, May 27, 1999.

²⁶¹ Program on International Policy Attitudes, Roper Center at University of Connecticut, October 1999.

international norms. Especially in the U.S. context, which has arguably been the most fruitful in terms of analyses of policy-making, scholars have rather focused on other societal actors, namely think tanks and interest groups.²⁶²

Constructivist scholars too have preferred to rely on other societal actors in order to assess and measure the impact of civil society. A vast part of the literature on international norms have argued that recognition of international norms at the domestic level is often decisively determined by the action of individuals and groups acting within state societies. In particular, they have focused on advocacy movements, such as NGOs and think tanks, and have emphasized their decisive role in processes of norm interpretation and legitimization. The main argument has been that, for norms to be socialized at the domestic level, they need to find the support of transnational and national advocacy movements.

Thanks to their action of lobbying on governments and parliaments, usually conducted in the form of campaigns and publication of reports, NGOs are thought fundamental to determine the position of a country toward instances of international norms. In a seminal study on transnational advocacy movements, Sikkink and Keck have elaborated a “boomerang pattern” to explain how norms are socialized and diffused within domestic systems. This pattern can be observed especially within countries that frequently violate international standards of behavior. As Sikkink and Keck have provided, “when channels between the state and its domestic actors are blocked, the boomerang pattern of influence characteristic of transnational networks may occur: domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside.”²⁶³ Starting from the assumptions that states are not unitary actors that pursue fixed interests, transnational actors, such as NGOs, are accorded a significant role in the formation of state preferences. Acting across state borders, transnational advocacy networks are often able to “frame issues to make them comprehensible to target audiences, to attract attention and encourage action, and to ‘fit’ with favorable institutional values.”²⁶⁴ Transnational networks are expected to “bring ideas, norms, and discourses into policy debates.”²⁶⁵

Various scholars have applied this model to explain how domestic systems that are usually reluctant to abiding by international standards of behavior end up socializing and internalizing international norms. Analyses have been conducted with particular reference to developing countries that are somehow forced to accept international norms as the consequence of programs of economic

²⁶² James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 197-215.

²⁶³ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, 12.

²⁶⁴ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders Advocacy Networks in International Politics*, 2-3.

²⁶⁵ *Cit.*, p. 3.

assistance.²⁶⁶ Other studies have concerned the impact of civil society groups within Western democracies. For example, Checkel has observed that “in the liberal structure, the role of elites is highly constrained: policy is formed more from the bottom-up than from the top-down. Individuals and groups in society are accorded a central role in policymaking, and, therefore, likely agents of norm-induced change.”²⁶⁷

Further analysis has provided important insights on how NGOs can sometimes create transnational coalitions that have “the capacity to generate coordinated and sustained social mobilization in more than one country to publicly influence social change.”²⁶⁸ NGOs would play the fundamental role to “help to define and raise issues to the political agenda, draft proposals for resolutions or legal conventions and ... coordinate the efforts of national social movement organizations to support government passage of international conventions or legislation.”²⁶⁹

A case that is often cited has been the process of negotiation that led to the adoption of the ICC Statute in July 1998. As has been explained in the previous chapter, the actions of the Coalition for an International Criminal Court, which is composed of a large number of NGOs committed to human rights issues, had a decisive impact on the adoption of the final Statute. The transnational character of the Coalition allowed coordination among advocacy groups operating in different countries. Exchange of information, legal assistance to governments, and elaboration of common strategies developed an

²⁶⁶ See for example Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights*; Neta Crawford and Audie Klotz, *How Sanctions Work: Lessons from South Africa* (London: Macmillan, 1999); Sanjeev Khagram, James V. Ricker, Kathryn Sikkink (eds.), *Restructuring World Politics: Transnational Movements, Social Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002).

²⁶⁷ Jeffrey T. Checkel, “Norms, Institutions, and National Identity in Contemporary Europe”, 89.

²⁶⁸ The ability of transnational civil society movements to create societal coalitions across state borders that can favor political change is also explained by the literature on ‘epistemic communities’. These are communities of experts that share a set of values and norms, which are considered reliable. They have the power and prestige to disseminate new norms and can consequently become powerful mechanisms of social change. See for example, Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination” *International Organization*, Vol. 46, No. 1, Special Issue on Knowledge, Power, and International Policy Coordination (Winter 1992): 1-35; Emanuel Adler and Peter M. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program”, *International Organization*, 367-390; Peter M. Haas, “When does power listen to truth? A constructivist approach to the policy process” *Journal of European Public Policy* Vol.11 No.4 (2004): 569-92; an important study that has provided a powerful application of these insights is Matthew Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War*, 1999. In this book, the author provides an extremely documented analysis of how a transnational movement of physicians was able to disseminate ideas and normative frameworks that favored the moderation of U.S.-Soviet relations, for example by highlighting the necessity to find some accommodation on arms control and disarmament. The author ambitiously provides a transnational explanation of how the Cold War ended and focuses in particular on the role of “ordinary citizens” (mostly scientists and human rights activists) “involving themselves in issues that used to be the exclusive preserve of governments” and engaging in experiments of “track-two diplomacy as an alternative to the official negotiations of government diplomats” (see p. 6); see also, Sanjeev Khagram, James V. Ricker, Kathryn Sikkink, *Restructuring World Politics Transnational Social Movements, Networks, and Norms*, 8.

²⁶⁹ Jackie Smith, “Characteristics of the Modern Transnational Social Movement Sector” in *Transnational Social Movements and Global Politics Solidarity Beyond the State*, ed. Jackie Smith, Charles Chatfield, and Ron Pagnucco (Syracuse, NY: Syracuse University Press, 1997): 43.

international consensus that highly facilitated the outcome of the Rome Conference. This example shows that the role of transnational civil society movements, especially in processes of adoption of international treaties and during interstate negotiations, cannot be overlooked.

Interestingly enough, even critical accounts of processes of norm socialization have sometimes focused on these actors as major agents of social change. Studying processes of diffusion of norms of humanitarian intervention, Chandler has for example argued that NGOs were among the most responsible actors for the prominence and legitimization of norms that dictate military interventions across state borders. In his analysis of the shift from neutral humanitarian assistance, that was typical of the Cold War period, to a more assertive and “rights-based²⁷⁰” humanitarianism, Chandler has illustrated the importance of NGOs in shaping the international and domestic agenda. For Chandler, NGOs, such as Oxfam and Medecins sans Frontieres, were decisive at changing the approach of governments towards humanitarian issues. In their view, humanitarian assistance should no longer be neutral and merely committed to alleviating the sufferings of people, but should become more assertive, capable of distinguishing between victims and perpetrators and “legitimizing the politics of intervention, condemnation, and bombings.²⁷¹” Especially during the 1990s, NGOs can be regarded as a decisive factor in the process of legitimization of armed humanitarian intervention.

These studies share the idea that, although they have “no ability to direct societies”²⁷², meaning that they do not have the capacity of taking authoritative decisions, NGOs can exert large impact on processes of norm diffusion. Acting as “private citizens’ organizations, separate from governments and active on social issues”²⁷³, NGOs can often “create the conditions that facilitate the formation of international institutions” and “reinforce the norms promoted by these institutions through public education as well as through organized attempts to hold states accountable. This often enhances institutional effectiveness by reducing the implementation costs associated with international institutions.”²⁷⁴ Thus, although they do not share power with political and institutional actors, NGOs can play the fundamental role to raise issues and promote solutions in the forms of international standards of behavior. This role is particularly relevant in case of international conventions and processes of ratification of international treaties, since NGOs are often capable of creating transnational

²⁷⁰ David Chandler, “The Road to Military Humanitarianism: How the Human Rights NGOs shaped a new Humanitarian Agenda” *Human Rights Quarterly* 23 (2001): 692.

²⁷¹ David Chandler, p. 700.

²⁷² Leon Gordenker, Thomas G. Weiss, “Pluralising Global Governance: Analytical Approaches and Dimensions” *Third World Quarterly* Vol. 16, No.3 (1995): 360.

²⁷³ Cit.

²⁷⁴ Leon Gordenker, Thomas G. Weiss, 366. By the same authors, see also *NGOs, the UN, and Global Governance* (Boulder, Colorado: Lynne Rienner, 1996).

coalitions.²⁷⁵

The active participation of NGOs and think tanks to debates on international issues both at the international and domestic levels, together with the large role accorded by the literature to these social agents, require an investigation of the action of advocacy movements during processes of domestic interpretation of international norms. As the example of the ICC Statute illustrates, NGOs and advocacy movements often play a highly relevant role in processes of legitimization of international norms that take place at the international level, in particular within international organizations. The present research aims to understand whether this is the case also for processes of interpretation and sponsorship of international norms that take place at the domestic level, in which civil society movements have to confront different types of actors, such as elected executive leaders and legislative assemblies.

2.2.3 Executive Leadership

Hypothesis No. 3: Political leaders and norm entrepreneurs are the main domestic determinants of state response to international norms

A relevant part of the literature under analysis has put forward the hypothesis that, given their privileged position as policy-makers, political leaders constitute the main vehicles for the diffusion of international norms. This has been true not only at the international level, in cases of heads of international governmental and non-governmental organizations, but also at the domestic level.

Scholars of domestic sources of foreign policy have often underscored how political leaders, such as Presidents, Prime ministers, heads of legislative assemblies, and leaders of bureaucratic governmental agencies, can become decisive factors in the implementation of foreign policy decisions.²⁷⁶

²⁷⁵ See for example Chadrick F. Alger, “Transnational Social Movements, World Politics, and Global Governance” in *Transnational Social Movements and Global Politics*, 260-75.

²⁷⁶ Once again, most studies on the issue concern the U.S. political system. Some scholars have highlighted this tendency, especially with reference to war issues. See for example, Arthur M. Schlesinger, Jr., *War and the American Presidency* (New York: W.W. Norton, 2004); Louis Fisher, *Presidential War Power* (Lawrence, Kansas: University Press of Kansas, 200); Eugene R. Wittkopf and James M. McCormick, *The Domestic Sources of American Foreign Policy*: introduction; on the exaggerated perception of the power and influence of bureaucracies in U.S. foreign policy, see Stephen Krasner, “Are Bureaucracies Important? (Or Allison Wonderland)” in *American Foreign Policy: Theoretical Essays*, ed. John G. Ikenberry: 447-459; on the capacity of the President of circumventing Congress not only in war issues but also in treaties, see James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*: chapters 6, 8, 13; David A. Deese, *The New Politics of American Foreign Policy*: chapters 3, 7.

Scholars of international norms too have taken this almost counter-intuitive hypothesis into serious account. They have done so by referring in particular to the notion of ‘moral and political entrepreneurs.’ In various studies, this has been identified as the crucial explanatory factor for the emergence and success of international norms. For example, Ethan Nadelmann has explained the evolution of international regimes as the result of the “proselytizing efforts” of “transnational moral entrepreneurs”²⁷⁷ intended as “powerful individual advocates within the government.”²⁷⁸ Operating from privileged organizational platforms, such as governments and international organizations, prominent and influent political leaders often have the chance to “mobilize popular opinion and political support”²⁷⁹ and persuade foreign and domestic audiences of the necessity to create new normative frameworks or institutionalize existing ones in order to take appropriate international action. In various cases of military intervention, leaders are deemed crucial to “provoke and justify international intervention in the internal affairs of other states.”²⁸⁰

Subsequent studies on international norms have tested the validity of these arguments by providing analyses of processes of norm emergence and evolution. Ann Florini has, for instance, shown that “norms held by powerful actors simply have more opportunity to reproduce.”²⁸¹ Influential individuals, acting in specific political contexts, are viewed as fundamental conditions for norms to emerge and gain prominence. In a similar way, Finnemore and Sikkink’s “life cycle of norms” identifies leaders as important explanatory factors of how norms originate and institutionalize at the international level. Norm entrepreneurs acting within governments or international organizations are “critical for norm emergence because they call attention to issues or even ‘create’ issues by using language that names, interprets, and dramatizes them”²⁸² Along this line, the emergence of norms of international humanitarian law has been interpreted as the result of the ideas and actions of creative and committed individual leaders.²⁸³ Political leaders, writers, journalists, entrepreneurs can sometimes possess the moral potential and the political and economic resources to promote campaigns, re-frame issues, invoke actions, and persuade governments and audiences of the necessity to implement particular policies. These activities can under certain conditions lead to the emergence of new

²⁷⁷ Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society” *International Organization*, Vol. 44, No. 4 (Autumn 1990): 481.

²⁷⁸ Cit., 483.

²⁷⁹ Ethan A. Nadelmann, 482.

²⁸⁰ Cit. For an application of these arguments to processes of emergence, evolution, and institutionalization of international regimes devoted to fighting against various categories of transnational crimes, see Peter Andreas and Ethan A. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: Oxford University Press, 2006).

²⁸¹ Ann Florini, “The Evolution of International Norms” *International Studies Quarterly*, Vol. 40 (1996): 375.

²⁸² Martha Finnemore and Kathryn Sikkink, “International Norms Dynamics and Political Change”, 897.

²⁸³ See for example, Martha Finnemore, *National Interest In International Society*, 69-88.

normative frameworks or favor the institutionalization of existing ones.²⁸⁴

In sum, for these authors, the decentralized nature of the international system makes it that the emergence and persistence of international norms are mostly the result of the will, beliefs, and interests of prominent political leaders, especially those operating within international organizations and the governments of the most powerful states. These studies have certainly improved our understanding of how international norms stick at the international level and influence the relationship among states and international organizations. Nevertheless, most analyses have focused on processes of emergence and institutionalization of international norms but have tended to overlook their impact on domestic contexts. For this reason, it is necessary to explain the role that is played by political leaders and norm entrepreneurs in processes of state response and reaction to existing international norms. At the domestic level, political leaders are often more constrained and compete with other powerful actors to the definition of state positions toward international norms.

These are the hypotheses that will guide this research on the domestic actors that can determine state response to international norms. Both the literature on domestic sources of foreign policy and the one on processes of norm diffusion have provided several insights on what actors matter when it comes to the interpretation of the international legal and normative system. The main problem is that most studies have tended to take into account one category of actors at a time. Comparative research and multiple case-study analysis promises to draw general conclusions on the actors that more frequently determine the outcomes of these processes.

2.3 Research Question

This study starts from an observation: some norms are more successful than others at shaping the interests of states. When performing at the international level, states sometimes invoke norms and take actions that are consistent with them. In other cases, states contest the meaning of norms and refuse to act upon them. For example, in 1999 the UK and the U.S. both vehemently advocated the emerging norm of humanitarian intervention before bombing the Federal Republic of Yugoslavia in order to stop the ethnic cleansing against the Albanian population of Kosovo. By contrast, the two states diverged in their interpretations of international criminal responsibility. This divergence emerged during the negotiation of the ICC Statute, which was accepted by the UK, but rejected by the U.S.

²⁸⁴ For a less recent piece of work that has constituted source of inspiration for various constructivist studies on the diffusion of international norms through the actions of norm entrepreneurs, see John Mueller, *Retreat From Doomsday: The Obsolescence of Major War* (Rochester, NY: University of Rochester Press, 1989).

These two international norms triggered different reactions. This different attitude was remarkable if we consider that the two norms are somehow related and that the U.S. and the UK have been both broadly concerned with human rights issues, especially during the 1990s.

Previous studies have shown that norms matter in international politics, in the sense that they shape the interests of states and define what they want. Material capabilities and distribution of power are not the only factors able to define the aims that states pursue at the international level. There are situations in which states make decisions on the basis of different ideational structures, such as international norms. Nevertheless, only a few studies have so far explained the reasons for different state responses to similar international norms.

Once they emerge and develop, norms have to confront a heterogeneous system composed of states that are different from one another. Each state decides whether or not to act upon a norm on the basis of its specific interpretation and on the basis of its own social, political, and cultural conditions. This is the main reason why international norms are often subject to processes of contestation. Before being invoked and acted upon by states, norms need to go through processes of domestic validation. As Wiener has recently argued, when norms are “dealt with outside their socio-cultural context of origin, a potentially conflictive situation emerges.”²⁸⁵

When they reach domestic systems, international norms trigger debates about their own legitimacy. International norms are subject to the interpretation of key political and societal actors. These actors take part to a conflict of values that aim to impose specific interpretations and privilege particular aspects of the norm under discussion. The position of a state toward a certain norm is the outcome of decisions that result from domestic debates that create winners and losers. Invocation or contestation depends on the array of actors and domestic conditions that characterize political and societal systems at specific points in time. Some actors are able to prevail over others, impose one particular outcome, and determine the position of a state toward a certain norm. For this reason, it is necessary to investigate what domestic actors and mechanisms determine state positions toward international norms, in particular in terms of invocation and contestation. This is the research question that guides this study.

Studying states’ response to international norms mostly means to focus on processes of domestic interpretation and legitimization. The existence of international norms or regimes does not necessarily mean that they will be recognized and accepted by states at any time. Norms need to fit with the normative frameworks of states at specific points in time and become part of the political

²⁸⁵ Antje Wiener, “Contested Meanings of Norms: A Research Framework” *Comparative European Politics*, 5 (2007): 1.

discourse of particular domestic actors. Given the importance of perceived legitimacy in a system that is still mostly characterized by anarchy, the answer to the question of why some norms are invoked, while others are rejected needs to be found at the domestic level.

In order to be invoked as possible frameworks of international action, norms need to be perceived as legitimate, which means just, effective, and useful. Conversely, if international norms are not perceived as legitimate, they are likely to be contested, rejected, or ignored. As Franck has noticed in a seminal study, legitimacy can be defined as “the property of a rule or rule-making institution, which itself exerts a pull toward compliance on those addressed normatively.” Compliance and recognition of norms take place when “those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”²⁸⁶ When discussing the legitimacy of a norm, domestic actors commit themselves to the production of arguments, symbols, and images that aim to impose one specific interpretation. These arguments concern the components of the norm and its ability to resonate with the prevalent domestic political discourse and its underlying values. This process of legitimization is fundamental to determine the position of states toward international norms.

This approach does not deny that states take actions that are consistent with their own interests – an argument forcefully put forward by realist and neo-realist scholarship. Previous studies have tried to explain state behavior by distinguishing between interest-based and legitimacy-based actions. These studies rely on the theoretical distinction between logic of consequences and logic of appropriateness, which was devised by James March and Johan Olsen.²⁸⁷ I argue that this distinction mostly constitutes reification. As has been shown in the discussion of the literature, logic of consequences and logic of appropriateness are rather indeterminate concepts that are difficult to distinguish in practice.

States tend to take actions, such as invoking an international norm, that are consistent with their own interests. At the same time, convincing arguments can be made to demonstrate that states can invoke an international norm because the values embodied by that specific norm cohere with their idea of justice and legitimacy. As with any other international action, states sometimes follow their own interests, sometimes their own perceived identities, while at other times both. As Nadelmann has argued, the problem with the distinction between the logic of compliance and the logic of appropriateness is that “it is difficult or often impossible to determine whether those who conform to a particular norm do so because they believe the norm is just and should be followed, or because

²⁸⁶ Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York, Oxford: Oxford University Press, 1990): 25.

²⁸⁷ James G. March, Johan P. Olsen, “The Institutional Dynamics of International Political Orders” *International Organization* Vol.52 No.4 (Autumn 1998): 943-69.

adherence to the norm coincides with their other principal interests, or because they fear the consequences that flow from defying the norm, or simply because conforming to the norm has become a matter of habit or custom.” In general, “our understanding of the impact of norms on state and non state behavior ... is ... limited by our inability to adequately penetrate the human consciousness.”²⁸⁸

The search for evidence to show whether a certain action was taken for altruistic reasons or to pursue an egoistic interest is likely to lead to a quagmire. States can always provide arguments that present their actions as motivated by justice and legitimacy. For this reason, instead of asking under what logic of action states choose to adhere to international standards of behavior, it is more useful to start from the observation that when they reach the domestic level, international norms trigger debates and value conflicts about their legitimacy. The resolution of these conflicts can lead to various outcomes, most notably invocation and contestation. What are the domestic actors and the domestic mechanisms that favor these results? What are the main transmitters of international norms within domestic systems?

These questions are not of mere academic interest. In a context that lacks an international authority capable of enforcing behavior, the fact that a norm is invoked by a state during a specific historical moment may constitute a precedent to which other states will subsequently refer to in order to justify their actions. In a similar way, contestation can represent the starting point of a process of decline or reconsideration. Invocation and contestation affect the effectiveness and credibility of international norms as legitimate frameworks of behavior. It is, thus, important to investigate how conflicts about the legitimacy of norms are solved at the domestic level and understand the actors that lead to norms being invoked or rejected in the process of foreign policy-making.

2.4 Research Design

The search of the actors that determine domestic invocation or contestation of international norms is conducted by analyzing the response of different states toward different normative frameworks. Since international norms trigger different reactions that can vary over time and country, it is necessary to study the variation in the way different states respond to different international norms. This will be done by focusing on the impact of two norms, humanitarian intervention (HI) and international criminal responsibility (ICR), on the foreign policy of two states, the U.S. and the UK.

When they reach the domestic level, international norms trigger debates about their legitimacy.

²⁸⁸ Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, 480.

These debates can take different forms depending on the historical circumstances or the characteristics of the actors that dominate the domestic system at particular points in time. Norms that are invoked today can be contested tomorrow. Consequently, instead of investigating the conditions under which norms are institutionalized, it is more useful to focus on the actors that trigger invocation or contestation.

With this aim, this study takes into account single historical events in which states have come to deal with international normative frameworks, such as HI and ICR. I focus on the decision to wage war against the Federal Republic of Yugoslavia (FRY) in 1999 and on the process of ratification of the ICC Treaty. The aim is to analyze the debates that international norms trigger at the domestic level and locate and explain the main issues that are raised as to the legitimacy of the norms. For example, what is to be done when the international community feels the necessity to use force in order to stop an ongoing humanitarian crisis but existing legal arrangements, most notably the functioning of the Security Council, do not allow international intervention? How can an international criminal court adequately prosecute massive violations of human rights without turning into a politicized institution? States express different opinions about these “legitimacy issues.” These opinions are often the result of domestic conditions and actors.

Along these lines, the premise on which this work is based is that international human rights norms, universal by definition, clash with the reality of a heterogeneous international system, in which states differently react to their imperatives. States tend to invoke or question the legitimacy of norms on the basis of their own interests and values. The first step consists of explaining the process of interaction between states and norms by analyzing what are the main issues at stake (“legitimacy issues”), how they are debated, what actors take part to the debate, what arguments in favor or against the norm are provided, and how the issues about the legitimacy of the norm are solved. What do we make of such a norm? What interpretation of the norms prevails? I analyze the ‘legitimacy problems’ triggered by the norms by identifying the main debates that took place in the U.S. and the UK about HI and ICR during the two specific instances of foreign policy-making.

The second step consists of locating the domestic actors that have the resources and power to solve the issues related to the legitimacy of norms during processes of domestic interpretation and the domestic mechanisms that favor these outcomes. I explain what actors and mechanisms exerted the largest impact on the process of norm interpretation. In particular, what actors were decisive at determining the position of the UK and the U.S. toward the norms of HI and ICR. The two possible outcomes of the legitimacy problem are invocation, understood as the recognition of the legitimacy of

international norms, and contestation, understood as the rejection of the legitimacy of international norms.

This framework of analysis aims to contribute to a better understanding of both the reasons for specific state attitudes as to human rights norms and the domestic actors that are expected to determine state response. This is important to understand the prospects for success of international norms at winning the support of states and the types of actors that need to be addressed in order to mobilize and facilitate domestic endorsement.

In the following sections, I expand this theoretical framework by clarifying some important issues. First, I provide a definition of international norms on which this study relies by drawing insights from the relevant literature on the topic. I explain the difference between institutionalized and emerging international norms, which constitutes an important element of this study. Second, in terms of research methodology, I clarify the analytical approach that is employed, the strategies for the operationalization of concepts, and the type of sources and data that are taken into account in order to answer the research question.

Third, I motivate the choice of cases and the necessity to focus on different instances of international norms and countries in order to understand the variation in the way states react to international norms and explain the reasons for one outcome or the other.

2.5 International Norms: Concepts and Definitions

This study takes into account international norms as collective and normative frameworks that provide standards of proper behavior and that are subject to extensive debates about their own legitimacy. Depending on the domestic conditions, debates about norms can lead to invocation or contestation. Under certain conditions, states recognize the legitimacy of norms and invoke them during instances of foreign policy. When such conditions are not satisfied, the legitimacy of norms is contested and states refuse to act on their basis. This definition relies on the several insights provided by the constructivist literature on international norms.

First, international norms are not conceptualized in strictly legal terms. As has been noticed in the discussion of the literature, until the advent of sociological approaches to the study of institutions, traditional IR approaches had mostly relied on what Kratochwil defines as the “negative analogy to domestic politics.”²⁸⁹ Following this analogy, the impact of norms on the international system was

²⁸⁹ Friedrich V. Kratochwil, “Norms, Rules, and Decisions”, 45.

thought possible only in the presence of a central authority capable of legally enforcing them. This partially made neo-liberalism, and especially neo-realism, unable to explain how norms emerge and shape state interests in an anarchical system. The domestic analogy has limited the possibility to conceptualize norms in IR theory and has allowed rationalist approaches to expunge norms from the study of a system that lacks a central agency capable of enforcing and interpreting them. In this study, norms are not analyzed as legal prescriptions but, rather, as social and political frameworks for the proper behavior and identity of actors.

Second, international norms are not taken into account as “causing occurrences.”²⁹⁰ Norms may sometimes guide behavior, provide mutual expectations about future action, or be ignored. Nevertheless, they do not affect behavior “in the sense that a bullet through the heart causes death or an uncontrolled surge in the money supply causes price inflation.”²⁹¹ Attempts to derive ‘If A, then B’ causations are not analytically useful in the study of norms. Norms provide “principled and shared understandings of desirable and acceptable forms of social behavior”²⁹², but they are counterfactually valid. As Kratochwil suggests, “although we may observe a certain regularity that might be caused by some underlying norm, we have no clear idea how this hunch can be translated into a causal mechanism so that we can establish the actual aetiology between norms and resulting behavior.”²⁹³ Non-compliance amounts to violation, but not necessarily to invalidation or ineffectiveness of the norm. If they believed that norms are irrelevant, it would be difficult to understand why states almost always provide justifications for non-compliance.

The main lesson of this approach is that what allows us to assess the impact of norms on foreign policy-making is not merely the extent to which states comply with them, but rather the capacity of norms to define the interests of states. This conceptualization of norms allows us to circumvent traditional neorealist critiques according to which the fact that states do not comply with international norms would make them either irrelevant or mere rationalizations of the will of great powers.²⁹⁴

²⁹⁰ Friedrich V. Kratochwil, John Gerard Ruggie, “International Organization: A State of the Art on an Art of the State” in Friedrich V. Kratochwil, Edward D. Mansfield (eds.) *International Organization: A Reader* (London: Longman, 1997): 11.

²⁹¹ *Ibidem*, 11.

²⁹² *Ibidem*, 9.

²⁹³ Friedrich V. Kratochwil, “How do Norms Matter?” in Michael Byers (ed.) *The Role of Law in International Politics. Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000): 63.

²⁹⁴ For a similar approach to the study of international norms, see also Friedrich V. Kratochwil, “The Force of Prescriptions” *International Organization*, Vol. 38, No. 4 (Autumn 1984): 685-708; along these lines, Ann Florini has suggested to consider norms as “standards of behavior” and not as “behavioral regularities”. See her “The Evolution of International Norms”, 364; in a similar way, Audie Klotz has provided that norms do not only have a “constraining” but also a “motivational role”, in the sense that they not only regulate behavior but also define the interests and identities of actors. See her *Norms in International Relations: The Struggle Against Apartheid*, 21. See also, Janice E. Thomson, “State Practices, International Norms, and the Decline of Mercenarism” *International Studies Quarterly*, Vol. 34 (1990): 23-47

Following this logic, Katzenstein defines norms as “collective expectations for the proper behavior of actors with a given identity.”²⁹⁵ This means that norms do not only “specify standards of proper behavior” but also “define the identity of an actor.”²⁹⁶ Along these lines, this study not only focuses on the regulative effect of norms but also on their constitutive effect. This means that norms are not only instruments that proscribe and regulate proper behavior but also normative frameworks that define the identity of actors in terms of what can be pursued at the international level.

An important element that distinguishes norms from other ideational structures, such as ideas or beliefs, is their shared and collective nature. As Finnemore has argued, norms are “collectively held ideas about behavior.”²⁹⁷ This has been maintained by other authors that have distinguished between ideas, understood as “beliefs held by individuals” and norms, understood as “intersubjective beliefs about proper behavior.”²⁹⁸ International norms are different from other ideational structures in that they are collectively held by a large number of actors and are characterized by what Florini has referred to as a “sense of ought.”²⁹⁹ Norms define behavior by providing prescriptions about what must and must not be done.

Finally, another important concept for this study is contestation. As Wiener suggests, “norms are contested by default.”³⁰⁰ This is even truer in the international system in which there is no authority to enforce norms and impose their correct interpretation. Consequently, states tend to behave according to their own interpretation of norms. There is no guarantee for norms to be effective, in the sense that they are not equally able to shape the interests of states. Studying the contested meaning of norms is analytically necessary to operationalize their impact on state interests. In a study that aims to analyze how norms change and evolve, Sandholtz has argued that “disputes about acts are the heart of a process that continuously modifies social rules.”³⁰¹ Successful norms are those that are more capable of overcoming contestation and being invoked by states. It is important to understand the process through which norms spread at the domestic level and the actors that are likely to make norms more successful at becoming part of the rhetorical discourse of states.

²⁹⁵ Peter Katzenstein, *The Culture of National Security*, 5

²⁹⁶ Peter Katzenstein, *The Culture of National Security*, 5.

²⁹⁷ Martha Finnemore, *National Interest in International Society*, 22.

²⁹⁸ Sanjeev Khagram, James V. Riker, Kathryn Sikkink (ed.), *Restructuring World Politics*, 14. This distinction was previously devised by Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, “Norms, Identity, and Culture in National Security” in Peter Katzenstein (ed.), *The Culture of National Security*, 54.

²⁹⁹ Ann Florini, “The Evolution of International Norms”, 364.

³⁰⁰ Antje Wiener, “Contested Meanings of Norms”, 13.

³⁰¹ Wayne Sandholtz, “Dynamics of International Norm Change: Rules Against Wartime Plunder” *European Journal of International Relations* Vol.14 No.1 (2008): 101.

2.5.1 *Emerging and Institutionalized International Norms*

This study takes into account cases of international norms that differ in terms of status and levels of institutionalization. In order to reach the status of effective normative frameworks able to affect behavior, international norms need to go through processes of emergence, evolution, and institutionalization. Finnemore and Sikkink have explained that international norms usually emerge as ideas that result from the initiative of prominent international actors that “call attention to issues or even create issues.”³⁰² Once they emerge, international norms need to face periods of time in which they have a provisional status. In order to become effective, they have to gain the acceptance of the majority of states or, at least, of a minority of critical states. If this process is successful, international norms are internalized and accepted by states and international organizations. When this happens, international norms cease to have an emerging status and become institutionalized, which means they are incorporated into specific international regimes, such as treaties or conventions that usually guarantee a high level of precision and clarity³⁰³.

Processes of evolution and institutionalization do not constitute the object of this study. What matters here is that at the international level, international norms are at different levels of institutionalization. Some norms have an emerging status, meaning that they exist in the international practice of states and organizations. As Risse and Sikkink have observed, “emergent international norms are often signalled by international declarations or programs of action from international conferences.”³⁰⁴ At the same time, emerging norms are those that have not reached the status of clear and precise norms and have not found any institutionalization into international treaties or customary law. The main difficulty at reaching the status of institutionalized and precise international norms can be sometimes explained by high levels of contestation and disagreement and by the consequent impossibility of finding approval by the majority of international actors. In sum, emerging norms are those that have not been clearly codified by international legislation, in the form of treaty or convention and that at the same time have not reached the necessary *opinio juris* among states to be regarded as customary law. This is the case, for example, of the norm of humanitarian intervention.

In a different way, institutionalized international norms are those that have reached a higher level of clarity and precision in the sense that they either have the status of customary law or have been

³⁰² Martha Finnemore, Kathryn Sikkink, “International Norm Dynamics and Political Change”, 893.

³⁰³ For studies that have provided analyses of the evolution of specific instances of international norms, see Martha Finnemore, *The Purpose of Intervention* (Ithaca, Cornell University Press, 2003) and Wayne Sandholtz, “Dynamics of International Norm Change: Rules Against Wartime Plunder” *European Journal of International Relations* Vol.14 No.1 (2008): 101-131.

³⁰⁴ Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights*, 15.

incorporated into binding international treaties. As Risse and Sikkink have suggested, “the entry into force or the adoption of new policies by intergovernmental organizations can often be used as an indicator of a norm reaching a threshold or tipping point. Widespread and rapid treaty ratification can be a signal of an international norms cascade.”³⁰⁵ When international norms become customary law or are incorporated into specific and binding international regimes, they have reached the level of institutionalized frameworks of behavior that are based on clear and precise rules, provisions, and procedures. This is, for example, the case of the norm of international criminal responsibility. Started as a principle that could be found in the practice and ideas of political leaders that pushed for the creation of the Nuremberg Tribunal in 1945, international criminal responsibility has gone through processes of international evolution, which led to its formalization into the 1998 Rome Treaty. That Treaty was signed by a large majority of states and subject to processes of domestic validation and ratification.

The difference between emerging and institutionalized international norms is particularly relevant for the purpose of this study. This difference is not taken into account in the sense that different levels of institutionalization would lead to different levels of compliance. As has been previously noticed, institutionalization does not constitute a guarantee for states’ compliance with international norms. Operating in a decentralized and mostly anarchic world, international norms can be always subject to processes of contestation, regardless of their degree of precision and clarity. Rather, the main consequence of different levels of institutionalization can be observed in the impact of international norms on domestic systems. As the analysis of cases will show, the quality of norms, in terms of precision and clarity, affects states’ responses in the sense that it modifies the domestic actors that are responsible for their invocation and contestation.

2.5.2 *Definition of Invocation and Contestation*

Invocation and contestation are defined in terms of the different perceptions of legitimacy that prevail within domestic systems. International norms are invoked when they are perceived as legitimate and states refer to them to take a specific action or solve a particular problem. Norms contain values that resonate with the prevailing interpretation of the international system that characterizes a country at a specific point in time. Some authors have elaborated similar concepts by referring to notions, such as salience and prominence.³⁰⁶ When the normative context of international norms match with the

³⁰⁵ Thomas Risse, Stepehn C. Ropp, and Kathryn Sikkink, 15.

³⁰⁶ Andrew P. Cortell and James W. Davis, “Understanding the Domestic Impact of International Norms.”

perception of legitimacy or interest that is put forward by key domestic actors and that consequently prevails at the domestic level, international norms are likely to be viewed as just and viable frameworks of behavior. In other words, international norms are invoked when they reach that ‘quality of oughtness’ that is perceived by the most important actors that operate within a domestic system.

In order to be recognized as legitimate frameworks of behavior, international norms need to be socialized within domestic systems and go through processes of domestic validation. For this reason, invocation is taken into account as the capacity of international norms of being socialized and recognized as legitimate by domestic systems at specific points in time.

By contrast, contestation is defined as the incapacity of international norms of being socialized and recognized as a legitimate framework of behavior. When states do not recognize their legitimacy, meaning that their normative components do not match with the widely held perceptions, understandings, and beliefs that characterize a domestic system at a specific point in time, international norms are likely to be contested. What comes to be contested is the normative content of international norms that are viewed as contrary to the perception of legitimacy or interest that prevails within domestic systems. As a consequence, international norms are rejected and states refuse to take specific action that would be consistent with them.³⁰⁷

2.6 Methodological Issues: Operationalization of Concepts and Analytical Approach

Studying immaterial factors, such as norms, identity, and ideas requires that strategies be devised in order to operationalize the concepts and their impact on actors. I start by clarifying how the two norms, HI and ICR, can be operationalized, by identifying the indicators of their existence. Then, I provide indicators for the impact of norms on states’ policies, by operationalizing the concepts of invocation and contestation.

As any other immaterial factor, norms are rather indeterminate concepts. They need to be related to empirical indicators that provide us with evidence of their existence. As to HI, I rely on the definition provided in the previous chapter³⁰⁸, which takes into account armed intervention to rescue non-nationals from massive violations of human rights. This is only one among the possible types of intervention. However, considering that I focus on the impact of the norm at the time of NATO Operation Allied Force against the FRY in 1999, this is the most suitable definition for the purposes of

³⁰⁷ The issue of contestation of international normative frameworks has been explored by Antje Wiener in “The Quality of Norms is What Actors Make of It”, cit. and in “Enacting Meaning in Use: Qualitative Research on Norms and International Relations”, cit.

³⁰⁸ For the definition of HI on which I rely, see chapter 1, section 1.2.

this study.

Although few would probably deny that at the time of the NATO bombing a norm of HI was already existent, it is necessary to provide indicators of its existence. I rely on Finnemore's study of HI, in which she argues that "the explanations states give for intervening and what they actually do on the ground"³⁰⁹ constitute possible indicators of HI. She concludes that "if states say they are intervening to save lives and their militaries act accordingly, then [this can] count as humanitarian intervention."³¹⁰ This does not completely solve the problem of whether an intervention was carried out on the basis of a hidden interest of some sort, but it is analytically useful to conclude that what matters as indicator of intervention is "whether [states] follow through the goals they claim."³¹¹ Following this logic and analyzing the political discourse of British and American leaders during the Kosovo crisis, it can be ascertained whether in that specific event the U.S. and the UK invoked a norm of HI. Moreover, as any other international norm, indicators of the existence of HI can be found in the public statements, declarations, and programs of action devised by specific international organizations. Evidence of the existence of a set of norms that dictate the use of force in case of massive violations of human rights can be found in the various policy documents that have been published in the last decade both at intergovernmental and academic levels, and in the disputes that characterized the legal and political debate.³¹²

The norm of ICR raises fewer problems of operationalization. At the point in time when the U.S. and the UK were negotiating the ICC, the norm of ICR was already existent and contained in several international treaties, such as the Statute of the International Military Tribunal, and the Statute of the International Criminal Tribunal for the former Yugoslavia. These tribunals have favored the institutionalization of the norm and contributed to its development through various judgments. Moreover, since July 2002, the ICC Treaty has officially come into force and constitutes the most important attempt to codify and institutionalize the norm of ICR into a precise and clear system of international provisions, rules, and procedures.³¹³

The impact of norms is taken into account in terms of invocation and contestation. As has been explained, invocation and contestation of international norms are the political outcomes that this study aims to explain. Invocation, understood as the capacity of being recognized as a legitimate framework

³⁰⁹ Martha Finnemore, *The Purpose of Intervention*, 12.

³¹⁰ *Ibidem*, 12.

³¹¹ *Ibidem*, 12.

³¹² For an analysis of these documents and disputes, see chapter 1, section 1.2.

³¹³ For an analysis of the historical and legal sources of the norm of ICR, see chapter 1, section 1.3.

of behavior, can be operationalized by investigating the arguments provided by political and societal actors during specific instances of foreign policy-making and by re-constructing the decisions taken at the domestic level. In particular, invocation of HI during the 1999 Kosovo crisis can be operationalized through the public statements issued by domestic actors in favor of intervention and through the decision to wage war against FRY. Invocation is consequently regarded as the reference to the norm of HI and as the decision to take an action that is consistent with it. In case of HI, this action is represented by the decision to intervene against FRY. In a similar way, invocation of ICR can be operationalized in terms of the decision to ratify the ICC Statute, which was consistent with the norm.

By contrast, contestation is operationalized in terms of the refusal to take international action that would cohere with a certain norm. Contestation of HI can be signaled by the refusal to join NATO Operation Allied Force in 1999 and by the various instances of public statements that rejected the logic of HI both at the domestic and international level. In a similar way, contestation of ICR has to be regarded as the refusal to sign and ratify the ICC Statute.

I explain the impact of HI and ICR by studying two specific decisions in which the U.S. and the UK interacted with these two norms. This methodology is for example followed by Antje Wiener and Uwe Puetter. In a recent article, they have analyzed the debates within the Council of the European Union during the 2003 Iraqi crisis in order to understand the impact of human rights and democracy on the perception of states. They have concluded that “norms become subject to contestation and re-interpretation when operationalized during individual instances of policy-making.”³¹⁴ This emerging research program provides a tool to operationalize the impact of norms by analyzing historical events during which they have been subject to state interpretation.

The choice to focus on how norms have been interpreted by the actors involved in specific decisions does not only respond to an exigency of operationalisation but also to one of parsimony. As social constructivists have explained, norms are both indeterminate and changing realities that evolve over time. It would be quite difficult to study their impact on states during a long period of time. Thus, this study aims to explain and analyze the impact of norms on state behavior with regards to specific foreign policy decisions and understand the motivations and interpretations that key political and societal actors provide for invoking or contesting international norms.

To put it in other terms, this study does not want to contribute to the debate about the philosophical and historical meaning of HI and ICR. Rather, it wants to explain the argumentative

³¹⁴ Uwe Puetter, Antje Wiener, “Accommodating Normative Divergence in World Politics: European Foreign Policy Coordination”, *Journal of Common Market Studies*, Vol. 45, No.5 (2007): 1080.

outcomes of norm-state interactions during specific instances of foreign policy. By analyzing the arguments of the actors that contributed to the invocation or contestation of the two norms, I devise explanations of the domestic conditions that are more likely to determine invocation or contestation. To do so, I focus on two dissimilar cases of norms. In the case of HI, the norm satisfied certain domestic conditions and was invoked by both the U.S. and the UK, while in the case of ICR, the norm was recognized as legitimate by the UK but subject to contestation and rejection by the U.S. The analysis of the arguments in favor or against HI and ICR promises to provide indicators of invocation and contestation and the conditions that can determine one outcome or the other. Such conditions are more likely to be found by focusing on specific instances of foreign policy in which states interacted with norms.

I investigate the impact of international norms on states by using a “structured focused comparison.”³¹⁵ The actors that are likely to lead to norms being invoked or contested by states are studied by analyzing the two proposed instances of foreign policy-making. The two decisions will be re-constructed and possible explanations devised in order to understand the role of political and societal actors in the process of invocation and contestation of norms. In order to understand the impact of different norms on states, it is necessary to study the various phases of the decision-making process related to the two instances of foreign policy and analyze the arguments that the actors involved have put forward in support or against the norms. This can be done by exploring a limited number of cases through an analysis of the arguments and justifications that emerge from the available data.

2.7 Case Selection

The actors and the mechanisms that determine state response to international norms are investigated by focusing on two cases of norms that have been subject to different patterns of acceptance and contestation. Norms are treated as independent variables. As has been previously discussed, there is a large literature on the way norms emerge, develop, and change at the international level. This study does not aim to explain where norms come from and how they become prominent. Rather, it wants to explain the reaction of states to norms in order to understand the conditions that may favor or hinder their capacity of being invoked and acted upon.

HI and ICR are controversial norms that have triggered large debates within states about their legitimacy. They are comparable as they show several similarities. They are both directed toward

³¹⁵ Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: MIT Press, 2005).

prevention and punishment of massive human rights violations. HI aims to stop and punish these violations by waging military operations. ICR privileges the use of judicial instruments to convict and prosecute violators of human rights. Both presuppose an infringement of state sovereignty: in the former case by means of a transboundary military action, while in the latter through the activation of a transnational criminal jurisdiction that crosses state borders. Thus, these two norms have common origins in the idea that when massive violations of human rights occur, the international community as a whole has to be involved. HI and ICR are manifestations of a similar internationalist outlook that aims to create an integrated and responsible international community to solve common problems, if necessary by infringing state borders.

The impact of these norms is tested on two states: the U.S. and the UK. This choice is motivated by the necessity to analyze the impact of norms on countries that are powerful enough to decide whether to invoke or contest the legitimacy of norms. Previous studies have mostly analyzed the impact of norms on countries for which there was a compelling and material reason to accept them. Countries considered by Risse, Ropp, and Sikkink all faced the dilemma of “accepting or paying the consequences”: foreign aid or economic assistance was conditional to state behavior with regard to human rights norms.³¹⁶ In a different way, in order to analyze the impact of norms on a context in which there is no guarantee of enforcement or compliance, it is more useful to focus on countries, such as the U.S. and the UK, for which paying the consequences of rejection or non-compliance is a rather marginal issue. The position of these two states in the international system allows them to decide whether to invoke or reject these norms in a relatively free way.

The U.S. and the UK are analyzed as examples of states that have differently reacted to the norms that I take into account. During the 1990s, the U.S. and the UK have been among the main supporters of HI, which they invoked in order to carry out the 1999 intervention against the FRY. Nevertheless, in the same historical period, they diverged with regard to the notion of ICR, as witnessed by their different attitudes toward the Statute of the ICC. This divergence raises the point of the different capacity of norms of being invoked by states and becoming part of their political discourse.

I analyze the incidence of HI and ICR by looking at two specific historical events in which the U.S. and the UK took international action. In March 1999, both the UK and the U.S. invoked the norm of HI in order to carry out intervention against the Federal Republic of Yugoslavia. Few months later,

³¹⁶ Thomas Risse, Stephen C. Ropp, and Kathrin Sikkink, *The Power of Human Rights International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

the US contested the norm of ICR as it was defined by the 1998 Rome Conference for the establishment of an ICC and refused to ratify the Statute. By contrast, the UK recognized the norm and consistently ratified the Statute. What are the explanatory factors that made the U.S. and the UK diverge as to their interpretation of the norms, with the UK recognizing both HI and ICR and the U.S. accepting the former but contesting the latter? The comparative analysis of the reasons that led these two countries to converge with regards to HI and diverge with regards to ICR serves the purpose of understanding the domestic actors and mechanisms that facilitate or hinder the impact of norms on the international behavior of states.

2.8 Data and Sources

I analyze the arguments in favor of HI and ICR and the justifications for refusing them that British and American actors provided during the decision-making processes that led to intervention in Kosovo and negotiation of the Rome Treaty. I conduct a qualitative analysis of different kinds of written and oral sources.

As clarified in the previous section, this study focuses on three types of actors. First, I investigate the role of political leaders, understood as those who occupy key positions in the executive. I focus on those members of the executive that are most responsible for a country's foreign policy-making. For a matter of parsimony, I take into account the role and actions of the head of the executive power, which means the Prime Minister in the UK and the President in the U.S.; the holder of the Foreign Affairs Ministry, which means the Secretary of State for Foreign Affairs in the UK and the Secretary of State in the U.S.; and the holder of the Ministry of Defense, which means the Secretary of Defense in the UK and the leader of the Pentagon in the U.S. Moreover, I focus on the role and actions played by their closest collaborators. In terms of sources, I rely on their public statements, contributions to parliamentary debates, and public declarations to the press. Wherever possible, I also rely on declassified documents.

Second, I investigate the impact of party politics and the institutional features of the political system. I analyze the parliamentary debates on the relevant issues, the role of party members and party leaders, and the contributions of various legislative committees. This analysis focuses respectively on the UK parliament, meaning the House of Commons and the House of Lords, and the U.S. Congress, meaning the House of Representatives and the Senate. The impact of parties and their members is also ascertained by studying party platforms and electoral manifestos.

Third, I investigate the impact of civil society actors in the process of norm interpretation and

socialization by focusing on national and transnational NGOs and advocacy movements. In order to understand their impact, I rely on the analysis of reports that were published on the issues under analysis and on the hearings held before national parliaments and relevant committees.

Chapter 3

3 DOMESTIC SYSTEMS AND FOREIGN POLICY

The study of the domestic response to international normative frameworks requires an overview of the two political systems under analysis – the U.S. and the UK – with particular reference to the domestic actors and mechanisms that characterize their respective foreign policy-making processes. This is important to understand the domestic conditions that determine state response to various international phenomena, such as international norms and institutions. The analysis of such international outcomes through the lenses of internal systems is motivated by two fundamental historical and political developments.

First, in the post-Cold War international system, units can hardly be taken into account as self-enclosed spaces in which political decisions only affect the citizens of the state involved. The globalization process, which is usually explained with diffusion of mass communication technologies and economic interdependence among states, presents upsides but also downsides. On the one hand, it has triggered processes of political integration and cooperation on several issues, such as financial crises, fight against terrorism, and human rights enforcement. On the other, it has often times favored opposite tendencies toward fragmentation that have taken the form of sub-national demands, civil wars, and massive violations of human rights. Interconnectedness and integration have augmented the possibility that political outcomes taking place in a region can have consequences that involve states and characters belonging to different geo-political areas. As a result, the sovereignty of states has been subject to limitations that “blur the distinction between foreign and domestic politics.”³¹⁷

At the moment of this writing, with the European Union torn by a financial crisis of unprecedented intensity, it appears that foreign policy is no longer, if it has ever been at all, the sole domain of foreign affairs departments. Financial crises often require concerted international action that heavily involves representatives of different areas of expertise and policy-making, such as economics departments, national and international regulative agencies, parliaments, and public opinions. In a similar way, refugee crises can require actions capable of putting together policies that are cooperatively produced by experts of economics, foreign affairs, and immigration. For this reason, scholars and observers have correctly invoked the concept of “domestication of foreign policy” or even “intermestic politics,”³¹⁸ which means a political dimension that is both in between and beyond the

³¹⁷ Eugene R. Wittkopf and James M. McCormick, *The Domestic Sources of American Foreign Policy*, 3.

³¹⁸ See for example, Eugene R. Wittkopf and James M. McCormick, *The Domestic Sources of American Foreign Policy*, 3;

international and domestic levels. One of the effects of this restructuring of international relations is the participation of a much larger number of domestic actors in the shaping of foreign policy stances.

Second, proliferation of domestic actors has been favored by another political phenomenon that has generally characterized the Western world, and especially the U.S. system. The end of the bipolar confrontation between the East and the West has led to a dramatic redistribution of power that provides a far more complex picture of the international system, which now ranges between unipolarism and multipolarism, depending on whether we look at the world from Washington, D.C. or from Beijing, New Delhi, and Rio de Janeiro. The main consequence has been a substantial difficulty for Western democracies at providing for a unifying and fundamental principle capable of guiding foreign policy.

The collapse of the Soviet threat has not only constituted the precondition for a supposedly more cooperative and integrated international system. It has also left Western foreign departments and governments with the problem of defining the priorities of foreign policy in a less intelligible world, characterized by less visible threats and less self-evident interests. Complexities in the definition of national interests have contributed to the proliferation of a wide array of domestic actors that have profited from the larger openness and sometimes even confusion of foreign policy strategies. Such an historical contingency has had particularly strong effects on the U.S. political system, which constitutively encourages the fragmentation and participation of a plurality of actors to the policy-making.³¹⁹ This was particularly clear for example during the Clinton Administration that mostly operated in the aftermath of Cold War.³²⁰

Along these lines, this chapter aims to clarify the functioning of the U.S. and UK's systems and the domestic characteristics that need to be known in order to understand foreign policy processes and

the expression "inter-mestic politics" is used by Christopher Hill in his *The Changing Politics of Foreign Policy*, 230; similar concepts can be found in David A. Deese, "The Hazards of Interdependence: World Politics in the American Foreign Policy Process in David A. Deese, *The New Politics of American Foreign Policy*, 2-34; Sergio Fabbrini, *Compound Democracies*. Interestingly enough, the large interconnection between domestic and international systems was recognized by Kenneth Waltz in the book that he wrote only a decade before the publication of his famous structural theory of international politics. In his *Foreign Policy and Democratic Politics*, he observed that "international issues have been domesticated" in the sense that "foreign and domestic problems of government have come to resemble each other" (see page 67).

³¹⁹ For analyses of the dispersed and decentralized nature of decision-making, both in terms of foreign and domestic politics, see for example, David A. Deese, *The New Politics of American Foreign Policy*; Sergio Fabbrini, "The American System of Separated Government: An Historical-Institutional Interpretation" *International Political Science Review*, Vol. 20, No. 1 (January 1999): 95-116; Michael W. Riesman, "The United States and International Institutions" in *American Foreign Policy: Theoretical Essays*, ed. John G. Ikenberry (New York: Longman, 2005): 40-58; Sergio Fabbrini, *Compound Democracies*.

³²⁰ See for example, Richard N. Haas, "Fatal Distraction: Bill Clinton's Foreign Policy", *Foreign Policy* (Fall 1997): 112-123; William G. Hyland, *Clinton's World: Remaking American Foreign Policy* (Westport, London: Praeger, 1999); Stephen Walt, "Two Cheers for Clinton's Foreign Policy" *Foreign Affairs* (March/April 2000): 63-79; James M. Mc Cormick, "Clinton and Foreign Policy: Some Legacies for a New Century" in *The Post-Modern Presidency: Bill Clinton's Legacy in U.S. Politics*, ed. Steven Schier (Pittsburgh: Pittsburgh University Press, 2000): pp. 60-83.

responses to international phenomena. As observed in the previous chapter, countless publications have attempted to identify the actors that matter during foreign policy-making processes and the political outcomes that are produced by constitutional mechanisms and political conventions. If the identification of the most important domestic determinants of foreign policy mostly remains an almost hopeless goal, this chapter explains that generalizations largely depend on the type of issue area. Depending on the type of foreign policy issue, different actors can become important or decisive at determining political results. Different issues trigger different mechanisms and outcomes. The subsequent empirical chapters clarify this point by applying the analysis of domestic political systems to actual cases of interaction between such systems and institutionalized and emergent international norms.

3.1 Executive Leadership in the UK and the U.S.

Scholars and observers tend to explain domestic response to international outcomes by focusing on political leaders, mostly understood as heads of states and governments, holders of the Ministries of Defense and Foreign Affairs, and responsible for national security strategies. This is in a way both natural and understandable. These actors are the most responsible for decisions taken by states at the international level, for example by conducting international negotiations, representing their countries in international forums, or debating cooperative solutions to international crises. As a consequence, they are usually held accountable for foreign policy-making.

Nevertheless, it would be wrong to take leaders into account as the sole responsible for the foreign performance of states. Leaders often face a set of domestic actors and institutional mechanisms that can considerably limit their activities and freedom of action. This constraining effect can at times be quite large to the point that leaders can be forced to reconsider their foreign policy strategies or even be prevented from taking some decisions. This is particularly true within democratic regimes, in which parliaments and public opinions are increasingly willing to scrutinize foreign policy-making.

3.1.1 British Leadership and the Westminster System

The UK is a parliamentary democracy, which is characterized by an unwritten constitution. As a consequence, the Westminster system of government has been mostly the result of historical experiences, institutional evolution, and constitutional conventions. The institutional system is structured around the formula of party government. This means that “the party that after an election can

command a majority in the Lower House of Parliament is entitled to form the government.”³²¹ The Prime Minister is generally the leader of the party that has won the elections. For this reason, Waltz noticed that, although he/she is not directly elected by the citizens or by an electoral college – as it happens in the U.S. system—the Prime Minister is practically “nationally elected” in the sense that members of the parliament (MPs) “elected in uninominal colleges, are the main source of Prime Minister’s power.”³²² Members of the party that commands a majority of the House of Commons elect the Prime Minister, who is the member that has won the leadership of the party.

The government is formed by the Prime Minister and the ministers that compose the Cabinet. Ministers are usually “members of the House...of the same political views, and of the party at the time prevalent in the House of Commons.”³²³ The fact that the Prime Minister is the head of “both the Cabinet and a major political party”³²⁴ and that components of the Cabinet are usually members of the same party constitute particular important features of the British system to which we shall return later.

The Cabinet functions as a collective body ruled by the Prime Minister. Each minister has a twofold nature, meaning that is “individually accountable head of a government department” but also a “member of a collectively responsible Cabinet.”³²⁵ Therefore, once the Cabinet has made a collective decision, each member is bound to observe it and defend it in public. The executive is usually referred to as “Cabinet government” because it is this institution that is “supposed to provide central coordination and policy coherence.”³²⁶ The Prime Minister exerts large power in the government, in particular as to choosing “whom to include and whom to exclude from the Cabinet.”³²⁷ For this reason, Giovanni Sartori has defined the British Prime Minister as a “first above unequal.” Differently from other parliamentary democracies, for example Italy, the Prime Minister “truly runs the government and has a free hand in picking and firing truly ‘subordinate’ ministers.”³²⁸ This is obviously not a guarantee of peaceful coexistence. Disagreements between the Prime Minister and members of the Cabinet are not infrequent, as in the case of the first Margaret Thatcher’s government, which was partially composed of Conservative MPs, sometimes very critical of her policies. In a similar way, Prime

³²¹ Ian Budge and David McKay (eds.), *Developing Democracy: Comparative Research in Honour of J.F.P. Blondel* (London: Sage Publications, 1994): 190.

³²² Kenneth N. Waltz, *Foreign Policy and Democratic Politics*, 1967, 41.

³²³ M. J. C. Vile, *Constitutionalism and Separation of Powers* (Indianapolis: Liberty Fund, 1998): 236.

³²⁴ Michael Gallagher, Michael Laver, Peter Mair, *Representative Government in Modern Europe* (New York: McGraw-Hill, 2006): 36.

³²⁵ Cit., 43.

³²⁶ Ian Budge and David McKay (eds.), *Developing Democracy*, 191.

³²⁷ Cit., 192.

³²⁸ Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry Into Structures, Incentives, and Outcomes* (London: MacMillan, 1994): 103.

Minister James Callaghan often disagreed with Secretary of State for Energy Anthony Benn who was particularly critical of the economic policy of the Labour Government.³²⁹

However, the Prime Minister is generally able to direct the government and its components in a fairly efficient way also thanks to the legitimacy that derives from being leader of the party government. Moreover, the characteristics of the British political system tend to reduce the possibility of coalition or minority government, which certainly favors efficiency and governmental coherence. Except for few cases, such as the emergency government run by Winston Churchill during WWII, minority governments run by the Labour Party in the 1970s, or the most recent Liberal and Conservative coalition, which sent David Cameron to Downing Street in 2010, the British Prime Minister and Cabinet members generally come from the same party that has won the general elections. Consequently, they both have an interest in maintaining unity and coherence.

The main feature of the UK's political system, which explains both the pre-eminence of the Prime Minister and the tendency of British politics to be centered round government figures, is the fusion of powers between the executive and the legislature. As Ian Budge and David McKay have provided, fusion of power means "unity of the legislature and executive secured through a disciplined political party."³³⁰ This is to say that "the party that controls the legislature thereby controls the executive branch too." Such a control, as in any other parliamentary democracy, is "conditional upon not losing that control of the legislature to another party or alliance of parties."³³¹ This evolution was partially the result of 19th century constitutional theory that favored the consolidation of a type of separation of power that is different from the one that prevailed in the U.S. system. If in the latter the main goal of Founding Fathers was to secure the separation of the legislative, executive, and judiciary powers, in Britain, theorists, such as Walter Bagehot, criticized the idea of mixed government and separation of powers and emphasized how "the efficient secret of the English system of government is the close union, the nearly complete fusion of the legislative and executive powers."³³²

As in most parliamentary democracies, in order to stay in power, governments need to win "a legislative vote of confidence."³³³ In Britain, single parties are usually able to manage the absolute majority of the House of Commons and form "single-party government."³³⁴ Separation of powers is,

³²⁹ Ian Budge, David McKay, 192.

³³⁰ Cit., 193.

³³¹ Cit., 193. See also, M.J.C. Vile, *Constitutionalism and the Separation of Power*, 235.

³³² Cit. in M.J.C. Vile, 248.

³³³ Ian Budge, Hans Keman, *Parties and Democracy: Coalition and Government Functioning in Twenty States* (Oxford: Oxford University Press, 1990): 44.

³³⁴ Cit.

thus, much fuzzier. Unlike the U.S. system, in which the executive—the President— is chosen by an electoral college directly elected by the people and is independent from the legislature for its survival, the British Prime Minister depends on the parliament in the sense that he/she always needs to “command a majority of votes in the elected parliament.”³³⁵

Unlike the U.S. President that is responsible to the people, British Prime Minister is responsible to the legislature. If it is true, on the one hand, that the government depends on the confidence of the parliament, it is equally true, on the other, that the parliamentary majority has large interests in grating its support. As Arend Lijphart has noticed, “because the Cabinet is composed of the leaders of a cohesive majority party in the House of Commons, it is normally backed by the majority in the House of Commons, and it can confidently count on staying in office and getting its legislative proposals approved.”³³⁶ Since the Prime Minister is also the leader of the party that commands the majority of the parliament, lack of confidence is likely to lead to the reshuffling of the parliament and to new elections. Not only is the Prime Minister likely to lose the job. Also, individual members of the majority are likely to lose the seats for which they have campaigned. This creates a strong fusion of power and interests between the Prime Minister and the parliamentary majority. Their destinies and political futures are truly interdependent according to the Latin formula of *simul stabunt, simul cadunt*. As a corollary, unlike the U.S. system, British governments “can expect to see the great majority of their proposals accepted by the parliament.”³³⁷ Proposals that do not come from the government or its majority are unlikely to be passed.

These features provide for a system in which power is only formally separated in the classic way (legislative, executive, judiciary). In fact, since “the legislature and the government are *de facto* fused together by the political party or parties that connect the majority of the members of the former with its members in the latter”, rather than institutional separation of power, it seems more correct to speak of political separation of power. As Sergio Fabbrini has argued, power in Britain and in general in most parliamentary democracies, is separated between the party government and the opposition, which scrutinizes the executive and its majority and acts with the aim of becoming the majority of tomorrow.³³⁸

Two are the historical and political conditions that make party government possible and

³³⁵ Michael Gallagher, Michael Laver, Peter Mair, 24.

³³⁶ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Twenty-Six Countries* (New Haven and London: Yale University Press, 1999): 12.

³³⁷ Michael Gallagher et alia, 62.

³³⁸ Sergio Fabbrini, *Compound Democracies*, 52.

generally efficient. On the one hand, the British system has developed a strong party discipline. This means that parties tend to be largely “cohesive” in the sense that they can “ensure that all of their members in parliament vote the same way on all important issues.”³³⁹ This condition is secured through powerful party whips that make sure that members of the party follow the party and government’s line in votes, by rewarding loyalty and punishing disloyalty. MPs that do not consistently vote with the government risk not being re-elected by the party leadership. This creates strong incentives to vote for the party government regardless of individual MPs’ preferences. Voting against the party and the government is usually avoided because of the general consequences, such as the weakening of the executive in favor of the opposition or the non-re-election of disloyal MPs.

On the other hand, the coherence and functioning of the system are protected by the electoral system. For the sake of governmental stability, the system is majority, pluralist, and uninominal. MPs are elected by winning single-member districts through the ‘first-past-the-post’ rule. This means that the candidate that obtains the relative majority of the votes of a district wins the district and the seat in the Commons. Such a system tends to punish small parties and has progressively led to a stable two-party system in which only two parties –Conservative and Labour—are capable of winning elections, managing absolute majorities in the House, and forming governments.³⁴⁰ This electoral system is sometimes subject to criticism, not only because it usually excludes third parties but also for its tendency to over-represent winners and create “manufactured majority.”³⁴¹

In sum, the UK’s political system is still considered as an almost ideal-typical form of majority parliamentary system. The party-system mostly emerged out of party cleavages that follow socio-economic features. Unlike the U.S., in which parties are more structured along a centre-periphery dynamics that reflects the federal nature of the state, British parties have acquired decisive relevance and constitute the main filters between the expectations of the electors and the performance of the elected.³⁴² The electoral system favors a two-party political competition to the point that “the alternation in power...between two alternative parties or coalitions has been the engine driving the

³³⁹ Michael Gallagher et alia, 57.

³⁴⁰ Giovanni Sartori, *Comparative Constitutional Engineering*, 104. Once again, it is important to remind that this is what has usually happened in British politics. The type of electoral system constitutes a facilitating condition for the consolidation of a two-party system but it does not constitute a guarantee, as shown by recent British elections after which the Conservative Party was forced to ally with the Liberal-Democratic Party in order to form a stable majority in the House of Commons.

³⁴¹ Arend Lijphart, *Patterns of Democracy*, chapter 8.

³⁴² For theories of party cleavages, see the classic Seymour Martin Lipset and Stein Rokkan, *Party System and Voters Alignments: Cross-National Perspectives* (Toronto: The Free Press, 1967); Stein Rokkan, Angus Campbell, Per Torsvik, and Henry Valen, *Citizens, Elections, Parties: Approaches to the Comparative Study of the Processes Development* (ECPR Press, 2010); for a comparative analysis of the evolution of party-systems in Britain and the U.S., see Sergio Fabbrini, *Compound Democracies*, chapter 4.

system.”³⁴³ Clear majorities usually come out of electoral consultations. This, together with a strong party discipline, creates the conditions for the “efficient secret” of the system that consists of a fusion of power and interests between the government and the parliamentary majority. Separation of power is limited to the presence of the parliamentary opposition that controls the activity of the incumbent government by acting as a ‘shadow government.’

Comparative scholars usually concur that, although he/she depends on the confidence vote of a parliamentary majority, the British Prime Minister tends to be politically stronger than the U.S. President. In the British system, “the person who can muster a legislative majority becomes head of the executive.”³⁴⁴ Given the powers to reshuffle the parliament and call new elections and the coincidence of interests with the parliamentary majority, the British Prime Minister can count on a political support that is more stable than the one provided by U.S. Congress, which, as we shall see, is independent from the President in terms of constituencies, electorate, and time in office.

These characteristics of the British system have led various American scholars, starting from former President Woodrow Wilson, to admire the Westminster model of democracy as more efficient, stable, and accountable. It has been considered a system in which constitutional and electoral conventions “gradually shifted the locus of power from the legislative to the executive.”³⁴⁵ No wonder observers often emphasize its tendency toward centralization and pre-eminence of the executive in both domestic and foreign policy-making.

Several scholars have argued that this process of centralization reached its peak during the Blair governments. Elected in 1997 in the aftermath of the political re-organization of the Labour Party according to the liberal ideology of the Third Way³⁴⁶, Blair undertook a process of reform that augmented the role of the Prime Minister and centralized decision-making power in the hands of the Prime Minister and his closest aides. Creation of the new position of Chief of Staff, previously unknown in British politics, and enhancement of the competences of the Treasury for what concerns control over the expenditure of ministries and departments are usually indicated as prominent catalysts of this trend. The main consequence has been a more direct relationship between the Prime Minister

³⁴³ Sergio Fabbrini, *Compound Democracies*, 76.

³⁴⁴ Michael Gallagher et al., 35.

³⁴⁵ Sergio Fabbrini, *Compound Democracies*, 125.

³⁴⁶ For information on the transformation of the Labour Party under Tony Blair’s leadership, see “New Labour Because Britain Deserves Better”, 1997 Labour Party Manifesto, available at <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>; Peter Mandelson and Roger Liddle, *The Blair Revolution: Can New Labour Deliver?* (London: Faber and Faber, 1996); Bodo Hombach, *The Politics of the New Centre* (Cambridge: Polity Press, 2000); Philip Stephens, *Tony Blair: The Making of a World Leader* (New York: Penguin, 2004): especially chapter 3; Anthony Giddens, *The Third Way and Its Critics* (Cambridge: Polity Press, 2000).

and key ministers with less involvement of the Cabinet as a whole.³⁴⁷

This evolution of British governmental politics has had relevant consequences for the foreign policy-making process. Several accounts of British foreign policy under the New Labour show how decision-making as to foreign affairs tended to be the almost exclusive domain of the Prime Minister and the Secretaries for Foreign Affairs and Defense, respectively Robin Cook and George Robertson. Working closely with their advisers and mostly bypassing departments' bureaucracies, in particular the Foreign and Commonwealth Office, created the conditions for a more personal foreign policy-making, result of the intentions of the leaders, rather than of the subtleties of bureaucratic politics.³⁴⁸ This will emerge for example in the analysis of Britain's invocation of humanitarian intervention during the Kosovo crisis.³⁴⁹ Necessary complement to this innovative and centralized style of foreign policy was a renewed commitment to managing media and information, which became crucial instruments to present and justify foreign policy decisions, especially the ones involving the use of British troops.³⁵⁰

In conclusion, both long-standing characteristics of British political system and recent developments during the New Labour's era have provided for a picture in which government leaders occupy a privileged and largely unconstrained position as to the making of foreign affairs. This analysis contains much truth but also tends to downplay other domestic actors and to focus only on some aspects of the policy-making. Later in this chapter, I provide an overview of the opportunities and constraints that the British system puts on leaders' capacity of policy-making. With reference to foreign policy, it will be noticed how specific issues tend to see a pre-eminent role of political leaders, while others tend to favor the participation, and sometimes even the decisive role, of different domestic mechanisms. First, I turn to the overview of the U.S. political system and the President.

3.1.2 *The U.S. President in a Separated System*

Media and observers have a tendency to consider the President of the United States, if not the most powerful person on the planet, at least the most powerful character of U.S. politics. In fact, this

³⁴⁷ Martin Burch, Ian Holliday, "The Blair Government and the Core Executive" *Government and Opposition*, Vol. 39, No. 1 (2004): 1-21; Peter Hennessy, "The Blair Style and the Requirements of 21st Century Premiership" *Political Quarterly*, Vol. 71, No. 4 (2000): 386-95; Dennis Kavanagh, "New Labour, New Millennium, New Premiership" in *The Blair Effect: The Blair Government 1997-2001*, ed. Anthony Seldon (London: Little Brown and Company, 2001): 3-18; Peter Riddell, "Blair as Prime Minister" in *The Blair Effect*, 21-40; Anthony Seldon, *Blair* (London: Simon & Schuster, 2004).

³⁴⁸ Christopher Hill, "Foreign Policy" in *The Blair Effect*, 331-53; Richard Little and Mark Wickham-Jones, *New Labour's Foreign Policy: A New Moral Crusade* (Manchester: Manchester University Press, 2000).

³⁴⁹ See chapter 4.

³⁵⁰ Rhiannon Vickers, "Blair's Kosovo Campaign" *Civil Wars*, Vol. 3, No. 1 (2000): 63-6; Philip Hammond and Edward S. Herman, *Degraded Capability: The Media and the Kosovo Crisis* (London: Pluto Press, 2000).

might be true for some issues, in particular, as we shall see, war powers. But presidential pre-eminence in the foreign policy process cannot be taken for granted, especially if we carefully consider the set of opportunities and constraints provided by the U.S. institutional system. U.S. Presidents are certainly not omnipotent policy-makers. Sometimes, the opposite can be true. Similarly to the British case, the role of Presidents as to foreign policy cannot be fully understood without an overview of the U.S. political and institutional system.

In contrast to the UK, in which the main feature of the system is the fusion of power between the executive and its parliamentary majority, the main principle guiding the U.S. system is the “fragmentation or diffusion of power.”³⁵¹ As Alexander Hamilton provided in the Federalist Papers with regards to the debate on the U.S. Constitution, “ambition must be made to counteract ambition.”³⁵² This famous statement identified the necessity to devise an institutional system capable of limiting power in a way that could preserve liberty and avoid tyranny.

This aim was pursued through “the curbing of governmental power – on dividing it among a variety of governmental agencies and making sure that the total power of the state cannot be concentrated in one sets of hands.” In this sense, it does not have to sound paradoxical to notice with William Livingston that “the American Constitution seeks to preserve liberty by preventing the too effective use of governmental power.”³⁵³ This led to a Constitution that devised a system of “separated institutions sharing power”³⁵⁴, which means a form of government in which decisions are made through the involvement of various institutional actors and mechanisms situated at different levels of authority. The main institutional struggle as to policy-making concerns the President and the legislature, which is composed of a House of Representatives and a Senate.

As to foreign policy-making, the main struggles, which are treated in more detail in the next section, concern the power to wage war and ratify international treaties. Article 2, Section 2 of the Constitution provides that “the President shall be Commander in chief of the army and navy.”³⁵⁵ The powers to conduct war and command the use of U.S. troops are prerogatives of the President. However, the power to initiate war is given to Congress: “The Congress shall have the power to...declare

³⁵¹ William Livingston, “Britain and America: The Institutionalization of Accountability” *The Journal of Politics*, Vol. 38, No. 4 (November 1976): 880.

³⁵² Cit. in Charles O. Jones, *The Presidency in a Separated System* (Washington, D.C.: Brookings University Press, 1994): 3.

³⁵³ William Livingston, “Britain and America”, 882.

³⁵⁴ Richard E. Neustadt, *Presidential Power: The Politics of Leadership from FDR to Carter* (New York: Macmillan, 1980): 26.

³⁵⁵ The United States Constitution, Article 2, Section 2, available at <http://www.usconstitution.net/const.html#A1Sec2>.

war...raise and support armies...and maintain a navy.”³⁵⁶ Moreover, the Constitution also makes clear that “no money shall be drawn from the treasury, but in consequence of appropriations by law.”³⁵⁷ The explicit goal of U.S. constitutional delegates was to separate the sword from the purse, which is to say to assign the conduct of war and its authorization and funding to two different sources of power.

As to the power to ratify international treaties, which constitute “supreme law of the land” together with the Constitution and the laws of the United States³⁵⁸, the Constitution re-proposes this dyadic structure. Article 2, Section 2 provides that President “shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the senators present concur.”³⁵⁹ These provisions underlie the fragmentation and separation of power that characterize the U.S. political system and have represented for generations of scholars “an invitation to struggle for the privilege of directing the American people.”³⁶⁰ Once again, the role of political leaders, in this case the President and the Administration, needs to be assessed in the light of the U.S. political and institutional system, which means that set of historical conditions, institutional characteristics, and constitutional conventions that have developed through years.

Scholars of political science and comparative politics tend to agree that it would be wrong to define the U.S. as a presidential system. The power is not centered round the President but rather divided among a plurality of decision-making levels. For this reason, it is better defined as “separated system” or “separated government.”³⁶¹ For Fabbrini, the system gives pre-dominance to the President as to some matters but not in all areas of policy-making. In particular, the legislature “retains considerable power in policy-making.”³⁶²

Unlike the UK, in which power is concentrated in the parliament through the formula of party government, the U.S. is characterized by a fragmented and polycentric sovereignty. Whereas in the UK, the separation of power took the form of a dialectics between party government and parliamentary opposition, the U.S. is characterized by a double separation of power: vertically, power is shared by

³⁵⁶ The United States Constitution, Article 1, Section 8.

³⁵⁷ The United States Constitution, Article 1, Section 9.

³⁵⁸ The United States Constitution, Article 6, Clause 2.

³⁵⁹ The United States Constitution, Article 2, Section 2.

³⁶⁰ The expression is usually attributed to former President of the American Political Science Association Edwin Corwin (1878-1963) and it is cited from Robert Zoellick, “Congress and the Making of U.S. Foreign Policy” *Survival* (Winter 1999-2000): 25.

³⁶¹ The former expression is used by Charles O. Jones, *The Presidency in a Separated System*, 2. The latter is used by Sergio Fabbrini, “The American System of Separated Government: An Historical-Institutional Perspective” *International Political Science Review*, Vol. 20, No. 1 (1999): 95-116.

³⁶² Cit. 95.

federal and federate states. Horizontally, power is shared by the President, the House, and the Senate.³⁶³ Power in the U.S. system is organized through a dispersion and fragmentation of authority around multiple institutions.

This peculiar separation of power is secured by assigning to the President and the two branches of Congress different interests to protect. The President represents the all nation and his authority is separated from the one of Congress in the sense that he does not need a confidence vote in order to stay in office. Moreover, he is elected for 4 years by a college of great electors, which are elected on a state basis by U.S. citizens. Congress cannot remove the President from office through a vote, unless in case of impeachment, which constitutes an exception to ordinary relations between the executive and the legislature and is motivated by serious presidential misconduct.³⁶⁴ At the same time, Congress cannot be reshuffled by the President, in contrast to what happens with the British Prime Minister. The House of Representatives has a two-year mandate and represents the interests of all citizens on the basis of the population of each state. Senate represents the interests of states on an equal basis. Each state, regardless of its size and population, elects two senators. Moreover, one-third of the Senate is renewed every two years.

This complex architecture corresponds to the Founding Fathers' will to check power and counteract ambition. The system constitutionally produces concurrent majorities that take part to the various levels that compose the decision-making process. None of the three institutions can be viewed as the center of decision-making power. Each majority within each institution interacts with the others according to a logic of "reciprocal control exercised by separated institutions."³⁶⁵ For this reason, Charles Jones has correctly observed that "election does not guarantee power in the American political system."³⁶⁶ Presidents, such as Lyndon Johnson and Richard Nixon, obtained landslide victories at their respective presidential elections but this did not prevent Congress from exerting constraints on their power. As Richard Neustadt noticed in a classic study, President and Congress always have a hard time obtaining action in their own respective terms. This is because "their formal powers are so intertwined that neither will accomplish very much, for very long, with the acquiescence of the other."³⁶⁷ Being elected by different constituencies, for different representation purposes, and staying in power for different time frames, make the coexistence of politically different Presidents and Congresses an almost

³⁶³ Sergio Fabbrini, *Compound Democracies*, chapter 3.

³⁶⁴ The United States Constitution, Article 2, Section 4.

³⁶⁵ Sergio Fabbrini, *Compound Democracies*, 79.

³⁶⁶ Charles O. Jones, *The Presidency in a Separated System*, 3.

³⁶⁷ Richard E. Neustadt, *Presidential Power*, 29.

natural feature of the U.S. system.

Fragmentation and dispersal of power have produced a weak party system, which further prevents any political force from taking over the system. Since geographical cleavages have been historically more important than socio-economic ones, political parties in the U.S. are not national federations, as in most European countries including Britain, but rather “confederations of state and local party institutions.”³⁶⁸ The separated system of elections and the centre-periphery dynamics between the federal and federate states make the development of a structured party system less likely. Differently from the UK’s system, in which parties could structure as national federations and become the real monopolists of political representation³⁶⁹, U.S. parties have generally been weaker containers of sometime different interests. As U.S. history provides, representing the interests of a Southern Democrat is different from representing the interests of an East-coast Democrat.

The institutional structure does not help either. Since the U.S. executive and legislature are elected separately and represent three different majorities (President, House, and Senate), “even an election that gives one party control of the White House and both houses of Congress in no way guarantees a unified or responsible party outcome.”³⁷⁰ Even when this is the case, the three centers of decision-making cannot forget that they represent different interests, those of the nation and those of single states. Moreover, things can change quite rapidly in a system in which every two years electors are called to renew the all House and 1/3 of the Senate. Not surprisingly, since the late 1960s, the main feature of the system has been, with few exceptions, the split-government, which means different majorities in the White House and Congress.³⁷¹

In sum, the U.S. system makes it more difficult to identify the main actors of policy-making. Responsibility tends to be diffused among various institutions, rather than focused on a single party government. Representation tends to be mixed, rather than univocal. As a consequence, institutional relations are characterized by an elevated level of competition for power.

The U.S. system has encountered various critiques by U.S. scholars as well. These critiques have mostly concerned the lack of clear accountability (who is really responsible for decisions) and the potential for an endless struggle among institutions. Critiques forcefully re-emerged after the 2000 presidential elections that led George W. Bush to a particularly controversial victory. Proposals for reform have ranged from direct elections of the President, instead of through an electoral college, and

³⁶⁸ Richard E. Neustadt, *Presidential Power*, 26.

³⁶⁹ Sergio Fabbrini, *Compound Democracy*, chapter 5.

³⁷⁰ Charles O. Jones, *The Presidency in a Separated System*, 11.

³⁷¹ Sergio Fabbrini, “The American System of Separated Government”.

creation of appropriate mechanisms for the transformation of popular vote into great electors. These proposals are supposed to guarantee a larger coincidence between the former and the latter by avoiding, for example, over-representation.³⁷² Critics of the U.S. system have never lost a sense of admiration for the British party government. Their remarks have encountered the opposition of a vast array of scholars that have noticed how the party government, which concentrates most authority in the party that wins the general elections, would upset a delicate institutional balance that is based on the cooperation between different interests, most notably the ones of the federal state and single members of the federation. Fragmentation and diffusion of power are still considered as the best possible way of making diverse entities coexist.³⁷³

In conclusion, this brief overview of the U.S. political system clarifies how the identification of executive leaders as the most influential actors of the decision-making process is even more problematic than in the UK. Some authors keep on focusing on the President as the main actor of foreign policy-making. For example, Michael Mastanduno has argued that notwithstanding the system of checks and balances that limits concentration of power, “the extent to which the domestic political system frustrates or constrains U.S. leadership has been significantly exaggerated.”³⁷⁴ Providing historical examples, such as the Tonkin Gulf resolution through which President Johnson obtained congressional approval to wage war against Vietnam, or the establishment of various bureaucratic agencies through the 1947 National Security Act, Mastanduno has noticed that “the President has the means and the capability to manage domestic constraints and minimize their detrimental impact on leadership.”³⁷⁵

This type of argument captures only one part of the truth and tends to analyze the President as the most actor of foreign policy-making by focusing on one specific aspect of U.S. external relations, which is war power. Other scholars have noticed how, instead of emphasizing presidential dominance, the U.S. has to be described as a system in which moments of presidential pre-eminence alternate with moments of congressional assertiveness. Fabbrini has explained how the 19th century mostly saw congressional pre-eminence. In a different way, 20th century processes of political and bureaucratic

³⁷² Arthur M. Schlesinger Jr., *War and the American Presidency* (New York: W.W. Norton & Company, 2005): 84.

³⁷³ William S. Livingston, “Britain and America”, 891-2; Charles O. Jones, “The Presidency in a Separated System”; Sergio Fabbrini, *Compound Democracies*.

³⁷⁴ Michael Mastanduno, “The United States Political System and International Leadership: A “Decidedly Inferior” Form of Government” in *American Foreign Policy* ed. John G. Ikenberry, 257.

³⁷⁵ Cit. For similar conclusions, see also Michael Nelson, “Person and Office: Presidents, the Presidency, and Foreign Policy” in *The Domestic Sources of American Foreign Policy*, 145-53; James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, chapter VI-VIII; Bert A. Rockman, “Presidents, Opinion, and Institutional Leadership” in *The New Politics of American Foreign Policy*, ed. by David A. Deese, 59-74.

centralization, and above all the necessity to confront the Soviet threat, have enhanced the role of the President.³⁷⁶ This process reached its peak with the abuses of the Nixon Administration that led to coining the term “imperial Presidency.”³⁷⁷ The aftermath of the Watergate scandal saw a new phase of renewed congressional activism.³⁷⁸ Since that epoch, the system seems to have stabilized on a clear separation of power. From 1968 on, the main outcome of electoral politics has been split-party control, with different majorities in the White House and Congress.³⁷⁹ As a consequence, the system has been generally able to maintain the promises of the Constitution that built a system of diffused responsibility and multiple levels of authority.

This reiterates the invitation put forward at the start of this section. The role of the U.S. President cannot be easily isolated. Rather, it needs to be contextualized in the U.S. political system as a whole. The formula of separated institutions sharing power forces Presidents to fabricate different majorities depending on the issue-area and to constantly look for collaboration with Congress, regardless of its political tendencies. This is the sense of Neustadt’s analysis according to which, despite the formal powers that the Constitution assigns to him, the most important power that the President has at his disposal is “the logic of his argument.” Given the plurality of actors involved, “the essence of the President’s persuasive task is to convince such men that what the White House wants of them is what they ought to do for their sake and on their authority.”³⁸⁰ In order to be a powerful President, relying on formal constitutional powers might not be sufficient. What is necessary is to achieve legitimacy for stated purposes, which means persuading other actors that do not depend on the President for their political survival, of the necessity and justice of each action.³⁸¹

The U.S. system provides a large set of constraints and opportunities. Depending on the issue at stake, President and executive leaders find their chance to steer and shape foreign policy-making according to their own aims and those of the Administration. At other times, they have to yield to the goals of other actors in a more constrained way than what happens to their colleagues beyond the Atlantic Ocean.

³⁷⁶ Sergio Fabbrini, “The American System of Separated Government.”

³⁷⁷ Arthur M. Schlesinger Jr., *The Imperial Presidency* (New York: First Mariner Books, 2004).

³⁷⁸ James M. Lyndsay, “From Deference to Activism and Back Again: Congress and the Politics of American Foreign Policy” in *The Domestic Sources of American Foreign Policy, 183-195*; John T. Tierney, “Congressional Activism in Foreign Policy: Its Varied Forms and Stimuli” in *The New Politics of American Foreign Policy*, 102-129.

³⁷⁹ The 2002 Midterm Elections constitute an important exception, since the Republican Party of incumbent President George W. Bush unusually gained seats in both branches of Congress. However, it should not be forgotten that elections were held in the aftermath of September 11 when the U.S. was characterized by a moment of intense ‘rally-round-the-flag’ effect.

³⁸⁰ Richard E. Neustadt, *Presidential Power*, 27.

³⁸¹ On this point, see also Alexander L. George, “Domestic Constraints on Regime Change in U.S. Foreign Policy: The Need for Policy Legitimacy” in *American Foreign Policy: Theoretical Essays*, ed. John G. Ikenberry, 333-57.

3.2 Prime Ministers and Presidents: Constraints and Opportunities

British and U.S. executive leaders cannot be easily assumed to be the main determinants of policy-making. Institutional structures, party systems, electoral cycles constitute examples of how in liberal democracies, representatives of the executive power need to accommodate the interests of a plurality of actors and the requirements imposed by constitutional provisions and political conventions.

However, British Prime Ministers and U.S. Presidents are not equally constrained by their respective political systems. The former enjoy a larger freedom of action and can count on facilitating conditions, such as party government and discipline of parties, which often make their lives easier in terms of production and implementation of foreign policy. The latter have to confront a system that privileges separation over fusion of power and constitutionally prevents the executive from relying on the unconditional support of the legislature. Along these lines, the British system has been often deemed to be more efficient and allowing for more rapid decision-making.

Nevertheless, the plurality of foreign policy issues that executive leaders, both in the UK and the U.S., have to deal with give us a more complicated picture. Despite the comparative advantages offered by the political system, British governmental leaders cannot be considered as operating in a vacuum. There are issues, most notably the approval of international agreements, which require British leaders to strike compromises within their own parties in order not to upset the efficient secret of British politics. Political parties are not only the diligent executors of government's policies. They are also the main source of executive power, the agents on which the existence of the government mostly rests. By contrast, the U.S. President only depends on popular support, except for the case of impeachment. This makes it more difficult to implement policy goals that require the formal approval of the legislature. However, it also gives him an advantage in case of decisions that concern the vital interest of the country as a whole and necessitate clear and credible responsibility.

3.2.1 *British Executive Leaders: Political Parties and Party Constraints*

Writing his comparative analysis of British and U.S. foreign policy-making, Waltz could not help noticing that the Prime Minister is generally stronger than the U.S. President because of parliamentary support. U.S. President does not enjoy such support because, as we have underlined, he is "nationally elected."³⁸² On the one hand, this means that the President cannot be voted out. On the

³⁸² Kenneth N. Waltz, *Foreign Policy and Democratic Politics*, 37.

other, it also means that he cannot count on that fusion of power and interests that allows British governments to implement most their policies. It is this characteristic of the UK's system that usually leads to the conclusion that Prime Ministers can act comparatively more efficiently than U.S. Presidents. The reason is that since governmental leaders and representative of the parliamentary majority are generally members of the same party, "the majority party in the Commons cannot punish its Ministry without thereby punishing itself."³⁸³ Nevertheless, being supported by a parliamentary majority does not free British executive leaders from some specific constraints as to foreign policy-making. Fusion of power does not only constitute an advantage or a facilitating condition.

First, being the leader of the majority party sometimes requires the Prime Minister "to place his concern for the unity of his party above his regard for the public interest."³⁸⁴ This is a problem that Presidents generally do not face. Since they are independent from the legislative branch, U.S. Presidents can pursue their foreign policy objectives without worrying too much about the desires of their parties. Once they get elected, U.S. Presidents do not depend on party politics for their staying in office. By contrast, in a system that is driven by the unity of interests and intents between a political party and the government, maintaining an image of party unity is much more important than in the U.S. system. Disagreements among members of the government or between the government and its supporting majority are not absent from British politics.

One single election in Britain decides who will have the majority of the legislative organ and who will run the country. Along these lines, British leaders cannot overlook "the importance of maintaining an appearance of party unity."³⁸⁵ Debates about legislative proposals or government's action are accurately kept "outside the public spotlight."³⁸⁶ For electoral purposes, such debates cannot take place on the floor of the parliament because the public would perceive it as an advantage for the opposition. They rather take place in Committees or in other informal forums in order to preserve the image of cohesiveness of a party on which the existence of both the government and the legislature depend.

This type of constraint mostly rests on a psychological rather than institutional logic. Being the party the real engine of the system, it is not a good idea to make differences too explicit. It would give the opposition good arguments against renewing electoral support to the government. It could start a

³⁸³ Cit.

³⁸⁴ Cit., 62.

³⁸⁵ Lisa L. Martin, "Legislative Influence and International Engagement" in *Liberalization and Foreign Policy*, ed. by Miles Kahler, 82.

³⁸⁶ Cit.

process that can lead the majority of today to be the minority of tomorrow. This can constitute a significant constraint on the action of the government, especially in case of executives that rest on narrow majorities or coalitions. In the U.S., disagreements are much more often brought to the public arena of Congress. But they exist in British politics too. Because of the higher issues at stake, they simply tend to remain inside parties.

Second, the relevance of political parties and the dynamics of party politics can constitute opportunities but also constraints for the British executive power. The image of a parliamentary majority that always obeys the dictates of the government thanks to the efficient action of party whips does not explain the all picture. The absence of formal constitutional provisions for the approval of international treaties and declarations of war could facilitate this conclusion. Moreover, available data suggest that, from 1945 until the early 1990s, 97% of governmental legislation has been turned into law.³⁸⁷ Nevertheless, various scholars have provided explanations for this trend that reveal much of the constraints to which UK's policy process is subject.

To begin with, governments are particularly careful about submitting to parliaments controversial proposals that might undermine party support. As Waltz observed, "British majority governments cannot often enough act boldly on matters that are important and controversial, for the half of the nation that the government happens to represent must be substantially agreed...before policy will ordinarily be essayed."³⁸⁸ Given the importance of party support for staying in power, "a Prime Minister refrains, if he can, from asking for policies that will split his party or spread discontent within it."³⁸⁹ For efficient policies to be implemented, it is not only for the parliamentary majority to follow the government. Government and party need to move together down the road of legislation and "important disagreements within the party are reasons for postponing action until accommodations can be reached."³⁹⁰ If in the U.S. Congress issues are debated and offered to the public arena before parties, representatives, and executive leaders have found viable compromises, in the UK the negotiating process among such actors usually takes place behind closed doors. Parliamentary votes take place when the government has a reasonable, or almost sure, chance to see its proposals passed. British leaders know that responsibility in the UK is almost exclusively concentrated in the party government. Failure to act as a common body does not merely undermine government's credibility, as it does in the U.S. It can lead to a new election and possibly a new government.

³⁸⁷ Cit. 78.

³⁸⁸ Kenneth N. Waltz, *Foreign Policy and Democratic Politics*, 116.

³⁸⁹ Cit.

³⁹⁰ Cit. 116-7.

This leads to the issue of “anticipated-reaction” by the executive. In the U.S. Congress, legislation is often initiated by congressional members that act as real lawmakers. In the UK, the process is more under the control of the executive in the sense that “if the government anticipates that the legislative process, once started, will lead to an outcome it finds unacceptable...it will keep the gates closed.”³⁹¹ Legislative debate will be postponed to moments of larger party cohesiveness. In this respect, executive legislation finds comfortable parliamentary approval also because, once it reaches the floor of the House, it has already obtained the support it needs.

For Lisa Martin, this is an important indicator of how “solid party-line voting does not reflect lack of policy influence.”³⁹² The narrow margins offered by the party government require that executive leaders acquire “detailed information about MPs preferences” and incorporate them in the policy process.³⁹³ In the UK, the opposition can take advantage of any sign of division within the party in power. Governments need to know in advance the consequences of their choices. This is usually the task of the whip that should not be seen as a mere instrument to check who votes for the government or to decide who was loyal enough to deserve re-election. The whip also operates as a “liason allowing ministers to estimate precisely what they can get away with without causing outright dissent within the party.”³⁹⁴ This allows MPs to exert influence on the policy-making without having to vote against proposals, a matter that would have unacceptable consequences for both the executive and the party.

In sum, British MPs cannot be simply taken into account as instruments to implement government’s will. Depending on the issue, executive leaders can create their own opportunities or face significant constraints. As we shall see in the empirical chapters, when governments deal with war issues, parliamentary representatives tend to delegate to them the authority to interpret the gravity of the situation and take consistent and efficient action. In other cases, such as the ratification of international treaties, governments might need to previously investigate the intentions of their MPs.

The lack of a written constitution makes it that ratification of treaties is not regulated by codified constitutional provisions but rather “rests on convention and practice.”³⁹⁵ Constitutional practice until the 1920s provided that the parliament had “no formal role in treaty making, the power of which [was] vested in the executive, acting on behalf of the Crown.”³⁹⁶ Things changed in 1924 with

³⁹¹ Lisa L. Martin, “Legislative Influence and International Engagement”, 83.

³⁹² Cit., 86.

³⁹³ Cit.

³⁹⁴ Cit.

³⁹⁵ Charles Carstairs and Richard Ware (eds.), *Parliament and International Relations* (Milton Keynes: Open University Press, 1991): 37.

³⁹⁶ Cit. 38.

the introduction of the Ponsonby rule, sponsored by Under-Secretary of State for Foreign Affairs Arthur Ponsonby. Such a rule, which is now fully recognized as a constitutional practice, provides that “when a treaty requires ratification, the government does not usually proceed with the ratification until a period of twenty-one days has elapsed from the date on which the text of such a treaty was laid before parliament.”³⁹⁷ International treaties that imply losses of sovereignty or financial expenditures are usually extensively debated. The opposition, in case it does not agree, works for putting them aside, for substantial modifications, or for the approval of reservations.

This is the case of treaties that can only be approved through the passing of new legislation in the form of a parliamentary bill, such as in 1972, when the parliament gave its consent to the Treaty of Rome, which formalized UK’s accession to the Economic Community. In these situations, the parliament wants to have the last say. The opposition exerts its criticism and power of proposing amendments. The incumbent government needs the support of its parliamentary majority to overcome opposition’s claims and perpetuate an image of stable party government.

Even though its role has been significantly diminished in the last decades, the House of Lords too can constitute an important check on government’s action. Lords debate legislation proposed in the Commons and have the opportunity to suggest amendments or propose a delay in the process of approval. Although they can no longer block legislation, Lords can represent important reference from a discursive point of view. The House of Lords receives representatives of civil society, foreign leaders, supporters and detractors of the government. Being composed of well known and expert personalities of British politics and society, the House of Lords operates as a “chamber of influence rather than one of power.”³⁹⁸ It is a chamber of analysis and reflection that, on virtue of its reputation and credibility, can influence policy-making, although not in a decisive way.

In conclusion, it is probably safe to argue that executive leaders encounter larger constraints in the U.S. than in the UK’s political system. Nevertheless, the characteristics of parliamentary democracies and the features of the party government make it that governmental leaders cannot operate “without the support of the parties in the executive and parliamentary majority.”³⁹⁹ Depending on the issues at stake, political parties and the dynamics of party politics still represent “the gatekeepers of the political process” in the sense that “continue to control the key for accessing both the electoral and governmental processes.”⁴⁰⁰ Although the characteristics of the system do not allow to easily

³⁹⁷ Cit. 39.

³⁹⁸ Cit. 73.

³⁹⁹ Sergio Fabbrini, *Compound Democracies*, 126.

⁴⁰⁰ Cit. 128.

distinguish UK's executive leaders from representatives of the parliamentary majority, there are situations and issues in which the attitude of the latter can become decisive to determine the life of the former. Executive leaders need to listen to them before submitting legislation to the parliament.

3.2.2 *U.S. Presidents and Executive Leaders: Facing a Plurality of Constraints*

U.S. Presidents and executive leaders too have to face an institutional and political system that offers constraints but also opportunities for autonomous action as to foreign policy-making. Nevertheless, if compared with British governments, U.S. executives encounter a larger number of actors and mechanisms that can limit their freedom of action and the possibility of having the last say in the making of authoritative decisions. Once again, it mostly depends on the issue at stake.

First, U.S. executives have to deal with a Congress whose involvement in foreign policy can change over time and issue. As has been already reminded, Congress has no chance to vote the executive out of power and, at the same time, it cannot be reshuffled by the President. Moreover, the two institutions are assigned different constitutional tasks and they are elected by different constituencies and for different time frames.

This separation of power and responsibility between the White House and Congress is formalized by the Constitution. Presidents are given "authority and responsibility to conduct war and diplomacy" and the responsibility for the negotiation of international treaties. Congress has the "authority to commence war and commit the national to significant foreign undertakings", which means the ratification of international treaties.⁴⁰¹ Political reality has not always contributed to the maintenance of this apparently efficient division of labor. Congress and President have developed complex institutional relations that, on the one hand, give President opportunity to circumvent constitutional provisions, in particular on war powers. On the other, it gives Congress opportunity to shape foreign policy through legislative activism and oversight of the Administration's actions.

Several authors have identified history as the main determinant of this dynamics. If Congress was generally able to control and orient President's foreign policy during the 19th century, this picture started to change in the 20th century and, especially, with the Cold War. Threats and responsibilities of post-WWII "seemed to demand greater efficiency than had been considered possible or desirable in the late 18th century."⁴⁰² The Soviet and nuclear issues allowed for the development of a Cold War consensus and a "system of bipartisan and executive-legislative relationships that circumvented the

⁴⁰¹ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 2.

⁴⁰² Cit. 72; see also, Sergio Fabbrini, "The American System of Separated Government."

difficulties of the constitutional design.”⁴⁰³ National consensus provided that the President should be the center of U.S. decision-making as to foreign policy. This was clear, for example, during the Truman and Johnson Administrations, which aggressively confronted Soviet communism.⁴⁰⁴

This atmosphere of bipartisan deference toward the Administration started to fade with the Vietnam failure and the Watergate scandal that renewed debates about the necessity to limit a presidential power that had gone too far.⁴⁰⁵ Partisanship and congressional activity were no longer seen as a threat to efficient U.S. foreign policy-making and Congress managed to pass resolutions, such as the 1974 War Powers Act, that aimed, at least in theory, to limit presidential authority as to the conduct of war and foreign policy.

The partisan dynamics of congressional politics re-emerged with particular intensity after Cold War. The capacity of the executive of being the center of foreign policy-making increasingly depended on the personality of Presidents, their popularity, and above all on the “depth and nature of partisan cleavages.”⁴⁰⁶ The breaking of the Cold War consensus, and the consequent difficulty at clearly defining U.S. national interests, favored congressional activism as to foreign policy. As David Rhode has noticed, the end of the Cold War has augmented the role of Committees, in particular in foreign affairs, armed services, and appropriations, and their responsiveness to majority party preferences. Amendments and proposed legislation on foreign policy issues have increasingly assumed a partisan nature.⁴⁰⁷ Congressional Committees have encouraged the participation of civil society groups to the legislative debate and have intensified their scrutiny of Administration’s actions as to appointment of U.S. representatives in foreign countries and international institutions and as to submission of U.S. sovereignty to international legal arrangements.⁴⁰⁸

Congressional influence on foreign policy mostly depends on the issue under consideration. Nevertheless, the use of congressional power to participate to the making of U.S. international affairs has undeniably grown stronger, not only through actual legislation but also through other instruments, such as hearings, speeches, media appearances, non-binding resolutions, and letters and statements by groups of representatives and senators. The use of these instruments tends to structure along more

⁴⁰³ James A. Nathan and James K. Oliver, 72.

⁴⁰⁴ Cit. 74-7.

⁴⁰⁵ On this point, see for example, David W. Rhode, “Partisan Leadership and Congressional Assertiveness in Foreign and Defense Policy” in *The New Politics of American Foreign Policy*, 76-101.

⁴⁰⁶ Bert A. Rockman, “Presidents, Opinion, and Institutional Leadership” in *The New Politics of American Foreign Policy*, 64.

⁴⁰⁷ David W. Rhode, “Partisan Leadership and Congressional Assertiveness”, 98.

⁴⁰⁸ John T. Tierney, “Congressional Activism in Foreign Policy: Its Varied Forms and Stimuli”, in *The New Politics of American Foreign Policy*, 102-129.

contentious and partisan lines and contributes to framing presidential decision-making in a larger context. This allows Congress to act as a powerful counterbalance to the power of executive leaders, at least with regards to specific issues.⁴⁰⁹

Various scholars have noticed that this tendency has grown particularly stronger during the Clinton Administrations. Democratic defeat at the 1994 Midterm elections gave the Republican Party control of both branches of Congress. This loss augmented the effects of divided government and intensified partisanship in the foreign policy debate.⁴¹⁰ This clearly emerged during consideration of important international agreements by the U.S. Senate.

Obviously, the return of partisan politics has not extended to all areas of foreign policy. Congress usually prefers to limit presidential power on issues that are not related to situations of particular emergency. For example, in case of decisions that involve the deployment of U.S. troops abroad, Congress tends to defer to the Administration. The ‘rally-round-the-flag’ effect is still particularly strong in U.S. foreign policy. When U.S. troops are sent to faraway combat theatres, the dominant idea is that the country has to stay united and not divide along partisan lines. This has made James Lyndsay conclude that partisanship and congressional activism are functions of the level of external threat. In times of peace, or during debates on issues that do not involve the use of force, “congressional assertiveness grows.” In a different way, “when Americans find themselves at war or fear great peril, congressional assertiveness gives way to congressional deference to the President.”⁴¹¹ This sort of informal division of labor between President and Congress can be noticed with reference to two important areas of foreign policy-making: War and international treaties.

As to the former, despite constitutional provisions, Presidents and executive agencies have generally been the dominant actors. War has been traditionally considered as a matter for the White House. Congress has been reluctant to assert its powers on declaration and funding of wars and has preferred to leave responsibility for the Administration. Moreover, Presidents have been able to bypass

⁴⁰⁹ Alexander L. George, “Domestic Constraints on Regime Change in U.S. Foreign Policy: The Need for Policy Legitimacy,” in *American Foreign Policy: Theoretical Essays*, 333-57; James M. Lyndsay, “From Deference to Activism and Back Again. Congress and the Politics of American Foreign Policy,” in *The Domestic Sources of American Foreign Policy: Insights and Evidence*, 183-95; David W. Rhode, “Partisan Leadership and Congressional Assertiveness in Foreign and Defense Policy,” in *The New Politics of American Foreign Policy*, 76-101.

⁴¹⁰ Richard N. Haas, “Fatal Distraction: Bill Clinton’s Foreign Policy,” *Foreign Policy* (Fall 1997): 112-123; “Clinton’s Foreign Policy,” *Foreign Policy*, November/December 2000, pp. 18-29; Moses Naim, “Clinton’s Foreign Policy: A Victim of Globalization,” *Foreign Policy* (Winter 1997-98): 34-45; Stephen Walt, “Two Cheers for Clinton’s Foreign Policy” *Foreign Affairs* (March/April 2000): 63-79; Stephen Schlesinger, “The End of Idealism: Foreign Policy in the Clinton Years,” *World Policy Journal*, Winter (1998-99): 36-40; Steven E. Schier (ed.), *The Postmodern Presidency Bill Clinton’s Legacy in U.S. Politics* (Pittsburgh, University of Pittsburgh Press, 2000).

⁴¹¹ James M. Lyndsay, “From Deference to Activism and Back Again: Congress and the Politics of American Foreign Policy” in *The Domestic Sources of American Foreign Policy*, 193.

congressional war powers during most international crises.⁴¹² This trend has worried various academics and observers that have agreed with Arthur Schlesinger on identifying war as the issue that more than anything else can upset the constitutional balance of power between Congress and Administration.⁴¹³ Thanks to a constitutional interpretation that is based on the notion of “inherent powers” and is usually invoked during situations of national emergency, Presidents and Administrations have successfully affirmed their primacy as to the making and conduct of war.⁴¹⁴

Presidents, such as Abraham Lincoln or Franklin Delano Roosevelt faced periods of intense or potential threat to the survival of the U.S., respectively the Civil War and WWII. This allowed them to take decisions that circumvented constitutional provisions as to war issues. In particular, it was with the Cold War that Presidents started to refer to the notion of “inherent powers.” Operating in a climate of “sustained and indefinite crisis”⁴¹⁵, Presidents could easily provide broad interpretations of their constitutional role as guarantors of the integrity of the nation and make war a presidential prerogative. The dangers imposed by the Soviet Union required that quick and effective action be taken. Moreover, the destructive characteristics of nuclear weapons made the procedure of formally declaring war obsolete and incapable of dealing with the necessity to strike first, if necessary. For this reason, Harry Truman and Lyndon Johnson could comfortably plan and start wars against Korea and Vietnam with virtually no congressional participation.⁴¹⁶

Things seemed to change with congressional approval of the War Powers Act. The act provides that without a declaration of war, the President is forced to gain congressional approval within 60 days from the start of the operation. The main aim was to make sure that U.S. troops could be deployed abroad with “adequate domestic support.”⁴¹⁷ Nevertheless, the literature agrees that Presidents fundamentally “ignored the spirit”⁴¹⁸ of the Act. A number of U.S.-led military operations, such as Lebanon, Grenada, Iraq, and Somalia illustrate that the presence of the Act has not significantly changed the pattern of congressional deference on war issues.⁴¹⁹

The end of the Cold War has not brought any change either. Most military operations conducted by the U.S. in the 1990s have taken place with rather scant congressional participation, generally

⁴¹² James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 107-126.

⁴¹³ Arthur A. Schlesinger Jr., *War and the American Presidency*, 45.

⁴¹⁴ Cit. 47.

⁴¹⁵ Cit. 53.

⁴¹⁶ James A. Nathan and James K. Oliver, *Foreign Policy and the American Political System*, 107-126.

⁴¹⁷ Cit. 128.

⁴¹⁸ Cit. 129.

⁴¹⁹ See Louis Fisher, *Presidential War Powers*, cit; Robert Scigliano, “Politics, the Constitution, and the President’s War Powers” in *The New Politics of American Foreign Policy*, 148-65.

limited to ex-post declarations of support, mostly voted when hostilities had already started. This was the case, for example, of the many instances of U.S. participation to international peace operations, such as in Haiti, Bosnia, and Former Yugoslavia. During such actions, the use of U.S. force was not authorized by congressional legislation but was, rather, the result of commitments “made unilaterally by the executive branch acting in concert with the United Nations” or NATO.⁴²⁰

The bypassing of the Constitution is also favored by international and domestic developments. On the one hand, U.S. participation to various security institutions, such as the UN, NATO, and SEATO has been often accompanied by the abuse of the concept of ‘defensive war.’ International treaty requirements to cooperate with allied states and the proliferation of U.S. bases and military facilities abroad have led the U.S. to initiate conflicts that can hardly be justified in terms of protection of U.S. borders and integrity.⁴²¹ Since the U.S. has mostly become a supplier of international security, U.S. Presidents have broadened the notion of defense in terms of military assistance to members of international organizations.⁴²² This has allowed them to frequently bypass both Congress and the Constitution. On the other hand, Congress has been happy to delegate war powers to the President. Initiating and conducting military operations involve risks and responsibilities that a legislative assembly is likely to leave for more cohesive institutions, such as the executive and the military. The need to act with promptness and efficiency has become one of the main justifications of presidential war power both in the White House and Congress.⁴²³ This historical and institutional evolution gives U.S. Presidents significant advantage over other domestic actors in dealing with matters that involve the commitment of war power. This will be shown by the analysis of U.S. invocation of the norm of HI during the Kosovo crisis.

A different balance between Congress and the White House determines foreign policy-making as to the commitment of U.S. sovereignty to international institutions and treaties. On this issue area, Congress has been much more willing to assert its constitutional powers. This specific outcome is largely related to the nature of the state, which is a federation of states.

Studies of foreign policy-making in federal states have contributed to challenge “the traditional assumption that foreign relations are the exclusive concern of central governments.”⁴²⁴ The making and ratification of international treaties represent prominent examples of how the federal nature of the U.S.

⁴²⁰ Louis Fisher, “Presidential Wars” in *The Domestic Sources of American Foreign Policy*, 164.

⁴²¹ Louis Fisher, *Presidential War Powers*, 11.

⁴²² Robert Scigliano, “Politics, the Constitution, and the President’s War Powers”, 160.

⁴²³ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 236-56.

⁴²⁴ Brian Hocking (ed.), *Foreign Relations and Federal States* (London, New York: Leicester University Press, 1993): 6.

can become an important variable, capable of explaining U.S. attitudes with regards to such international frameworks. The reason is that the organ that most represents the interests of single states – the U.S. Senate – is also the one that is given the largest powers as to treaty making. In order to become “supreme law of the land,”⁴²⁵ international treaties require Senate’s ratification by a 2/3 majority. Presidents can negotiate treaties at the international level and, under some circumstances, even proceed with ratification, as in the case of so-called “executive agreements.”⁴²⁶ However, for the most important treaties, and especially the ones implying a loss of sovereignty or financial expenditures, the approval by 2/3 of U.S. states is constitutionally required. This has often made the life of the executive particular difficult. Senate representatives present a historical record characterized by reluctance to submit the country to international agreements.⁴²⁷ Since the Senate is based on the principle of equal representation of states with different geographical positions and international interests, a core of states is given substantial veto power over international treaties.

This has favored a tradition of rejection of international treaties, some of which have triggered widespread criticism. The U.S. finally ratified the Genocide Convention only in the mid-1980s, almost 40 years after its conclusion at the UN level. The previous League of Nations and the subsequent Human Rights Covenants encountered even worse destinies. In the post-Cold War era, U.S. Senate also blocked ratification of the ICC Statute, the Kyoto Protocol, and the Anti-Land Mine Treaty.

Opposition to international treaties has been explained with the development and consolidation of an anti-internationalist rhetoric and a general fear to upset the constitutional balance between federate and federal states. Since the 1950s, international treaties have been charged with the accusation of injecting a tendency toward centralization in a system that is based on respect for federate and decentralized entities. As Nathalie Kaufman has argued, these arguments have maintained incredibly stable over the years.⁴²⁸ The main concern has been with the possibility of undermining the protection of individual liberties and states’ rights that are guaranteed by the Constitution. Subjecting U.S. sovereignty to international legal arrangements has been viewed by isolationist sectors of Senate as potentially promoting an ideal of world government. This directly threatens both U.S. freedom of action in international affairs and the rights of U.S. citizens that risk being subject to the authority of foreign and unelected institutions.⁴²⁹ As a consequence, Senate has mostly accepted international

⁴²⁵ The United States Constitution, Article 6.

⁴²⁶ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 91-106.

⁴²⁷

⁴²⁸ Nathalie Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (Chapel Hill: The University of North Carolina Press, 1990): 184-192.

⁴²⁹ Cit.

treaties over which the U.S. can maintain some form of control or exemption – for example the UN in which the U.S. enjoys veto power over decisions of the Security Council – and has rejected the others.

In sum, by giving to slightly more than 1/3 of states a veto power over international treaties, the U.S. Constitution creates a large constrain on the possibility of limiting sovereignty in favor of external arrangements. This is particularly relevant if we consider that a significant part of U.S. states are geographically less interested in international affairs and, in general, more skeptical about non-U.S. institutions.

Some scholars have explained U.S. attitude on international agreements by referring to cultural factors. In particular, U.S. public debate would be shaped by an isolationist and exceptionalist rhetoric that makes the country constitutively and culturally skeptical toward international treaties.⁴³⁰ This type of argument is treated in more detail in the chapter on U.S. rejection of the ICC, where it is argued that it mostly constitutes an exaggerated statement, which is inadequate to account for change in U.S. foreign policy discourse and general state attitudes toward treaties.

To conclude the overview of institutional constraints to foreign policy-making, one needs to mention an important feature of U.S. executive power, which is the competition that often characterizes executive agencies that are part of the Administration.

The necessity to manage foreign policy in an efficient way and face the threats of a bipolar world led President Truman to pass, with the support of Congress, the 1947 National Security Act, which established the Department of Defense (DOD), the Central Intelligence Agency (CIA), and the National Security Council (NSC). The enlargement of foreign policy bureaucracies “augments the capacity of the President to conduct American foreign policy” but also favors the proliferation of a number of competing perspectives, “personal rivalries”, and “organizational fragmentation.”⁴³¹ When analyzing a foreign policy issue, the White House needs to take into account the opinions of a variety of agencies that are “inevitably...influenced in some measure by organizational interests.”⁴³² This means that Presidents and their staffs cannot act as the top of a bureaucratic architecture, by steering the foreign policy process at the executive level. Although they enjoy the legitimacy that derives from being elected officials, Presidents need to confront “well-established institutions” whose members “have careers and perspectives that inevitably reflect more than the most recent presidential electoral

⁴³⁰ Edward C. Luck, *Mixed Messages: American and International Organizations, 1919-1999* (Washington, D.C.: Brookings Institution Press, 1999); Edward C. Luck, “The United States, International Organizations, and the Quest for Legitimacy” in *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, ed. Shepard Foreman, Stewart Patrick, and Joanne J. Myers (Boulder: Lynne Rienner, 2002): 47-74.

⁴³¹ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 4.

⁴³² Cit.

returns.”⁴³³

When devising foreign policy strategies, Presidents need to move around a jungle of military and information agencies. Each unit “will tend to concentrate on acquiring information that protects or advances its own interests” and “will tend to produce partisan analyses.”⁴³⁴ In some cases, such as the struggle that characterized the Defense and State Departments in 2003 over intervention in Iraq, the Pentagon and Foggy Bottom can come to support contrasting views of the international system and pursue competing goals. This can create disagreements and conflicts that, depending on the credibility of the President and the activism of Congress, can significantly affect foreign policy-making and shape outcomes in one direction or the other.⁴³⁵ This is what happened, for instance, during negotiations for the ICC Treaty. Although the struggle between the President and the State Department, on the one hand, and the Department of Defense, on the other, was not explicit, manifestations of skepticism and disagreements against the ICC and the Administration’s policies did take place. This allowed domestic opponents to rely on a fertile ground for arguing against the Court.

Both U.S. Administrations and British governments are subject to variable sets of constraints that can be located in constitutional and legislative practices and in the characteristics of their respective institutional systems. A univocal interpretation of the actors and mechanisms that hold the keys of U.S. and UK’s foreign policy is particularly difficult. No actor alone is able to have decisive impact on domestic and foreign policy-making. No institutional mechanism alone determines predictable policy outcomes. The relevance of domestic actors and mechanisms in foreign policy-making mostly depends on the issue. Different matters, played by different rules, determine who is in and who is out of the foreign policy game. Different issues activate different sets of constraints and opportunities. Things can be even become more complicated when considering the impact of other domestic actors that formally do not belong to the domestic institutional setting, most notably civil society and advocacy groups.

3.3 Civil Society and Foreign Policy-Making

As has been explained in section 2.2.2, a significant part of the literatures on both domestic

⁴³³ Cit. 28.

⁴³⁴ Donald L. Hafner, “Presidential Leadership and the Foreign Policy Bureaucracy” in *The New Politics of American Foreign Policy*, 44.

⁴³⁵ For classic studies on the institutional and domestic constraints to presidential power see, Richard E. Neustadt, *Presidential Power*; Graham Allison, *Essence of Decision*; James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*: chapters 2, 13; John Peterson, “In Defence of Inelegance: IR Theory and Transatlantic Practice”.

sources of foreign policy and international norms has focused on civil society actors as important determinants of decision-making processes.⁴³⁶ The impact of transnational coalitions, advocacy movements, interest groups, and think tanks would be particularly relevant in liberal democracies, which constitutionally favor the organization of interests at the social level and encourage their participation to the public debate.

However, one should immediately ask whether this argument can be applied to most liberal democracies and whether different institutional settings can provide different outcomes in terms of participation of civil society groups to processes of foreign policy-making. Is the type of institutional system a relevant variable when assessing the role of civil society during domestic decisions that involve foreign policy? Are some liberal democracies more likely than others to favor its involvement in the public debate? These questions require an overview of the role of these groups in the UK and the U.S. and of the respective institutional and political mechanisms that might favor participation or exclusion.

3.3.1 *Civil Society under the Party Government System*

The debate on the role of civil society movements and interest groups in the Westminster system is characterized by disagreements. Some scholars have argued that the centralized nature of government would create several difficulties in terms of access to decision-making, especially because of the highly structured and disciplined party system that would make parties the main gatekeepers of policy processes. Others have maintained that political parties, despite their central role, cannot neglect social movements and interest groups as they still represent the interests of large portions of the national electorate.

For example, Budge and McKay have argued that “interest groups do flourish in Westminster model systems...but claims to be the decisive voting blocs in elections have generally been unconvincing.”⁴³⁷ Unlike the U.S. system, in which such groups are allowed large participation to the policy process especially at the legislative level, British institutional features would inhibit “most institutionalized forms of interest group political power.”⁴³⁸ The main reason is that the fusion of power and interests between the government and its parliamentary majority would make parties the almost exclusive entities to regulate access to and focus on relevant policy issues. If the party government

⁴³⁶ See chapter 2, section 2.2.2.

⁴³⁷ Ian Budge and David McKay (eds.), *Developing Democracy*, 195.

⁴³⁸ Cit.

feels the necessity to involve civil society groups, their participation will be encouraged. Otherwise, the policy process will remain impermeable to their influence and mostly a matter within the competence of the party government and its leadership. Party politics and dynamics of government would constitute “a very effective check on their power.”⁴³⁹

Along these lines, Fabbrini has observed that concentration of power in the parliamentary majority and its government renders alternative forms of representation highly difficult. Since parties, especially the most influential, are organized as national federations, their role as gatekeepers of the policy process would be exercised at any decision-making level. This allows them to monopolize not only decision-making but also the representation of the interests that emerge within society.⁴⁴⁰ Civil society groups might even be invited to debates within legislative committees but their role would mostly remain residual and clearly subject to political parties.

In sum, some political scientists have downplayed civil society actors as capable of influencing decision-making processes. The Westminster system of government largely simplifies electoral choices. Only few parties are able to win a sufficient number of seats in the parliament in order to elect governments. As a consequence, responsibility for political action is centralized around homogenous and recognizable parties. Accountability is so clearly located at the level of party government that public opinion finds it easier to focus on them as most producers of public policies. It is for party leaderships to steer policy processes. Competing groups tend to be excluded.

In addition, party discipline is thought to have the effect of making party members less susceptible to pressure groups and advocacy movements. As we have seen in the previous section, parliamentary votes on public policies at times imply extremely high stakes, such as the survival of the government. For this reason, parties have a special interest in excluding other types of influences on decision-making. Moreover, favorable institutional conditions, such as the electoral system, allow them to formulate and implement political action with no particular need to listen to other forms of organized interests.

By contrast, other scholars have emphasized how even in the Westminster system civil society demands cannot be easily neglected. For example, Roland Pennock has provide that, despite the higher barriers to access the policy-making process, interests and social groups can still find their way to influencing political and government’s decisions. In particular, the strong interests of the government and its parliamentary majority in staying in power can constitute an advantage for civil society groups

⁴³⁹ Cit.

⁴⁴⁰ Sergio Fabbrini, *Compound Democracies*, chapter 5.

that aim to participate to public policies. Pennock has reminded that for parties to maintain their positions of power, “they must bid for the support of interest groups.”⁴⁴¹ The necessity to legitimately act as the party government and the goal to be re-elected require that British governments make sure that the demands of the electorate are satisfied. In particular, British governments need to listen and give satisfaction to the claims of powerful economic groups, such as farmers, trade unions, and producers.⁴⁴²

In a similar way, R. M. Punnet has noticed that, as in any other liberal democracy, it is thanks to trade unions, employers associations, religious bodies, and welfare societies if “the opinion and interests of sections of the community are brought to bear on the political process.”⁴⁴³ The Labour Party too was the result of various pressure groups and civil society movements, most notably the Fabian Society. Each party needs to refer to specific pressure groups. Trade unions and cooperative movement constitute the main sections of the traditional Labour electorate. Business, industrial, and agricultural associations constitute the main stakeholders of the Conservative Party. For British parties to win elections and stay in power, the demands of these groups have to become part of their public discourse and governmental action.

Interestingly enough, these scholars have gone as far as to suggest that civil society groups can heavily influence British policy processes precisely because of the structure of the Westminster system of government. As has been observed, “the unitary nature of the British system, with the concentration of constitutional authority in the hands of the central government, means that pressure groups can direct their activities toward the machinery of a single central government.”⁴⁴⁴ The concentration of power in the party government facilitates the identification of responsibility, which is mostly located in the government and its supportive parliamentary majority.

This means that civil society movements are facilitated in their political action. Since responsibility can be clearly assigned to the party that occupies Downing Street, social campaigns can specifically focus on the government as the ultimate decision maker. This is not far away from Evangelista and Risse-Kappen’s analyses of processes of norm diffusion. According to these scholars, a centralized system of government might sometimes become an advantage to social campaigns.

⁴⁴¹ Roland J. Pennock, “Responsible Government, Separated Powers, and Special Interests: Agricultural Subsidies in Britain and America” *The American Political Science Review*, Vol. 56, No. 3 (September 1962): 627.

⁴⁴² For similar arguments, see also Roland J. Pennock, “The Pork Barrel and Majority Rule: A Note” *The Journal of Politics*, Vol. 32, No. 3 (August 1970): 709-16; Brian Barry, “Comments on the Pork Barrel and Majority Rule” *The Journal of Politics*, Vol. 33, No. 2 (May 1971): 530-1; see also the response by Pennock in “The Author Responds” *The Journal of Politics*, Vol. 33, No. 2 (May 1971): 531-33.

⁴⁴³ R. M. Punnet, *British Government and Politics* (London: Heinemann, 1970): 133.

⁴⁴⁴ Cit. 135.

Systems that centralized decision-making around few actors not only make policy process more recognizable. They also imply that once movements and campaigns reach the top of decision-making, they are likely to be carefully listened to and their proposals possibly implemented.⁴⁴⁵

The role of civil society and interest groups in processes of decision-making constitutes a line of profound disagreement among political scientists. For some, the profile of British parties as disciplined gatekeepers of the policy process means high barriers to participation. For others, this very same characteristic can give British social movements the chance to direct their campaigns toward more easily recognizable targets and can allow them, in case they are capable of reaching the heart of decision-making, to exert large influence.

Recent experience from British foreign policy could potentially confirm the latter set of hypotheses. British foreign policy under the New Labour government was not impermeable to the actions and campaigns of civil society actors. For some scholars, one of the novelties of the New Labour was the attempt to base the foreign policy-making process on alternative actors. Increasingly, “Labour politicians came to utilize more informal and unorthodox sources, ones less bounded by either the conventions of party politics or traditional commitments.”⁴⁴⁶ This process led Labour leaders to rely on the work of think tanks, such as Nexus and Demos, which privileged a bi-partisan and non-ideological approach to foreign policy. Thanks to these contributions, Labour leaders were sometimes able to “bypass traditional sources of policy, which were regarded as inflexible, ideological, and conservative,”⁴⁴⁷ most notably the Foreign and Commonwealth Office and the Directorate of the Labour Party. This effort to diversify the process of foreign policy-making culminated in the establishment by the government of the Foreign Policy Centre, directed by Mark Leonard and presided by Foreign Secretary Robin Cook. An example of detachment of Labour leaders from traditional sources of foreign policy was represented by the attitude of the government toward the issue of Kashmir. As Vernon Hewitt and Mark Wickham-Jones have explained, Cook’s policy towards the Kashmir region was arguably influenced by the Kashmir diaspora and the positions of a British think tank called New Century Foundation.⁴⁴⁸

These examples certainly do not solve the issue, especially because the decision to include

⁴⁴⁵ Matthew Evangelista, *Unarmed Forces*; Thomas Risse-Kappen, “Ideas do not Float Freely.”

⁴⁴⁶ Mark Wickham-Jones, “Labour’s Trajectory in Foreign Affairs: the Moral Crusade of a Pivotal Power” in *New Labour’s Foreign Policy: A New Moral Crusade?* ed. Richard Little and Mark Wickham-Jones (Manchester: Manchester University Press, 2000): 13.

⁴⁴⁷ Cit., 13.

⁴⁴⁸ Vernon Hewitt and Mark Wickham-Jones, “New Labour and the Politics of Kashmir” in *New Labour’s Foreign Policy: A New Moral Crusade?*, cit., 201-217.

societal actors in the foreign policy process seemed to come directly from the government and not from a general attitude of British civil society. Not by chance it was for the British government, and consequently for the leadership of the Labour Party, to select what think tanks and diaspora groups had to be listened to.

The role of societal actors in UK's foreign policy processes, with particular regards to domestic interpretations of international norms, is assessed in the subsequent chapters on Britain. In general, the analysis shows that their role was not particularly effective and processes of interpretation and diffusion of international norms were mostly shaped by the executive and the legislature.

3.3.2 *Civil Society in a System of Separated Government*

The role of civil society movements and interest groups in U.S. policy-making has created fewer disagreements among scholars of U.S. politics. In general, the literature seems to agree that a fragmented and pluralist decision-making process tends to favor the participation of a plurality of actors. Fragmentation of power and diffused responsibility have produced a weak and less disciplined party system. Parties are mainly confederations of state and local parties. Moreover, congressional representatives often act as real lawmakers, by proposing autonomous legislation and amendments both at the floor and committee levels. Since their behavior influences the position of the executive, which is independently elected, much less than in the Westminster system, parties are hardly identifiable as mere executors of the government's will. U.S. parties are not seen as the gatekeepers of the policy-process.

These features would give way to pluralist and multiple access to decision-making, which favors the formation and activity of societal and interest groups.⁴⁴⁹ In the U.S. system, civil society actors are expected to become powerful voting blocks capable of obtaining political favors from congressional representatives and Administration's members in exchange for their support and funding.⁴⁵⁰ Lesser party discipline and lack of common interests between the executive and the legislature would make Congressmen and members of the Administration more subject to societal pressure. Legislative committees often invite think tanks and advocacy movements to express their views on policy-issues. These groups frequently lobby members of Congress that are searching re-elections. Given the decentralized nature of political parties, Congressmen can sometimes count more on these groups than on the leadership of their parties in order to be re-elected. A system that does not

⁴⁴⁹ Sergio Fabbrini, *Compound Democracies*, chapter 5.

⁴⁵⁰ Ian Budge and David McKay, *Developing Democracy*, 195.

directly subject the survival of the executive to the attitude of legislators tends to allow for more societal pressure.

These arguments start from the observation that U.S. policy-making is characterized by fragmentation and competition among a large number of political and economic forces. Many actors compete for the definition of U.S. national interests, and consequently, private and societal groups can find their way to participate to the process. Being the central government only one of the actors at play, the decision making process would encourage the “exercise of private power in public affairs.” In particular, the focus has been on the role of interest groups, such as ethnic minorities, which often have their own associations and are represented in Congress, and think tanks, which are capable of producing their own analyses of events and influencing the public debate on several issues.⁴⁵¹

The historically high level of association that characterizes U.S. civil society reinforces this situation of intense societal lobbying on the Administration and Congress. The presence of a myriad of social movements, lobbies, think tanks, and advocacy groups make it that “a grass-roots campaign can...be mounted almost instantaneously on any issue that taps these intensively ideological segments of the American polity.”⁴⁵²

In his famous analysis of political and civic participation in the U.S., Putnam has observed a trend that identifies less participation and less influence of civil society movements in the public debate. Interestingly enough, this trend includes a notable exception. Social movements have maintained their level of participation considerably high through the last decades. Societal groups that pursue eminently political aims are still fairly active and organized.

This phenomenon includes very different groups in terms of ideology and goals. Both conservative and progressive social movements keep on lobbying the executive, legislative, and, at times, even judiciary power. The most notable examples are represented by environmentalist groups, usually located in the left side of the political spectrum, and religiously oriented and pro-life movements that have been one of the most relevant constituencies of Republican Administrations since the Reagan era.⁴⁵³

Religious movements, peace corps, human rights-oriented NGOs, campaigns for abolition of death penalty, anti-abortion groups, isolationist and internationalist think tanks: U.S. civil society has

⁴⁵¹ James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System* (The Johns Hopkins University Press: Baltimore and London, 1994): 196

⁴⁵² James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 209.

⁴⁵³ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000): chapter 9.

been generally deemed to be particularly lively, rich of different opinions and goals, and fairly capable of determining policy outcomes. Sometimes these groups are even capable of creating unexpected links that focus on specific aspects of U.S. policy-making. Populists like Ross Perot can occasionally find political consonance with trade unions in their fight against free trade. Left-wing human rights movements can find themselves on the same page of neoconservative think tanks, such as the American Enterprise Institute or the Heritage Fund, as to opposition to humanitarian interventions. Libertarian movements, such as the Cato Institute, can sometimes agree with environmental movements on the critique of the close link between government and corporations.

In sum, U.S. civil society has been broadly conceived as a space in which many different issues are debated by a large number of movements that often divide along ideological lines and compete for shaping domestic and foreign policy-making. The long-standing tendency of U.S. society toward the creation of free associations of individuals and the characteristics of a system with many actors and few gatekeepers encourage participation of civil society to policy processes. The next chapters on the U.S. analyze its role during processes of domestic interpretation of international norms and explain why they were by and large marginalized from the public debate on these issues, despite their expected large influence.

3.4 Institutional Settings and Interpretation of International Norms

Any study of domestic responses to international norms requires an understanding of how domestic institutional systems function and interact with policy-making.

The U.S. and British systems have been the object of many comparisons that have tried to identify the most relevant actors that determine foreign policy outcomes and have attempted to measure their foreign policy performance.

Various scholars identify a fundamental difference between the UK and the U.S. in terms of management of foreign policy. The U.S. system, characterized by diffused and fragmented accountability, is thought to perform better in the short term. Given the separation of power between the executive and the legislature, U.S. Presidents can often times need to conduct foreign policy without congressional support. This has not implied particular problems in terms of short-term foreign policy-making. Some extremely important decisions, such as waging war or sign international agreements, can be made in a reduced period of time. U.S. Presidents fare reasonably well as to those foreign policy activities that require quick response and decided assumption of responsibility.

In terms of efficiency and rapidity of decision-making, the system has not constituted a

particular obstacle during these types of actions, also thanks to traditional congressional deference on war issues. Things have worked differently in case of long-run decision-making processes, especially when they require appropriations made by law or limitations of sovereignty. In those cases, the President needs the support of a Congress that, at least in theory, does not have strong institutional incentives to back the President. Non-ratification of the Treaty establishing the ICC will illustrate this point.

By contrast, the UK's system is based on a strong co-responsibility between the executive and the legislative majority. The latter is bound to back the government unless it wants new elections and a new government, which is usually not the case. For this reason, UK governments usually fare better in managing long-term foreign policy processes that require parliamentary support. The Prime Minister does not need to fabricate a new majority for each issue because the system already provides him/her with a stable one. Nevertheless, in case of sudden crises that require quick decisions, such as the deployment of British troops, the Prime Minister can be more constrained than the U.S. President. First, because, being mostly responsible to the parliament rather than the public, he/she cannot invoke popular support as much as the President can. Second, because he/she usually needs to persuade the Cabinet, which takes decisions collectively.⁴⁵⁴ This requirement has partially decreased in importance during the Blair years, which have seen further centralization around the figure of the Prime Minister. However, the coalition government that is currently running Britain is likely to see a new moment of Cabinet's influence on decisions.

Along these lines, U.S. Presidents are supposed to perform better in case of sudden and relatively short situations of crisis. By contrast, UK's Prime Ministers tend to perform better in case of long and protracted crises that require stable parliamentary support. This trend is also favored by electoral cycles. In the UK, general elections usually take place every four or five years and, most importantly, they are called by the government. In the U.S., elections take place at least every two years and subject the President to tight electoral constraints.

The institutional characteristics of the respective systems make it that it is not easy to isolate the actor(s) that mostly determine foreign policy-making. Complex institutional systems rather suggest that the relevance of the actors depends on the type of issue at stake. Issues that require quick and determinate action tend to privilege executive leaders as main determinants of the policy outcome. By contrast, issues that require long and potentially divisive debates tend to privilege legislative and party actors.

⁴⁵⁴ Sergio Fabbrini, *Compound Democracies*, chapter 1.

This conclusion reflects the main findings of the subsequent empirical chapters on UK and U.S. domestic responses to international norms. When states interact with emergent and mostly undefined international norms, the main group of actors to determine state response is usually located at the executive level. This emerges from the analysis of U.S. and UK's invocation of HI during the Kosovo crisis. Being an undefined and scantily codified international norm whose invocation can require the waging of a war, its invocation mostly takes place through arbitrary decisions that tend to exclude other institutional actors, such as parties and legislative assemblies. The tendency of the last decades to leave for executive leaders decisions that concern the use of military force reinforces this effect.

In a different way, when states deal with international norms that have reached a high level of international institutionalization and codification, in the form for example of an international treaty, the picture becomes more complicated. State responses to these types of norms tend to depend on more complex interactions between executive leaders and actors that mostly operate at the legislative level, such as political parties. Recognition or rejection of codified international norms often requires long and divisive processes of legislative ratification that follow more routinized and established procedures. This gives political parties the chance to play a larger role and augments the effect of institutional mechanisms regulating the relationships between executive and legislatures on the policy process. In the case of the U.S., processes of norm interpretation can see the involvement of other actors that are located at the executive level but that are not directly identifiable with the Presidency, such as foreign policy bureaucracies. In general, longer and less urgent processes of domestic interpretation favor the participation of a larger number of actors. Differently, in case of emergent norms that trigger more rapid and determinate decision-making, interpretation tends to be the prerogative of state leaders.

The analysis will also show how civil society actors tend not to be relevant actors during processes of domestic interpretation of international norms. Although they are not excluded from the specific debates, their capacity of making a difference remains rather scant in favor of more institutional and recognizable actors.

Chapter 4

4 “INVOKING HUMANITY”⁴⁵⁵

The UK and NATO Intervention in Kosovo

On 22 March 1999, after several weeks of intense international debate, NATO officially started a bombing campaign against the Federal Republic of Yugoslavia. The stated goal was to stop massive violations of human rights perpetrated by the Yugoslav regime against the Albanian population of Kosovo. One of the states that most strongly advocated intervention was the UK. Before and during Operation Allied Force, Britain consistently invoked the existence of a norm of humanitarian intervention that invested the international community with the right and duty to use military force to stop massive violations of human rights. As Prime Minister Tony Blair maintained few days after the start of the operation, “we are doing what is right, for Britain, for Europe, for a world that must know that barbarity cannot be allowed to defeat justice.”⁴⁵⁶

This chapter aims to explain what are the domestic actors that determined UK’s recognition of the norm of humanitarian intervention during the 1999 Kosovo crisis. It analyses the debate that took place in the UK over the legitimacy of intervention in Kosovo and over the participation of Britain to the NATO bombing campaign. I argue that executive leaders and members of the Labour government were the actors that mostly determined the invocation of humanitarian intervention and the decision to intervene in Kosovo. Acting as norm entrepreneurs, they provided a specific interpretation of the notion of intervention that created the adequate normative framework for invoking the legitimacy of the norm and for carrying out the military operation. The presence of a Labour government that pursued a moralist and internationalist foreign policy, which was largely concerned with human rights enforcement and international justice, created the conditions for the UK’s invocation of humanitarian intervention as a legitimate framework of behavior and for the commitment of British troops against a sovereign state.

4.1 The UK And Humanitarian Intervention In Kosovo

Both before and during the crisis in Kosovo, the UK was one the most vehement advocates of

⁴⁵⁵ The title of this chapter refers to the title of the English version of Danilo Zolo’s *Chi dice umanità*, cit. See Danilo Zolo, *Invoking Humanity: War, Law, and Global Order*, cit.

⁴⁵⁶ Tony Blair, “It is simply the right thing to do”, *The Guardian*, 27 March 1999.

humanitarian intervention and the right of the international community to take action through the waging of a military operation. The study of the conditions that determined this attitude requires an analysis of the debates that took place at the domestic level, the arguments that were put forward by the actors involved, and the manner by which the most controversial issues were interpreted and solved.

The conflict between Serbs and Kosovars dates back from the early 1990s and has been the object of a vast literature⁴⁵⁷. What matters here is to outline the involvement of the UK in the issue. At the beginning of 1998, when hostilities between Serbs and Kosovars started to outbreak, the UK government mostly took a moderate stance by condemning both Serb repression and KLA actions and by supporting a diplomatic solution of the crisis. British positions started to change in August 1998, when Serbian police and militias undertook various repressive actions that led to the displacement of 200,000 Kosovars. With winter approaching and memories of Srebrenica re-emerging, the UK took a leading role among Western countries and presented to NATO diplomats a plan to deploy 60,000 NATO troops as peacekeepers.

On 23 September 1998, the UN Security Council passed Resolution 1199 that demanded that Serbs and Albanians stop fighting and start negotiation.⁴⁵⁸ The day after, NATO approved the Activation Warning that aimed to prepare NATO members for possible forcible measures.⁴⁵⁹ With Milosevic being quite reluctant to accept NATO's requests, UK and Western leaders increasingly faced the issue of taking action against a sovereign state, without having been previously attacked or threatened. As repression against Kosovars intensified, NATO approved an Activation Order that constituted an explicit threat to use force against the FRY and aimed to convince Milosevic to accept the conditions imposed by NATO and the UN through the mediation of the Special Envoy for the Balkans Richard Holbrooke. These conditions included the withdrawal of Serbian forces from Kosovo, the return of refugees to their homes, a new round of negotiations with Kosovars, and the acceptance of a Verification Mission promoted by OSCE. Despite Milosevic's formal acceptance, tensions in the region did not soften but actually increased. The real turning point in the attitude of British and Western leaders toward the crisis was represented by the Racak massacre in January 1999, when Serb forces killed 45 Kosovars among the civilian population.

Western countries, together with Russia, managed to convince Milosevic and Kosovars to go

⁴⁵⁷ See for example, Tim Judah, *Kosovo War and Revenge* (New Haven and London: Yale University Press, 2002); Wesley K. Clark, *Waging Modern War Bosnia and Kosovo and the Future of Combat* (Oxford: Public Affairs, 2002).

⁴⁵⁸ Carol Hodge, *Britain and the Balkans: 1991 Until Present* (Abingdon: Routledge, 2006): 161.

⁴⁵⁹ Statement by NATO Secretary-General following ACTWARN Decision, Villamoura, 24 September, 1998, in Marc Weller, *The Crisis in Kosovo 1989-1999* (Documents and Analyses Publishing Ltd., 1999): 217.

back to the negotiation table in a last-ditch effort to find a diplomatic solution. Negotiations started in Rambouillet on 6 February 1999 and concluded in Paris in mid-March 1999 with a substantial failure to reach a compromise between the two factions.⁴⁶⁰ As a consequence, on 23 March 1999, Tony Blair and the leaders of NATO countries chose intervention. With a speech in the House of Commons, the British Prime Minister announced the participation of Britain in a military operation that aimed to “avert what would otherwise be a humanitarian disaster.”⁴⁶¹ The day after, Operation Allied Force began in the form of a bombing campaign against the FRY. This decision attracted much criticism by many observers and found the explicit opposition of permanent members of the UN Security Council, such as Russia and China. NATO members undertook a military operation against a sovereign state without having been previously attacked or threatened and, more importantly, without the formal authorization of a UN Security Council resolution.

Operation Allied Force represented the culmination of a process of invocation of the norm of humanitarian intervention and the conclusion of a debate that produced a highly controversial outcome: under exceptional circumstances, such as gross violations of human rights against citizens of a foreign country, humanitarian concerns can and must overcome the legal requirements imposed by international law. Many domestic actors took place to this debate. Only few determined the final outcome.

4.2 Civil Society In Retreat: British Ngos And Intervention In Kosovo

The analysis of the decision by the UK to invoke humanitarian intervention and participate to the NATO Operation against the Federal Republic of Yugoslavia reveals that British civil society actors were not among the main determinants of state response. The investigation of the events and debates that characterized the British context both before and during the Kosovo crisis shows that NGOs and civil society actors played a minor role in the process of invocation of humanitarian intervention.

Nobody could obviously expect British NGOs to determine the final decision to wage a military operation. These decisions are made by governments and parliaments and no private organization would ever have the power to autonomously decide whether or not a military operation should be carried out. However, what is remarkable in the case under analysis is the substantial inability of

⁴⁶⁰ For an excellent overview of the Rambouillet and Paris Conferences and its main documents, see Marc Weller, *The Crisis in Kosovo*, 392-501.

⁴⁶¹ Statement by Prime Minister Tony Blair in the House of Commons, Tuesday, 23 March 1999, in Weller, *The Crisis in Kosovo*, 495-6.

British NGOs to exert any political influence in the process of norm interpretation and invocation.

During the debate that led to the invocation and recognition of humanitarian intervention by the UK, NGOs played a rather scant role, in the sense that they did not contribute to any specific interpretation of the norm. The depiction of intervention as a right and a duty of the international community to respond to massive violations of human rights was mostly the consequence of a particular political stance taken by some members of the government. British NGOs did not contribute to framing the issue in any specific way, mostly because they did not take a clear stance in favor or against intervention.

Few NGOs took part to the debate on the legitimacy of armed humanitarian intervention. Most analyses were conducted several months after the end of the Kosovo intervention when the norm had already been invoked and acted upon by Britain. Moreover, the reports concerning humanitarian issues that were published before the war by some influential NGOs mostly maintained an either neutral or skeptical stance. With few exceptions, British NGOs neither invoked, nor contested the legitimacy of using force for humanitarian purposes and preferred a more disengaged and sober approach to human rights enforcement. In sum, during the debate over the Kosovo crisis, British NGOs mostly behaved as impartial observers and did not provide any specific policy guidelines, or any particular political view that could favor invocation and enforcement of humanitarian intervention.

4.2.1 Humanitarian Intervention and the Kosovo Crisis: British NGOs between Skepticism and Neutral Approaches

Instances of participation of British NGOs to the debates on human rights and human rights enforcement can be found by looking at parliamentary records. Humanitarian issues were, for example, discussed by the House of Commons Foreign Affairs Committee in the Report called “Foreign Policy and Human Rights”, which was published in December 1998.⁴⁶²

On 17 February 1998, Amnesty International UK was invited to submit a memorandum on the role of human rights in foreign policy.⁴⁶³ This report shows that Amnesty essentially agreed with the internationalist stance taken by the Blair government and seemed to share its commitment towards human rights. As Amnesty stated in its memorandum, “world peace and stability are more likely to be threatened by countries in which human rights violations and abuses are widespread and in which

⁴⁶² “Foreign Policy and Human Rights”, First Report of the Foreign Affairs Committee of the House of Commons, 21 December 1998.

⁴⁶³ “The place of Human Rights in Foreign Policy”, memorandum submitted by Amnesty International UK to the Foreign Affairs Committee of the House of Commons, 17 February 1998.

power can be concentrated in the hands of repressive governments through the fear engendered by systematic violations.”⁴⁶⁴ In this respect, Amnesty called for a foreign policy capable of promoting human rights by “providing valuable support to the civil societies in those countries, from whom future leaders and governments may well emerge.”⁴⁶⁵ Nevertheless, Amnesty mostly took a neutral stance about the possibility to enforce human rights through military instruments. During the debate before the Committee, Fiona Weir and Harriet Ware-Austin explained that “in terms of sanctions [...] Amnesty takes no position.”⁴⁶⁶ As the Conservative member of the Committee Mrs. Virginia Bottomley put it, Amnesty did not prescribe any particular solution to enforce human rights and remained fundamentally “agnostic on the means to achieving the solution.”⁴⁶⁷ Neutrality was the approach of Amnesty International toward the possibility of enforcing human rights. In spite of its large commitment to the promotion of human rights through foreign policy, Amnesty did not contribute to the invocation of armed humanitarian intervention and preferred to maintain a neutral position that did not prescribe any specific solution.

A similar discussion took place before the House of Commons Defence Committee with regards to the Strategic Defence Review, elaborated by the UK government and discussed by the parliament in the first half of 1998.⁴⁶⁸ On 25 March 1998, Oxfam was invited to submit a memorandum to the Committee. Similarly to Amnesty International, Oxfam demonstrated to share the government’s view on human rights and humanitarian emergencies. For Oxfam, the interdependent nature of the international system made it that “failure to invest in preventive deployments can lead to spiralling costs for humanitarian emergencies, as the Rwanda experience demonstrated.”⁴⁶⁹ Nevertheless, Oxfam also showed a certain concern with the risk of “blurring the lines between military and humanitarian interventions.”⁴⁷⁰ According to the organization, the use of military force for humanitarian reasons could undermine the humanitarian intent.

The core values of humanitarian intervention are neutrality, impartiality and independence. Military intervention, on the other hand, is by definition political and will be perceived as such by actors on the ground.⁴⁷¹

⁴⁶⁴ “The place of human rights in Foreign Policy, cit. para. 2.2.2.

⁴⁶⁵ “The Place of Human Rights in Foreign Policy”, cit. para. 2.2.4.

⁴⁶⁶ “Foreign Policy and Human Rights”, First Report of the Foreign Affairs Committee of the House of Commons, Minute of Evidence 17 February 1998, col. 273.

⁴⁶⁷ Cit. col. 275.

⁴⁶⁸ “The Strategic Defence Review” Eight Report of the Defence Committee of the House of Commons, 10 September 1998.

⁴⁶⁹ “The Strategic Defence Review”, Eight Report of the Defence Committee of the House of Commons, Submission by Oxfam on the Strategic Defence Review, 25 March 1998.

⁴⁷⁰ Submission by Oxfam on the Strategic Defence Review, 25 March 1998, cit.

⁴⁷¹ Submission by Oxfam on the Strategic Defence Review, 25 March 1998, cit.

On the one hand, Oxfam agreed with the government about the necessity to intervene against a wide range of new threats that were typical of the post Cold War international system, such as ethnic cleansing and lack of democratic rule of law. On the other hand, the organization put forward a more sober approach to tackling these issues. For Oxfam, instead of deploying troops and resorting to military force, the government should develop policies and instruments finalized to “reduce, rather than exacerbate, the risks of conflict.”⁴⁷² Not surprisingly, during the debate before the Committee, David Bryer, the then Director of Oxfam, maintained that military intervention should be used as a complement to other policies and be based on the consent of people involved. Quite clearly, Bryer argued that “the more we are seen as close to and part of the military intervention which is not there with total consent, the more we are part of the problem rather than the solution.”⁴⁷³

This position was re-proposed by Oxfam in a working paper published by the organization in 1998. Many of the essays contained in the paper aimed at defending the principle of neutrality during humanitarian emergencies. Responding to the accusation of those who charge humanitarian agencies for not distinguishing between victims and perpetrators of conflicts, Hugo Slim reminded that “in the right hands and in pursuit of the right ideals recognized in international humanitarian law, neutrality is an extremely valuable principle.”⁴⁷⁴

The debate before the Defence Committee saw the participation of another NGO that put forward similar ideas. Saferworld endorsed the government’s view presented in the Strategic Defence Review according to which internal conflicts and humanitarian emergencies constitute major threats to the security of the international system and require that the British military be ready to conduct peace keeping and peace enforcement operations in a more efficient way. Nevertheless, Saferworld preferred to stress the necessity to prevent humanitarian crises by intervening on the deeper causes of conflict, mostly poverty and economic inequality. As David Mepham argued before the Committee, “if one is serious about security in its broadest sense one clearly needs to engage [...] with the development agenda.”⁴⁷⁵ Fight against poverty and economic injustice was conceived by Saferworld as a more

⁴⁷² Submission by Oxfam on the Strategic Defence Review, 25 March 1998, cit.

⁴⁷³ “The Strategic Defence Review” Eight Report of the Defence Committee of the House of Commons, Minute of Evidence 25 March 1998, col. 1223.

⁴⁷⁴ Hugo Slim, “Relief Agencies and moral standing in war: principles of humanity, neutrality, and impartiality and solidarity” in *From Conflict to Peace in a Changing World: Social Reconstruction in Times of Transition*, edited by Deborah Eade (Oxford: Oxfam Working Paper, 1998): 13.

⁴⁷⁵ “The Strategic Defence Review” Eight Report of the Defence Committee of the House of Commons, Minute of Evidence 25 March 1998, col. 1184.

efficient approach rather than military enforcement in the form of humanitarian intervention.⁴⁷⁶

The only exception in this context of skepticism and neutrality was represented by a paper that was written by Professor Malcolm Chalmers and published by Saferworld in June 1999, right before the end of NATO military operation. This report endorsed coercive humanitarian intervention and accepted its logic. As Chalmers argued, “the use of force is a blunt instrument, liable to have serious and unanticipated consequences and therefore only to be deployed as a last resort. Yet Kosovo also suggests that, in some circumstances, the international community will be left with no alternative if it is not to stand by helplessly while mass murder and genocide take place.”⁴⁷⁷ The paper went further by calling for a deeper commitment of NATO through the deployment of ground troops. The bombing campaign was justified but still considered insufficient because it did not guarantee the safe return of refugees to their homes. This paper constituted one of the few clear examples of manifest endorsement by British NGOs of the use of force for humanitarian reasons.

Nevertheless, it is important to remind that the paper was published during the hostilities, when the issue of whether or not to invoke the norm of intervention had been already largely discussed by the government and the parliament. The fact that the only manifestation of open support for humanitarian intervention came in the form of an *ex post* justification almost at the end of hostilities sounds as further confirmation of the minor role played by NGOs and civil society actors in the process of invocation of the norm. The Saferworld report was published after the country had already implemented its strategy of norm invocation and humanitarian enforcement.

British NGOs, understood as representatives of the civil society’s point of view, played a minor role in the process of invocation of humanitarian intervention. Few NGOs and virtually no think tanks were involved in this process. The few reports on humanitarian issues did not take any strong stance either in favor of humanitarian intervention or in favor of the use of force to solve the Kosovo crisis.

On the one hand, British NGOs were supportive of an international action capable of pursuing justice and protecting human rights. For these reasons, they tended to endorse the “ethical foreign policy” put forward by the Blair government at the end of the 1990s. On the other hand, as to the instruments and the logic to be employed in order to achieve these aims, they took either an agnostic stance, as in the case of Amnesty International, or they stressed the importance of non-military means, such as development policies and neutral foreign aid.

British NGOs were not particularly keen on the norm of humanitarian intervention, which they

⁴⁷⁶ See also Malcolm Chalmers and David Mepham, *British Security Policy: Broadening the Agenda*, (London: Saferworld, 1997).

⁴⁷⁷ Malcolm Chalmers, *Kosovo: The Crisis and Beyond* (London: Saferworld, 1999): 19.

considered potentially more disruptive than neutral humanitarian assistance finalized at alleviating the sufferings of people. They remained more sympathetic towards a traditional view of the international system, in which external actors do not necessarily take side with a selected class of victims but provide aid in an impartial and non-contentious way. For British NGOs, the best way to enforce human rights remained the implementation of policies capable of preventing peoples from starting conflicts for scant resources.

In conclusion, in the case of humanitarian intervention during the Kosovo crisis, civil society actors did not play the role that a considerable part of the literature often predicts.

4.3 Party Politics And Intervention In Kosovo

UK's military intervention against the Federal Republic of Yugoslavia was preceded by the large victory of the Labour Party at the 1997 general elections. The proportion of this success allowed the newly elected Blair government to rely on a safe and comfortable majority in the House of Commons. This created the conditions for the appointment of a strong and effective party government, which is the typical institutional feature of the Westminster system.

Various scholars have viewed these characteristics of the British system, and the change of government that occurred in 1997, as the main explanatory factors for the high degree of receptiveness by the UK toward the norm of humanitarian intervention and, consequently, for its decision to intervene in the Balkans in 1999. The election of a 'renewed' Labour government capable of counting on a safe and comfortable majority provided the necessary ideological shift that allowed Britain to become sympathetic toward a norm that had been mostly neglected by the previous Conservative government and Party.

Paul Williams has, for example, explained how the Labour victory represented a revolution not only for UK's domestic politics but also for its foreign policy. At the basis of several decisions taken by the Labour government, especially during its first term, there would be what Williams defines as "crusading mentality"⁴⁷⁸, understood as the belief in the existence of universal values that need to be enforced by responsible states. This moral concern would require a re-consideration of the "ethical basis of the Westphalian understanding of international society and the norm of non-intervention."⁴⁷⁹ In this sense, the roots of British interventionism in Iraq (1998), Sierra Leone (1998), and Kosovo (1999) can be already found in the 1997 New Labour Electoral Manifesto in which it is said that Britain "will

⁴⁷⁸ Paul D. Williams, *British Foreign Policy Under the New Labour 1997-2001* (New York: Palgrave, 2005): 166.

⁴⁷⁹ Cit. p. 166.

make the protection and promotion of human rights a central part of [its] foreign policy.”⁴⁸⁰ The implementation of this foreign policy was facilitated by the interdependence between the political aims of the government and those of its majority.

Other scholars have provided analyses of British interventionism at the end of the 1990s as the result of a renewed commitment of the New Labour towards morality and human rights. These proactive stances sharply departed from the moderate and interest-based foreign policy of previous Conservative governments⁴⁸¹.

UK’s involvement in Operation Allied Force has been often interpreted as a “partisan intervention”, motivated by a structure of party politics and a type of party government that were favorable toward the possibility of waging war for humanitarian purposes. Thanks to the large victory at the 1997 elections, British politics came to be dominated by an interventionist government, whose political views and aims could be secured by a disciplined parliamentary majority capable of prevailing over the reluctant attitude of the Conservative opposition. The implicit point is that British intervention in Kosovo would have been much more difficult, if not impossible, had the Conservative Party been in power at the time of the crisis. Similarly to the Bosnian crisis, Britain would have taken a more cautious and less active stance, which would have been consistent with the ideology of the Conservative Party.⁴⁸²

This chapter does not ignore the importance of institutional and ideological factors, such as the structure of British party politics and the type of relations between the government and the legislature that characterized the debate over Kosovo. The existence of a parliamentary majority that was ideologically sympathetic toward intervention and politically loyal to the Blair government certainly constitutes an important element to understand the attitude of the UK over the issue.

Nevertheless, when the UK started to face the Kosovo crisis, the invocation of the existence of a duty and right to intervene mostly emerged as the result of legal and political interpretations autonomously put forward by the executive leaders. Invocation and recognition of humanitarian intervention implied an act of war and an arbitrary interpretation of the norm that were mostly devised by executive leaders. The decision to intervene against a sovereign state in the absence of a formal authorization of the UN Security Council was not the result of a parliamentary debate between political parties. Rather, it was the product of a specific set of ideas and beliefs that characterized the key figures

⁴⁸⁰ New Labour because Britain deserves better”, 1997 New Labour Electoral Manifesto, available from www.labour.org.uk.

⁴⁸¹ See for example, Richard Little and Mark-Wickham Jones, *New Labour’s Foreign Policy: A new Moral Crusade*.

⁴⁸² Brian C. Rathbun, *Partisan Interventions European Party Politics and Peace Enforcement in the Balkans*: 46-81.

of the British cabinet at the time of the debate.

4.3.1 Not a Partisan War: The Bipartisan Nature of UK's Intervention in Kosovo

If the structure of party politics were a decisive condition at explaining the invocation of humanitarian intervention during the Kosovo crisis, one should expect debates among parties to be characterized by a substantial difference between the positions of the Labour Party, which was sympathetic toward intervention, and those of the Opposition, represented by the Conservative Party, which should be more reluctant to commit British troops in faraway theatres. Nevertheless, what the analysis shows is the large degree of support by the majority of the parliament for the norm of humanitarian intervention and for the carrying out of Operation Allied Force. This support went beyond political affiliations. In all phases of the conflict, from the first acts of official condemnation by the government in mid-1998 until the outbreak of hostilities in March 1999, the majority of the three main parties recognized the legitimacy of invoking humanitarian intervention to stop the massive violations of human rights perpetrated by Slobodan Milosevic.

It is incorrect to define the military operation in Kosovo as a partisan intervention. Operation Allied Force is more correctly identifiable as a bipartisan intervention in which neither the frequent instances of support, nor the few instances of contestation followed clear ideological lines. Debates and disagreements were mostly within rather than among parties and the parliament was not characterized by a real political struggle between a majority, sympathetic to the norm and supportive of the government, and a minority, reluctant toward intervention and skeptical about the positions of the government.

Bipartisanship constituted the main feature of the debate that took place in Britain. For this reason, it would probably be hazardous to argue that had the Conservative Party been in power, the UK would have not intervened in Kosovo. The bipartisan nature of the debate over the Kosovo crisis did not activate the typical dynamics of party government, in which the government can rely on a safe parliamentary majority that is able to outvote the minority and implement its proposals. The Blair government did not need such a mechanism. No vote over the legitimacy of intervention was ever expressed by the parliament. Humanitarian intervention in Kosovo was invoked and performed with the consent of most British parliament. Instead of engaging in an ideological and partisan struggle, the parliament limited itself to endorse a political stance that was devised by the main members of the Labour cabinet.

The next section analyses the parliamentary debates that took place before and during the

Kosovo crisis. This analysis serves three main purposes: first, it gives a sense of the main arguments put forward by members of the parties in favor or against intervention; second, it shows the bipartisan nature of the debate over humanitarian intervention, which saw the opponents to the war substantially relegated to the extreme wings of their own parties; third, it demonstrates that during the Kosovo crisis, the invocation of humanitarian intervention by the UK was not the result of institutional factors, such as the structure of party politics or the mechanisms of party government that are typical of the Westminster system.

Operation Allied Force was not a partisan intervention motivated by the existence of a Labour majority capable of overcoming the skepticism of the Conservative Party. Rather, it was a bipartisan intervention, motivated by a specific interpretation of the norm of humanitarian intervention that was devised by the Labour leadership and endorsed by most British political parties.

4.3.2 *Invocation and Recognition of Humanitarian Intervention: An Intra-Party Debate*

The British Parliament mostly endorsed Operation Allied Force since its inception. This support was not only motivated by the need to back up the country and its armed forces in a time of crisis or by the commitment of the Labour majority toward the incumbent government. Rather, it was also motivated by the recognition of the legitimacy of a norm that dictates the use of military force for humanitarian purposes. The interpretation of humanitarian intervention put forward by the Blair government found the approval of the Labour Party and the Liberal Democrats, which supported an internationalist view of foreign policy, but also of the Conservative Opposition that by and large accepted the humanitarian logic with regards to the Kosovo crisis.

The Labour Party endorsed humanitarian intervention during the most important debates. This is not particularly surprising for a party whose 1997 electoral manifesto called for restoring “Britain’s pride and influence as a force for good in the world.”⁴⁸³ Led by Donald Anderson and Bruce George, respectively Heads of the Foreign Affairs and Defence Committees, the almost totality of the Party provided extensive support for a war that was conceived as “the use of humanitarian human rights to prevent holocausts.”⁴⁸⁴

Party members started to recognize the legitimacy of intervention and take it into account as a viable option already during fall 1998, when NATO countries were still trying to devise a diplomatic solution. In October 1998, Labour MP Campbell-Savours identified Milosevic as the real threat to

⁴⁸³ “New Labour because Britain deserves better”, cit.

⁴⁸⁴ Harry Cohen, *House of Commons Official Report*, 25 March 1999, col. 609.

peace and stability in the region by noticing that “it might be better for him to do a deal now rather than face the consequence of military action.”⁴⁸⁵

Similarly to the government, Labour MPs became even more supportive of the legitimacy of intervention after the Racak massacre, which occurred in January 1998. Ann Clwyd did not hesitate to argue that “in all the time that we have been talking and using diplomatic methods, we have achieved very little.”⁴⁸⁶ For this reason, David Winnick emphasized the necessity “to stop giving warnings to Belgrade and instead to act along military lines.”⁴⁸⁷ Comparisons with the “Nazi genocide” and requests to start treating Milosevic as a “war criminal” constituted constant elements of the Party’s rhetoric.⁴⁸⁸

What is important to notice is that the Labour Party not only showed its loyalty to the Blair government but also consistently endorsed the actions taken by British diplomacy as legitimate and motivated by just values. At the start of hostilities, Bruce George argued in favor of intervention in the region as a demonstration that “the concept of just war is not redundant.”⁴⁸⁹ In a similar way, Winnick noticed how the situation posed a fundamental choice to be made: “either we allow the atrocities – crimes against humanity – to continue or we decide to act, and act decisively.”⁴⁹⁰

Support for the operation and its humanitarian logic was guaranteed during the entire debate. Even more importantly, the Labour Party fully endorsed the interpretation provided by the government, according to which, there are exceptional circumstances, such as the need to prevent a humanitarian catastrophe, in which it is necessary to derogate from international law and enforce principles of justice through force. Council. For example, Donald Anderson argued that “international law has moved on from when we said that the integrity of sovereign states was sacrosanct.”⁴⁹¹ Siding with the government, the Party recognized the legitimacy of humanitarian intervention even in cases in which the requirements of international law, such as the necessity to rely on a UN Security Council resolution, are not strictly respected. Labour MPs agreed with the government’s interpretation that there are situations in which moral considerations of justice can and must overcome legal provisions.

In this respect, Franck Cook provided that “we can make nice legal points about why we should

⁴⁸⁵ Campbell-Savours, *House of Commons Official Report*, 19 October 1998, col. 963.

⁴⁸⁶ Ann Clwyd, *House of Commons Official Report*, 18 January 1999, col. 570.

⁴⁸⁷ David Winnick, *House of Commons Official Report*, 18 January 1999, col. 572.

⁴⁸⁸ Malcolm Wicks, *House of Commons Official Report*, 18 January 1999, col. 576.

⁴⁸⁹ Bruce George, *House of Commons Official Report*, 23 March 1999, col. 166.

⁴⁹⁰ David Winnick, *House of Commons Official Report*, 23 March 1999, col. 171.

⁴⁹¹ Donald Anderson, *House of Commons Official Report*, 25 March 1999, col. 550.

not take this action, but, frankly ... we cannot allow slaughter to go on in that state.”⁴⁹² In a similar way, Harry Cohen emphasized the necessity to stop massive violations of human rights by pointing that “if the United Nations will not do that, someone else must.”⁴⁹³ The Labour Party in its almost totality defended the arguments provided by the government during the entire debate that took place from the outbreak of hostilities until the end of the NATO campaign.

As the debates in the House of Commons indicate, Labour members backed up the Blair government in its invocation of humanitarian intervention for reasons of both institutional loyalty and ideological affinity. On the one hand, the Labour majority recognized the necessity to guarantee support for its newly elected government. On the other, most arguments put forward by Party members showed that humanitarian intervention was clearly perceived as ideologically coherent and morally fit with the ethical and internationalist foreign policy of the New Labour.

Along these lines, Liberal Democrats too vehemently advocated intervention in Kosovo. Since they were not part of the parliamentary majority that supported the Labour government, the Liberal Democrats sided with the logic and rationale of intervention mostly for ideological reasons. In their 1997 electoral manifesto, Liberal Democrats provided that the main goal of British foreign policy should be one of promoting “an enforceable framework for international law, human rights, and the protection of the environment.”⁴⁹⁴ Even though it did not explicitly mention humanitarian intervention, the electoral manifesto was based on the idea that for human rights and international law to be valid, they need to be enforced.

Since the very beginning of the crisis, the Liberal Democrats expressed their strong support for the possibility of using military force. In June 1998, Foreign Affairs Spokesman Menzies Campbell reminded that “diplomacy is at its most effective when it is supported by a credible military threat.”⁴⁹⁵ As with many other MPs, Campbell’s support intensified after the Racak massacre. In his opinion, the dramatic situation required that NATO forces be ready and available “to protect the innocent citizens of Kosovo if they are subjected to deliberate aggression by the Serbian government.”⁴⁹⁶ As can be noticed, the humanitarian argument in favor of intervention was accompanied by the identification of Milosevic as the main responsible to be prosecuted.

The strong commitment of Liberal Democrats toward humanitarian intervention was sometimes

⁴⁹² Franck Cook, *House of Commons Official Report*, 25 March 1999, col. 601.

⁴⁹³ Harry Cohen, *House of Commons Official Report*, 25 March 1999, col. 608.

⁴⁹⁴ “Make the Difference”, 1997 Liberal Democrat General Election Manifesto.

⁴⁹⁵ Menzies Campbell, *House of Commons Official Report*, 16 June 1998, col. 118.

⁴⁹⁶ Menzies Campbell, *House of Commons Official Report*, 18 January 1999, col. 569.

even more vigorous than the one of the Labour majority. For example, Liberal Democrats often criticized the bombing campaign as insufficient and ineffective. For Liberal Democrats, the government needed to take into account the possibility of deploying ground troops, an option that was viewed with skepticism by most NATO countries. The leader of the Party Paddy Ashdown argued that the gravity of the situation implied that “the international community could not stand idly by and watch Kosovo descend into a bloody civil war if President Milosevic attempts a final solution.”⁴⁹⁷ As a consequence, Britain had to be ready to deploy ground troops.

Remarkably, despite the fact that they were not part of the parliamentary majority that supported the Blair government, Liberal Democrats were among the most advocates of humanitarian intervention and the possibility of waging a military operation against the sovereignty of another state, even without the formal authorization of the UN Security Council. Relying on moral arguments, Liberal Democrats endorsed the interpretation of humanitarian intervention put forward by the government according to which, under exceptional circumstances, the legitimacy of intervention must overcome the legal requirements imposed by international law. As Liberal Lord Wallace observed during a debate in the House of Lords, the traditional doctrine of sovereignty needed to be revised in order to guarantee the protection of fundamental human rights. This major revision of international law had to involve the main international institutions established after WWII: “The doctrine of a just war was always a limitation on sovereignty...It is extremely odd that we see in the UN at present China and Russia as the defenders of the principle of absolute sovereignty against those in the world who recognize that government is also a contract and that contract can be broken.”⁴⁹⁸

For Liberal Democrats, in today’s international relations, individuals and their rights need to take precedence over traditional concepts such as sovereignty and non-intervention. The endorsement of the interpretation of intervention provided by the government was consistent with this ideology and characterized the attitude of Liberal Democrats during the entire debate.

What is more surprising is the degree of support for the logic of intervention and for the interpretation put forward by the government that characterized the Conservative Party. In his analysis of the parliamentary debates, Rathbun has argued that only few Conservatives supported the war and they did so merely for patriotic reasons. Once hostilities began, they thought it was necessary to support British troops in the midst of a war. This would be the main reason for support by some members of the Conservative Party during the Kosovo crisis. Except for this, for Rathbun, the majority

⁴⁹⁷ Paddy Ashdown, *House of Commons Official Report*, 20 January 1999, col. 904.

⁴⁹⁸ Lord Wallace, *House of Lords Official Report*, 6 May 1999, col. 894.

of the Party rejected the logic of intervention as they had already done in 1992 during the Bosnian crisis.⁴⁹⁹

Certainly, some Conservative MPs supported the war for mere patriotic reasons. Particularly at the start of hostilities, various Conservatives manifested their support for British troops. As Michael Colvin claimed when the government announced the start of air strikes, “at a time when our armed forces are putting their lives at risk, it is necessary to demonstrate solidarity.”⁵⁰⁰ In a similar way, during the air campaign, the leader of the Party William Hague reminded how, “in order to achieve peace and security in Kosovo, British service men now risk their lives every day.”⁵⁰¹ With Britain involved in a dangerous operation, the Opposition felt necessary to endorse the intervention.

Nevertheless, in many other instances, important members of the Conservative Party not only supported the effort of British troops, but also put forward argument in favor of the logic of intervention and pushed the government toward more resolute action in order to solve the humanitarian crisis. Conservative MPs perceived humanitarian intervention as both a necessary option and a legitimate action. Manifestations of support for the logic of intervention came from the Conservative Party even before the outbreak of hostilities. For example, on 19 October 1998, when Foreign Secretary Robin Cook announced NATO’s readiness to use force, Shadow Foreign Secretary Michael Howard did not hesitate to argue that “if action had been taken along these lines in March or April [...] hundreds of lives would have been saved, hundreds of thousands of people would still be living in their homes and enormous suffering and anguish would have been prevented.”⁵⁰² Consistently with this stance of the Party in favor of intervention, at the beginning of the Rambouillet talks in February 1999, Howard announced the intention of the Opposition to “support the decision by the North Atlantic Treaty Organization to authorize the possible use of force.”⁵⁰³

Surprisingly enough for a Party whose foreign policy is usually based on traditional concepts, such as the defense of the national interest, various Conservative MPs often pushed the government toward the use of military force. This call for more resolute action soon turned into an explicit request to deploy ground troops in case of necessity. On 19 April 1999, after three weeks of only partially successful bombing, Nicholas Soames noticed how, in the light of the situation, “it is clear that there will have to be a major commitment of ground forces.”⁵⁰⁴

⁴⁹⁹ Brian C. Rathbun, *Partisan Interventions*, 46-81.

⁵⁰⁰ Michael Colvin, *House of Commons Official Report*, 24 March 1999; see also William Hague, 13 April and 19 April.

⁵⁰¹ William Hague, *House of Commons Official Report*, 13 April 1999, col. 21.

⁵⁰² Michael Howard, *House of Commons Official Report*, 19 October 1998, col. 955.

⁵⁰³ Michael Howard, *House of Commons Official Report*, 1 February 1999, col. 599.

⁵⁰⁴ Nicholas Soames, *House of Commons Official Report*, 19 April 1999, col. 594.

That the Conservative Party did not endorse Operation Allied Force only for patriotic or strategic reasons can be understood by looking at the moralistic rhetoric of its leaders, which was not very different from that of the Labour Party. During the main debates on intervention, Hague defined Milosevic as “an evil man with much blood in his hands.”⁵⁰⁵ This required that action be taken in order to both save NATO’s credibility and avoid a humanitarian catastrophe. When hostilities began, Howard observed that the operation “[was] consistent with the requirements of a just war.”⁵⁰⁶ In a similar way, he added that:

There are those who say that despite that aggression, despite the crimes against humanity that have been committed and despite the untold human misery that we have witnessed, NATO and the West should have stood by. I am not one of them.⁵⁰⁷

Along these lines, Opposition’s Deputy leader, Patrick Cormack referred to the widespread abuses of human rights perpetrated by Milosevic by arguing that “to allow these things to happen in our continent is, frankly, shaming to us all.”⁵⁰⁸

Conservative support for humanitarian intervention during the Kosovo crisis was also motivated by the memory of previous inaction in Bosnia in 1992. The awareness of the humanitarian disasters to which that political choice led became a powerful trigger to embrace the rationale for intervention in Kosovo. This emerges from the analysis of the debates in House of Lords. For example, in March 1998, the Earl of Onslow admitted that “force worked ultimately in Bosnia [...] had we been more prepared to use it earlier, it may not have been necessary.”⁵⁰⁹ In a similar vein, in January 1999, Lord Moynihan recalled the Bosnian experience by asking the Government to “respond before it is too late.”⁵¹⁰ Even during the actual war, when air strikes did not prove particularly successful at ending the ethnic cleansing against Kosovars, Lord Selsdon did not hesitate to criticize the previous Conservative government for its inaction in Bosnia: “this is one of those occasions when I feel a ghost passing over my grave. I refer to 1 April 1993. I remember a debate in this House [...] we talked about Kosovo and the fear of a war and ethnic cleansing. We asked what the then government intended to do about that. They did nothing. I feel a sense of shame I did not do anything.”⁵¹¹ These statements show how several Conservative representatives conceived intervention in Kosovo as a necessary political stance to avoid

⁵⁰⁵ William Hague, *House of Commons Official Report*, 23 March 1999, col. 164.

⁵⁰⁶ Michael Howard, *House of Commons Official Report*, 25 March 1999, col. 542.

⁵⁰⁷ Michael Howard, *cit.*, col. 542.

⁵⁰⁸ Patrick Cormack, *House of Commons Official Report*, 25 March 1999, col. 569.

⁵⁰⁹ The Earl of Onslow, *House of Lords, Official Report*, 10 March 1998, col. 137.

⁵¹⁰ Lord Moynihan, *House of Lords Official Report*, 18 January 1999, col. 396.

⁵¹¹ Lord Selsdon, *House of Lords, Official Report*, 6 May 1999, col. 841-2.

another failure that could evoke the dramatic experience of Bosnia.

In conclusion, parliamentary debates indicate that the process of invocation of humanitarian intervention before and during the Kosovo crisis did not follow clear ideological lines. Support for the logic of intervention not only came from the Labour Party and the Liberal Democrats but also from the Conservative Opposition. Even in the midst of hostilities, when most NATO governments started to express concern with the effectiveness of the bombing campaign, Howard, speaking on behalf of the Party, maintained that “it was right to take action against the regime that has inflicted so much terror on those whom it regards as its own citizens.”⁵¹² This constituted an important manifestation of support for the logic of invoking humanitarian intervention.

This support came from a Party that is traditionally viewed as being mostly concerned with the defense of the narrow interests of Britain. Remarkably, Conservative MPs and Lords did not question the legitimacy of an operation that was being carried out without authorization of the UN Security Council and that implied a large commitment of military resources to solve a crisis that did not directly affect the interests of Britain. The moralistic rhetoric employed by most Conservative members shows the substantial acceptance of the idea that under exceptional circumstances justice has to take precedence over both the legal requirements imposed by international law and calculations of the material interest of a country.

4.3.3 Contesting Humanitarian Intervention: Another Bipartisan Debate

A further indicator of the bipartisan nature of the debate can be found in the analysis of the instances of contestation and opposition that were raised against the invocation of the norm. Despite the large support for humanitarian intervention, not all members of the parliament agreed with the interpretation provided by the government and with the consequent decision to wage a military operation. Nevertheless, similarly to what happened with the endorsement of the norm, neither opposition followed ideological or partisan lines. Rather, contestation of humanitarian intervention was present in both Labour and Conservative parties. In particular, the main disagreements emerged within the left wing of the Labour Party and some members of the Conservative Party.

Labour MPs, such as Alice Mahoney and Tony Benn, criticized the use of force for humanitarian reasons on pacifist grounds, in the sense that military violence was not regarded as the right instrument to save people. After the first weeks of bombings, when BBC started to broadcast

⁵¹² Michael Howard, *House of Commons Official Report*, 19 April 1999, col. 583.

images of the killings of civilians, Mahoney polemically asked Tony Blair “what is humanitarian about bombing civilians on a passenger train?”⁵¹³ George Galloway and Tam Daylell criticized the notion of humanitarian intervention for being hypocritical and selective. As Galloway argued, “I merely ask the British Government to take great care, because the arguments that they are advancing for intervening in the civil war in Yugoslavia will be advanced by others in other theatres and will, at best, show the Government to be guilty of double standards and, at worst, lead the Government into ever-more bloody and complicated territory.”⁵¹⁴ For left-wing Labour MPs, humanitarian intervention was to be regarded as a contradiction. By using traditionally pacifist arguments, these MPs contested the nature of war that by definition cannot aspire to be humanitarian.

Some Conservative MPs criticized the logic of intervention by putting forward realist arguments based on the notion of national and defense interest. For example, backbenches, such as Douglas Hogg and Peter Viggers, argued that there were no clear interests for Britain to justify an intervention in the region. Viggers often reminded that “the purpose of foreign policy is to protect and promote the interests of the United Kingdom.”⁵¹⁵ Intervention in Kosovo had to be interpreted as a waste of resources that could potentially distract Britain from the pursuit of more vital foreign policy goals. Along these lines, Julian Brazier, a member of the Defence Select Committee, admonished that “Britain cannot be the world’s police-man.”⁵¹⁶

The most relevant critique that followed this ‘realist’ logic came from former Foreign Secretary Lord Carrington. In a debate in the House of Lords, Carrington defended the cautious stance taken by Britain during the Bosnian crisis and criticized the excessively proactive position of the Blair government. In particular, he referred to previous involvement in the region by arguing that it is always a mistake “to intervene, in particular militarily, to keep a peace which does not exist.”⁵¹⁷ In the words of the former head of British diplomacy, intervention was to be regarded as a risky action, likely to pave the way for a major and long-standing involvement in an extremely unstable region.

Finally, the largest instances of contestation of humanitarian intervention came from those MPs and Lords that opposed the Operation for its lack of legal basis. The left wing of the Labour Party, Conservative MPs, such as Bowen Wells and Alan Clarke, and most notably Labour Lords Kennet and Jenkins variously opposed the principle of intervention for humanitarian purposes as a “direct blow at

⁵¹³ Alice Mahoney, *House of Commons, Official Report*, 13 April 1999, col. 31.

⁵¹⁴ George Galloway, *House of Commons, Official Report*, 25 March 1999, col. 593.

⁵¹⁵ Peter Viggers, *House of Commons Official Report*, 19 April 1999, col. 630.

⁵¹⁶ Julian Brazier, *House of Commons Official Report*, 18 January 1999, col. 576.

⁵¹⁷ Lord Carrington, *House of Lords Official Report*, 25 March 1999, col. 1490.

the rule of international law.⁵¹⁸ In particular, Lord Kennet criticized the government and NATO for bypassing the Security Council and creating the conditions for “the institutionalisation of U.S. hegemonism outside the United Nations with the connivance and support of the rest of NATO.”⁵¹⁹ For Lord Kennet, these kinds of NATO operations should be “properly mandated by UN authority”⁵²⁰ and not by the arbitrary decision of a restricted group of Western states. For this heterogeneous group of MPs and Lords, humanitarian intervention in Kosovo was setting a dangerous precedent that could compromise the stability and validity of international law.

Similar concerns were expressed by the Conservative Earl of Lauderdale who reminded how intervention could not but be unlawful “without clear sanction either in international law or by resolution of the United Nations Security Council.”⁵²¹ This group of MPs and Lords rejected the interpretation provided by the Labour government and most NATO countries according to which under exceptional circumstances, such as the urgent necessity to stop massive violations of human rights, the legal basis of an intervention can be found in its legitimate attempt to enforce moral values of justice. This was perceived as an unacceptable derogation from existing international law that could facilitate inconsistent or instrumental use of military force.

At the time of the 1999 Kosovo crisis, British party politics was generally sympathetic toward the invocation and enforcement of the norm of humanitarian intervention. The majority of parties, both within the House of Commons and the House of Lords, substantially recognized the legitimacy of using force for humanitarian purposes. Not only the Labour Party, but also the Liberal Democrats and most Conservative Party endorsed the logic of intervention. Recognition and invocation of the norm were much more bi-partisan than one could expect. Similarly, the few instances of contestation did not follow clear ideological lines, but involved both left and right wing representatives of the two Houses. Most of the arguments provided were similar, especially with reference to the lack of legal basis. This should be a further confirmation that invocation and contestation of humanitarian intervention could be found in all parties and the arguments provided in favor or against the norm were only partially driven by their respective ideologies. Invocation and contestation cut across parties. Debates took place much more within rather than among parties.

Party politics and the dynamics of party government did not constitute the main conditions that

⁵¹⁸ Lord Kennet, *House of Lords, Official Report*, 14 December 1998, col. 1212; see also Bowen Wells, *House of Commons, Official Report*, 25 March 1999, 565; Alan Clarke, 25 March 1999, col. 574.

⁵¹⁹ Lord Kennet, *House of Lords, Official Report*, 19 June 1998, col. 1829.

⁵²⁰ Lord Kennet, *House of Lords Official Report*, 3 March 1999, col. 1721.

⁵²¹ Earl of Lauderdale, *House of Lords Official Report*, 6 May 1999, col. 860.

led the UK to be one of the most vehement advocates of humanitarian intervention. Although the existence of a large consensus in favor of the norm certainly helped the government to implement its strategy of intervention, the bipartisan nature of the debate did not activate the typical dynamics of party government, according to which the Cabinet invokes the support of a disciplined and cohesive majority to achieve its aims.

In order to invoke and enforce humanitarian intervention, the Blair government did not need to secure any particular legislative proposal by obtaining the consent of its majority. The norm of intervention triggered a debate that did not follow partisan or ideological lines. As a consequence, the government did not face any real minority to outvote and rather enjoyed the large and bipartisan support of an assembly that could not even formally express its binding opinion in the form of a resolution or a bill.

The institutional structure of party government, which is typical of the Westminster system and usually allows the Cabinet to have its proposals passed, did not play a decisive role in the process of invocation of humanitarian intervention and should not be seen as the main condition for this outcome. Invocation of humanitarian intervention was by and large the result of an autonomous decision by the British leadership. Composed of the main members of the Cabinet, this leadership devised a particular interpretation of the norm and imposed it on a receptive but fundamentally disarmed parliament. This finding confirms that in case of unspecified and scantily institutionalized norms, whose invocation does not require the ratification of a treaty or a decisive involvement of the legislature, the final outcome of the process is likely to be the result of the will and arbitrary decision of executive leaders.

Invocation of humanitarian intervention during the Kosovo crisis was not a partisan process that occurred as the result of specific institutional features of the British system. Rather, it was the product of the ideas and beliefs of a specific executive leadership.

4.4 Executive Leaders And Intervention In Kosovo

Executive leaders, understood as the main members of the government, have often the lion's share in the process of domestic legitimization of norms. This is true especially in case of norms that have not found any specific institutionalization at the international level in the form of a treaty or a convention and are consequently still in an emergent status.

Government leaders play a crucial role at providing interpretations of emerging norms that would otherwise remain obscure or uncertain. After having chosen the interpretation that most fits with their interests and ideology, leaders are in a privileged position to convince domestic and foreign

audiences of the validity of such an interpretation. Particular efforts are devoted to convincing other domestic actors, such as political parties and civil society movements, that their interpretation of the norm “reflects a widely shared or even universal moral sense, rather the peculiar moral code of one society.”⁵²²

The decision to recognize an emerging and unspecified international norm or to contest and reject it tends to be the prerogative of government leaders. Their action is not subject to the institutional constraints that are usually related to the passing of a parliamentary proposal. Consequently, leaders are freer to decide what to make of a certain norm and to devise and impose their own interpretation on the basis of their ideas, goals, and beliefs.

4.4.1 British Leadership and Humanitarian Intervention

Operation Allied Force constitutes a prominent example of invocation and recognition of the legitimacy of armed humanitarian intervention. In the UK, the outcome of this process was mostly shaped by the members of the Labour government that were responsible for foreign policy-making, in particular Prime Minister Tony Blair, Secretary of State Robin Cook, and Secretary of Defence George Robertson. These political characters acted as moral and norm entrepreneurs by devising a specific political strategy and a particular interpretation of the international system that led the UK to be one of the most supporters of humanitarian intervention at the end of the 1990s. These political leaders found their own way to invoke the legitimacy of a highly controversial norm and impose it on the domestic debate.

Party politics and institutional characteristics of the British system did not hinder the process but at the same time should not be seen as major explanatory factors for the recognition of humanitarian intervention as a legitimate normative framework. Most of the job was done by the British leadership that could count on the *ex post* support of a receptive party system and on the substantially neutral position of civil society. This emerges, in particular, from the analysis of the most controversial aspect of the process, which concerned the legality of humanitarian intervention and Operation Allied Force.

Various scholars of British politics have emphasized the dominant role of Tony Blair and his closest advisors in the process of domestic and foreign policy-making. Many policies were devised and implemented through the actions of small groups of advisers and political allies, coordinated by key

⁵²² Ethan A. Nadelmann, “Global Prohibition Regimes”, 482.

figures of the Cabinet. For this reason, the Blair government has been defined as “command and control premiership rather than collegial.”⁵²³ In a similar way, British foreign policy under the New Labour has been interpreted as the result of the ideas and beliefs of Prime Minister Blair and Foreign Secretary Cook. These would be the main political actors that were responsible for the definition and implementation of an “ethical foreign policy”, which was based on a cosmopolitan rhetoric and on the protection and enforcement of human rights.⁵²⁴

This particular style of foreign policy was evident in the waging of intervention in Kosovo, which has been interpreted by many scholars and observers as a “Blair’s war”. Some have highlighted how at the basis of intervention there were material interests, such as the will to play “a diplomatic and military card in order to gain influence in Europe.”⁵²⁵ Others have emphasized how the war was mostly motivated by ethical reasons, such as the necessity to avoid that “amoral equivalency”⁵²⁶ that had previously led Western countries to be indifferent to the tragic events in Bosnia.⁵²⁷ Despite their differences, what these analyses generally share is that intervention in Kosovo should be mostly seen as a fundamentally autonomous decision of prominent figures within the Labour government, in particular Tony Blair⁵²⁸, and Robin Cook⁵²⁹.

What need to be explained is how the Labour leadership interpreted the norm of humanitarian intervention and how this interpretation was imposed on the other actors involved in the debate. This helps understand the domestic mechanisms through which a highly controversial norm, which was subject to extensive criticism by powerful members of the international community, gained prominence and legitimacy in the British system.

Since October 1998, when NATO members agreed on authorizing a limited set of air strikes against the Federal Republic of Yugoslavia, Western leaders had to face the difficulties at waging a war that would certainly find the opposition of permanent members of the Security Council, such as Russia and China. Moreover, the operation could not be presented as a defensive war since it was not a response to a previous threat or attack. This made clear that humanitarian intervention could be invoked

⁵²³ Peter Riddell, “Blair as Prime Minister”, in *The Blair Effect. The Blair Government 1997-2001*, ed. Anthony Seldon (London: Little Brown and Company, 2001): 21.

⁵²⁴ Christopher Hill, “Foreign Policy” in *The Blair Effect*, 331-353.

⁵²⁵ Carol Hodge, *Britain and the Balkans 1991 Until Present*, 158.

⁵²⁶ John Kampfner, *Blair’s Wars* (London: Free Press, 2003): 37.

⁵²⁷ The importance of the Bosnian experience for the decision to wage war against the Federal Republic of Yugoslavia in 1999 can also be found in Andrew Rawnsley, *Servants of the People The Inside Story of the New Labour* (London: Hamish Hamilton, 2000): 260; and John Rentoul, *Tony Blair Prime Minister* (London: Little Brown and Company, 2001): chapter 32.

⁵²⁸ Anthony Seldon, *Blair* (London: Simon and Schuster, 2004).

⁵²⁹ John Kampfner, *Robin Cook* (London: Orion Books, 2004).

and the war waged only by breaching existing international law and bypassing the authority of the Security Council. British and NATO leaders faced the challenge of finding an interpretation that could be accepted and recognized as legitimate at the domestic and international level.

4.4.2 *Providing the Context: The New Labour Interpretation of the International System*

In order to understand the strategy that British leaders devised to invoke the norm of intervention, it is necessary to analyze the political mindset that characterized the British government with regards to foreign policy.

During the 1997 Electoral campaign, foreign policy did not constitute the most concern of New Labour leaders. The electoral manifesto was mostly focused on domestic politics. Only its last part was dedicated to foreign policy, but was characterized by broad statements, as for example that “with a New Labour Government, Britain will be strong in defence; resolute in standing up for its own interests; an advocate of human rights and democracy the world over.”⁵³⁰ Moreover, during the 1997 Electoral campaign, Blair dedicated only one speech to foreign policy⁵³¹.

However, once in power, the key figures of the newly elected Labour government were quick to devise a specific foreign policy strategy. From this moment on, Blair, Cook, and Robertson elaborated a foreign policy that aimed to mark a significant difference from previous Conservative governments. This foreign policy has been defined by scholars and members of the government alike as “ethical foreign policy,”⁵³² in that it aimed to depart from isolationism and mere defense of the national interest in favor of human rights and democracy. Labour leaders started to spell out this foreign policy immediately after the electoral victory through the publication of two major documents: The Mission Statement, devised by the FCO and presented to the parliament in May 1997, and the Strategic Defence Review (SDR), elaborated by the Secretary of Defence and presented in July 1998. These documents, together with various speeches and public statements, help understand the ideological and cultural context in which the norm of humanitarian intervention could be invoked, interpreted, and enforced. Three main elements constituted this foreign policy mindset.

First, the Labour government provided an interpretation of the post-Cold War international system as characterized by interdependence. On the one hand, this meant interdependence of opportunities, such as free trade and foreign investments. On the other hand, this could also mean

⁵³⁰ “New Labour because Britain deserves better”, cit.

⁵³¹ Tony Blair, Speech at Bridgewaterhall, Manchester, 21 April 1997.

⁵³² Robin Cook, “speech on the Government’s ethical foreign policy” 12 May 1997, available from <http://www.guardian.co.uk/world/1997/may/12/indonesia.ethicalforeignpolicy>.

interdependence of threats and challenges to peace and security. In a speech before the South African parliament, Blair reminded how

A breakdown of law and order in Afghanistan means more heroin on the streets of London. A stock market fall in Asia can destroy jobs in Johannesburg. Bosnia exploding into chaos threatens the EU. War in the Congo holds back the whole of Southern Africa.⁵³³

In an interdependent and globalized world, interests could not be merely conceived as national since any country was enmeshed in a complex web of reciprocal responsibilities.

The foreign policy document that more than any other emphasized this challenging dimension of contemporary international system was the SDR, which represented the ambitious attempt to restructure British defense in order to adapt it to the post-Cold War environment.⁵³⁴ This document started from the assumption that the end of the Cold War had brought instability and “new risks to our security and our way of life.”⁵³⁵ For this reason, the British Army needed to become more flexible and able to “go to the crisis rather than have the crisis come to us.”⁵³⁶ This called for a large commitment “to contribute to a strong world community”⁵³⁷, in which interests and responsibilities should have primarily an international dimension, and not only a national one.

According to this logic, international crisis had to be conceived as sources of both injustice and instability, thus calling “on our Armed Forces to become involved in averting, managing, or countering these new security challenges, with other NATO allies or other countries.”⁵³⁸ Among the main threats to security, the document listed intra-state conflicts and massive violations of human rights. In this respect, British forces “must be able to back up our influence as a leading force for good in the world and meet our responsibility towards the UN by helping to prevent or manage crisis.⁵³⁹” Peace operations should no longer aim to merely keep factions separate. Rather, they had to be “coercive in nature⁵⁴⁰” and conducted with the purpose of enforcing universal values from which the security of the international community depended.

⁵³³ Tony Blair, “Facing the Modern Challenge: The Third Way in Britain and South Africa”, speech by the Prime Minister Tony Blair, The Old Assembly Dining Room, Parliament Building, Cape Town South Africa, Friday 8 January 1999. Available from <http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=2149436>.

⁵³⁴ For an analysis of the Strategic Defence Review, see Colin McInness, “Labour’s Strategic Defence Review” *International Affairs* Vol.74 No.4 (October 1998): 823-45; Rod Thornton, “A Welcome Revolution? The British Army and the changes of the strategic defence review” *Defence Studies* Vol.3 No.3 (Autumn 2003): 38-62.

⁵³⁵ “Strategic Defence Review: Modern Forces for the Modern World”, presented to Parliament by the Secretary of State for Defence by Command of Her Majesty, July 1998, para. 5.

⁵³⁶ “Strategic Defence Review”, para. 6.

⁵³⁷ Cit., para. 19.

⁵³⁸ Cit., para. 22.

⁵³⁹ Cit., para. 201.

⁵⁴⁰ Cit., para. A 25.

The Labour government put forward an interpretation of the international system according to which faraway humanitarian crises could become a threat to the security of any country. In this sense, during the Kosovo crisis, Blair did not hesitate to argue that “we are all internationalist now, whether we like it or not”, by which he meant that “we cannot turn our backs on conflicts and the violations of human rights within other countries if we want still to be secure.”⁵⁴¹

This leads to the second main element of Labour foreign policy, which consisted of the attempt to create a strategic link between international security and commitment to justice and human rights. This link could help devise a foreign policy, in which defense of the national interest and commitment to justice could not only coexist but also reinforce each other. This was argued, for example, by the FCO Mission Statement, which provided that “we shall work through our international forums and bilateral relations to spread the values of human rights, civil liberties, and democracy, which we demand for ourselves.”⁵⁴² In a similar way, the SDR provided that “instability inside Europe as in Bosnia, and now Kosovo threatens our security. Instability elsewhere - for example in Africa - may not always appear to threaten us directly. But it can do indirectly and we cannot stand aside when it leads to massive human suffering.”⁵⁴³ For the government, justice and respect for human rights were preconditions for a secure international system. Consequently, defense and security interests should not be seen as opposed to humanitarian values, but they were, rather identifiable as the two sides of the same coin.

Members of the government reiterated this point in several occasions. For example, Ministry of Defence Lord Gilbert suggested that “Britain has also wider security interests which could lead us to contribute to coalition operations and humanitarian operations.”⁵⁴⁴ Along these lines, in his famous speech given in Chicago in April 1999, Blair reminded how

In the end values and interests merge. If we can establish and spread the values of liberty, the rule of law, human rights, and an open society then it is in our national interest too. The spread of our values make us safer.⁵⁴⁵

The interconnection between security and values of justice required that resolute action be taken, especially in cases of sudden and massive threats, such as violations of human rights and humanitarian crises. This action had sometimes to involve the use of military force. As Blair stated at the beginning

⁵⁴¹ Tony Blair, “The Doctrine of the International Community”, Speech at the Chicago Economic Club, Chicago, 24 April 2009, available from <http://www.number10.gov.uk/Page1297>

⁵⁴² FCO Mission Statement, 12 May 1997.

⁵⁴³ “Strategic Defence Review, para. 7.

⁵⁴⁴ *House of Lords, Official Report*, 6 November 1997, col. 1484.

⁵⁴⁵ Tony Blair, “The Doctrine of the International Community”.

of intervention in Kosovo, “there are times when we have to stand up and fight for peace, when force is the final resort of those who know that the only peace that ever lasts is a just peace, a peace based on justice.”⁵⁴⁶ Nevertheless, responsible action to tackle humanitarian crises could not be appropriately carried out without a re-consideration of the logic and functioning of the international organizations that had been created after WWII.

For this reason, the third main element of British foreign policy under the New Labour was constituted by the will to re-define goals and decisions-making procedures within international organizations, particularly the Security Council and NATO. As Robertson argued during a debate in the House of Commons Defence Committee, “organisations have two fundamental choices: they can adapt, or they can die. A state of irrelevance for a security organisation is no different than honest disbandment.”⁵⁴⁷ This meant that in an interdependent world in which threats to security could emerge in many different theatres, international institutions needed to work efficiently and be able to respond to crises in a resolute way. Decision-making procedures and goals that had been defined after WWII had to be updated and adapted to the present circumstances.

This attitude has been defined as “assertive multilateralism”, intended as the search for “effective forms of cooperation rather than the need to work through permanent organisations.”⁵⁴⁸ These organizations were not any longer to be seen as the ultimate benchmark for the legitimacy of international action. On the one hand, in his introduction to the SDR, Robertson argued that Britain supported “the efforts to make the UN a more effective tool in resolving international problems.”⁵⁴⁹ Nevertheless, on the other hand, in case of impossibility of reaching a consensual decision, the Security Council could not become an obstacle to the pursuit of justice and security. This was considered particularly unacceptable by the Labour leadership in case of massive violations of human rights. When they occur, the international community has the duty and the right to intervene. This intervention could find legitimacy even in case it was carried out only by one part of the international community and without formal authorization by the Security Council. As Blair put it, “when the international community agrees certain objectives and then fail to implement them, those who can act must.”⁵⁵⁰

According to this logic, Labour leaders believed that NATO was likely to become one of the

⁵⁴⁶ Tony Blair, “Blair confirms launch of NATO air strikes”, edited transcript of Press Conference by the Prime Minister, Mr. Tony Blair, Berlin, Germany, 24 March 1999, Available from <http://www.fco.gov.uk/en/newsroom/latest-news/?view=News&id=2243503>.

⁵⁴⁷ George Robertson, “Third Special Report on the Future of NATO”, House of Commons Defence Committee, para. 173.

⁵⁴⁸ Paul Williams, *British Foreign Policy Under the New Labour*, 166.

⁵⁴⁹ George Robertson, “Introduction by the Secretary of State for Defence” in *Strategic Defence Review*, para. 18.

⁵⁵⁰ Tony Blair, “Facing the Modern Challenge”, cit.

international actors that could intervene and enforce human rights in situations of emergency or impossibility of reaching a common position within the UN. Speaking about the moral duty to fight against ethnic cleansing and genocide, Cook did not hesitate to define NATO as a “major humanitarian agency.”⁵⁵¹ Along these lines, Blair did not seem to be particularly concerned with the lack of Security Council’s authorization for NATO Operation in Kosovo. For Blair, it was crucial “to find a new way to make the UN and its Security Council work if we are not to return to the deadlock that undermined the effectiveness of the Security Council during the Cold War.”⁵⁵² What the British political leader meant was that when justice is at stake, legal requirements and international organizations cannot become an excuse for inaction.

Members of the Labour government reiterated these types of arguments in the most important parliamentary debates over the Kosovo crisis. Especially after the failure of the Rambouillet Conference in early March 1999, when it became clear that military force was the only way to stop human rights abuses in the region, government representatives provided an interpretation of humanitarian intervention and in general of the international system according to which, formal authorization by the Security Council was not to be seen as the only element capable of rendering a military operation legal.

‘Overwhelming humanitarian necessity’ became the official label through which to identify the legality and legitimacy of a humanitarian intervention. As Foreign Office Minister Baroness Symons argued several months before the operation, “any NATO action would need to be in accordance with international law, but it is clear that not all operations should require a Security Council resolution.”⁵⁵³ In a subsequent debate that took place after NATO Actworn in September 1998, Symons provided another example of assertive multilateralism, when she warned that “NATO cannot allow any politically motivated veto to prevent us from saving lives in Kosovo.”⁵⁵⁴ Through this logic, the government made clear that constraints imposed by legal requirements or procedures of international institutions could not become obstacles to processes of human rights enforcement.

In conclusion, for the Labour government, the interdependent nature of contemporary international relations obliged states to link security interests and humanitarian reasons. Even faraway and minor crises could soon lead to challenges to international stability. This required that effective

⁵⁵¹ Robin Cook, “Kosovo and the Modern Europe”, speech by the Foreign Secretary Robin Cook at the Lord Mayor’s Easter Banquet, Mansion House, London, 14 April 1999.

⁵⁵² Tony Blair, “The Doctrine of the International Community”, Speech at the Chicago Economic Club, Chicago, 24 April 2009, available from <http://www.number10.gov.uk/Page1297>.

⁵⁵³ Baroness Symons, *House of Lords Official Report*, Written Answer 9 July 1998, col. 147.

⁵⁵⁴ Baroness Symons, *House of Lords Official Report*, 8 October 1998, col. 775.

action be taken in order to tackle and prevent these threats, if necessary by resorting to military force. If international institutions, such as the UN, could not provide the necessary resources to intervene, other members of the international community had to take the burden and pursue legitimate and vital goals of justice and security. This is the political context in which the Labour leadership could devise its strategy to invoke and enforce humanitarian intervention. This strategy was based on the idea that, under exceptional circumstances, strict legal requirements, such as the need to obtain formal authorization by the Security Council or the duty to respect the sovereignty of other states, could be overcome by moral and humanitarian motivations.

4.4.3 *“Simply the Right Thing to Do”: Interpretation and Invocation of Humanitarian Intervention by Labour Leaders*

The initial steps in the process of invocation of humanitarian intervention by the Labour leadership can be located in October 1998, when NATO approved the Activation Order that authorized a phased air campaign against the Federal Republic of Yugoslavia. That initial threat convinced Milosevic to accept UN and OCSE’s conditions and led to a provisional cessation of hostilities. As Cook argued in that occasion, the agreement would have never been accepted, had Milosevic not faced “the credible threat of military action by NATO.”⁵⁵⁵ From that moment on, the Labour leadership started to conceive military intervention as a legitimate response to a crisis that could hinder the stability of the international community and offend common perceptions of justice. Several months later, after the Racak massacre, Robertson reinforced this argument, by warning that the government, together with NATO, was taking the necessary steps for a military action in order to avoid “a humanitarian catastrophe.”⁵⁵⁶

When it became clear that military action was about to take place, the government started to provide an interpretation of the norm of humanitarian intervention that could justify the participation of Britain to a NATO operation, which could not be presented as a defensive war and which would be waged in the absence of formal authorization by the Security Council. The official justification of humanitarian intervention was contained in a memorandum submitted in January 1999 to the Foreign Affairs Committee by the Minister of State for Foreign Affairs Tony Lloyd. The document, which represented the official position of the government as to the legality of intervention, stated that “the legal basis for any military action would need to be considered in the light of the circumstances at the

⁵⁵⁵ Robin Cook, *House of Commons Official Report*, 19 October 1998, col. 576.

⁵⁵⁶ George Robertson, *House of Commons Official Report*, 25 January 1999, col. 10.

time.”⁵⁵⁷ After having listed all the possibilities of intervention under existing international and UN law, the document went on by saying that “there may also be cases of overwhelming humanitarian necessity where in the light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe.”⁵⁵⁸

During various debates in the parliament, representatives of the government refined their arguments, especially as a reaction to the few instances of opposition by those MPs and Lords that questioned the legal basis of the operation. Speaking in the House of Commons the day before the start of the bombings, Blair justified intervention as a way “to avert what would otherwise be a humanitarian disaster.”⁵⁵⁹ The day after, Deputy Prime Minister John Prescott argued that Operation Allied Force should be seen as “an exceptional measure to prevent an overwhelming humanitarian catastrophe.”⁵⁶⁰ Finally, in a Written Answer to a member of the parliament, Blair ruled out the necessity to rely on an authorization of the Security Council as a precondition for the legality of the operation

Under international law a limited use of force can be justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. Any such case would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.⁵⁶¹

Exceptionality of intervention and gravity of the humanitarian circumstances constituted the two main pillars of the government's interpretation of intervention. These exceptional circumstances could even render formal authorization by the Security Council unnecessary.

This debate was replicated in the House of Lords, where Baroness Symons, Minister of State for Foreign Affairs, played a key role at rejecting the opposition of a small group of Lords, mostly composed of Labour Lords Kennet and Jenkins. In October 1998, Baroness Symons argued that “if action through the Security Council is not possible, military intervention by NATO is lawful on the grounds of overwhelming humanitarian necessity.”⁵⁶² In a similar vein, she rejected the opposition of Lord Kennet that was questioning the legality of NATO action by saying that “force may also be used to defend a non-NATO state [...] in exceptional circumstances to avert an immediate and

⁵⁵⁷ Memorandum submitted by the FCO to the Foreign Affairs Committee, 26 January 1999, para. 2, in Foreign Affairs Committee, Seventh Report “Kosovo: Interim Report”, 29 July 1999.

⁵⁵⁸ Cit., para. 5.

⁵⁵⁹ Tony Blair, *House of Commons Official Report*, 23 March 1999, col. 161; for similar statements see also, Robin Cook, *House of Commons Official Report*, 1 February 1999, col. 957; 25 March, col. 538.

⁵⁶⁰ John Prescott, *House of Commons Official Report*, 24 March 1999, col. 483.

⁵⁶¹ Tony Blair, *House of Commons Official Report*, Written Answer, 29 April 1999, col. 240.

⁵⁶² Baroness Symons, *House of Lords, Official Report*, 12 October 1998, col. 757.

overwhelming humanitarian catastrophe. In such cases, a United Nations Security Council Resolution may not be necessary.”⁵⁶³ Once again, this particular interpretation of humanitarian intervention rested on the notion that the exceptionality and gravity of circumstances could overcome the requirements imposed by international law. This meant that the legitimacy of the purpose could provide the legal basis through which to authorize the use of force.

This argument was re-proposed by Blair in his famous speech given in Chicago, in which the Prime Minister stated that the one in Kosovo was “a just war, based not on any territorial ambitions but on values.”⁵⁶⁴ For Blair, “if we want a world ruled by law [...] we need to find a new way to make the UN and its Security Council work.”⁵⁶⁵ The essential line of reasoning was that in exceptional circumstances the strict letter of international law needed to be overcome in order to enforce legitimate values of justice. In particular, for Labour leaders and members of the government, the notion of humanitarian emergency could be used to exceptionally derogate from the requirements of existing international law, which is based on the principles of inviolability of sovereignty and non-intervention and, which consequently allows the use of force only as self-defense or with formal authorization by the Security Council.

The process of invocation of humanitarian intervention before and during the Kosovo crisis was mostly driven by the British political leadership, represented by Blair, Cook, Robertson, and their closest collaborators. These political leaders acted as norm entrepreneurs by arguing that, under certain conditions, such as the necessity to pursue just aims and enforce universal values, the legitimacy of an action needs to overcome the existing legal requirements. In this way, they contributed to shifting the balance away from traditional international law, characterized by the prevailing of sovereignty rights and non-intervention, toward the enforcement of human rights in response to situations in which they are massively violated.

Various scholars have analyzed the Kosovo war as a conflict between international norms⁵⁶⁶: in this conflict, the UK decisively sided with the so-called right to intervention. The domestic factor that

⁵⁶³ Baroness Symons, *House of Lords, Official Report*, 3 March 1999, col. 1738-9; for similar arguments by Baroness Symons, see also 12 October 1998, col. 775; 16 November 1998, col. 140; 14 December 1998, col. 1220.

⁵⁶⁴ Tony Blair, “The Doctrine of the International Community”, Speech at the Chicago Economic Club, Chicago, 24 April 2009, available from <http://www.number10.gov.uk/Page1297>.

⁵⁶⁵ Tony Blair, cit.

⁵⁶⁶ For a good account of the legal debate, see Antonio Cassese, “Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *European Journal of International Law* 10 (1999): 23-30; Michael J. Glennon, “The New Interventionism” *Foreign Affairs* 78 (1999); Bruno Simma, “NATO, the UN, and the Use of Force: Legal Aspects” *European Journal of International Law* 10 (1999): 1-22; Kai Ambos, “Comment” on the articles by Bruno Simma, “Nato the UN and the Use of Force: Legal Aspects” and Antonio Cassese “Ex Iniuria Ius Oritur”, available at <http://www.ejil.org/journal/Vol10/No1/coma.html>; Danilo Zolo, *Invoking Humanity: War, Law, and Global Order* (London and New York: Continuum, 2000).

more than any other allowed this outcome was the British political leadership. Other domestic factors contributed to this outcome only in the sense that they endorsed the government's arguments through an *ex post* acceptance. In May 2000, one year after the end of hostilities, the Foreign Affairs Committee, concluded its report on Kosovo by saying that "NATO's military action, if of dubious legality in the current state of international law, was justified on moral ground."⁵⁶⁷ The prevailing of moral concerns over legal requirements, which reflects a preference for legitimacy over legality, constituted the core of the government's strategy to invoke humanitarian intervention. The conclusion of the Committee represented its posthumous manifestation of support.

During the debates that took place at the parliamentary level, MPs and Lords did not provide their own original contribution to the interpretation of the norm. Most discussions concerned the viability of intervention and its moral or political justifications. By and large, MPs and Lords did not commit themselves to solving the problem posed by a norm that could only be invoked by breaching existing international law. Except for some instances of contestation by MPs and Lords that questioned the legal basis of intervention, the main arguments on the legality of Operation Allied Force were provided by government representatives. Given their substantial incapacity of providing an interpretation of the norm that could allow Britain to participate in the operation, MPs and Lords limited themselves to endorsing the arguments put forward by the government.

The analysis of the 2000 Report on Kosovo shows that the Foreign Affairs Committee, composed of members of all parties, was characterized by a conflict of interpretations. On the one hand, the Committee argued that "the doctrine of humanitarian intervention has a tenuous basis in current international customary law and that this renders NATO action legally questionable."⁵⁶⁸ On the other hand, the Committee recognized the difficult situation of NATO countries that had to face the veto of some permanent members of the Security Council⁵⁶⁹ and concluded by endorsing the view proposed by the government:

We believe that, while legal questions in international relations are important, law cannot become a means by which universally acknowledged principles of human rights are undermined. To determine whether NATO's action was morally justified, and legally justified under the criteria which NATO set itself, we have to ask whether a humanitarian emergency existed before NATO intervened, and whether a humanitarian catastrophe would have occurred ... if intervention had not taken place. We have dealt with these issues elsewhere and concluded that the answer to both questions is yes.⁵⁷⁰

⁵⁶⁷ Fourth Report, "Kosovo", Foreign Affairs Committee, 7 June 2000, para. 138.

⁵⁶⁸ Fourth Report, "Kosovo", *House of Commons Official Report*, Foreign Affairs Committee, 23 May 2000, para. 132.

⁵⁶⁹ Cit. para. 134.

⁵⁷⁰ Cit., para. 137-8.

With this conclusion, the Committee recognized the substantial legitimacy of the interpretation through which the government had resolved the legal issue posed by intervention in Kosovo almost one year before. Even though the parliament and its representatives never really questioned this course of action, they did not provide any original contribution to the most substantial element of the process of invocation of humanitarian intervention, which had to do with its legal status in contemporary international affairs. Rather, it was the government and its members that successfully imposed on a sympathetic party system and a mostly neutral civil society the idea that there are situations of extreme necessity in which it is more appropriate to privilege legitimacy, understood as moral consideration of what is just, over legality. Despite their doubts as to the legality of intervention, political parties and representatives of civil society did not devise any alternative interpretation and endorsed a political stance that mostly emerged from the ideological mindset of a new generation of British leaders.

4.5 Conclusions

NATO intervention in Kosovo has been interpreted by a vast array of scholars and observers as a watershed in the history of humanitarian intervention. In a way, it represented both the culmination of a process that led a significant part of the international community to view humanitarian intervention as a necessary tool of contemporary international relations and the start of its decline. That intervention caused much criticism by an equally considerable part of the international community, which contested its very nature and its potential for subverting existing international law. From that moment on, developing countries and permanent members of the Security Council, such as Russia and China, have started to conceive intervention as a dangerous weapon in the hands of Western countries.

The analysis of UK's response toward the norm of humanitarian intervention during the Kosovo crisis has shown that in case of emerging norms that are still to find a precise codification into customary or treaty law, executive leaders become the domestic actors that are most responsible for how these norms are interpreted and conceived. Since invocation of emerging norms does not depend on complex processes of ratification or recognition of international legislation, the dynamics of domestic institutions plays a lesser role in the process. The interpretation of emerging norms and what states want to make of them often depend on arbitrary decisions, such as the waging of a military operation. These decisions require an assumption of responsibility that generally only leaders can take.

In case of norms that have not found any specific institutionalization and that are consequently in an emerging status, political leaders, most notably key figures of the government, can operate from a

privileged position and have more chance to act as norm entrepreneurs. No international convention or treaty needs to be ratified in order to recognize the legitimacy of an emerging norm. Consequently, domestic institutional features, such as the structure of party politics or the type of relationship between the executive and the legislature are not the main explanatory factors for the final outcome of the process. In these situations, leaders have more room of maneuver and are relatively freer to provide and impose their own interpretation of the norm on more or less sympathetic audiences. This is what happened in the UK during the Kosovo crisis. Domestic actors that are usually seen as important vehicles of norm interpretation and diffusion did not exert a significant impact on invocation of humanitarian intervention.

On the one hand, civil society actors, such as NGOs and advocacy movements, mostly took a neutral stance toward the issue or advanced minor critiques. In general, their contribution was scant and limited to ex post analyses of the operation. In this sense, they did not provide any particular interpretation of the norm that could lead to either invocation or contestation. On the other hand, political parties did not provide any specific interpretation that could make humanitarian intervention ‘fit’ with the existing structure of international affairs. Incapable of expressing a formal vote on the operation, British political parties mostly sided with the interpretation provided by the government and guaranteed a large and bipartisan support. This bipartisan endorsement certainly created a favorable environment for the action of the government but at the same time did not contribute to defining the position of the country toward humanitarian intervention in contemporary international affairs. Indeed, this support was mostly limited to an ex post recognition of the validity of the interpretation that had been previously and autonomously put forward by the Labour leadership.

Facing a political environment that ranged from neutrality to substantial delegation of authority and responsibility, British leaders could devise an interpretation of humanitarian intervention as the possibility of derogating from international and UN law in order to pursue a goal that was perceived as legitimate. This legitimacy derived from both the moral necessity to avoid a humanitarian catastrophe and the political interest in ending a crisis that could spill across borders and threaten the security of Britain.

Chapter 5

5 BETWEEN JUSTICE AND NATIONAL INTERESTS

United States and NATO Intervention in Kosovo

The United States too was among the main supporters of NATO operation Allied Force. Before and during the military operation, prominent members of the Administration consistently invoked and recognized the legitimacy of an intervention that was considered necessary for both moral and security reasons. As President Bill Clinton argued, it was not only the “right thing to do”, but also “the smart thing to do, very much in our national interest, if we are to leave a stable, peaceful, and democratic Europe to our children.”⁵⁷¹ Invocation of humanitarian intervention by one of the leading members of the international community and the Western world was likely to give prominence and prestige to an international norm that has always been in an emergent status.

The main aim of this chapter is to understand and explain the domestic determinants of U.S. decision to participate in operation Allied Force. U.S. support for intervention in Kosovo was the result of a domestic debate in which certain actors were able to impose a specific interpretation of the international system and of the norm under analysis. Political arguments in favor of intervention prevailed over those against it. The favorable response of the U.S. toward this international norm depended upon the array of actors that characterized its public debate at the end of the 1990s.

I argue that executive leaders were the domestic actors that mostly determined the position of the U.S. toward humanitarian intervention and the consequent decision to carry out military intervention in Kosovo. The arguments provided by the Administration decisively shaped and oriented a particularly chaotic debate, which involved a large number of participants, toward the acceptance of the norm of intervention. This is consistent with my major argument on the relationship between states and emergent international norms. When states interact with norms that are still highly contested and have consequently not found a clear institutionalization into specific international legislation, executive leaders enjoy considerable freedom in interpreting their content. During the Kosovo crisis the Clinton Administration put forward an arbitrary, and sometimes even contradictory interpretation of the international legal system that was, nonetheless, fundamental to create the conditions for U.S.’ invocation of humanitarian intervention and for the decision to use force against Belgrade.

⁵⁷¹ President Clinton, “Remarks on Returning from Camp David, Maryland”, *Public Papers of the President*, March 22, 1999, 490.

5.1 The U.S. And Intervention In Kosovo

The U.S. government and Yugoslav President Slobodan Milosevic were never great friends. The aggressive attitude of the U.S. toward Milosevic dated back from the George H. Bush Administration and its famous ‘Christmas warning’ of 24 December 1992. At that point in time, President Bush announced that “in the event of conflict in Kosovo caused by Serbian action, the U.S. will be prepared to employ military force against Serbians in Kosovo and in Serbia proper.”⁵⁷² This soon became the official position of the Clinton Administration that will renew this threat in several occasions.

During the second Clinton Administration (1996-2000), one of the U.S. officials that was most committed to the Kosovo issue was Secretary of State Madeleine Albright. On 7 March 1998, when hostilities between Serb troops and Kosovars began, she argued that the U.S. was “not going to stand by and watch what the Serbian authorities can no longer get away with doing in Bosnia.”⁵⁷³ In this initial phase, Albright had to face the skepticism of the Department of Defense and the military community that did not view with favor a possible intervention in the region.

Nevertheless, the position of the military community was far from being monolithic and soon came to be challenged by the Supreme Allied Commander Europe of NATO General Wesley Clark. Very similarly to Albright, Clark tried to push the Administration to “use diplomacy backed by the threat of force to head off the looming crisis in Kosovo.”⁵⁷⁴ Following the well-tried pattern employed during the Bosnian crisis, Clark thought that the threat of air strikes would provide “a strong incentive for Milosevic to halt operations.”⁵⁷⁵

The interventionist camp, composed of General Clark and the Department of State, acquired credibility in summer 1998, when Serb military and police forces started a campaign against Albanian villages in Kosovo. Milosevic’s aggressiveness softened skepticism within the military community and the Administration in general. As a result, under strong pressure by U.S. diplomacy, on 23 September 1998 the Security Council passed Resolution 1199 that demanded that the FRY “cease all action by the security forces affecting the civilian population”, “enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission”, “facilitate ... the safe return

⁵⁷² Barton Gellman, “The Path to Crisis: How the United States and Its Allies Went to War” *Washington Post*, April 18, 1999.

⁵⁷³ Madeleine Albright, *Madame Secretary* (New York: Miramax, 2003): 381.

⁵⁷⁴ Wesley Clark, *Waging Modern War*, 119.

⁵⁷⁵ Wesley Clark, *Waging Modern War*, 122.

of refugees and displaced persons to their homes”, and “make rapid progress ... with the aim of ... finding a political solution to the problems of Kosovo.”⁵⁷⁶

Resolution 1199 can be read as an indicator of how the portrait of the situation provided by the Department of State started to prevail over the more cautious approach of the defense and military establishment. The day after, U.S. diplomacy also obtained the passing by NATO of the Activation Warning for “both a limited air option and a phased air campaign in Kosovo.”⁵⁷⁷ Later, in October 1998, NATO intensified its pressure on Milosevic by approving an Activation Order that constituted an explicit threat to resort to air strikes in case FRY did not comply with Resolution 1199.⁵⁷⁸ NATO’s threat to use force convinced Milosevic to conclude a new agreement with U.S. Special presidential envoy to the Balkans Richard Holbrooke. Nevertheless, Milosevic only formally accepted the conditions imposed by NATO and the Western world and hostilities were soon to restart.

As Serb violence against Kosovars escalated, the Administration increasingly put aside its disagreements and started to develop a common position. The massacre of Racak, when on 15 January 1999 45 civilians were killed in a small village in Kosovo by Serb militias, put the arguments in favor of intervention in a new light. The same day the Administration approved a 13-page classified document known as ‘Status-quo plus’. This document represented the “highest common denominator among the National Security Advisor Sandy Berger, Secretary of Defense Cohen, and Secretary of State Albright.”⁵⁷⁹ The document indicated among the priorities of the Administration those of promoting “regional stability”, preventing “resumption of hostilities in Kosovo and renewed humanitarian crisis”, and preserving “U.S. and NATO credibility.”⁵⁸⁰

The Racak accident has been described as an “echo of Srebrenica that precipitated U.S. involvement.”⁵⁸¹ On the one hand the Administration committed to the search of a negotiated agreement between Serbs and Kosovars. On the other hand, it started to elaborate an interpretation of international relations, and in particular of the international legal system, that ended up in the invocation of a right and duty to intervene in order to solve major humanitarian crises. The Administration realized that “being the indispensable nation put added burdens on the United States to

⁵⁷⁶ United Nations, Security Council Resolution 1199, S/RES/1199, 23 September 1998.

⁵⁷⁷ Statement by NATO Secretary-General following ACTWARN Decision, Villamoura, 24 September, 1998, in Marc Weller, *The Crisis in Kosovo 1989-1999* (Documents and Analyses Publishing Ltd., 1999): 217.

⁵⁷⁸ Javier Solana, “Statement to the Press by the Secretary General following Decision on the ACTORD”, NATO Headquarter, 13 October 1998, available at <http://www.nato.int/docu/speech/1998/s981013a.htm>.

⁵⁷⁹ Barton Gellman, “The Path to Crisis”.

⁵⁸⁰ Barton Gellman, “The Path to Crisis”.

⁵⁸¹ Sidney Blumenthal, *The Clinton Wars* (New York: Farrar, Straus and Giroux, 2003): 631.

assume a greater, more varied responsibility for international stability.”⁵⁸²

Between February and March 1999, NATO countries, together with Russia, made the last attempt to reach an agreement between Serbs and Kosovars by calling a last round of negotiations in Rambouillet. While Kosovars accepted the accords that were drafted during the conference, Serbs refused to sign them. This was the trigger for NATO intervention. With an address to the nation on 24 March 1999, President Clinton declared that “America has a responsibility to stand with our allies when they are trying to save innocent lives and preserve peace, freedom, and stability in Europe.”⁵⁸³ This statement constituted a strong endorsement of the idea of using military force for humanitarian purposes. Even though the Security Council never voted a resolution that explicitly authorized the use of force against the FRY, the U.S. led NATO countries to an operation that aimed to enforce universal human rights in the name of the international community. The following analysis explains how the U.S. came to embrace this position and what domestic actors decisively contributed to this political outcome.

5.2 Disarmed Voices: U.S. Civil Society And Intervention In Kosovo

The analysis of the domestic debate that led to the U.S. invoking and recognizing the legitimacy of the emerging norm of humanitarian intervention does not accord a relevant role to societal groups. Their impact on the process of interpretation, which was necessary to invoke the right of intervention even in the absence of a formal legal mandate, was quite modest and did not make any substantial difference. With few exceptions, U.S. NGOs and think tanks did not contribute to framing the issue of using (or not using) force without U.N. authorization in any specific way.

Some organizations took a neutral approach and limited to reporting human rights violations without suggesting any particular political or military solution. Other think tanks provided different and sometimes contradictory political stances and were incapable of developing a clear and unambiguous position. Very few expressed explicit opposition to the idea of intervention for humanitarian purposes and questioned the lack of legal basis for NATO Operation. Finally, some organizations, in particular diaspora and ethnic groups, managed to have their voice heard in favor of intervention, for example at the congressional level. Nevertheless, their contribution was rather scant, isolated, and in many cases only subsequent to the decision by the Clinton Administration to bomb FRY.

⁵⁸² Sidney Blumenthal, 633.

⁵⁸³ Bill Clinton, “Address to the Nation on Air Strikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), *Public Papers of the President*, 24 March 1999, 518.

5.2.1 *A Babel Tower of Opinions: the Irrelevance of U.S. NGOs and Think Tanks during the Kosovo crisis*

The most important U.S. NGOs and think tanks did not exert a significant impact on the process of invocation of humanitarian intervention during the Kosovo crisis. Different reasons can explain their incapacity of contributing to the domestic debate.

Some organizations maintained a substantially neutral approach and did not put forward any specific suggestion as to the political or military instruments to be employed to solve the crisis. This was the case, for example, of two organizations with a large experience in the field of monitoring human rights violations: Amnesty International (AI) and Human Rights Watch (HRW). Both explicitly refused to take a stance as to the responsibilities for the conflict in the region. For instance, AI made clear already in spring 1998 that “both sides of the conflict are accountable.”⁵⁸⁴ Although it sometimes identified Serb authorities as the most responsible for humanitarian violations, AI consistently reported how the “UCK and other ethnic Albanians perpetrated human rights abuses, against “non-combatants of Serbian, Montenegrin, Albanian or Romani ethnicity.”⁵⁸⁵ In a similar way, HRW did not identify one or the other faction as the only responsible for the conflict and violations of humanitarian law. For example, when NATO and the UN invested the OSCE Verification Mission with the task of monitoring the situation in October 1998, HRW recommended the mission to take a genuinely human rights orientation. This meant not only to “monitor, report, and publicize abuses committed by the security [Serb] forces”, but also to “monitor, report, and publicize KLA abuses.”⁵⁸⁶

This impartial approach as to the responsibility for the Kosovo crisis was maintained even at the time of Operation Allied Force during which both organizations did not hesitate to denounce violations of human rights committed by NATO. In many occasions, AI argued that “the intervention has failed to prevent or stop human suffering”⁵⁸⁷ and denounced how “insufficient consideration may have been given to the proximity of civilians in NATO’s planning of the attack.”⁵⁸⁸ Quite harshly, HRW criticized NATO air strikes for the use of cluster bombs and reminded that “the U.S. may not have signed the landmines treaty, but it’s still obliged to carry out warfare according to international humanitarian

⁵⁸⁴ Amnesty International, “Concerns in Europe”, January/June 1998, available at www.amnestyusa.org.

⁵⁸⁵ Amnesty International USA, “1999 Annual Report for Federal Republic of Yugoslavia”, 1999.

⁵⁸⁶ Human Rights Watch, “Human Rights Watch Recommendations on the OSCE Kosovo Verification Mission”, October 20 1998.

⁵⁸⁷ Amnesty International USA, “Kosovo: A Decade of Unheeded Warnings”, Statement by Secretary General Pierre Sane, News Service 088/99, AI Index Eur 70/58/99, 10 May 1999.

⁵⁸⁸ Amnesty International USA, “Amnesty International Writes to NATO’s Secretary General”, News Service 092/99, AI Index Eur70/60/99, 11 May 1999.

law.”⁵⁸⁹

This indistinct criticism of all the actors involved in the crisis was the result of a neutral approach taken by both AI and HRW toward the idea of solving humanitarian crises through military force. At the beginning of hostilities in March 1999, AI communicated the intention to take “no position on ... the threat of military intervention on the part of NATO.”⁵⁹⁰ Similar statements were issued by HRW in different occasions.⁵⁹¹ These positions sometimes turned into open skepticism. During the crisis AI and HRW manifested their preference for non violent instruments of intervention, capable of solving the crisis without necessarily siding with one part to the conflict: “independent human rights monitoring”⁵⁹², “economic isolation”⁵⁹³, and above all full cooperation with the “independent investigators”⁵⁹⁴ of the International Criminal Tribunal for Former Yugoslavia were viewed as more appropriate ways of solving a conflict in which no faction should be portrayed as necessarily right or wrong.

Maintaining their preference for a neutral, impartial, and non-contentious approach, AI and HRW excluded themselves from the debate on the use of military force to avert humanitarian crises. Their interpretation of the issue was still rooted in a traditional understanding of the international system in which the international community uses force only as a last resort and with the explicit authorization of the Security Council. Human rights were seen as values to be spread through international legislation and judicial institutions and not through the imposition of military force. As a consequence, their contribution to the debate on the emerging doctrine of humanitarian intervention could only be scant.

Some other organizations did not develop a clear position toward the issue and maintained a more ambiguous approach. This was the case of the conservative American Enterprise Institute (AEI), which put forward arguments both in favor and against intervention. For example, during a debate before the House of Representatives Committee on International Relations Senior Fellow Jeane Kirkpatrick supported NATO Operation for both moral and interest reasons: “the conflict in Kosovo

⁵⁸⁹ Human Rights Watch, “NATO’s Use of Cluster Bombs Must Stop”, May 10 1999.

⁵⁹⁰ Amnesty International USA, “Letter to all parties involved in the Kosovo conflict”, News Service 056/99, AI Index: Eur 70/13/99, 23 March 1999; for similar manifestations of neutrality, see also Amnesty International USA, “Concerns in Europe”, January/June 1998.

⁵⁹¹ Human Rights Watch, “HRW Condemns Violence by Security Forces in Kosovo”, March 2 1998; “Yugoslav Military and Serbian Police Commit War Crimes in Kosovo”, 30 June 1998.

⁵⁹² Amnesty International USA, “Federal Republic of Yugoslavia, Kosovo Province: Statement by Pierre Sane Secretary General, Amnesty International, News Service 125/98 London, 30 June 1998.

⁵⁹³ Human Rights Watch, “Yugoslav Military and Serbian Police Commit War Crimes in Kosovo”, 30 June 1998.

⁵⁹⁴ Amnesty International USA, “The Truth Behind the Killings of 45 Ethnic Albanians in Kosovo Must be Found”, News Service 011/99, AI Index Eur 70/05/99, 18 January 1999.

has caused great human suffering and, if permitted to continue, could threaten the peace in Europe.”⁵⁹⁵ At the basis of this argument, there was the recognition that “sovereignty rights of government are related to their legitimacy.”⁵⁹⁶ As a consequence, “the only known antidote” to solve the situation was the “imposition of law and civilization.”⁵⁹⁷ This provided the international community with the moral duty to intervene against FRY even in the absence of a Security Council Resolution.

Quite different arguments were put forward by John Bolton, vice-president of AEI, who in a more traditionally conservative fashion highlighted how U.S. interests in Kosovo were “tenuous at best.”⁵⁹⁸ During the operation, Bolton criticized Clinton for his excessive search of a legal basis for intervention. U.S. military intervention should not be justified in terms of international law or universal values but rather in terms of national interests. In particular, the Administration was wrong to base its action on the notion of humanitarian intervention that was defined by Bolton as “even more malleable than most principles of international law” and “especially susceptible to cynical manipulation.”⁵⁹⁹ In sum, the Kosovo issue triggered competition among different positions. As a result, the organization could not develop a strong and coherent political stance capable of producing an effective action of lobbying toward the Administration’s policies in the Balkans.

Other organizations engaged in a more structured debate on the notion of humanitarian intervention and, in particular, on the political and legal justifications for Operation Allied Force. Each of these organizations developed clearer and more coherent stances in favor or against the norm of intervention but for various reasons did not exert a significant impact on the process of its invocation and recognition. Their contributions to the public debate tended to remain isolated and were not particularly taken into account. Moreover, most of their arguments came after the decision to bomb Belgrade and constituted posthumous manifestations of endorsement or critique. Consequently, they did not participate to the process of invocation but limited themselves to analyze a *fait accompli*.

Two think tanks that are generally identified as sympathetic toward the Republican Party contested the rationale for intervention. The libertarian Cato Institute, for instance, put forward traditional arguments based on the notion of national and defense interest. During a hearing before the House Committee on International Relations in March 1999, Senior Fellow Doug Bandow argued that

⁵⁹⁵ Statement by Jeane Kirkpatrick, Levy Professor of Government, Georgetown University and Senior Fellow, American Enterprise Institute, House of Representatives Committee on International Relations, 10, 106th Congress, First Session, March 1999, 7-8.

⁵⁹⁶ *Ibidem*, 27.

⁵⁹⁷ Jeane Kirkpatrick, “Why Are We in Kosovo?”, March 30, 1999, available at www.aei.org.

⁵⁹⁸ John R. Bolton, “Adult Supervision...Needed on Stage”, February 23 1999, available at www.aei.org.

⁵⁹⁹ John R. Bolton, “Clinton Meets ‘International Law’ in Kosovo”, April 5 1999, available at www.aei.org.

Operation Allied Force “could put U.S. troops at risk without having any serious, let alone vital, American interest at stake.”⁶⁰⁰ In a similar way, Cato’s policy analyst Gary Dempsey defined a possible intervention in Kosovo as a “strategically irrelevant commitment overseas.”⁶⁰¹

This type of rhetoric can be found also in the contributions of the conservative National Heritage Foundation. In a memorandum published in October 1998, policy analyst James Anderson recommended that the U.S. avoided another “open-ended Balkan commitment.”⁶⁰² As U.S. military involvement increasingly became more than a possibility, Anderson admonished that the involvement in the “Balkan quagmire” would be “costly and protracted” and “would undermine the ability of the United States to meet vital security obligations elsewhere in the world.”⁶⁰³ At the basis of these arguments, there was a traditionally realist understanding of U.S. role in today’s world, which cannot afford to act as a “global policeman with endless involvement in far-flung conflicts, civil wars, and sectarian feuds.”⁶⁰⁴

In addition, Cato Institute developed a critique that touched upon the crucial issue of intervening without an adequate legal basis. Right after the start of hostilities, Bandow stressed how the U.S. was waging war against a sovereign state that “hasn’t attacked the U.S.,” or “hasn’t threatened American citizens.”⁶⁰⁵ Cato was never particularly sympathetic toward the emerging norm of humanitarian intervention. Several months before intervention in Kosovo, Dempsey had noticed how “states are sovereign entities that have exclusive jurisdiction over matters within their borders. There is a move afoot to circumvent that principle by arguing that ‘human rights is not an internal issue.’”⁶⁰⁶

These arguments had the potential to open a crack in the line of reasoning of the Administration that was basing intervention on the idea that there are some superior moral values, such as the obligation to avert a humanitarian catastrophe, which would sometimes justify a suspension of international law. Nevertheless, Cato was quite isolated in its battle of ideas against such a redefinition of traditional international law as based on sovereignty rights and non-intervention. Most conservative

⁶⁰⁰ “Statement of Doug Bandow, Senior Fellow, Cato Institute, House of Representatives Committee On International Relations, 106th Congress, First Session, March 10, 1999, 45.

⁶⁰¹ Gary T. Dempsey, “Kosovo Consequences”, October 5, 1998, available at www.cato.org. For similar arguments see also, Gary T. Dempsey, “Washington’s Kosovo Policy: Consequences and Contradictions”, Cato Institute Policy Briefing, No. 321, October 8, 1998; “Clinton’s Kosovo Confusion”, February 11, 1999, available at www.cato.org; Doug Bandow, “Hurling Into the Kosovo Quagmire”, February 19, 1999, available at www.cato.org.

⁶⁰² James H. Anderson, “No Ground Troops In Kosovo”, The Heritage Foundation Executive Memorandum, No. 555, October 8, 1998.

⁶⁰³ James H. Anderson, “Avoiding Another Balkan Quagmire in Kosovo”, The Heritage Foundation Executive Memorandum, No. 572, February 12, 1999.

⁶⁰⁴ Kim R. Holmes, “No Ground War in Kosovo”, The Heritage Foundation Backgrounder 1278, April 22, 1999.

⁶⁰⁵ Doug Bandow, “Europe’s Welfare Queens”, March 30, 1999, available at www.cato.org.

⁶⁰⁶ Gary T. Dempsey, “Washington’s Kosovo Policy: Consequences and Contradictions”, available at www.cato.org.

opposition toward intervention coming from civil society preferred to base its analyses on traditional concepts, such as the lack of clear U.S. interests in the region. Despite some occasional reference to the problem of legal basis, even most Cato analysts focused their critiques on the question of national interest and treated the lack of legal basis as a residual argument. This did not allow the development of a strong and structured resistance against the process of invocation of this contentious and innovative international norm.

Finally, not even the arguments in favor of the idea of military intervention for humanitarian purposes had much chance to influence the public debate on the issue. The most active was the Albanian American Civic League (AACL), which was founded in 1989 by former Congressman Joseph Dioguardi with the aim of “representing the concerns of Albanian Americans about the national cause of seven million Albanians living side by side in Albania, Kosova, Macedonia, Montenegro.”⁶⁰⁷

Since the beginning of 1999, the AACL lobbied the U.S. Congress by harshly criticizing the attempts to find a diplomatic solution to the crisis: “One must ask why our State Department is allowing a chauvinistic and dictatorial pan-Slavic Orthodox regime...to emerge in the Balkans.”⁶⁰⁸ For the League, the only possible way of solving the crisis was for NATO to “bomb Serbian military positions in Serbia and Kosova.”⁶⁰⁹ Interestingly enough, the final goal of the League was not just the end of Serb violations of human rights but rather recognition by the Administration of the right to independence for Kosovo. This was made explicit in a document submitted by the League to the House Committee, which opposed the draft agreement reached at the Rambouillet Conference for its giving “unconditional support for Yugoslavia’s territorial integrity” and for its giving “control of Kosova’s borders with Macedonia and Albania to the FRY military.”⁶¹⁰

The League often disagreed with the Administration, such as in the case of the Rambouillet talks that were considered as a useless waste of time, and above all, on the issue of possible independence for Kosovo. No U.S. actor, whether in the Administration or in Congress, ever considered it as a viable option during the 1999 crisis. The difference between the positions of U.S. government and Congress and those of the League can be understood by analyzing the hearings of the

⁶⁰⁷ See www.acl.com.

⁶⁰⁸ “Statement by Albanian American Civic League Regarding Situation in Kosovo”, House of Representatives, Official Records, 106th Congress, First Session, January 6, 1999, E59.

⁶⁰⁹ “Statement by Joseph Dioguardi, President of the Albanian American Civic League”, House of Representatives Committee on International Relations, 106th Congress, First Session, February 10, 1999, 51.

⁶¹⁰ Albanian American Civic League, “Kosova on the Brink”, Document submitted to the House International Relations Committee, 106th Congress, First Session, 10 March 1999, 89. See also “Statement of Hon. Joseph Dioguardi, Volunteer President, Albanian American Civic League, Subcommittee on European Affairs of the Committee on Foreign Relations, United States Senate, 105th Congress, Second Session, May 6, 1998, 30-7.

relevant House Committees. Representatives of the League were only rarely invited and their arguments did not trigger any significant debate. For example, in February 1999, Dioguardi presented one of his few statements before the House Committee at the presence of Thomas Pickering, Under Secretary of State for Political Affairs. Quite tellingly, during the debate that followed the hearing, Pickering did not even mention the contribution of the President of the League.⁶¹¹ In general, members of the Administration rarely engaged in discussions with the League during congressional hearings.⁶¹²

The think tank that most advocated intervention was the Brookings Institution. Through its leading scholars and policy analysts, Brookings developed a clear political stance in favor of the norm of humanitarian intervention, which was understood as a necessary step to reform the international legal and political order. For example, during a foreign policy event organized in October 1998, Ivo Daalder argued that the international community needed to move “from the kind of legalism where you’re looking for the legal basis for international action to where can we find friends who think like us to do what we think is right.”⁶¹³

This argument was put forward in many other occasions. For example, right after the start of hostilities, John Steinbruner provided that if the international community had given earlier recognition to the emerging doctrine of humanitarian intervention, “many lives would have been spared and much of the social devastation prevented.”⁶¹⁴ Along these lines, Daalder rejected the legalist approach of those countries that were complaining for the lack of an explicit international mandate, by stressing that “the insistence on a UN mandate implies that ...the widespread abuse of human rights and denial of fundamental freedoms would go effectively unpunished or undeterred.”⁶¹⁵ For Brookings’ scholars, the international community had to move forward and recognize the existence of a right and duty of humanitarian intervention capable of improving the old international system based on sovereignty rights and non-intervention. As Richard Haas observed, “sovereignty reflects something of a contract between government and their people...When the government violates that contract...the international community has the right or even the obligation to intervene on behalf of the weak and powerless people of that society.”⁶¹⁶

⁶¹¹ House of Representatives Committee on International Relations, 106th Congress, First Session, 10 February, 1999, 19.

⁶¹² House of Representatives Committee on International Relations, 106th Congress, First Session, 10 March 1999, 1-42.

⁶¹³ “Kosovo: U.S. Policy at Crossroads”, Foreign Policy Event Organized by Brookings Institution, October 9 1998, available at www.brookings.edu.

⁶¹⁴ John D. Steinbruner, “The Consequences of Kosovo”, March 1999, available at www.brookings.edu.

⁶¹⁵ Ivo H. Daalder, “NATO, the UN, and the Use of Force”, United Nations Association of the United States of America Policy Roundtable, March 1999, available at www.brookings.edu.

⁶¹⁶ “The Kosovo Crisis: NATO Strikes Serbia”, Foreign Policy Event organized by Brookings Institution, 29 March 1999, available at www.brookings.edu.

These arguments touched upon the core of the debate on humanitarian intervention and constituted significant contributions to its domestic legitimization. Nevertheless, from an analytical point of view, it is important to notice that most meetings and publications came out only after the start of hostilities. For this reason, their influence should not be overestimated. Most of them were posthumous manifestations of support for a process that had been already completed with the decision to bomb Belgrade. Other actors determined U.S.' position toward the issue. The arguments of think tanks, such as Brookings, merely constituted its ex-post legitimization.

In conclusion, civil society movements are not to be considered as significant domestic actors in the process of recognition of the norm of humanitarian intervention. Despite few exceptions, they did not contribute to the debate on the legitimacy of a norm that could only be invoked by taking a strong stance in favor of a radical re-consideration of the international system that came out of the Cold War and that was still mostly based on sovereignty rights and non-intervention, except in case of an explicit UN authorization. Some organizations refused to take a position and maintained a neutral approach. Others were divided and incapable of developing a clear line of argument. Some rejected the idea of intervention and preferred to adhere to a traditional interpretation of the international system. Finally, some actors were too isolated, had few occasions to partake to the debate, or simply limited themselves to providing posthumous manifestations of support. In general, their performance during the Kosovo crisis shows a substantial incapacity of developing an opinion movement in favor or against intervention. For these reasons, they cannot be interpreted as relevant actors in the process of diffusion and domestic legitimization of humanitarian intervention.

5.3 Between Deference And Bipartisan Support: U.S. Party Politics And Legislative Actors During The Kosovo Crisis

Legislative actors and dynamics of partisan politics are not to be interpreted as major determinants of the domestic recognition of humanitarian intervention during the Kosovo crisis. Although the U.S. Congress was quite active and characterized by large debates, its contribution to the process of invocation of humanitarian intervention was lesser than one would expect.

Confusion, rather than assertiveness, mostly characterized the performance of the U.S. Congress during the Balkan crisis. Legislators were not capable of developing and expressing a clear majority position that could determine the attitude of the U.S. toward the issue of using force for humanitarian purposes in Kosovo.

In a similar way, partisanship and dynamics of party politics did not represent a major

explanatory factor for the invocation of humanitarian intervention. The main arguments provided by legislators in favor or against intervention did not follow clear ideological or party lines. Opposition and support for NATO operation could be found both in the Republican and Democratic parties. Many prominent members of the leading Republican Party often sided with Democrats in supporting intervention during the crucial moments of the crisis. Similarly, various members of the Democratic Party sided with those Republican legislators that opposed the rationale and justification for the operation. Bipartisanship, rather than partisanship, constituted the key aspect of the debate.

This analysis does not aim to ignore the relevance of congressional and institutional constraints on the actions of Presidents and their closest collaborators. In various moments, Congress considerably limited the actions of the Clinton Administration and its capacity of making foreign policy decisions. This was the case, for example, of the debates over the Land Mine Treaty or the International Criminal Court. In these and other situations, the Congress took rather activist stances, asserted its prerogatives in the foreign policy-making process, and even prevented the Administration from achieving its aims.

Nevertheless, this was not the case during the Kosovo crisis. When it comes to interpreting international norms, the capacity of institutional actors of playing a significant role in the process depends on the type of norm with which states have to deal. When states interact with norms that have reached a high level of international institutionalization or codification into international agreements or customary law, domestic institutional actors, such as legislative assemblies, are likely to exert a large impact on processes of domestic interpretation and provide significant contributions to determining the position of the state. By contrast, in case of emerging norms that are still less defined and subject to more arbitrary interpretations, executive leaders are likely to be the domestic actors that determine the attitude of a country toward the norm. This is what happened during the debate over humanitarian intervention at the time of the Kosovo issue. President Clinton and the main members of the Administration had the lion's share in the process of domestic legitimization of humanitarian intervention, while the role of Congress in this process was residual and secondary.

5.3.1 The Confused Assembly: U.S. Congress and Intervention in Kosovo

The 106th Congress that the Clinton Administration had to face at the peak of the Kosovo crisis was a Republican one. Thanks to the victories at the Midterm Elections in 1994 and 1998, the Republican Party managed a majority of 12 seats in the House and 10 seats in the Senate. This political circumstance, together with the direct involvement of the President in the Lewinsky scandal, which led to his impeachment by the House at the end of 1998, 'presumably provided the conditions for a more

assertive Congress.”⁶¹⁷ It seemed likely that the Administration would have faced significant resistance by such a Republican-led Congress in the pursuit of intervention in Kosovo. Nevertheless, despite some attempts to develop an opposition and limit the room of maneuver of the Administration, the performance of Congress as to the Kosovo issue was mostly characterized by confusion and substantial deference to the executive.

In particular, when in summer 1998 the Administration started to put forward arguments in favor of intervention, if necessary without a UN or congressional authorization, Congress did not act in order to assert its constitutional prerogatives as to declaration of war or waging of military operations. Rather, it limited itself to vague manifestations of condemnation of Serbian actions.⁶¹⁸ Despite some mild attempts to constrain the possibility for the Administration of deploying ground troops in the region, Congress was not particularly proactive until the beginning of 1999.⁶¹⁹

In February 1999, when military intervention became more than an option, a group of 52 Republican members of the House promoted resolution H. Con. Res. 29. This resolution opposed military involvement in the region. In particular, Republican representatives declared that “U.S. national security interests do not warrant the use of ground forces in Kosovo.”⁶²⁰ This initiative has to be read as the first direct attempt by the Congress to assert its right to be involved in the decision-making process. At least at the beginning, this strategy produced some results. On 11 March 1999, the House debated and voted Concurrent Resolution 42, which provided that “the President is authorized to deploy United States armed forces personnel to Kosovo as part of a NATO peacekeeping operation implementing a Kosovo Peace Agreement.”⁶²¹ This resolution found the opposition of both the Administration and the Democratic Party, which contested the timing of the debate. At that point in time, U.S. diplomacy was trying to reach an agreement between Serbs and Kosovars at the Rambouillet talks. A vote from the House was seen as an obstacle to the attempt to “secure a settlement...at this critical time.”⁶²² In the end, the House passed the resolution with a comfortable margin of 28 votes.⁶²³

⁶¹⁷ Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress and War Powers* (Nashville: Vanderbilt University Press, 2002): 117.

⁶¹⁸ For example, in 23 September 1998, the House of Representatives unanimously passed H.Con.Res. 315 in order to condemn Serbian actions in Kosovo (“Members Intensifying for Stronger Action in Kosovo”, *Congressional Weekly Online*, August 8 1998, 2192-2192, available at <http://library.cqpress.com/cqweekly/WR19980808-32BSNOTES007> (accessed January 14, 2010))

⁶¹⁹ *Congressional Records*, Senate, 105th Congress, 2nd Session, October 8 1998, S11896-S11992.

⁶²⁰ Pomper, Miles A. “FOREIGN AFFAIRS: Congress Wants a Bigger Voice On Sending Troops to Kosovo.” *CQ Weekly Online* (February 27, 1999): 499. <http://library.cqpress.com/cqweekly/WR19990227-09KOSOVO001> (accessed January 14, 2010).

⁶²¹ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, March 11, 1999, H1214.

⁶²² Pomper, Miles A. “FOREIGN AFFAIRS: Congress Wants a Bigger Voice on Sending Troops to Kosovo”, 499.

⁶²³ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, March 11 1999, H1180-H1239.

Nevertheless, the impact of this action should not be overestimated.

First, the resolution was not crucial since it expressed the will of the Congress on a possibility, such as the deployment of peacekeeping troops as a result of an agreement between Serbs and Kosovars, which would have never taken place. As explained in the first section, Serbs and Kosovars never reached that agreement. Second, being just a concurrent resolution, H. Con. 42 was not legally binding and consequently did not formally authorize the Administration to carry out military intervention. In order for the measure to be legally binding, lawmakers should have voted a joint resolution to be submitted to the President for signature and veto. Lacking this legal content, the resolution ended up being a mere manifestation of vague support.⁶²⁴

The involvement of Congress in the Kosovo crisis before the start of the actual military operation was rather scant. Debates and votes concerned marginal aspects and did not touch upon the crucial points, such as the thin legal basis on which intervention rested both from an international and constitutional point of view. Until few hours before the beginning of hostilities, only a minority of legislators, such as Republican Thomas Campbell and Democrat David Skaggs, raised these concerns. In various letters to the Congress, these representatives reminded that “air strikes require authorization from Congress.”⁶²⁵ Despite these few instances of opposition, the Administration pursued its strategy of military involvement without encountering any major obstacle from Congress. Operation Allied Force finally started on 23 March 1999.

Quite tellingly of the incapacity of Congress of exerting any significant impact on the process of invocation of humanitarian intervention and on the planning of the military operation, the main attempts by U.S. legislators to constrain, or at least influence, the actions of the Administration came after the start of hostilities. As a commentator observed, “lawmakers debated the wisdom of the Kosovo mission virtually up to the time that the air strikes began soon after dusk on March 24.”⁶²⁶ On 23 March, the Senate passed a resolution sponsored by a bipartisan group led by Democrat Biden and Republican John Warner. The Resolution stated that “the President of the United States is authorized to conduct military operations and missile strikes against the Federal Republic of Yugoslavia.”⁶²⁷ Once again, the resolution was not legally binding and amounted to a simple manifestation of support. War against FRY started “without any statutory or constitutional support.”⁶²⁸ Neither the House nor the

⁶²⁴ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004): 199.

⁶²⁵ Ryan C. Hendrickson, *The Clinton Wars*, 123.

⁶²⁶ Congressional Quarterly Almanac, 106th Congress, 2nd Session, March 23 1999.

⁶²⁷ *Congressional Records*, Senate, 106th Congress, 1st Session, March 23 1999, S3110.

⁶²⁸ Louis Fisher, *Presidential War Power*, 1999.

Senate formally authorized the participation of U.S. troops to NATO Operation.

Instances of opposition and attempts to resist intervention in Kosovo started to emerge only when NATO aircrafts were already bombing Serbia. On 12 April, Republican Campbell introduced in the House two resolutions calling for the withdrawal of U.S. troops from NATO operation and for a declaration of war against FRY. In particular the latter resolution was an attempt to apply the 1973 War Powers Act that provides that without a declaration of war the President is forced to gain congressional approval within 60 days from the start of the operation.⁶²⁹ These resolutions came to the House floor on 28 April. During the debate, Campbell reminded that intervention in Kosovo was “contrary to the constitution” in the sense that the Founding Fathers “were quite clear that war was too important to be commenced by the action of one single individual.”⁶³⁰ Nevertheless, these kinds of arguments were deemed to be rejected by a Congress in which Republican leaders had no intention to challenge the authority of the President on the issue. Resolution 82, which directed “the President to remove United States Armed Forces... within 30 days after the passage of this resolution” was tabled by a 139-230 vote.⁶³¹ Resolution 44 on the necessity to declare war to FRY was overwhelmingly rejected by a 2-427 vote.⁶³²

Two other resolutions, which were debated and voted by the House on 28 April, seemed to indicate a capacity of Congress of playing a more assertive role. In fact, these debates led to surprising results. Republican representatives Tilly Fowler and William Godling sponsored resolution HR 1569, which aimed to limit the possibility for the Administration of deploying ground troops in the Kosovo region: “None of the funds appropriated or otherwise available to the Department of Defense may be obligated or expended for the deployment of ground elements of the United States Forces... unless such deployment is specifically authorized by a law.”⁶³³ This resolution found a bipartisan support, with 46 Democrats voting with the Republican majority, and was finally passed. Through this vote the House seemed to put a significant constraint on the action of the Administration.

Nevertheless, the significance of this resolution was almost immediately defeated by another vote that took place the same day. After over a month from the beginning of hostilities, the House

⁶²⁹ Pomper, Miles A. "FOREIGN AFFAIRS: Clinton Gains Support on Hill For Kosovo Campaign." *CQ Weekly Online* (April 17, 1999): 905-906. <http://library.cqpress.com/cqweekly/WR19990417-16KOSOVO001> (accessed January 15, 2010).

⁶³⁰ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H2383.

⁶³¹ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H2414.

⁶³² *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H2439.

⁶³³ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H 2400.

debated resolution 21 that authorized the President “to conduct military air operations” against FRY.⁶³⁴ The same resolution had been passed by the Senate few moments before the start of the operation. Surprisingly enough for a House that had previously approved several resolutions in support of the operation, the debate over resolution 21 led to a tie vote (213-213). According to the rules of the House, this meant rejection.⁶³⁵ The House of Representatives did not authorize the Administration to participate in NATO air strikes. The impact of this vote was almost nonexistent, since it came after over a month from the start of intervention. Rejection of resolution 21 was a posthumous manifestation of opposition in a moment in which it would have been impossible to withdraw U.S. aircrafts from the operation. Moreover, it came after the positive vote of the Senate on 23 March, when the Republican majority, together with the Democratic Party, had shown no hesitation to authorize the operation.

28 April further demonstrated that congressional action was as confused as it could be. Both the Republican and Democratic parties were incapable of expressing a clear position. Examples of congressmen that crossed their partisan affiliation and supported the standpoints of the rival party became the rule rather than the exception. Instead of siding with the party to which they were members, congressmen seemed to develop positions that mostly depended upon their personal views or sectional interests. No real majority either in favor or against the norm of humanitarian intervention virtually existed. Stuck between the necessity to support U.S. troops against a perceived enemy and the will to exercise its constitutional prerogatives in order to limit the war powers of the Administration, the Congress followed an extremely shaky and contradictory course of action.

This contradictory behavior also characterized the last month of war. At the beginning of May a bipartisan group of senators led by John McCain and Joe Biden presented resolution 20, which authorized the President “to use all necessary force and other means...to accomplish United States and North Atlantic Treaty Organization objectives in the Federal Republic of Yugoslavia.”⁶³⁶ Far from being a manifestation of opposition to the operation, Resolution 20 aimed to support the Administration in the pursuit of its military and political objectives. Surprisingly, this resolution encountered the opposition of both Republican and Democratic Senate leaders. Majority and Minority leaders Trent Lott and Tom Daschle managed to table the resolution that was rejected by a large majority. Behind the official justification that the resolution was unnecessary, this vote showed once again the difficulty of Congress at dealing with the ever-changing situation in Kosovo and expressing a clear and univocal stance.

⁶³⁴ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H2441.

⁶³⁵ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, 28 April 1999, H2446.

⁶³⁶ *Congressional Records*, Senate, 106th Congress, 1st Session, May 4 1999, S4612.

The moody and inconsistent attitude of Congress found a final confirmation during the debate on the “Kosovo and Southwest Asia Emergency Supplemental Appropriations Act (HR 1664), which contained provisions that aimed to guarantee financial support for Operation Allied Force. In that occasion, Republican Ernest Istook presented an amendment, which wanted to make sure that “no ground forces of the United States can invade Yugoslavia absent a declaration by this Congress to do so.”⁶³⁷ As Istook clarified, the amendment was not meant to kill the entire Bill or to stop operation Allied Force but simply to give Congress the opportunity to exert some sort of control over the use of ground troops in Kosovo.⁶³⁸

This amendment would have given teeth to resolution 1569, which had been passed by the House only one week before and which required that the Administration gain congressional approval before committing ground troops. One more time, the House went against a previous decision and rejected Istook’s amendment with only 97 Republicans supporting it.⁶³⁹ These episodes provide another indicator of the ambiguity of Congress and its incapacity of making any real difference in the debate. A similar amendment presented in the Senate by Republican Arlen Specter encountered the very same destiny.⁶⁴⁰

With no hesitation both the House and the Senate passed with large majorities the Appropriations Acts that secured financial support for the operation.⁶⁴¹ Various observers noted the contradiction by stressing how “scores of Republicans who had cast mostly symbolic votes against air strikes...only a week earlier changed their votes to support financing the war.”⁶⁴² On the one hand, the positive vote for the Bill was a manifestation of responsibility by Congress that could not fail to support U.S. troops during a delicate military operation. On the other hand, it is less clear why Congress was sometimes committed to limiting the room of maneuver of the Administration, while at other times during the crisis refused to pass legislation that could have made these actions more effective. This, if anything, signaled the inability of Congress to “find its voice on the conflict.”⁶⁴³ The few times in which the debate seemed to get politicized and follow ideological lines, Congress manifested exceptional difficulties at expressing clear-cut and understandable positions.

⁶³⁷ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, May 6 1999, H2879

⁶³⁸ *Ibidem*.

⁶³⁹ *Ibidem* H2891.

⁶⁴⁰ *Congressional Records*, Senate, 106th Congress, 1st Session, May 24 1999, S5809.

⁶⁴¹ *Congressional Records*, House of Representatives, 106th Congress, 1st Session, May 6 1999, H2830; *Congressional Records*, Senate, 106th Congress, 1st Session, May 20 1999.

⁶⁴² Taylor, Andrew. "APPROPRIATIONS: Paying for the Kosovo Air War: How Much Is Too Much?" *CQ Weekly Online* (May 1, 1999) <http://library.cqpress.com/cqweekly/WR19990501-18SUPP001> (accessed January 16, 2010).

⁶⁴³ Gebe Martinez, “Campbell Maneuvers to Force an Ambivalent Congress to Choose”, *Congressional Quarterly Weekly*, April 24, 1999.

In conclusion, although the Administration had to face an unfavorable Congress, in the middle of a sex scandal, and despite the thin constitutional justification for the conduct of the operation, Congress failed to exercise its war powers and did not play any significant role in the process of invocation of humanitarian intervention.

5.3.2 *A Bipartisan Debate*

The incapacity of acting as a constraint on the actions of the Administration and contributing to the U.S. position toward humanitarian intervention was also the result of the bipartisan atmosphere that characterized Congress during the Kosovo crisis. With the Republican Party controlling both the House and the Senate, a partisan debate over Kosovo could have at least partially influenced the strategy of intervention put forward by President Clinton and the main members of the executive. Nevertheless, congressional debates over Kosovo mostly followed a bipartisan scheme. The main arguments in favor or against humanitarian intervention in the Balkans cut across party lines and ideological affiliations to the extent that debates and divisions took place more within rather than between parties. Support and opposition to the norm could be found both in the Republican and Democratic Parties. Leading party members often sided with each other in invoking the right and duty of intervention, while a minority of Republicans and Democrats developed similar critiques of the humanitarian rationale for operation Allied Force.

Along these lines, the dynamics of party politics, which are often viewed as an important element of recent U.S. foreign policy making, did not constitute a determinant domestic factor for the invocation of humanitarian intervention. The presence of a Republican majority in both branches of the legislature did not influence the process of norm interpretation that was mostly left to the Administration. In a particular delicate phase of U.S. foreign policy, Congress did not demonstrate a clear position on the issue and preferred not to take any specific responsibility.

The roots of this bipartisan dynamics can be observed from the very start of the crisis. In spring 1998, both the House and the Senate passed, with overwhelming majority, resolutions to condemn the actions of Serb forces against the Kosovo province.⁶⁴⁴ In this initial phase, Republicans and Democrats were united in arguing that the U.S. “cannot and will not tolerate another Bosnia in the Balkans.”⁶⁴⁵

⁶⁴⁴ See for example, H. Con. Res. 235 “calling for an end to the violent repression of the legitimate rights of the people of Kosova”, *Congressional Records*, House of Representatives, 105th Congress, Second Session, March 17 1998, H1201; for a similar resolution that was passed by the Senate, see S. Con. Res. 85 calling for “an end to the violent repression of the people of Kosovo”, *Congressional Records*, Senate, 105th Congress, Second Session, March 18 1998, S2203.

⁶⁴⁵ *Congressional Records*, House of Representatives, 105th Congress, Second Session, March 17 1998, H1202.

This bipartisan effort to blame Serb actions was particularly strong in the Senate. Republicans, such as Joe D'Amato and Gordon Smith, promoted several resolutions against Milosevic, often in collaboration with Democrats, such as Biden and John Liebermann.⁶⁴⁶ Kosovars were often depicted as victims that "have been subject to...tyrannical exercise of power to deprive them of their own self-experience."⁶⁴⁷ Letting Milosevic free to perpetrate these violations "could easily set off a chain reaction leading to wider conflict in the Balkans."⁶⁴⁸

When the use of armed force to solve the humanitarian crisis became more than a possibility in fall 1998, congressional debates started to be increasingly characterized by the first disagreements. In particular, the main issue at stake regarded the uneasy relationship between the legality and legitimacy of intervention. This debate had two dimensions: first, Congress debated whether intervention could be carried out even in case the Security Council could not find the necessary consensus to explicitly authorize the use of force. Second, U.S. legislators extensively discussed whether congressional authorization was necessary before the Administration could take action.

The Congress soon divided in two camps. On the one hand, there were those who invoked the existence of "higher interests", in particular the moral imperative to enforce universal human rights and the political necessity to avoid an escalation of conflict in the area with potentially destabilizing effects. For these representatives, the gravity of the situation, both from a humanitarian and national interest point of view, justified an exceptional circumvention of the strict letter of international and domestic law. On the other hand, for those who argued against intervention, the crisis in Kosovo did not imply any superior humanitarian and defense interests that could justify an action without UN or congressional authorization. The legitimacy of intervention could only rest upon a clear legal basis that had to be provided by the UN and, above all, by U.S. Congress. The most interesting aspect of this debate is that divisions and disagreements did not follow party lines. Support and opposition to the logic of intervention took a bipartisan form and followed intra-, rather than inter-, party lines.

The Republican and Democratic parties were both characterized by a majority that put forward a mix of moral and national interest arguments sharing the idea that the legitimacy of intervention in Kosovo must be located in the exceptionality of the humanitarian crisis. The legal basis was not seen as the decisive determinant of the legitimacy of operation Allied Force.

Various members of the House pointed to the importance of U.S. interests in the region as one of the main reasons for intervention. For example, Democrat Sander Levin observed in fall 1998 that

⁶⁴⁶ *Congressional Records*, Senate, 105th Congress, Second Session, July 17 1998, S 8456-7.

⁶⁴⁷ *Congressional Records*, Senate, 105th Congress, Second Session, March 18 1998, S2206,

⁶⁴⁸ *Congressional Records*, Senate, 105th Congress, Second Session, March 18 1998, S 2207.

“if the United States and the international community fail to take effective action to stop the violence in Kosovo, the likelihood is that the conflict will grow and spread.”⁶⁴⁹ Along these lines, Democrat Steny Hoyer reminded that intervention was necessary to “bring a chance for peace to the Balkans.”⁶⁵⁰ Most Republicans equally recognized the existence of sensitive national and defense interests in the region by underscoring that “a secure and stable Europe is of great concern to the United States.”⁶⁵¹

Bipartisan consensus on the necessity to intervene in Kosovo in order to secure U.S. interests was even stronger in the Senate. During a debate in summer 1998, Democrat Biden argued that “the continuing fighting threatens the stability of neighboring Albania and also of the former Yugoslavian Republic of Macedonia.”⁶⁵² In a similar way, Republican McCain noticed that “the prospects are quite real that [conflict] may eventually embroil other countries in the region in a larger war.”⁶⁵³

The positions of leading Republicans and Democrats were also quite similar as to the moral logic behind intervention. For example, Republican representative Henry Hyde supported the use of force by arguing that “there is really a moral obligation on those people who have the resources to intercede when people are being wantonly, atrociously killed.”⁶⁵⁴ Similar arguments were put forward by the Chairman of the House Committee on International Relations Republican Benjamin Gilman that, few hours before the start of intervention, reminded that NATO air operation had mostly the aim “to end Milosevic’s brutal attacks upon the Albanian population of Kosovo.”⁶⁵⁵ A member of the same committee, Democrat Eliot Engel did not hesitate to declare that “when the United States has the ability to help prevent these kinds of atrocities we ought to do it.”⁶⁵⁶ In the Senate, the Chairman of the Committee on Armed Services, Republican John Warner, defined NATO operation as “necessary to bring about a cessation of the tragic situation in Kosovo.”⁶⁵⁷

This mix of political and humanitarian justifications was summarized by Senate Minority Leader Democrat Tom Daschle who provided that the U.S was bound to intervene “to defend its national interest” and “to say no to the torture and slaughter of innocent civilians.”⁶⁵⁸ As these examples show, the leading members of the Republican and Democratic parties interpreted

⁶⁴⁹ *Congressional Records*, House of Representatives, 105th Congress, Second Session, September 14 1998, H 7653.

⁶⁵⁰ *Congressional Records*, House of Representatives, 105th Congress, Second Session, September 23 1998, H 8495.

⁶⁵¹ Doc Hastings (R-Washington), *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1194.

⁶⁵² *Congressional Records*, Senate, 105th Congress, Second Session, June 17 1998, S 6463.

⁶⁵³ *Congressional Records*, Senate, 105th Congress, Second Session, October 7 1998, S 11651.

⁶⁵⁴ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1197.

⁶⁵⁵ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 24 1999 H 1661.

⁶⁵⁶ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 17 1999, H 1389.

⁶⁵⁷ *Congressional Records*, Senate, 105th Congress, Second Session, October 2 1998, S 11328.

⁶⁵⁸ *Congressional Records*, Senate, 105th Congress, Second Session, October 12 1998, S 12436.

humanitarian intervention as both consistent with U.S. interests in the stability of the Balkans and with universal human rights.

These two dimensions of U.S. intervention rested upon an interpretation of the international system that was based on the recognition of the emergent norm of humanitarian intervention and on the consequent necessity to revise traditional norms of international law, such as non-intervention and inviolability of state sovereignty. This view of international relations was mostly promoted by the Clinton Administration and found the bipartisan support of both branches of Congress.

Most Republicans and Democrats were quite skeptical about the necessity to even discuss the legitimacy of NATO operation in Congress. For House Minority Leader Democrat Dick Gephardt, “to conduct a divisive debate now in Congress and perhaps fail to support our government’s efforts is the height of irresponsibility.”⁶⁵⁹ Although he was in favor of giving Congress the possibility of debating the issue, the Speaker of the House Republican Dennis Hastings openly opposed legislative proposals that could limit the action of the Administration. During the debate on the Fowler’s amendment to prevent the President from developing ground troops without congressional authorization, Hastings criticized the measure by reminding that “the United States can and should intervene when a country violates international law and commit crimes against humanity.”⁶⁶⁰ In a similar way, Republican John Porter opposed these types of amendments and defined their potential approval as a “victory for Milosevic.”⁶⁶¹

The hostility of the bipartisan majority of Congress to any legislative attempt to limit intervention in Kosovo was also directed against those who subjected the legitimacy of NATO operation to a positive vote by the Security Council. In October 1998, Democrat Engel criticized the search of UN authorization by arguing that “the United Nations does not have a veto on what we can do.”⁶⁶² Many senators equally rejected the centrality of UN procedures when crucial humanitarian and security interests are at stake. For Republican Warner, for example, “in no way should the United Nations...have any veto over the decision of the collectivity of nations...to take such action as they deem necessary to bring about a cessation of the tragic situation in Kosovo.”⁶⁶³ Along these lines, for Democrat Biden “a UN Security Council mandate is not a necessary precondition to use NATO forces.” Stressing that an excessive search of UN authorization would mean the possibility for China

⁶⁵⁹ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1186.

⁶⁶⁰ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1235.

⁶⁶¹ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1236.

⁶⁶² *Congressional Records*, House of Representatives, 105th Congress, Second Session, October 1 1998, H 9212.

⁶⁶³ *Congressional Records*, Senate, 105th Congress, Second Session, October 2 1998, S 11328.

and Russia of vetoing U.S. foreign policy, Biden concluded that Kosovo represented “a vital national security interest of the United States” and the U.S. had to be “prepared to act alone if necessary.”⁶⁶⁴

These arguments shared the idea that under exceptional circumstances that can be dictated by pressing national interests or universal standards of international morality, the U.S. has the right to intervene even if the letter of international and domestic law is not fully respected. This notion was supported by a bipartisan congressional consensus that accepted the interpretation of humanitarian intervention provided by the Administration and renounced to exert any constraint on the Presidency.

The bipartisan character of the debate over humanitarian intervention in Kosovo can be also understood by analyzing the examples of opposition to NATO operation. In both parties, a minority of members devised various arguments against intervention. These arguments ranged from the shaky legal basis to the lack of clear U.S. interests in the crisis. Despite their differences, these standpoints were all characterized by the rejection of the ‘emergency logic’ spelt out by the Administration.

In October 1998, Republican Campbell and Democrat Skaggs reported to the Congress on a letter that they sent, together with a group of congressmen, to the President. In this letter, they pointed out that “the Constitution says that we do not go to war unless the representatives of the people, in the House and in the other body, vote for it. It does not give the President the right to go to war on his own.”⁶⁶⁵ Several Republican legislators re-proposed this kind of argument and occasionally reinforced it with considerations of national interest. For example, in February 1999, Republican Ron Paul criticized a possible intervention on the basis that “troops in Kosovo will not serve the interests of the United States.” At the same time, “the President cannot send these troops without congressional approval.”⁶⁶⁶ Few weeks before the start of air strikes, Republican Doug Bereuter highlighted how intervention in Kosovo was likely to resemble the Somali fiasco: “I want to remind my colleagues what happened in Somalia where without any consultation, we saw the Administration move from protecting the people involved in the deliveries of food to a nation building process.”⁶⁶⁷

This mix of legal and political objections was employed by some Democrats too. During a debate on the possibility of intervention, Ralph Hall provided that without a “true national interest”, it would be foolish to “sacrifice one American life for all Bosnia, Iraq, or Kosovo.”⁶⁶⁸ Other Democrats, such as Pat Danner, stressed that Kosovo should have been mostly a concern for European states.⁶⁶⁹ As

⁶⁶⁴ *Congressional Records*, Senate, 105th Congress, Second Session, June 17 1998, S 6464.

⁶⁶⁵ *Congressional Records*, House of Representatives, 105th Congress, Second Session, October 1 1998, H 9191.

⁶⁶⁶ *Congressional Records*, House of Representatives, 106th Congress, First Session, February 9 1999, H 529.

⁶⁶⁷ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1194.

⁶⁶⁸ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1206.

⁶⁶⁹ *Congressional Records*, House of Representatives Committee on International Relations, 105th Committee, Second

a member of the House Committee on International Relations noticed, U.S. troops “don’t want to be policemen to the world.”⁶⁷⁰

It was during the hearings of the House Committee that opponents to the operation mostly developed their anti-interventionist rhetoric. In particular, Campbell criticized NATO intervention on legal grounds, both from an international and constitutional point of view. FRY, was reminded, was a sovereign country. Consequently, attacking FRY could not be treated as a police operation but as an “act of war.” Along these lines, Campbell stressed that “the Constitution says that the Congress shall declare war.”⁶⁷¹ This was the reason that led Campbell to present to the House two resolutions: one to declare war against FRY and one to remove U.S. troops from NATO air strikes. U.S. intervention against FRY was considered illegal. In terms of international law, NATO was waging war against a sovereign state without having been previously attacked and without UN authorization. In terms of U.S. constitutional law, the Administration had ignored that according to the Constitution, it is for Congress to declare war.⁶⁷²

This logic was supported by several Republican and Democratic members. Democrat Danner presented, together with Fowler, a bipartisan amendment to prevent the President from using ground troops in Kosovo.⁶⁷³ Later, after the operation had already started, several Democrats endorsed Campbell’s attempts to limit the actions of the Administration on the basis that the President cannot “act unilaterally to put our young men and women in uniform into ground battle in Kosovo without the explicit authorization of the U.S. Congress.”⁶⁷⁴ Representatives with different backgrounds and ideological positions shared such arguments. Left-wing Democrat Barbara Lee reminded, toward the end of hostilities, that with operation Allied Force, U.S. Congress had “abdicated [its] Constitutional responsibility.”⁶⁷⁵

Although the Senate was generally more sympathetic toward intervention in Kosovo, the few examples of opposition by U.S. senators also presented this bipolar character. Similarly to Campbell in the House, Republican Specter put forward several legal arguments against intervention. In particular,

Session, July 23 1998, 16.

⁶⁷⁰ *Congressional Records*, House of Representatives Committee on International Relations, 106th Congress, First Session, February 10 1999, 21.

⁶⁷¹ *Congressional Records*, House of Representatives Committee on International Relations, 106th Congress, First Session, February 10 1999, 24.

⁶⁷² *Congressional Records*, “Situation in Kosovo”, Hearing Before the House of Representatives Committee on International Relations, 21, 106th Congress, First Session, 6.

⁶⁷³ *Congressional Records*, House of Representatives, 106th Congress, First Session, March 11 1999, H 1217.

⁶⁷⁴ Jerry Costello (D-Illinois), *Congressional Records*, House of Representatives, 106th Congress, First Session, April 28 1999, H 2393.

⁶⁷⁵ *Congressional Records*, House of Representatives, 106th Congress, First Session, April 28 1999, H 2430.

Specter noticed that “air strikes constitute an act of war.”⁶⁷⁶ As such, “only Congress has the constitutional prerogative to authorize war.”⁶⁷⁷ These ideas found the support of Democrat Russ Feingold that opposed intervention both because it gave too much authority to the President and because of the lack of clear U.S. interests in the region: “This proposed deployment to Kosovo is another in the long line of ill-fated and seemingly unending peacekeeping missions that this Administration has chosen to undertake without the explicit authorization of the Congress.”⁶⁷⁸

Opposition to intervention by U.S. senators was less widespread and mostly characterized by a minority of Republican members, such as John Ashcroft and Strom Thurmond.⁶⁷⁹ However, various discussions on legislation to provide operation Allied Force with congressional authority show how the struggle was not between one party and the other. Rather than a partisan dynamic between the Republican and Democratic parties, what characterized the Senate during the Kosovo crisis was mostly a bipolar logic. The debate was shaped by the “presence of a number of moderate Republicans with strong foreign policy credentials, coupled with Democrats who wanted to use force.”⁶⁸⁰ In a similar way, also opposition was not identifiable with one party or the other but could be found among both Republican and Democratic senators.

In conclusion, U.S. intervention in Kosovo was not a partisan one. Using force for humanitarian purposes was an issue that created divisions more within rather than between parties. Opposition and support characterized both the Republican and Democratic parties. This bipartisan scheme overlapped with the impossibility for Congress of developing a clear position as to NATO operation and the norm of humanitarian intervention. The domestic struggle for Kosovo saw many legislators supporting positions that were different from the ones of their party leaders. Neither the Republican, nor the Democratic Party took a clear ideological stance in favor or against humanitarian intervention and their members were mostly left to their own personal choices and views. In this political context, bipartisan support and opposition emerged as almost accidental results and not as the outcome of specific policies pursued by the two main parties. Differently from other foreign policy debates in which the final outcome was the result of a political struggle between Republicans and Democrats, party politics cannot be seen as a domestic determinant of U.S. favorable position toward the emergent norm of humanitarian intervention.

⁶⁷⁶ *Congressional Records*, Senate, 106th Congress, First Session, March 18 1999, S 2918.

⁶⁷⁷ *Congressional Records*, Senate, 106th Congress, First Session, February 23 1999, S 1772.

⁶⁷⁸ *Congressional Records*, Senate, 106th Congress, First Session, 22 March 1999, S 3055.

⁶⁷⁹ *Congressional Records*, 10^{6th} Congress, First Session, March 23 1999, S 3114.

⁶⁸⁰ Ryan C. Hendrickson, *The Clinton Wars the Constitution, Congress and War Powers*, 135.

5.4 Shaping International Norms At Home: The Clinton Administration And The Kosovo Crisis

U.S. executive leaders, understood as President Clinton and the main members of the Administration, were the domestic actors that mostly determined U.S. position toward humanitarian intervention during the Kosovo crisis.

The U.S. was one of the most supporters of the right to humanitarian intervention in case of massive violations of human rights perpetrated by foreign governments against their own nationals. The U.S., together with NATO countries, invoked the existence of a norm that was, and still is, highly debated and contested by national and international actors. They were dealing with an emergent norm that was still far from being unequivocally recognized as an instrument of international behavior. In that situation, the Clinton Administration acted as a norm entrepreneur and provided an interpretation of the domestic and international legitimacy of humanitarian intervention that put the U.S. at the forefront of international support for this controversial norm. Especially through the arguments of Clinton and the State Department, the Administration soon came to be dominated by an interventionist approach that interpreted operation Allied Force as morally legitimate and politically consistent with U.S. interests.

5.4.1 To Intervene or Not to Intervene: A Debate Inside the Administration

Intervention in Kosovo and invocation of humanitarian intervention were mostly the result of the actions of the main members of the Clinton Administration. Although the Administration went to war on the basis of a widespread consensus about the necessity to use force to stop Serbian violence in the region, the planning of the operation was not devoid of debates and disagreements. An analysis of these debates serves two main purposes. First, it clarifies what members of the Administration were most influential in shaping the proactive stance of the U.S. as to humanitarian intervention. Second, it further demonstrates the predominance of political leadership in the domestic process of invocation of humanitarian intervention. Discussions and disagreements on the possibility of committing U.S. forces to solve the humanitarian crisis remained mostly within the Administration and only marginally involved other domestic actors, such as Congress or civil society movements.

At the beginning of the Kosovo crisis, the Administration was characterized by a political struggle between two different mindsets: on the one hand, the cautious approach of the military and Defense communities that were reluctant about the possibility of getting involved in a complicated

political and humanitarian emergency; on the other hand, the proactive and interventionist approach of the State Department that always maintained that diplomatic action could be effective only if supported by the credible threat to use force. After an initial phase of partial neutrality, President Clinton increasingly endorsed the latter view and his support resulted fundamental for the victory of the interventionist logic.

Secretary of State Albright was the main representative of this muscular mindset. Since the beginning of hostilities between Serbs and Kosovars, Albright made clear that “Kosovo was a repeat of Bosnia” and that Milosevic “understood only force.”⁶⁸¹ Her arguments and actions presented a twofold commitment to geopolitical interests and moral values. As several observers noticed, her personal background, with three grandparents died in Auschwitz and her all family forced to escape from Czech communism, had a strong influence on Albright’s interpretation of the issue: “Albright’s approach...has been idealistic and moralistic, with an emphasis on battling evil dictators.”⁶⁸² In more than one occasion, she did not hesitate to draw comparisons between the 1938 Munich Conference and the Kosovo issue. During a meeting of the Contact Group in March 1998, she polemically asked: “Where do you think we are, Munich? ... In this very room our predecessors delayed as Bosnia burned and history will not be kind to us if we do the same.”⁶⁸³ In Albright’s view, the search of an appeasement with Milosevic was likely to produce severe consequences on both the stability of South Eastern Europe and the life of Kosovars.⁶⁸⁴

Nevertheless, in this initial phase, various members of the Administration were still quite reluctant to the possibility of using force. Albright was aware that intervention “would only be possible...if [she] were able to forge a consensus within [the] government.”⁶⁸⁵ Although this was not an impossible task, neither the Pentagon nor the military community showed particular enthusiasm for a military operation. As she recalls in her memoirs, in summer 1998 Albright’s positions could only count on the support of State Department’s officials, such as Deputy Secretary of State Strobe Talbott and Special Envoy to the Balkans Robert Gellbard.⁶⁸⁶

An important factor for the victory of Albright’s positions was represented by the approach toward the crisis that was taken by the Head of U.S. European and Southern Command General Wesley

⁶⁸¹ David Halberstam, *War in a Time of Peace*, 376.

⁶⁸² Michael Dobbs, *Madeleine Albright: A Twentieth Century Odyssey* (New York: Henry Holt and Company, 1999): 421.

⁶⁸³ Cit. in Walter Isaacson, “Madeleine’s War”, *Time*, May 9 1999; see also Ivo H. Daalder and Michael E. O’Hanlon, *Winning Ugly: NATO’s War to Save Kosovo* (Washington DC: Brookings Institution Press, 2000): 27.

⁶⁸⁴ William G. Hyland, *Clinton’s World: Remaking American Foreign Policy* (Westport, London: Praeger, 1999): 21-2.

⁶⁸⁵ Madeleine Albright, *Madame Secretary*, 383.

⁶⁸⁶ Madeleine Albright, *Madame Secretary*, 383.

Clark. Supporting Albright's view on the necessity to develop a credible military threat against Milosevic, Clark often clashed against the "military's innate conservatism." As he provided, "the top military officials wanted to protect their people and resources...They were committed to the national military strategy, prioritized on the Persian Gulf and Northeast Asia...They didn't want to step forward and take responsibility for difficult and dangerous actions in what they saw as a less vital region."⁶⁸⁷

The most prominent examples of opposition came from Secretary of Defense Cohen, Under-Secretary of Defense William Slocum and the Chairman of the Joint Chiefs of Staff Hugh Shelton. In particular, Secretary Cohen, a former moderate Republican Senator that had grown up in the Vietnam era, warned against the enthusiastic zeal of those who wanted "to intervene in areas where there is not an immediate threat to our vital interests."⁶⁸⁸ General Shelton also shared this concern and expressed preoccupation for "a second major long-term mission in the Balkans" and "worried about getting caught in the middle of a civil war."⁶⁸⁹ In sum, in this initial phase, the Administration did not act as a cohesive political body. Although opposition to intervention was mostly "lurking, rather than openly voiced"⁶⁹⁰, the Administration witnessed several disagreements between the interventionism of the State Department and General Clark and the more cautious and skeptical approach of the Defense and military communities.

As the situation in Kosovo worsened, President Clinton started to increasingly support Albright's positions. In September 1998, for example, he warned that "the escalation of tension in Kosovo inflicts human suffering on innocent civilians" and consequently "the threat of humanitarian catastrophe is becoming even more real."⁶⁹¹ Clinton's endorsement of a more proactive stance had a significant impact on NATO decision to threaten the use of force against Milosevic. As Albright recalled, "my argument, combined with daily news of disasters from Kosovo, ultimately prevailed. The President approved a strategy for supporting alternatives to Milosevic through overt, public means; we also decided to push for a clear-cut Alliance decision on Kosovo."⁶⁹²

In addition to President Clinton's positions, events from the region played a decisive role in softening the resistance of the Defense community. For instance, report of the killings of 45 civilians

⁶⁸⁷ Wesley Clark, *Waging Modern War*, 119-20.

⁶⁸⁸ Cit. in David Halberstam, *War in a Time of Peace*, 441; for an analysis of Cohen's figure, see Adam Clymer, "A Bipartisan Voice: William Sebastian Cohen", *New York Times*, December 6 1996.

⁶⁸⁹ Madeleine Albright, *Madame Secretary*, 395.

⁶⁹⁰ David Halberstam, *War in a Time of Peace*, 422.

⁶⁹¹ President Clinton, "Joint Statement on the Situation in Kosovo", *Public Papers of the President*, September 2 1998, 1693.

⁶⁹² Madeleine Albright, *Madame Secretary*, 388.

by Serb forces in the small village of Racak augmented the credibility of the interventionist camp.⁶⁹³ As observers underscored, “what happened at Racak changed everyone, and its political impact was obvious: Kosovo, like Bosnia, could no longer be ignored.”⁶⁹⁴ Humanitarian and strategic concerns got together and considerably weakened the skepticism of the military. As Michael Dobbs acutely noted, “it was not just the humanitarian catastrophe that grabbed everybody’s attention”, but also the possibility of celebrating the 50th anniversary of NATO “at the same time that massacres were occurring in the heart of Europe.”⁶⁹⁵ The Racak massacre bridged the gap among the divisions that had characterized the Administration and created the conditions for a renewed commitment to solving the crisis.

The doubts of the Pentagon and the military did not completely dissipate. The military was still wary of the possibility of succeeding through an air operation and expressed preoccupation that “Yugoslav air defenses were well dug in and that losing air-crafts in combat was a distinct possibility.”⁶⁹⁶ Moreover, they feared that involvement in the region would have been longer than expected as it was not clear what the exit strategy would be.

It was, once again, for Albright to overcome the impasse. After harshly criticizing the last attempts to resist intervention by declaring that Administration’s actions resembled those of “gerbils running on a wheel”⁶⁹⁷, Albright and her staff started to work on a strategy that provided an ultimatum to the parties in conflict to accept an interim agreement. In case of acceptance, NATO would deploy its troops to enforce the agreement. In case of rejection, NATO would start an air campaign to liberate Kosovo. This paved the way for the Rambouillet Conference in February 1999 and eventually for NATO intervention against Milosevic. As Daalder noticed, “no one could come up with a better alternative to the proposal”⁶⁹⁸ and President Clinton endorsed this course of action. As the President provided at the time of the Rambouillet talks, “We...stand united in our determination to use force if Serbia fails to meet its previous commitment to withdraw forces from Kosovo, and if it fails to accept the peace agreement.”⁶⁹⁹ This became the official position of the Administration. Milosevic’s failure to accept the Rambouillet agreement led directly to the start of air strikes in March 1999. From that

⁶⁹³ Robert C. Diprizio, *Armed Humanitarians: U.S. Interventions from Northern Iraq to Kosovo* (Baltimore and London: The Johns Hopkins University Press, 2002): 138.

⁶⁹⁴ David Halberstam, *War in a Time of Peace*, 409.

⁶⁹⁵ Michael Dobbs, Madeleine Albright: A Twentieth Century Odyssey, 415.

⁶⁹⁶ Jane Perlez, “Doubts on NATO Air Raids as the Talks on Kosovo End”, *New York Times*, March 19, 1999.

⁶⁹⁷ Madeleine Albright, *Madame Secretary*, 392.

⁶⁹⁸ Ivo H. Daalder and Michael E. O’Hanlon, *Winning Ugly*, 72.

⁶⁹⁹ President Clinton and President Chirac, “Joint Press Conference”, *Public Papers of the President*, February 19, 1999, 253.

moment on, disagreements almost completely disappeared. The Administration convincingly spoke with one voice and debates were limited to whether or not to use ground forces, which never became a real necessity.⁷⁰⁰

This was the conclusion of a debate that saw the victory of the interventionist mindset of the State Department over the more conservative and cautious approach of the Defense Department and the military. This struggle remained fundamentally inside the Administration. It was a battle of ideas that did not involve societal actors and mostly marginalized Congress. This indicates a clear predominance of executive leaders as the domestic actors that determined U.S.' invocation of humanitarian intervention. Starting from the State Department, the interventionist logic created the conditions for a unified and coherent political stance. At the basis of this political stance there was a conception of the international system as one in which exceptional humanitarian crises need to be solved by a responsible international community. In these situations, the legitimacy of intervention is not necessarily provided by its legal basis, but rather by the necessity to enforce universal values of humanity and pursue vital political interests. This interpretation was produced in various steps by the main members of the Administration and finally imposed on the domestic debate.

5.4.2 *Constructing Humanitarianism for a New Century: U.S. Leadership and the Interpretation of Post-Cold War International System*

The invocation of humanitarian intervention in Kosovo by the Clinton Administration has to be located in a specific interpretation of the international system, which was composed of four fundamental elements.

First, for the Administration, the end of the Cold War and the process of economic globalization created the conditions for a “dynamic and uncertain security environment replete with both opportunities and challenges.”⁷⁰¹ The post-Cold War international system was not necessarily more secure than the previous one. In the 1997 National Security Strategy (NSS), the Administration provided that the U.S. had to face dangers that were “unprecedented in their complexity.”⁷⁰² Ethnic conflict, outlaw states, terrorism, organized crime, and weapons of mass destruction were often listed by Administration’s members as threats that “respect no nation’s borders”⁷⁰³ and require common and

⁷⁰⁰ Jane Perlez, “Doubts on NATO Air Raids as the Talks on Kosovo End”; Dana Priest, “A Decisive Battle that Never Was” *Washington Post*, September 19, 1999.

⁷⁰¹ “The Report of the Quadrennial Defense Review”, May 1997, available at <http://www.fas.org/man/docs/qdr/>.

⁷⁰² “A National Security Strategy for a New Century”. The White House, May 1997, available at <http://www.fas.org/man/docs/strategy97.htm#preface>.

⁷⁰³ Bill Clinton, “Address Before a Joint Session of the Congress on the State of the Union Address, January 23 1996,

resolute action. In particular, the Quadriennial Defense Review, published in 1997 under the direction of Secretary of Defense Cohen, focused on “failed or failing states [that] may create instability, international conflict, and humanitarian crises, in some cases within regions where the United States has vital or important interests.”⁷⁰⁴ Civil wars and massive violations of human rights had the potential to make the international system less just and stable and called for a strategy of U.S. engagement.

This strategy constituted the second element of the Administration’s interpretation of the post-Cold War international system and is usually referred to by scholars as “democratic enlargement.”⁷⁰⁵ Following a re-proposition of classic democratic peace theory, the Administration believed that “countries whose citizens choose their leaders...are more likely...to be reliable partners in trade and diplomacy, and less likely to threaten peace.”⁷⁰⁶ This view was shared by the military community, which provided that it was in the U.S. vital interest to foster “an international environment in which critical regions are stable, at peace [and] democratic norms and respect for human rights are widely accepted.”⁷⁰⁷ The Administration had to be prepared to use its diplomatic, and if necessary, military resources in order to promote democratic values whose diffusion would be functional to U.S. security.

This interdependence between international values and national interests constituted the third pillar of the Administration’s interpretation of post Cold War international relations.⁷⁰⁸ As the 1997 NSS stressed, “the spread of democracy supports American values and enhances both our security and prosperity.”⁷⁰⁹ Commitment toward international norms and promotion of liberal values, such as democracy, free trade, and respect for fundamental human rights were considered consistent with the implementation of U.S. interests. This view was particularly supported by Secretary of State Albright that often argued that the United States had “a vital strategic interest in seizing the opportunity...to strengthen the international system by bringing nations closer together and basic principles of

available at <http://www.presidency.ucsb.edu/ws/index.php?pid=53091>

⁷⁰⁴ “The Report of the Quadrennial Defense Review”, May 1997, available at <http://www.fas.org/man/docs/qdr/>.

⁷⁰⁵ John Dumbrell, “Was there a Clinton Doctrine? President Clinton’s Foreign Policy Reconsidered” *Diplomacy and Statecraft*, 13 (2002): 43-56; Douglas Brinkley, “Democratic Enlargement: The Clinton Doctrine” *Foreign Policy*, 106 (Spring 1997): 111-127; Thomas Carothers, “The Clinton Record on Democracy Promotion” *Carnegie Endowment for International Peace*, September 2000.

⁷⁰⁶ Strobe Talbott, “Democracy and the National Interest” *Foreign Affairs*, Vol. 75, Issue 6 (November/December 1996): 47.

⁷⁰⁷ “The Report of the Quadrennial Defense Review”, May 1997, available at <http://www.fas.org/man/docs/qdr/>; for similar arguments, see also Samuel E. Berger, “A Foreign Policy Agenda for the Second Term”, Center for Strategic and International Studies, Washington, D.C., March 27 1997, available at <http://clinton4.nara.gov/WH/EOP/NSC/html/speeches/032797speech.html>.

⁷⁰⁸ Michael Cox, G. John Ikenberry, Tagashi Inoguchi, “Introduction” in *American Democracy Promotion: Impulses, Strategies, and Impacts* (ed.) Michael Cox, G. John Ikenberry, Tagashi Inoguchi (Oxford: Oxford University Press, 2000): 1-17.

⁷⁰⁹ “A National Security Strategy for a New Century”, The White House, 1997.

democracy, open markets, law, and a commitment to peace.”⁷¹⁰ This political goal needed to be backed by a precise diplomatic and military doctrine able to “speak out against human rights abuses” and “prepared to take strong measures against human rights violators.”⁷¹¹

This leads to the last and most important element of the Administration’s view on the international system. The way to bring international values and U.S. interests together was found in a political formula that has been defined as “assertive humanitarianism.”⁷¹² This strategy aimed to secure U.S. interests through the cautious and selective enforcement of universal values, most notably fundamental human rights. According to this logic, the U.S. would “intervene where necessary to prevent genocide and other humanitarian catastrophes.”⁷¹³ What is important to notice is that military intervention for humanitarian reasons had to meet certain criteria that were outlined by the Administration in several policy documents. U.S. military forces had to be committed through a selective and flexible approach.

The memory of the Somali fiasco, in which scant political and military planning caused the impossibility of solving the humanitarian crisis led the Administration to issue Presidential Decision Directive 25 (PDD 25), which fixed the conditions for U.S. participation in peace operations. U.S. participation had to be limited to immediate threats to international security, such as “international aggression...urgent humanitarian disasters coupled with violence...gross violations of human rights.”⁷¹⁴ Moreover, it must have “clear objectives” and be tied to “realistic criteria for ending the operation.”⁷¹⁵ PDD 25 made clear that the Administration did not aspire to be the world policeman and that it would commit U.S. troops in a selective way after cautious consideration of the pros and cons of military action.⁷¹⁶

In addition, flexibility should have been the cornerstone of U.S. interventionism. This meant mostly two things. First, U.S. military action must not necessarily have a multilateral character. As National Security Adviser David Lake provided in a speech given in 1993, “only one overriding factor can determine whether the U.S. should act multilaterally or unilaterally, and that is America’s

⁷¹⁰ Secretary of State Madeleine Albright, “USAID Conference”, Washington, D.C., October 31, 1997.

⁷¹¹ “A National Security Strategy for a New Century”, The White House, 1997.

⁷¹² John Dumbrell, “Was there a Clinton Doctrine?”, 49.

⁷¹³ “Clinton’s Foreign Policy”, *Foreign Policy* (December/November 2000): 20.

⁷¹⁴ “Presidential Decision Directive 25: Reforming Multilateral Peace Operations”, Executive Summary, May 5 1994, available at <http://www.fas.org/irp/offdocs/pdd25.htm>.

⁷¹⁵ Cit.; see also James McCormick, “Assessing Clinton’s Foreign Policy at Midterm” *Current History*, 94 (November 1995): 370-1.

⁷¹⁶ These concepts will be subsequently reinforced by “Presidential Decision Directive 56, “Complex Contingency Operations”, May 1997.

interests.”⁷¹⁷ On this point, the Administration was characterized by large consensus. As the 1996 NSS maintained, “we will act with others when we can, but alone when we must.”⁷¹⁸ The Administration had no intention to sacrifice U.S. foreign policy on the altar of multilateralism but was prepared to act alone where the “most important national interests are at stake.”⁷¹⁹ Along these lines, the military and defense community stressed that multilateral action was certainly welcomed but could not become an obstacle to the legitimate pursuit of U.S. interests. In this respect, Secretary of Defense Cohen admonished that the U.S. “must, and does, retain the capability to employ its armed forces unilaterally.”⁷²⁰

Second, the Administration made clear that international and domestic legal requirements could not be invoked as grounds to limit U.S. capacity of pursuing its fundamental foreign policy goals. For example, U.N. authorization of peace and humanitarian operations was to be considered neither as the “linchpin of world peace”, nor as a “dangerous illusion.”⁷²¹ On the one hand, the U.N. was viewed as a useful tool to “defuse crises and prevent breaches of peace from turning into larger disasters.” On the other hand, the Administration noticed that “for reasons that may be inherent in the institution, the U.N. has not yet demonstrated the ability to respond effectively...when military credibility is what is required.”⁷²² For this reason, the Administration announced that “when threats arise to us or others...we may act through the U.N... through NATO...through a coalition...or we may act alone. But we will do whatever is necessary to defend the vital interests of the United States.”⁷²³ International legality could not become the ultimate benchmark to judge the legitimacy of U.S. military action.

In a similar way, domestic requirements, such as congressional authorization, could not be the deciding factors between intervention and non-intervention. As Lake pointed out, “when we use force...we must use it unflinchingly...When Congress...considers resolutions calling for an early withdrawal of our forces when deployed in non-traditional settings, it undermines our objectives and it compounds the risk for our troops.”⁷²⁴ For Lake, when it comes to war affairs, executive leaders have

⁷¹⁷ David Lake, “From Containment to Enlargement”, Johns Hopkins University, School of Advanced International Studies, Washington, D.C., September 21, 1993, <http://www.mtholyoke.edu/acad/intrel/lakedoc.html>.

⁷¹⁸ “A National Security Strategy and Engagement and Enlargement”, The White House, February 1996, <http://www.fas.org/spp/military/docops/national/1996stra.htm>.

⁷¹⁹ Cit.

⁷²⁰ William S. Cohen, “Annual Report to the President and the Congress”, April 1997, <http://www.dod.mil/execsec/adr97/index.html>.

⁷²¹ Madeleine K. Albright, Anthony Lake, Wesley Clark, “The Clinton Administration Policy on Reforming Multilateral Peace Operations” *U.S. Department of States Dispatch*, Vol. 5, No. 20, May 16, 1994, 315.

⁷²² Cit., 315.

⁷²³ Cit. 315.

⁷²⁴ David Lake, “American Power and American Diplomacy” *U.S. State Department Dispatch*, 5/46, November 14, 1994, http://findarticles.com/p/articles/mi_m1584/is_n46_v5/ai_16415699/.

to take the lead and Congress mostly back up their actions. In sum, adherence to international and domestic constitutional law was not to become the decisive criterion to determine the legitimacy of U.S. foreign policy, especially with regards to military affairs.

This complex interpretation of the international system produced a pragmatic and flexible commitment to human rights enforcement. The Somali fiasco taught the Administration that the U.S. could not aspire to police the entire world and enforce human rights wherever they were violated. Rather, the U.S. would have to “pick and choose”⁷²⁵ and intervene only where there was a reasonable possibility of succeeding and clear national interests at stake. Once these fundamental conditions were met, multilateralism and legal basis would be taken into account but at the same time could not hinder U.S. ability and willingness to pursue just goals and concrete security interests.

5.4.3 Surpassing International and Domestic Law: U.S. Intervention in the Name of Humanity and National Interests

The decisive step in the process of invocation of humanitarian intervention was constituted by an original interpretation of the relation between legitimacy and legality of military action. According to the Administration, the post-Cold War international system was occasionally characterized by exceptional situations in which the legitimacy of military action did not necessarily rest with its legal basis. Under circumstances of particular urgency, military action did not need to find its justification in an explicit authorization by the Security Council or in a formal declaration of war by the Congress. Rather, it was the urgent and exceptional character of the situation that provided the legitimacy for using force. Military intervention could be sometimes dictated by the duty to enforce universal moral values, while at other times by the necessity to implement security and defense interests. In both cases, its legitimacy rested on a superior logic of emergency that overcame the strict letter of international or domestic law. If the legal basis for intervention in Kosovo could not be found due to the impossibility of reaching a consensus at the UN level, action had to be anyway taken.

This was the role of moral entrepreneurs that U.S. leaders played during the crisis. Searching a legitimization to use force that could be found neither in self-defense, nor in a Security Council resolution under chapter VII of the UN Charter, the Administration invoked an emergent and contested norm that went beyond the traditional interpretation of international law as based on non-intervention and inviolability of state sovereignty. The justification to attack Serbia was located in the existence of a superior logic that required intervention through military force in order to both stop the ethnic

⁷²⁵ Anthony Lake, “From Containment to Enlargement”, cit.

cleansing against Albanian Kosovars and guarantee the stability of South-Eastern Europe. In the Administration's view, this moral and political logic filled the gap between the justice of a necessary action and its scant adherence to existing international law.

Emphasizing the morality of military action was the first pillar of the Administration's strategy of invocation of humanitarian intervention in Kosovo. As Secretary of State Albright often underscored, "the Alliance has the legitimacy to act to stop a catastrophe."⁷²⁶ This legitimacy was mostly found in the humanitarian purpose of the operation. For President Clinton, operation Allied Force was "right for humanity."⁷²⁷ In order to avoid "a humanitarian disaster of immense proportions"⁷²⁸, the U.S. and its allies had to intervene in a quick and resolute manner. Situation in Kosovo was usually depicted as "an urgent matter"⁷²⁹ for which any delay could have caused morally unacceptable consequences.

The moral dimension of military action was not the only element that rendered U.S. involvement in the Balkans necessary. According to the Administration, the Kosovo crisis also represented a fundamental strategic concern. For Under-Secretary of Defense Slocombe, intervention was "essential for our leadership and our ability to defend our interests around the world." Along these lines, the U.S. had a "broad authority to act...in defense of the interests of our allies and friends."⁷³⁰ U.S. authority to use force derived from the crucial strategic necessity to stabilize a region "that has historically been a tinderbox, thereby helping to preserve peace and security."⁷³¹ Aiming at securing peace and stability in the Balkans, operation in Kosovo was functional to U.S. interests.

The presence of such interests represented for the Administration an important element of legitimization. As Under-Secretary of State Pickering argued, the U.S. had to "judge its own security interests and...take the action that it believes is necessary."⁷³² Even in the absence of a clear legal authority, the presence of U.S. interests constituted enough a justification for military action. Following this logic, Vice-Chairman of the Joint Chiefs of Staff Joseph Ralston observed that "while we

⁷²⁶ Madeleine Albright, "Statement by Secretary of State Madeleine K. Albright, Situation in Kosovo", 8 October 1998, in Marc Weller, *The Crisis in Kosovo 1989-1999* (Documents and Analyses Publishing Ltd., 1999): 278.

⁷²⁷ President Clinton, "Remarks at the Seventh Millennium Evening at the White House", *Public Papers of the President*, April 12 1999, 632.

⁷²⁸ President Clinton, "Letter to Congressional Leaders Reporting on the Decision to Send Certain United States Forces to Macedonia and Albania" *Public Papers of the President*, April 3 1999, 580.

⁷²⁹ Kenneth H. Bacon, "DoD News Briefing", April 20 1999.

⁷³⁰ "Statement of the Honourable Walter Slocombe, Under-Secretary of Defense for Policy", House of Representatives Committee on International Relations, July 23 1998.

⁷³¹ President Clinton, "Letter to Congressional Leaders Reporting on the Decision to Send Certain United States Force to Macedonia and Albania", 580.

⁷³² Under-Secretary of State Thomas Pickering, "Hearing before the Senate Armed Services Committee", February 25 1999, 25.

welcomed U.N. resolutions prior to Kosovo, noting the situation was a threat to peace and security, the United States must reserve the authority to act in concert with our NATO allies or alone if our security and significant interests are at stake.”⁷³³

In sum, moral considerations of international justice and political calculations of national interest represented the sources of justification for U.S. intervention in Kosovo. They were both used as rhetorical devices to interpret humanitarian intervention as an exceptional norm that rested with an “emergency logic” composed of a mix of international ethics and national security concerns.

For the Administration, this logic vested the U.S. and its NATO allies with the right and duty to overcome any international and domestic legal requirement that could prevent or slowing the solving of the humanitarian crisis. This argument characterized the Administration from the beginning of the Kosovo issue. In July 1998, Slocombe provided that while “it is always better from the point of view of international support to have a U.N. mandate... [this] doesn’t mean that it’s essential.”⁷³⁴ Dealing with an exceptional situation, NATO could neither “be subject to a requirement of Security Council action” nor to “a veto before it could take action.”⁷³⁵ Along these lines, Cohen reminded that a mandate from the Security Council would be “helpful...but not mandatory.”⁷³⁶

Interestingly enough, the Administration did not completely renounce the possibility of justifying action in terms of international law. In particular, its members interpreted the use of armed force in the region as consistent with article 51 of the UN Charter, which provides for individual and collective self-defense in case of armed attack. For example, for Cohen, authorization by the Security Council was unnecessary because intervention would be “an act consistent with defending the interests of NATO itself in terms of the potentiality of [conflict] to spread and to undermine and destabilize a number of countries throughout the region.”⁷³⁷ National Security Advisor Berger provided similar arguments by noticing that NATO action was to be considered as a response to “threats to the stability and security of its areas.”⁷³⁸ At the basis of this reasoning, there was a broad interpretation of the right to self-defense. For the Administration, the changing nature of threats to peace and security in the post-

⁷³³ Statement of Gen. Joseph W. Ralston, United States Air Force, Vice-Chairman of the Joint Chiefs of Staff”, Hearing before the Senate Armed Services Committee, February 25 1999, 90.

⁷³⁴ Statement of the Honourable Walter Slocombe, 12.

⁷³⁵ Under Secretary of Defense for Policy Walter B. Slocombe and Ambassador Vershow, “Background Briefing”, Vilamoura, Portugal, September 24, 1998.

⁷³⁶ Secretary of Defense William Cohen and U.S. Chairman of the Joint Chiefs of Staff, General Henry S. Shelton, Press Conference, Vilamoura, 24 September 1998, available at <http://www.nato.int/docu/speech/1998/s980924c.htm>.

⁷³⁷ Cit.

⁷³⁸ Press Briefing by National Security Advisor Sandy Berger, March 25 1999, in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=47833>.

Cold War environment made it that self-defense could not any longer be limited to responding to an explicit attack against the integrity of a state's territory. In this new environment, international security could be affected by a vast array of threats, such as massive flows of refugees, widespread violations of human rights, or political instability in strategic areas.

The validity of this way of thinking has been the subject of a large debate that would be beyond the scopes of this chapter.⁷³⁹ What is important to underscore here are the political roots of this reasoning. U.S. leadership invoked the existence of an emergent right to intervention in order to justify an action that could not be stopped by narrow legal requirements. The legitimate concern with a large humanitarian crisis that could have consequences on the security of Europe and NATO provided a moral and political surplus that allowed to overcome existing international law. As Cohen argued, "to subordinate NATO's interests to a potential Russian or Chinese or other country's veto really was undermining NATO's security itself."⁷⁴⁰ The legitimacy of military action would not be reached by bowing to the legal requirements of an inefficient international organization, but rather by pursuing just and necessary political goals.

The Administration applied a similar logic to the issue of domestic legal basis. As has been provided in the previous section, a minority of representatives and senators criticized the operation for its failure to comply with the constitutional requirement to achieve congressional authorization. Even in this case, the Administration employed the logic of emergency in order to justify the failure to officially declare war against FRY and gain congressional approval for the commitment of U.S. troops. Consistently with most administrations since the start of 20th century, President Clinton argued that he had the "constitutional authority to conduct U.S. foreign relations...as a Commander in Chief."⁷⁴¹ This became the official justification for the lack of domestic legal basis and was expanded by various members of the Administration. For Pickering, the "authorities of the President under the Constitution [were] adequate" to deal with the crisis.⁷⁴² Along these lines, during a News Briefing of the Department of Defense, Captain Mike Doubleday provided that "it's very important for Congress to be consulted and to hear their views on this before any decision is made." Nevertheless, this would not "require any

⁷³⁹ See note 3.

⁷⁴⁰ Statement of Hon. William S. Cohen, Secretary of Defense before the U.S. Armed Forces Committee, 15 April 1999.

⁷⁴¹ President Clinton, "Letter to Congressional Leaders Reporting on Airstrikes Against the Federal Republic of Yugoslavia (Serbia and Montenegro)", *Public Papers of the President*, May 25 1999: 990; see also President Clinton, "Message to the Congress Reporting on the Situation in Kosovo", *Public Papers of the President*, June 10 1999: 1092-4.

⁷⁴² Statement of Thomas R. Pickering, Under-Secretary for Political Affairs, U.S. Department of State, House of Representatives International Relations Committee, February 10 1999, 26.

kind of affirmative action by the Congress.”⁷⁴³

For the Administration, a declaration of war was unnecessary since the U.S. was not “at war with Yugoslavia or its people.”⁷⁴⁴ Carrying out a military intervention that aimed to cease violations of human rights and restore stability in the Balkans, the U.S. and NATO were “upholding the will of the international community.”⁷⁴⁵ NATO operation had to be more accurately described as a police operation and not as a traditional war.

This thesis was further explained by the legal experts of the State Department, Barbara Larkin and Michael Matheson, before the House Committee on International Relations. For the State Department, that between the U.S. and FRY was to be interpreted as an “armed conflict” rather than a war and for this reason did “not involve a declared and recognized state of war.”⁷⁴⁶ The legal significance of this distinction and its validity in terms of U.S. constitutional law do not constitute the focus of this chapter. The debate over the constitutionality of the Kosovo operation is not even particularly new. Various legal and political scholars have noticed how, during the 20th century, U.S. administrations have rarely complied with the constitutional provision on congressional war powers. Unfettered presidential authority as to the conduct of military operations has almost become a constitutional convention.⁷⁴⁷

The important point is that even during the domestic debate the Administration relied on the same logic of emergency that had characterized the all process of invocation of humanitarian intervention. For the Administration, the attempt to constrain the President’s leadership as Commander in Chief created an “unwise limitation on [its] authority to deploy U.S. forces in the interests of U.S. national security.”⁷⁴⁸ U.S. effort to solve a massive humanitarian crisis that required rapid and determined decisions could not find any obstacle in the Constitution. Superior national and international interests gave U.S. leadership the right to exert authority in accordance with their aims.

The search of a solid legal basis was never the main concern of the Clinton Administration. Given its urgent and emergency nature, humanitarian intervention in Kosovo could not find a legal justification capable of meeting all the requirements of international and domestic law. Rather, the

⁷⁴³ Captain Mike Doubleday, “DoD News Briefing”, February 4 1999.

⁷⁴⁴ Statement of Hon. Madeleine Albright, Secretary of State, House Committee on International Relations, 21 April 1999, 7.

⁷⁴⁵ Statement of Hon. Madeleine K. Albright, Secretary of State before the United States Senate Committee on Foreign Relations, April 20 1999, 17.

⁷⁴⁶ Statement of Barbara Larkin, Assistant Secretary of State for Legislative Affairs, accompanied by Michael Matheson, Principal Deputy Legal Adviser, House Committee on International Relations, 22 April 1999, 36.

⁷⁴⁷ Louis Fisher, *Presidential War Power*; Arthur J. Schlesinger, *War and the American Presidency*; Charles O. Jones, *The Presidency in a Separated System*.

⁷⁴⁸ Statement of Barbara Larkin, Assistant Secretary of State for Legislative Affairs, 33.

rationale for intervention rested on a moral and political justification and on the necessity to implement just and vital U.S. foreign policy goals. The different arguments provided by the Administration, most notably the moral duty to tackle the humanitarian crisis, the presence of crucial security interests, and the right of the President to exert its authority all encompassed a broader and more fundamental logic: when emergency becomes the rule, as in the middle of a humanitarian catastrophe, derogating from existing international and constitutional law is not only possible but also necessary. The legitimacy of military action takes precedence over its legality.

5.5 Conclusions

When states deal with international norms that are poorly codified and still in an emergent status, executive leaders are able to behave as moral entrepreneurs and determine the position of their countries toward the norm. If the emergent norm is functional to their interests and consistent with their political views on the international system, invocation and recognition is the expected result. In case it is not, they ignore it or fight it. This conclusion emerges from the analysis of the process of invocation of humanitarian intervention that took place in the U.S. during the 1998-9 Kosovo crisis.

Civil society movements, such as think tanks and NGOs, did not make any real difference during the debate. With few exceptions, they did not develop a clear and homogenous position on the legitimacy of using force for humanitarian purposes even in the absence of adequate legal authority. The action of lobbying that they are usually able to exercise in the U.S. decision-making process was quite confused and ineffective.

U.S. invocation of humanitarian intervention at the end of the 1990s was mostly a matter for the Administration. The Kosovo crisis triggered a debate on an emergent norm that had not reached a level of codification, in the form of consuetudinary or treaty law, that was capable of defining when humanitarian intervention had to be invoked, under which circumstances, and through which modalities. Even nowadays, the norm is mostly left to the arbitrary interpretation of states that decide if and when to invoke its legitimacy. The domestic actors that determine this interpretation and the choice between invocation and contestation are executive leaders.

This is what happened in the U.S. during the debate on Kosovo intervention. Dealing with an emergent norm that did not warrant any significant legislative action, U.S. Congress divided into a vast array of political opinions, none of which was capable of taking over. The mechanisms of party politics did not materialize and the issue caused divisions more within than between the two parties. The result was the substantial impossibility of developing a clear majority in favor or against the norm and the

incapacity of exerting any serious constraint on the actions of the Administration.

The undefined and provisional nature of humanitarian intervention allowed U.S. executive leaders, understood as the main members of the Administration, to develop and impose their own interpretation as based on their particular view of 1990s international politics. In an international environment in which the definition of threat to peace and security had broadened by including massive violations of human rights, the most powerful nations needed to stand ready to use force whenever justice and national interests were at stake. This position was the result of an ad hoc approach based on a selective and case-by-case understanding of when and where to commit U.S. troops.

Not surprisingly, the Clinton Administration never indicated the conditions under which U.S. participation to humanitarian and peace operations should take place. As Presidential Decision Directive 13 provided, “too much precision in regard to the use of force can inhibit flexibility and can send contrary messages abroad and at home.”⁷⁴⁹ This equaled to say that the emergent status of the norm did not allow to identify in advance and in a routinized and institutionalized manner the conditions under which to invoke humanitarian intervention. It was for the will of political leaders to selectively decide when humanitarian action was legitimate and necessary.

President Clinton too implicitly recognized the arbitrary nature of this process of normative interpretation. Discussing the rationale for intervention in the Balkans, Clinton argued that when dealing with emerging norms, the U.S. and the international community in general cannot establish fixed criteria of legitimacy for the use of force: “I don’t believe the United States can intervene in every ethnic conflict...I don’t think there can be a requirement of international law or a justification for military intervention.”⁷⁵⁰ The only thing the international community could do was to develop “certain limits” within which humanitarian intervention becomes necessary. As Clinton argued, “when there is no limit to what you can do to somebody else who’s different from you, life quickly becomes unbearable.”⁷⁵¹ Along these lines, given the impossibility of developing a clear legal basis for a principle of intervention that was still poorly defined, the best course of action was to tie its invocation to a logic of emergency: “This is in America’s interest, but it is also morally the right thing to do.”⁷⁵²

Political calculations of national interest and moral considerations of justice became for the Administration the most effective ways of invoking a norm that was too vague to warrant ordered and

⁷⁴⁹ Cit. in Brenda Connors, “Mission Possible: Making United Nations Peace Operations More Effective” Paper Submitted to the Faculty of the Naval War College, Newport R.I., 17 June 1994, 10.

⁷⁵⁰ President Clinton, “Remarks at a Democratic National Committee Luncheon in San Diego”, *Public Papers of the President*, May 16 1999, 919-20.

⁷⁵¹ Cit.

⁷⁵² Cit.

predictable action. The decision as to the circumstances under which intervention could meet the requirements dictated by this twofold logic had to be obviously determined by the intervening states.⁷⁵³

This interpretation went beyond traditional understandings of international law. Members of the Administration behaved as what David Hendrickson has defined “crusaders for democracy and human rights.” U.S. leaders shared the conviction that “the universal appeal and intrinsic justice of their objectives serve to override the traditional legal prohibition against interference in the international affairs of other states”⁷⁵⁴ and against the use of force in the absence of proper legal authorization. Being invoked in exceptional and urgent circumstances, such as the need to stop widespread violations of human rights, the legitimacy of humanitarian intervention could be hardly defined in terms of its legal basis. Rather, it depended on moral considerations of what is just and rational calculations of what is necessary.

Resting with such a political and moral logic, it should not come as a surprise that U.S. leaders were the most effective domestic transmitters of its invocation and legitimacy. In an international system that lacks a centralized structure for establishing and enforcing values in a univocal and legitimate way, executive leaders, especially those of powerful countries, are the actors that mostly possess the necessary vision and resources to recognize and impose the validity of such values.

⁷⁵³ A recent literature has explored how the logic of emergency is often invoked by states, especially Western states, in order to justify foreign policy actions that do not resonate with international or domestic law. This literature mostly relies on Giorgio Agamben’s analyses of the legal concept of “state of exception”. Drawing on Carl Schmitt and Walter Benjamin, Agamben has described it as a “no man’s land between public law and political fact, and between legal order and bare life”. States of exception have been invoked by Western states at least since the U.S. civil war in order to justify policies that aim to eliminate threats to their national security. This use has become so widespread, especially after 9/11, that it would now be difficult to distinguish between law and exception. On this point, see Giorgio Agamben, *Stato di Eccezione* (Torino: Bollati Boringhieri, 2003): 10. Several situations in which law is suspended in order to perform coercive actions against selected categories of individuals are analyzed in Shampa Biswas and Sheila Nair (eds.), *International Relations and States of Exceptions: Margins, Peripheries, and Excluded Bodies* (New York: Routledge, 2010). The book specifically focuses on suspected terrorists, illegal immigrants, detainees, asylum seekers, and victims of environmental disasters. However, in the introduction, the editors also explicitly refer to human rights doctrines and humanitarian intervention. The identification of humanitarian crises as threats to the national security of states gives Western leaders the chance to deploy military force in a way that is presented as exceptional and limited in time and scope but that has, in fact, no limits. Legal limits, in particular, are often circumvented in the name of protection of fundamental national interests and humanitarian values (see p. 21-23).

⁷⁵⁴ David C. Hendrickson, “The Democratist Crusade: Intervention, Economic Sanctions, and Engagement” *World Policy Journal* Vol. 11 (Winter 1994/95): 20.

Chapter 6

6 INVOKING INTERNATIONAL JUSTICE

The UK and the Process of Ratification of the ICC Treaty

On 10 May 2001, the House of Commons passed the International Criminal Court Bill, which enabled ratification of the Statute of the International Criminal Court. With this historical decision, the United Kingdom formally accepted the jurisdiction of an international tribunal whose main aim is to prosecute and try individuals “for the most serious crimes of concern to the international community as a whole.”⁷⁵⁵ This event represented the culmination of a process of invocation and recognition of the norm of international criminal responsibility, which the UK government had undertaken by signing the ICC Treaty at the Rome Conference in 1998. When the government first submitted the Bill to the British parliament in August 2000, Foreign Secretary Robin Cook did not hesitate to identify the creation of the ICC as “one of my major objectives as Foreign Secretary.”⁷⁵⁶

The main aim of this chapter is to investigate the domestic actors that determined UK’s invocation and recognition of the norm of international criminal responsibility and consistently favored ratification of the ICC Treaty. I argue that the invocation by the UK of the norm of international criminal responsibility as embodied by the ICC Treaty was determined by the structure of British party politics at the time of the debate and by the type of relationship between the executive and the legislature that is provided by the Westminster system.

Given the necessity to ratify the ICC Treaty by passing a parliamentary bill, the main explanatory factor for the invocation of the norm of international criminal responsibility by the UK is located in the structure of party government that is typical of the British system. In particular, the election of a Labour government supported by a large and disciplined majority, which was favorable to the establishment of the ICC, created the conditions for the invocation and recognition of international criminal responsibility as a legitimate framework of behavior.

6.1 Fighting Against Impunity: Ratification Of The ICC Treaty In The UK

Both before and during the ratification process, the UK was one the most vehement advocates

⁷⁵⁵ Rome Statute of the International Criminal Court, Art. 1, available at <http://www.un.org/icc/romestat.htm>.

⁷⁵⁶ Robin Cook, “Message From the Foreign Secretary”, in *International Criminal Court Consultation on Draft Legislation* (London: The Stationery Office, August 2000): 1.

of international criminal responsibility, which was perceived as a necessary instrument to protect and enforce international human rights.

On 15 June 1998, 160 states convened in Rome to negotiate a Statute for the ICC. After five weeks of intense negotiation, on 17 July 1998 the Statute was adopted by a vote of 120 to 7. 21 countries abstained. After this vote, the Statute was open to signature and ratification by member states. All members of the European Union voted in favor of the Statute, with the UK as the leader of the so-called like-minded group constituted by the supporters of the ICC.⁷⁵⁷

The UK signed the Treaty on 30 November 1998 but, “despite the Government’s stated intention that the UK should be among the first 60 states to ratify the Statute, the production of draft implementing legislation was substantially delayed.”⁷⁵⁸ On 25 August 2000, the government published a draft of the ICC Bill in the form of a Foreign and Commonwealth Office Consultation Document. The Bill aimed to ratify the Statute by incorporating its provisions into the British legal system. It was introduced in the parliament on 6 December 2000. After several readings, both in the House of Commons and in the House of Lords, the Bill was finally passed by the House of Commons on 3 April 2001, received Royal assent on 11 May, and entered into force on 1 September.

The main indicator for invocation and recognition of the norm of international criminal responsibility is the ratification of the ICC Treaty. The analysis of the domestic conditions that led to the invocation and recognition of the norm by the UK focuses on the period between the Rome Conference and the passing of the ICC Bill.

6.2 British Civil Society And The ICC

The campaign for the creation of the ICC is often understood as a major political victory for civil society groups. This section argues that this might have been true at the international level, where several NGOs played a fundamental role in campaigning for the ICC and pushing governments towards its acceptance during the Rome Conference. However, after the end of the Rome Conference, signature and ratification were mostly left to the policymaking of national governments, with transnational advocacy movements substantially incapable of shaping the interests of states and their views in the choice between recognition and rejection.

⁷⁵⁷ Dominic McGoldrick, “Political and Legal Responses to the ICC”, In *The Permanent International Criminal Court Legal and Policy Issues*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly, 389-449.

⁷⁵⁸ David Turns, “Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States” In *The Permanent International Criminal Court Legal and Policy Issues*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly, 337-387.

6.2.1 *Campaigning for the ICC at the International Level...*

During the 1990s, NGOs participated in the debate about international criminal responsibility by providing extensive comments on the version of the ICC Statute that had been drafted by the International Law Commission in July 1994.⁷⁵⁹ Later, they successfully lobbied the UN General Assembly in favor of the creation of an Ad Hoc Committee to discuss the draft. During the entire process that led to the 1998 Rome Conference, NGOs constantly published position papers, bulletins, and newsletters, and organized regional meetings to provide information on the ICC.⁷⁶⁰

One of the most active organizations was Amnesty International (AI). In July 1995, AI published a report to call for a draft Statute for an ICC. In addition to the request for a strong Court characterized by an independent Prosecutor capable of starting proceedings without the authorization of the UN Security Council, the document called for the establishment of a universal jurisdiction. For AI, the Court had to be put in the condition to intervene “no matter where the crime occurred.”⁷⁶¹ Later, between January 1997 and July 1998, AI published a series of papers titled “Making the Right Choice”, in which the organization took position in favor of the ICC.

The most important is the fifth paper, published in May 1998 and containing a set of recommendations for the Conference. AI called for automatic and inherent jurisdiction for the Court, meaning that states had to accept the ICC merely upon ratifying the Statute. This demand aimed to avoid a case-by-case approach towards the Court, with states able to refuse or recognize its jurisdiction depending on the issue and the timing.⁷⁶² Moreover, the organization also asked for an independent Prosecutor capable of autonomously starting proceedings.⁷⁶³ In addition, AI called for universal jurisdiction, meaning that both Member States and the Court had to be able to “exercise jurisdiction over a person ... no matter where the crime was committed.”⁷⁶⁴ Finally, the Court should have been isolated from any political body, including the UN Security Council, which should not be able to stop a proceeding.⁷⁶⁵ These points were re-affirmed by other documents and also by an official statement

⁷⁵⁹ See for example, Amnesty International, “Memorandum to the International Law Commission: Establishing a Just, Fair, and Effective Permanent International Criminal Tribunal, 1994.

⁷⁶⁰ Most of this information is available at www.iccnw.org.

⁷⁶¹ Amnesty International, “Time for a Permanent International Criminal Court”, July 1995, 8; See also, Christopher Keith Hall (Amnesty International), “Challenges Ahead for the United Nations Preparatory Committee Drafting a Statute for a Permanent International Criminal Court”, February 1996.

⁷⁶² Amnesty International, “The International Criminal Court: Making the Right Choice”, Part V, May 1998, paragraph 5.

⁷⁶³ Amnesty International, “The International Criminal Court: Making the Right Choice”, paragraph 9.

⁷⁶⁴ Amnesty International, “The International Criminal Court: Making the Right Choice”, paragraph 6.

⁷⁶⁵ Amnesty International, “The International Criminal Court: Making the Right Choice”, paragraph 10.

issued by Secretary General Pierre Sane at the Rome Conference.⁷⁶⁶

The impact of an organization like Amnesty International, and in general of the transnational movement in favor of the ICC, should be evaluated in the light of these requests. The movement was not completely able to obtain what it campaigned for at the international level. In a document published right after the Rome Conference, AI lamented that, according to the Treaty, the Court could have jurisdiction over states that are not party to the Statute only upon the consent of such states: “Saddam Hussein, Pol Pot, Karadzic, Pinochet, Amin, Mobutu. These are just some of the men responsible for the worst crimes in the world whose prior consent would have been required in order for them to be tried under the Statute for a permanent international criminal court.”⁷⁶⁷ Moreover, AI criticized the possibility for the UN Security Council to stop a proceeding for 12 months, as provided by Article 12. Finally, the organization called for the elimination of Article 124, which allows states to opt out from the jurisdiction of the Court over war crimes for the first seven years after its entry into force. For these reasons, AI committed to “lobbying ... governments to work for a better Court.”⁷⁶⁸ This sounded like a promise to push governments towards the passing of domestic legislation capable of improving some of the compromises that had been reached in Rome.

In the UK, various NGOs worked to obtain a Bill capable of both ratifying the existing ICC Treaty and improving its crucial aspects. Even before the Rome Conference, British NGOs such as Amnesty International and Oxfam called for the “establishment of a just, fair, and effective international criminal court.”⁷⁶⁹ More specifically, Oxfam announced to support “a strong and independent International Criminal Court, with no United Nations Security Council veto, and an independent Prosecutor who is empowered to collect evidence from all sources.”⁷⁷⁰ These were considered as fundamental elements to avoid the politicization of an institution that should only pursue the interests of justice.

6.2.2 *...and at the Domestic Level*

After the Rome Conference, AI published a list of suggestions to be incorporated in the ICC

⁷⁶⁶ Amnesty International, “16 Fundamental Principles for a Just, Fair, and Effective International Criminal Court”, May 1998; Amnesty International, “Questions and Answers Concerning the Proposed Permanent International Criminal Court”, 3 June 1998; Amnesty International, “Final Statement at the Diplomatic Conference delivered by Pierre Sane”, July 1998;

⁷⁶⁷ Amnesty International, “International Criminal Court: Crippled at Birth”, 17 July 1998.

⁷⁶⁸ Amnesty International, “International Criminal Court: Crippled at Birth”, 17 July 1998.

⁷⁶⁹ Amnesty International UK, “The place of human rights in foreign policy”, Memorandum submitted to the House of Commons Foreign Affairs Committee, First Report, 17 February 1998, para. 4.5.1.

⁷⁷⁰ Oxfam, Memorandum Submitted to the House of Commons Foreign Affairs Committee, First Report, 17 February 1998, para. 3.4.

Bill in order to “ensure that the Court is an effective complement to national courts.”⁷⁷¹ Again, the most controversial issue was universal jurisdiction. The document recommended that “national courts should be able to exercise universal jurisdiction in all cases of crimes under international law.”⁷⁷² This request was a clear attempt to limit the political compromise reached in Rome with Article 12, which provides that the Court has jurisdiction only on nationals of state parties and on the territory of state parties. In particular, AI argued that “all states parties should fill this gap in the Court’s jurisdiction by ensuring that their own courts can exercise universal jurisdiction over such crimes wherever they are committed, without requiring any link to the state such as the nationality of the suspect or the victim.”⁷⁷³

The best opportunity for NGOs and civil society actors to influence the debate and obtain a stronger ICC was the publication of a Consultation document by the Foreign and Commonwealth Office (FCO) in August 2000. This document contained the draft of the ICC Bill prepared by the government and was intended to allow “all interested individuals, non-governmental organizations, and other groups to be able to contribute their views on the Bill.”⁷⁷⁴ Subsequently, the FCO published a report containing the responses of 45 groups giving comments on the draft bill.⁷⁷⁵ This report is useful to understand the contribution of civil society to the ratification of the ICC Treaty and its effective impact on the process.⁷⁷⁶

According to the report, British NGOs had two main concerns with regards to the ICC Bill. First, some provisions risked giving the UK government too much discretion on some specific matters, such as investigation, institution of proceedings, and relationship between the ICC Prosecutor and the government. Second, and more important, civil society groups called for the introduction of provisions to allow universal jurisdiction for British courts.

As to the first matter, AI and the All-Party group on Rwanda criticized clause 6(4) of the Bill according to which “if a court considered that a person had not been lawfully arrested ... or that ‘the person’s right’ had not been respected, the Court would notify the Secretary of State who would transmit the notification to the ICC.”⁷⁷⁷ For NGOs, this provision could pave the way for political interference by the FCO with the works of the Court. The idea was that “it should be for the ICC to

⁷⁷¹ Amnesty International, “International Criminal Court: Checklist for Effective Implementation”, July 2000, 1.

⁷⁷² Amnesty International, 5.

⁷⁷³ Amnesty International, 5.

⁷⁷⁴ Robin Cook, “Message From the Foreign Secretary”, in *International Criminal Court Consultation on Draft Legislation*, The Stationery Office, August 2000, 1.

⁷⁷⁵ “International Criminal Court Bill, Report on the Responses to the Draft Legislation”, Foreign and Commonwealth Office, January 2001.

⁷⁷⁶ For a list of the NGOs and societal groups that participated to the consultation process and commented on the draft ICC Bill, see “International Criminal Court Bill, Report on the Responses to the Draft Legislation”, Annex A, 12.

⁷⁷⁷ “International Criminal Court Bill, Report on the Responses to the Draft Legislation”, 3.

decide whether violations were of such gravity as to prevent a prosecution from taking place”⁷⁷⁸ and not for the national court or for the FCO. In this case, the government followed the suggestion of civil society groups and promised to clarify the provision.

However, in other more substantial matters, the government rejected the suggestions of civil society groups. For example, several human rights associations requested an explicit provision to “enable the ICC Prosecutor to conduct investigations in the UK.”⁷⁷⁹ This request aimed to enhance the independence of the ICC Prosecutor. Nevertheless, in this case the government rejected the proposal by deeming it unnecessary. In a similar way, the government refused to modify clause 35 of the ICC Bill that aims to protect the national security interests of the UK in case of cooperation with the ICC on a proceeding. AI and other organizations lamented that “this provision could be open to misuse”⁷⁸⁰, but the government rebuffed this opinion by arguing that “a State Party has the right to deny a request for assistance if the request concerns the production or disclosure of evidence which would be prejudicial to its national security interests.”⁷⁸¹

It was on the issue of universal jurisdiction that British NGOs faced the largest defeat. According to the Report, “22 submissions called for domestic jurisdiction to be extended to ICC crimes committed overseas by non-UK nationals so that all war criminals could be prosecuted.”⁷⁸² This proposal aimed to strengthen the jurisdiction of the ICC in a way that could not be agreed at the Rome Conference. Once again, civil society groups tried to establish a *de facto* universal jurisdiction in the prosecution of ICC crimes by empowering domestic courts. Yet, the government drastically rejected this possibility by arguing that “the criminal justice systems of this country are based on the principle of territoriality and our common law procedures are designed accordingly The ICC Statute does not require universal jurisdiction and there is as yet no international agreement on when and how universal jurisdiction should be exercised over these crimes.”⁷⁸³ By putting forward this argument, the government frustrated one of the most important requests expressed by the CICC and British NGOs.

These groups achieved some minor political victories, such as the one announced by Minister of State for the FCO John Battle. During a sitting of the House of Commons Standing Committee, Battle cheered Amnesty International, Save the Children and the Medical Foundation for the Care of Victims of Torture as the main supporters of clause 49 of the ICC Bill, which provides reparation for victims of

⁷⁷⁸ “International Criminal Court Bill, Report on the Responses to the Draft Legislation”, 4.

⁷⁷⁹ “International Criminal Court Bill, Report”, 6.

⁷⁸⁰ “International Criminal Court Bill, Report”, 8.

⁷⁸¹ “International Criminal Court Bill, Report”, 8.

⁷⁸² “International Criminal Court Bill, Report”, 9.

⁷⁸³ “International Criminal Court Bill, Report”, 9.

ICC crimes.⁷⁸⁴ Notwithstanding its importance, that of reparations was a minor political achievement for NGOs, especially if compared with more controversial issues, such as the request to provide for universal jurisdiction or to limit the influence of national and international political bodies over the activity of the ICC Prosecutor.

These points clearly emerged in the words of Battle that concluded the debate in the House of Commons Standing Committee: “We have considered carefully all suggestions made by NGOs before, during and since the consultation process began and have taken on board many of their helpful and constructive propositions However ...we shall not be able to go as far and as fast as they would want. Their role is to lead us into new areas and ours is to consider such issues and reach decisions within our parameters.”⁷⁸⁵ The work of NGOs was certainly respected and taken into serious account but not enough to influence in any decisive way the government’s policy making, especially on the most relevant aspects of the ICC Bill.

In conclusion, in the case of ratification of the ICC Treaty by the UK, British and international NGOs and civil society groups were not decisive factors for the final outcome. Although at the international level NGOs “helped create the normative climate that pressed states to take seriously creation of the Court,”⁷⁸⁶ during the ratification phase civil society actors did not exert the same political impact. NGOs certainly played an important role, for example with regards to the drafting of the ICC Treaty or to its promotion at the international level. However, during the process of acceptance of the Court by single states (in this case the UK), other domestic actors had a larger impact.

6.3 British Political Leaders And The ICC

During the process of recognition of the norm of international criminal responsibility as embodied by the ICC Treaty, executive leaders did not hesitate to put forward arguments and devise strategies to present the ICC as a legitimate institution. Nevertheless, given the necessity to ratify a treaty through the passing of a parliamentary bill, invocation and recognition of the norm were decisively determined by the structure of party politics at the time of the debate and by the nature of the institutional relations between the executive and the legislature. The institutional dynamics of party government, which is typical of the British system, and the existence of a large and disciplined majority in favor of ratification of the ICC Treaty constituted the fundamental conditions for the recognition of

⁷⁸⁴ House of Commons Standing Committee D, Tenth Sitting, 3 May 2001.

⁷⁸⁵ House of Commons Standing Committee D, Tenth Sitting, 3 May 2001.

⁷⁸⁶ Benjamin N. Schiff, *Building the International Criminal Court*, 163.

the norm of international criminal responsibility as a legitimate framework of behavior.

6.3.1 *Ethical Foreign Policy and International Justice*

Every analysis of the process of incorporation of the ICC Statute into the British legal and political system has to take into account the role played by foreign policy makers, in particular Prime Minister Tony Blair, Foreign Secretary Robin Cook, and Defence Secretary George Robertson. British foreign policy under the New Labour contained elements that were significant for the acceptance of an international jurisdiction that aims to prosecute international crimes and enforce human rights. These elements have been explained by various scholars of British politics.

For example, Hill has emphasized the ethical dimension of British foreign policy as conducted by the New Labour government since 1997. This dimension was mostly the result of Foreign Secretary Cook who had “the courage to tie actual policy into the moral debate.”⁷⁸⁷ The commitment towards the establishment of an ICC has to be viewed in the light of this renewed ethical stance. In a similar way, Williams has interpreted the attitude of the New Labour government towards international institutions like the ICC as the result of “Labour’s more cosmopolitan brand of liberal internationalism”⁷⁸⁸, which contrasted with previous Conservative foreign policy that was mostly based on Realpolitik and defense of British sovereignty. For these reasons, Williams has defined the ICC as a “key part of the British Government ethical foreign policy.”⁷⁸⁹

Furthermore, Spyros Economides has defined the UK as “the State that most vociferously proclaims the newly acquired moralism in its post-cold war foreign policy.”⁷⁹⁰ Along these lines, he has highlighted how at the basis of British support for the ICC there was the attempt to prosecute “massive abuses of human rights and crimes against humanity” as well as the will to “take action against the perpetrators of such gross violations of international law.”⁷⁹¹ In particular, three main elements constituted the supportive foreign policy of the UK towards the ICC.

First, British leaders often interpreted globalization through the lenses of a renewed liberal internationalism that emphasized the interdependent nature of international relations. As Cook argued one year before the start of the Rome Conference, “in the modern world all nations belong to the same

⁷⁸⁷ Christopher Hill, “Foreign Policy” in *The Blair Effect: The Blair Government*, ed. by Anthony Seldon (London: Little Brown and Company, 2001), 333.

⁷⁸⁸ Paul Williams, *British Foreign Policy Under the New Labour 1997-2005* (New York: Palgrave, 2005), 18.

⁷⁸⁹ Paul Williams, *British Foreign Policy Under the New Labour*, 157.

⁷⁹⁰ Spyros Economides, “The International Criminal Court” in *Ethics and Foreign Policy*, ed. Karen E. Smith and Margot Light (Cambridge: Cambridge University Press, 2001), 112.

⁷⁹¹ Spyros Economides, “The International Criminal Court”, 112.

international community.⁷⁹² The interdependent nature of international relations required responsibility in the sense that “if every country is a member of an international community, then it is reasonable to require every government to abide by the rules of membership”⁷⁹³. A similar concern was expressed by Defence Secretary Robertson in the 1998 Strategic Defence Review, which proclaimed the impossibility of “standing aside” in front of “massive human suffering.”⁷⁹⁴

Second, British leaders supported an interpretation of the international community as constituted by universal human rights. As Blair argued, “human rights may sometimes seem an abstraction in the comfort of the West, but when they are ignored human misery and political instability all too easily follow.”⁷⁹⁵ Blair strongly rejected the attempt to interpret human rights as relative concepts created by Western countries to impose their will on the rest of the international community. Rather, human rights had to be seen as the fundamental ethical components of today’s international relations, available to any human being and worthy of the respect of any government.

This leads to the third element of British foreign policy that favored support for the ICC, which is the need to create effective institutions capable of enforcing human rights and deter from their violation. For Cook, the necessity to “enforce the international law on crimes against humanity” was inextricably linked to the creation of an international tribunal with jurisdiction over massive violations of human rights. As he claimed during the debate over ratification, “one of the lessons of the Balkan war is that the world needs a permanent mechanism for securing justice against dictators and war criminals.”⁷⁹⁶ In sum, for British leaders, human rights could only be validated by creating appropriate instruments of enforcement. One of these instruments should be an international criminal court capable of prosecuting crimes in an impartial way and in the sole interest of justice.

This was the set of values endorsed by British policy makers before and during the process of negotiation and ratification of the ICC Treaty. And this was also the political and normative framework from which British leaders drew their arguments and devised their strategies to favor invocation of the norm of international criminal responsibility and acceptance of the ICC.

⁷⁹² Robin Cook, “Human Rights Into a New Century”, speech by the Foreign Secretary Robin Cook, Locarno Suite, FCO, London, 17 July 1997, available at <http://hrpd.fco.gov.uk/news/speeches.asap>.

⁷⁹³ Robin Cook, cit.

⁷⁹⁴ *Strategic Defence Review*, presented to Parliament by the Secretary of State for Defence, July 1998, para. 7.

⁷⁹⁵ Tony Blair, “Prime Minister Speech at the Lord Mayor’s Banquet”, 10 November 1997, available at <http://www.number10.gov.uk/Page1070>.

⁷⁹⁶ Robin Cook, “Human Rights: A Priority of British Foreign Policy”, speech by the Foreign Secretary Robin Cook, FCO, London, 28 March 2001; for similar arguments see also *Strategic Defence Review*, para. 18-19.

6.3.2 *Political Leaders between Entrepreneurship and Strategic Positions*

The UK was among the most supporters of the ICC. Especially after the victory of the Labour Party at the 1997 general election, UK diplomacy increasingly favored the establishment of a strong and independent ICC capable of prosecuting international crimes without interference of states or international organizations.

During the last session of the Preparatory Committee for the draft statute, held in March and April 1998, the UK presented a paper that proposed to provide the Court with automatic jurisdiction. This meant that for the UK “a state [should] accept the jurisdiction of the Court by the fact of becoming party to the Statute.”⁷⁹⁷ The UK rejected the position of other states, such as the U.S. and China, which wanted to limit the Court by subjecting its jurisdiction to a case-by-case decision of states. Moreover, at the same meeting, the UK substantially modified its position with regards to the relationship between the Court and the Security Council. As reported by the Newsletter of the CICC, the UK decided to

oppose the provision in the draft statute of the ILC which would require prior approval by the Security Council before the Court could proceed with investigations and trials. This provision in effect gave the Security Council veto power over the ICC. Instead the UK indicated it will support a modified formulation ... which would require a positive decision to be taken by the Council to prevent or delay or block the ICC, and then only for a limited length of time.⁷⁹⁸

This position was described by the CICC as a “dramatic shift” in the attitude of the UK towards the issue of the relationship between the Court and the Security Council. Differently from the previous Conservative government, which used to side with U.S. position to give the Security Council a veto power over ICC activities, the Labour government put forward a proposal that indicated an independent Court as the best way to avoid the risk of politicization of prosecutions. Minister of State for the FCO Tony Lloyd reiterated this position during a press conference held before the start of the Rome Conference. Discussing the issue of Security Council, Lloyd expressed the hope that the U.S. could be persuaded “to move its own agenda forward to accept that Court.”⁷⁹⁹

During the Rome Conference, the UK delegation, headed by Franklin Berman and Tony Lloyd, was part of the so-called like-minded group supporting the Court. UK diplomacy pursued a strategy that aimed to bridge the gap between the positions of supporters of the Court and those of skeptical states, mainly the U.S. This led to the adoption of a moderate, middle-of-the-way position, which

⁷⁹⁷ Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute*, 132.

⁷⁹⁸ “Sixth Committee Voices Strong Support for Court” *The International Criminal Court Monitor: The Newsletter of the NGO Coalition for an International Criminal Court*, Issue 7 (February 1998): 3.

⁷⁹⁹ Tony Lloyd, “Press Conference”, Rome, 15 June 1998, International Criminal Court Conference, available at Available at <http://www.un.org/icc/journal/156ukpc.htm>.

aimed, both to create a strong and independent Court, and to avoid provisions that could have rendered it unacceptable for countries, such as the U.S. For this reason, at the opening of the Conference, Berman announced that the UK would support an independent jurisdiction, complementary to national courts, but not a universal one predominant over national systems. For Berman, the key to a successful conference was finding a compromise capable of combining “the requirements of national security and the essential needs of an effective system of international justice.”⁸⁰⁰

Although it had a clear interest in having the U.S. as party to the Treaty, the UK delegation never subjected its positions to the consent of the American ally. Few days before the end of the Conference, UK diplomat Elizabeth Wilmshurst stated that “if a state became party to the Statute, it should thereby accept the Court’s jurisdiction on all the core crimes without the Court’s remit.”⁸⁰¹ This argument was not supported by the U.S. delegation, which would have preferred an opt-in jurisdiction, subject to a case-by-case consent by party states.

Also, UK’s opposition to universal jurisdiction provoked much dissatisfaction among supporters of the Court. Nevertheless, even though the UK never sided with the German attempt to provide the Court with universal jurisdiction both over party and non-party states, British diplomats always argued in favor of a strong and independent Court.⁸⁰² As will be shown in the analysis of domestic debates, the rejection of universal jurisdiction in favor of a complementary one cohered with the moderate view of a government that wanted to find a compromise capable of making the Court acceptable for powerful members of the international community. This stance has to be interpreted as a strategic and pragmatic one and not as the attempt to water-down an institution that was consistent with the main goals of British foreign policy.

The degree of support for an independent Court can be also measured by UK’s stance towards the ICC Prosecutor. While several states, including the U.S., were concerned with the possibility that this organ would be granted with excessive power, the UK always supported provisions to confer on the Prosecutor the power to autonomously start prosecutions (*proprio motu*) without previous referral to states under investigation or to the UN Security Council⁸⁰³.

⁸⁰⁰ Franklin Berman, “Statement of the Head of Delegation, United Kingdom of Great Britain and Northern Ireland”, Rome, 17 June 1998.

⁸⁰¹ “Statement by Elizabeth Wilmshurst, United Kingdom of Great Britain and Northern Ireland”, Committee of the Whole, 29th Meeting, Rome, 9 July 1998, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol. II, p. 295, para. 11.

⁸⁰² “Statement by Erkki Kourula, Finland”, Committee of the Whole, 7th Meeting, Rome, 17 June 1998, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol. II, p. 182, para. 32.

⁸⁰³ “Statement by Erkki Kourula, Finland”, Committee of the Whole, 7th Meeting, Rome, 17 June 1998, in *United Nations*

Finally, the UK expressed its support for the ICC Treaty through its positive vote at the end of the Conference and through several subsequent statements. In October 1998, the government declared that “the Court would give more strength to the rule of law, the foundation of our security and prosperity.”⁸⁰⁴ Even in this occasion, the government did not hesitate to underscore the difference between its view and that of the countries that had voted against the Treaty. In particular, the UK invited dissenting states “to rethink their conclusions thus turning widespread international support for the Statute into universal support.”⁸⁰⁵

After the conclusion of the international negotiate, UK leaders focused their attention on the domestic context. The ICC Treaty had to be incorporated into the British system through the passing of appropriate legislation by the parliament. The debates at the international level now moved to the domestic level, where the main members of the government had to face the challenge of obtaining support for the ICC.

6.3.3 *Domestic Debate And Governmental Action*

Similarly to the international context, the government faced the domestic debate by taking a strong stance in favor of ratification of the ICC Treaty, which was presented as one of the main goals of British foreign policy. Government leaders maintained a moderate but firm position by highlighting the necessity to have an independent ICC, capable of prosecuting international crimes in an impartial and de-politicized way, without exerting universal jurisdiction. Moreover, they did not renounce to emphasize their difference from the U.S., which was the main opponent to the Court among Western countries.

These arguments were supported by government representatives both in the House of Commons and in the House of Lords. In order for the ICC Treaty to be ratified in an expeditious way, the government needed parliamentary approval.

Even before the introduction of the ICC Bill in the House of Commons, Cook and his closest collaborators supported the idea of an ICC before the parliament. During a debate in July 1998, Cook provided moral arguments in favor of the Court by highlighting that “it has been a paradox of our century that those who murder one person are more likely to be brought to justice than those who plot

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II, p. 183, para. 38.

⁸⁰⁴ “View expressed by the UK Government at the end of the Rome Conference, 22 October 1998”, in Roy S. Lee, *The International Criminal Court*, 631.

⁸⁰⁵ “View expressed by the UK Government at the end of the Rome Conference, 22 October 1998”, in Roy S. Lee, *The International Criminal Court*, 632.

genocide against millions.⁸⁰⁶” In this sense, Cook cheered British diplomacy for its attempt to secure an independent ICC characterized by a Prosecutor with “the power to initiate investigations leading to prosecutions on his or her own authority.⁸⁰⁷” The independence of the Prosecutor was viewed as a fundamental way to avoid politicized investigations.

As a supporter of the ICC, Cook believed that a strong and independent Court would be the most effective solution to “protect our servicemen against malicious or politically motivated prosecutions.”⁸⁰⁸ This sounded as a further attempt to emphasize the difference from U.S. positions, whose concerns with the possibility to have American soldiers prosecuted by a supranational jurisdiction constituted the main reasons for rejecting the ICC Treaty. Similar arguments were put forward in a later debate by Keith Vaz, Minister of State for the FCO, who recalled how the complementary nature of the ICC should constitute sufficient guarantee for any state to accept the Court:

The Rome statute contains sufficient safeguards to protect service men, the most important of which is the complementarity principle that allows domestic jurisdictions the right to try their own people. If serious allegations were made in good faith against British citizens, we are confident that we could demonstrate that there was a remedy in British justice. The same argument would apply to the United States of America.”⁸⁰⁹

The Bill prepared by the government to ratify the ICC Treaty was presented to the parliament in August 2000 in the form of an FCO official document. Consistently with its internationalist ideology, “committed to international law and order, as well as law and order at home”⁸¹⁰, the government was firmly convinced that the compromise reached in Rome had to be defended.

The most important debate took place in the Public Bill Committee, which was composed of representatives of the main parties and which discussed the ICC Bill in detail between April and May 2001. In this circumstance, the government made use of its closest experts on the subject to support the ratification of the Treaty.

In general terms, the government presented the Court as an organ that was coherent with its foreign policy, based on the attempt to legalize and institutionalize international politics. Minister of

⁸⁰⁶ Robert Cook, *House of Commons, Official Report*, 20 July 1998, col. 803.

⁸⁰⁷ *Cit.*, col. 803.

⁸⁰⁸ *Cit.*, col. 804.

⁸⁰⁹ Keith Vaz, *House of Commons, Official Report*, 27 October 1999, col. 947. Similar statements in defense of the Rome Treaty with regards to the protection of British forces were made by governmental officials in several other occasions: Geoff Hoon, *House of Commons, Official Report*, Written Answer 16 March 2001; Robin Cook, *House of Commons, Official Report*, 3 April 2001, col. 216; John Battle, *House of Commons, Official Report*, 3 April 2001, col. 279.

⁸¹⁰ Robin Cook, “Government to introduce International Criminal Court Bill. Comment by Foreign Secretary Robin Cook on the Queen Speech”, 6 December 2000.

State Battle defined the ICC Treaty as a “giant step forward for universal human rights and the rule of international law.”⁸¹¹ For Battle, the necessity to provide the international community with a judicial instrument to enforce the norm of international criminal responsibility required the adoption of the ICC Treaty, even though it was mostly the result of a compromise among states. As he argued:

We cannot defer matters forever until we find the perfect statute that all other countries in the world have signed and then agree to join it. We do not have the luxury of being in that position.⁸¹²

Along these lines, international institutions and rule of law needed to be established through a set of pragmatic policies capable of finding large but not necessarily universal support by the international community.

To achieve this aim, the government defended the Statute as an instrument capable of combining the need to enforce human rights with respect for state interests and sovereignty. For this reason, on the one hand, the government rejected the idea of incorporating the ICC Treaty by passing a Bill that allowed British courts to exercise universal jurisdiction over nationals of other states. As Solicitor-General Ross Cranston argued in response to some Labour and Liberal Democrat members of the Committee, the Bill would give British courts jurisdiction over citizens and individuals that have a “substantial link with the United Kingdom”⁸¹³, by which the government meant British citizens and foreign individuals residing in the UK. This was consistent with the will to ratify a Treaty that “does not require universal jurisdiction⁸¹⁴” and that had aimed to find a compromise among different states during the Rome Conference.

On the other hand, the government equally rejected every attempt to implement a Bill that could limit the scopes and powers of the ICC. For instance, the government criticized those amendments to the Bill that were presented by several Conservative members of the Committee and that aimed to give Foreign Secretary large discretion in the evaluation of ICC requests for investigation or prosecution. As Cranston argued, these attempts “would be in breach of our obligations under the Rome Statute. [They] would frustrate the aim of Part II of the Bill, which is to give effect to ICC requests in an expeditious and straightforward manner.”⁸¹⁵

⁸¹¹ John Battle, *House of Commons, Official Report*, 3 April 2001, col. 276.

⁸¹² John Battle, House of Commons Public Bill Committee International Criminal Court Bill, Standing Committee D, Session 2000-01, 8th Sitting, 1 May 2001.

⁸¹³ Solicitor-General Ross Cranston, *House of Commons Public Bill Committee International Criminal Court Bill*, Standing Committee D, Session 2000-01, 10th Sitting, 3 May 2001.

⁸¹⁴ John Battle, *House of Commons, Official Report*, 3 April 2001, col. 278.

⁸¹⁵ Solicitor-General Ross Cranston, *House of Commons Public Bill Committee International Criminal Court Bill*,

In a similar way, the government always opposed resorting to Article 124 of the ICC Statute. This Article allows states to opt-out from the ICC jurisdiction over war crimes for seven years. Even a European state such as France made use of this clause, which had been inserted during the Rome Conference to soften the opposition of some states. Nevertheless, the government refused to incorporate this Article into the ICC Bill. As Battle argued in several occasions, the ICC Statute contained provisions that allowed sufficient legal protection for individuals under investigation. In particular, the complementary nature of the ICC constituted a relevant barrier against biased prosecutions: “The rules state that the ICC will consider only cases that the country in which the accused resides is ‘unwilling’ or ‘unable’ to prosecute If a soldier in Britain commits an offence, he comes before our courts.”⁸¹⁶ In concluding the debate on the third reading of the Bill, Battle reiterated government’s opposition to Article 124 because this would “send the most appalling signal to those countries that we want to encourage to build the international institution and ensure that is properly supported.”⁸¹⁷

These arguments in defense of the ICC Treaty encountered the opposition of the Conservative Party, which tended to support the stances taken by the U.S. administration. For government representatives, this opposition demonstrated that Conservatives “[were] stalking horses for blocking [the Court] and ensuring that it does not take its place in the Statute book.”⁸¹⁸

These arguments were replicated in the House of Lords, which analyzed the Bill during several readings. Once again, government representatives defended a Bill that aimed to incorporate the substance and the spirit of the ICC Treaty and give support to an independent Court capable of prosecuting crimes without taking precedence over national courts and capable of avoiding politically motivated prosecutions. In this respect, Minister of State for Trade Baroness Symons criticized the U.S. position by arguing that “we have servicemen serving abroad and we believe that adequate safeguards exist.”⁸¹⁹

Other instances of support were expressed by the rejection of the attempt to incorporate Article 124 into the Bill or to augment the discretion of Foreign Secretary in dealing with the Court. Attorney-General Lord Williams criticized the “cherry-picking approach to those matters”⁸²⁰ that characterized

Standing Committee D, Session 2000-01, 7th Sitting, 1 May 2001.

⁸¹⁶ John Battle, *House of Commons Public Bill Committee International Criminal Court Bill*, Standing Committee D, Session 2000-01, 8th Sitting, 1 May 2001.

⁸¹⁷ John Battle, *House of Commons, Official Report*, 10 May 2001, col. 348.

⁸¹⁸ Robin Cook, *House of Commons, Official Report*, 10 May 2001, col. 349.

⁸¹⁹ Baroness Symons, *House of Lords, Official Report*, 27 January 1999, col. 1012-3.

⁸²⁰ Attorney-General Lord Williams, *House of Lords, Official Report*, 8 February 2001, col. 1278.

the Opposition. International institutions could only work through an effective limitation of state sovereignty and not by granting some powerful states a right to discretion. In particular, the only way to contribute to the improvement of international rule of law was to make these institutions work for any state, regardless of size or geographical position:

I believe that we all agree that the international tribunal in Rwanda should take action against, allegedly, genocidal murder on a colossal scale – murder of hundreds of thousands of people – and that it is right to prosecute alleged war criminals from Yugoslavia. But one cannot then cherry-pick and say that because their skin is white or their nationality is British, they are not subject to the same rules of law.⁸²¹

Following the same logic, Parliamentary Under-Secretary of State for the FCO Baroness Scotland criticized Conservative attempts that aimed to limit the powers of the Court⁸²². Complementary jurisdiction and a detailed catalogue of crimes over which the Court has jurisdiction were considered sufficient reasons to support the ICC Treaty. Government representatives often recalled that the crimes listed in the ICC Statute “are already crimes under international law and many of them are crimes under domestic law.”⁸²³ In the government’s view, no provision contained in the ICC Statute could possibly constitute a threat to British interests.

In conclusion, the UK government strongly sided with the idea of an independent and effective ICC. Consistently with its internationalist foreign policy, which was based on a belief in the need to create international institutions capable of achieving goals of relevance for the international community as a whole, the UK supported the newly created Court. This support was sometimes expressed by criticizing the positions of UK’s closest international ally. During the entire domestic debate, UK representatives remained firmly convinced that in order to avoid the risks of politicized prosecutions, it was not necessary to put the Court under the control of states or the Security Council. Rather, it was crucial to create an effective tribunal capable of acting independently (although not completely) of states. Independence in the exercise of justice, together with complementary jurisdiction, was perceived as the key to guarantee impartiality in the Court’s activities.

These arguments significantly contributed to creating a favorable environment for the acceptance of the Court and consequently for the invocation and recognition of the norm of international criminal responsibility. British leaders created a normative framework and actively promoted the acceptance of this norm. In other words, they acted as ‘norm entrepreneurs’: operating

⁸²¹ Attorney-General Lord Williams, *House of Lords, Official Report*, 8 February 2001, col. 1278-9.

⁸²² Parliamentary Under-Secretary of State for the FCO Baroness Scotland, *House of Lords, Official Report*, 8 March 2001, col. 373, 382, 385.

⁸²³ Attorney-General Lord Williams, *House of Lords, Official Report*, 20 March 2001, col. 1303.

from privileged ‘organizational platforms’, such as the British government, they contributed to increase the prominence of international criminal responsibility during the entire debate over the ICC. In particular, they framed the issue of accepting the Court according to their own interpretation of the international system, in which a permanent international tribunal is necessary to enforce fundamental human rights.

Nevertheless, the characteristics of the process of invocation and acceptance of the norm did not allow British leadership to be the only actor capable of determining the final outcome. The ICC could be recognized by the UK as a legitimate institution only through a complex process of ratification, which required the passing of appropriate legislation in the form of a parliamentary bill. Recognition of the norm of international criminal responsibility depended upon the structure of domestic party politics and was decisively favored by the type of institutional dynamics that characterized the British political system at the time of the debate. In particular, British leaders could rely on a set of institutional conditions that favored their political stance.

In the conduct of their policy-making, British governments can generally take advantage of the domestic characteristics of the Westminster system, namely the presence of a parliamentary majority that is largely supportive of their policies. Also in the ICC case, the existence of a large and disciplined majority, which was favorable to ratification of the ICC Treaty, represented the fundamental condition for successful implementation of Labour leaders’ political views and for UK’s recognition of the norm of international criminal responsibility.

The next section explains the impact of party politics and institutional conditions on the process of invocation and recognition of the norm of international criminal responsibility as embodied by the ICC and analyzes its decisive impact on the final outcome, by investigating the political stances taken by the main parties represented in the Parliament.

6.4 Invoking Responsibility: British Political Parties And The ICC

The process of ratification of the ICC Treaty shows that the main explanatory factor for the invocation and recognition of the norm of international criminal responsibility by the UK is located in the dynamics of party politics at the time of the debate and in the institutional features of the Westminster system, which provide a fusion of powers and interests between the executive and the legislature.

The domestic debate over the legitimacy of the ICC took place in a moment in which the norm of international criminal responsibility had reached a high level of international institutionalization.

After the 1998 Rome Conference, all the ideas and principles that had emerged after WWII with the establishment of the Nuremberg Tribunal were codified and formalized in the ICC Statute, which found the approval of most members of the international community. After having been institutionalized into such a regime, the norm of international criminal responsibility had to be formally recognized by single states. Countries that had previously expressed their consent to the ICC Statute needed to ratify it according to their own domestic procedures.

In the UK, this process of recognition could be completed only by passing domestic legislation in the form of a parliamentary bill capable of incorporating the spirit and the letter of the ICC Treaty into the British legal system. For this reason, recognition of international criminal responsibility depended upon the interaction between the executive and the legislative powers and upon the structure of its party politics. With recognition being subject to the ratification of an international treaty, the presence of one parliamentary majority or the other could determine whether the norm would be invoked or rejected. Thus, political parties became the main actors capable of putting into practice the plans of the British leadership.

The strict interconnection between the interests of the government and those of the parliamentary majority, together with the existence of disciplined and cohesive parties, have been long discussed as the main features of the British political system. These characteristics constituted crucial explanatory factors for the successful completion of the process of ratification of the ICC Treaty and for UK's invocation of international criminal responsibility as a legitimate international norm.

Labour leaders wanted the ICC Treaty to be ratified and their political preferences could count on the favorable domestic conditions offered by the structure of party government. After the large victory at the 1997 general elections, executive leaders could rely on a safe and disciplined majority that was ideologically favorable toward the norm of international criminal responsibility and the ICC Treaty.

In order to understand this process, it is necessary to analyze the parliamentary debates over the ICC that took place between 1998 and 2001. This analysis serves three main purposes. First, it provides an overview of the main arguments that were put forward in favor or against the ICC during the debate and helps understand the British political climate before and during the process of ratification of the ICC Treaty. Second, it aims to give a sense of the partisan nature of the debate: during the entire process, the British parliament was characterized by a political struggle between a Labour and Liberal Democrat majority, which was mostly supportive of the ICC, and a Conservative opposition that was highly skeptical towards the possibility to limit British sovereignty in favor of a permanent

international jurisdiction. Finally, the analysis explains how the mechanisms of party government determined invocation and recognition of the system of norms embodied by the ICC Treaty.

6.4.1 Justice and International Institutions: Political Partisanship and the Interpretation of the International System

Debates in the House of Commons and the House of Lords show that with respect to the norm of international criminal responsibility, the existence of a political majority in favor of the establishment of the ICC played a fundamental role in the final outcome of invocation and recognition.

Coherently with the formula of party government, British leaders could rely on the support of the majority of the parliament. This majority, mostly composed of the Labour Party, was even reinforced by the favorable attitude of the Liberal Democrats towards the ICC. This institutional and political contingency represented a guarantee against the attempt of the Conservative Opposition to delay or suspend the process of ratification. Labour and Liberal Democrat MPs consistently outvoted the skeptical political stances of the Conservative Party and secured the political view of the government. Thanks to this favorable institutional condition and to the prevailing mood of the parliament in favor of the ICC, the UK successfully became one of the first 60 states to ratify the Treaty and submit to the jurisdiction of the Court.

The entire debate over the norm of international criminal responsibility was very much ideologically oriented and mostly followed partisan lines. In particular, it was characterized by the clash between two different political views of the international system and of the relationship between state sovereignty and international institutions. By and large, the debate mostly followed a right – left dimension, with disagreements emerging ‘among’ rather than ‘within’ parties. On the one hand, there was the internationalist logic of the Labour Party and the Liberal Democrats that accepted limitations on sovereignty in order to create institutions capable of reducing conflict and legalizing international politics. On the other hand, the Conservative Party was much more reluctant to renounce sovereignty in favor of an international tribunal, which was perceived as intrusive and potentially threatening the national and defense interests of Britain.

Such differences were observable also in the political manifestos of the three main parties, which were published before the 1997 general elections. For example, the New Labour manifesto referred to “a sharp division between those who believe the way to cope with global change is for nations to retreat into isolationism and protectionism, and those who believe in internationalism and

engagement”. Therefore, the New Labour committed itself to the “protection and promotion of human rights” and to the “creation of a permanent international criminal court.”⁸²⁴ Along these lines, the manifesto of the Liberal Democrats listed among the main aims of its foreign policy that of “strengthening international institutions” and creating “an enforceable framework for international law, human rights and the protection of the environment”. For this reason, the Party declared that it would “support the creation of an International Criminal Court to deal with genocide and war crimes.”⁸²⁵ In contrast, the Conservative Party manifesto did not even mention the ICC and did not spend many words in favor of international institutions. Its section on foreign policy was mostly dedicated to the European Union and the need to avoid the creation of “a federal European State.”⁸²⁶

These differences emerged even more clearly during parliamentary debates and affected parties’ views towards crucial issues, such as international institutions and justice.

6.4.2 *British Parties and International Institutions*

During the debate over the ICC, political parties often disagreed about the role of international institutions and their relationship with state sovereignty. Following their internationalist ideology, the Labour Party and the Liberal Democrats supported a Kelsenian view of international relations in which state sovereignty has to be limited in order to create institutions capable of peacefully managing conflict. For this reason, even before the start of the process of ratification of the ICC Treaty, various Labour and Liberal Democrat MPs praised the ICC as a “fundamental instrument in the defense of human rights by allowing the prosecution of those responsible for the most atrocious crimes.”⁸²⁷

Particular emphasis was given to the necessity to provide the international community with mechanisms capable of enforcing human rights. As Labour Oona King argued, “having laws alone is just not good enough: we must have the means of enforcing those laws.”⁸²⁸ In a similar way, Liberal Democrat Robert Maclennan reminded that “it has been part of mankind’s progress to build on the development of the theories of jurists ... in developing laws of war. What has always been missing is the means of giving effect to the agreed norms.”⁸²⁹ Similar arguments were put forward in the House of

⁸²⁴ “New Labour because Britain deserves better”, 1997 New Labour Electoral Manifesto, 1997, available from www.labour.org.uk.

⁸²⁵ “Make the Difference”, 1997 Liberal Democrat General Election Manifesto, 1997, available from <http://www.libdemmanifesto.com/1997/1997-liberal-manifesto.shtml>.

⁸²⁶ “You can only be sure with Conservatives”, 1997 Conservative Party General Election Manifesto, 1997.

⁸²⁷ Des Browne, *House of Commons, Official Report*, 27 October 1999, col. 939.

⁸²⁸ Oona King, *House of Commons, Official Report*, 27 October 1999, col. 929.

⁸²⁹ Robert Maclennan, *House of Commons, Official Report*, House of Commons Public Bill Committee, 8th sitting, 1 May 2001.

Lords by Labour Lords Archer and Shore.⁸³⁰

For Labour and Liberal Democrat representatives, the establishment of such instruments required a redefinition of traditional concepts of international relations, such as national interest and sovereignty. Coherently with the positions expressed by the government, Labour and Liberal Democrat MPs often argued that the interdependent nature of post-Cold War international relations had blurred the lines between the interests of states and those of the international community. In this respect, MacLennan referred to the ICC Treaty as an example of the interconnection between national and international interests:

I find it unattractive that the Conservatives constantly presume an opposition between national interests and the interests of implementing the Treaty. I perceive no such opposition. To my mind, the treaty's implementation is precisely in the interest of this country.⁸³¹

For Labour and Liberal Democrat MPs, in contemporary international relations there was a constitutive – rather than oppositional – relationship between national and international interests.⁸³²

Finally, regarding sovereignty, Labour and Liberal Democrat MPs followed a moderate internationalist ideology. Without supporting a view of international relations in which nation states should be substituted by supranational institutions, they believed that, under certain conditions, sovereignty could be limited for the sake of justice and peace:

In many ways sovereignty is a good concept. It allows citizens to order their own affairs without external interference from powerful neighbours. But sovereignty – or at least this exaggerated notion of sovereignty – has also provided an excuse for despots behind which they can hide to justify no interference in the domestic affairs of the country. Many changes have been made over the past 50 years which have led towards an erosion of that sovereignty.⁸³³

This approach was consistent with the idea of subjecting sovereignty rights to respect of some fundamental norms of interest for the international community as a whole.

In contrast to these arguments, Conservatives elaborated an opposition to the ICC that was characterized by a more traditional view of international relations, skeptical towards the possibility of reducing international conflict through law and consequently privileging protection of state sovereignty and defense of national interests. For example, during one of the final debates on the relationship

⁸³⁰ Lord Archer, *House of Lords, Official Report*, 15 January 2001, col. 974; Lord Shore, 15 January 2001, col. 963.

⁸³¹ Robert MacLennan, House of Commons Public Bill Committee International Criminal Court Bill, 4th sitting, 24 April 2001.

⁸³² Des Browne, *House of Commons, Official Report*, 10 May 2001, col. 338.

⁸³³ Lord Goldsmith, *House of Lords, Official Report*, 15 January 2001, col. 980.

between the UK government and the future ICC, Edward Garnier argued against the excessive loss of state sovereignty by recalling that the primary interest of a British government “must be to protect the national interest.” For this reason, he called for introduction into the ICC Bill of provisions that could allow the government and the Foreign Secretary to “retain a sufficient ambit of independent action to protect British interests”. Without such provisions, “the statute and the Bill amount to a complete denial of our national sovereignty.”⁸³⁴

These arguments were characterized by substantial skepticism towards an institution whose interests could easily clash against those of the UK, which is one of the main providers of troops for peace and security operations. As Gerald Howarth illustrated:

It is important that those who are called upon by the Government, with the support of our Parliament, to risk their lives in pursuit of our nation's interests, whether it be defending our shores or our friends and allies abroad, or indeed, simply trying to restore order, are aware that we value their actions and their commitment. They should be certain that we would not take any action here that might put them at risk of being unfairly subjected to an international tribunal when they were acting on instructions in accordance with all the rules laid down by the British Government.⁸³⁵

In a similar way, Conservative Lords often criticized the ICC Treaty. One of the most critical was Lord Howell, who in various occasions referred to the U.S. as a country that was rejecting the ICC for reasons that should be of concern also for the UK. In his view, the ICC Bill could become acceptable only in case it included provisions that maintained a certain degree of discretion for the Foreign Secretary in dealing with the Court. Such discretion was deemed necessary in order to guarantee “protection for our Armed Forces and all servants of the state ... against vexatious prosecutions.”⁸³⁶ Conservatives obviously did not reject the logic of international institutions *tout court*, but were highly concerned with a Treaty, which created a “higher jurisdiction [that] could penetrate deep into the lives of our citizens, and Armed Forces ... in a way that has never happened before.”⁸³⁷

The debate over the ICC became an occasion for parties to express their diverging views on the role of international institutions and their relationships with sovereign states. Depending on the parties’

⁸³⁴ Edward Garnier, *House of Commons Public Bill Committee International Criminal Court Bill*, 7th Sitting, 1 May 2001; for similar arguments by Conservatives, see also Cheryl Gillan, *House of Commons Public Bill Committee*, 5th Sitting, 26 April 2001; Gerald Howarth, *House of Commons Public Bill Committee*, 5th Sitting, 26 April 2001.

⁸³⁵ Gerald Howarth, *House of Commons Public Bill Committee*, 3rd Sitting, 24 April 2001; see also Crispin Blunt, *House of Commons Public Bill Committee*, 8th Sitting, 1 May 2001; Edward Garnier, *ibidem*; Francis Maude, *House of Commons, Official Report*, 3 April 2001, col. 230.

⁸³⁶ Lord Howell, *House of Lords, Official Report*, 8 February 2001, col. 1273.

⁸³⁷ Lord Howell, *House of Lords, Official Report*, 20 March 2001, Col. 1306; see also Lord Lamont, 8 March 2001, col. 355; Lord Hurd, 12 February 2001, col. 27.

political stance, international jurisdictions were seen either as instruments capable of reducing the adversarial nature of international relations, or as political arrangements that, if implemented in too pervasive a way, could hinder the pursuit of fundamental national interests. In most debates, Labour MPs and Lords sided with the political views expressed in several occasions by the main members of the government. This similarity of political views and institutional interests was the result of both the internationalist ideology that characterized the Labour Party and the institutional nature of the Westminster system in which the party that controls the majority of parliament usually supports the policies of the incumbent government.

6.4.3 *British Parties and International Justice*

The second major disagreement that emerged during the debate over the ICC concerned the notion of international justice and the possibility of creating impartial judicial institutions at the international level. This led parties to diverge as to the mechanisms that would prevent the risk of ‘political justice’, that is a judicial system driven by political considerations and not by the genuine attempt to establish responsibilities and punish international crimes. For Labour and Liberal Democrat MPs and Lords, the ICC represented an opportunity to create an international and permanent tribunal capable of prosecuting international crimes in the sole interests of justice. In order to establish such an impartial and unbiased institution, it was necessary to provide the ICC with a strong jurisdiction, as independent as possible from governments. This would be the only way to institutionalize international justice and mitigate conflict through international law and judicial proceedings.

Labour MP Mike Gapes argued that the most important issue at stake was to prevent international justice from becoming “the plaything of one side in the conflict.”⁸³⁸ In order to achieve this aim, Labour and Liberal Democrat MPs emphasized the importance of having a “truly independent international court with an independent Prosecutor.”⁸³⁹ This point was further developed by Liberal Democrat Lord Thomas who recalled how “both the Security Council and states are political bodies and they may, if they so choose, select situations for investigation on political rather than legal grounds.”⁸⁴⁰ Independence of the Prosecutor and autonomy of the Court from State Parties were seen as preconditions for the creation of an effective and credible jurisdiction. Following this logic, Labour Lord Goldsmith defended the ICC Treaty as a reasonable compromise capable of preventing the risk of

⁸³⁸ Mike Gapes, *House of Commons, Official Report*, 27 October 1999, col. 943.

⁸³⁹ Des Browne, *House of Commons, Official Report*, 27 October 1999, col. 939.

⁸⁴⁰ Lord Thomas, *House of Lords, Official Report*, 9 June 1998, col. 955.

political proceedings conducted for reasons other than international law and justice. Along these lines, he argued that “no investigation will take place unless an independent prosecutor decides that there are reasonable grounds for doing so.”⁸⁴¹ In sum, both the Labour Party and Liberal Democrats supported the ICC Treaty provided that it included sufficient guarantees to establish an impartial system of justice.

In contrast, the ICC represented a major source of concern for the Conservative Party. In particular, Conservatives considered its independence and supranational character as a threat to a country, such as the UK, that was largely involved in several peace operations. Its participation in such operations could leave the UK exposed to political proceedings promoted by interested states or “biased” NGOs.⁸⁴² For this reason, MP Gillan argued that the Treaty had “some fundamental flaws, which our military commanders have warned could lead British troops being prosecuted for war crimes and being prevented from carrying out our peacekeeping tasks.”⁸⁴³

Along these lines, Howarth was preoccupied that the Prosecutor could start investigations on his/her own initiative. “Real powers”, he argued, “will reside in the prosecutor and it is likely that there will be lobbying to establish the most popular choice.”⁸⁴⁴ For these reasons, Conservatives thought that the most effective way to avoid politicization was either to insert provisions into the ICC Bill capable of protecting British interests by augmenting discretion of the government in dealing with the ICC or to call for a modification of the ICC Treaty itself in order to make the Court more dependent on the Security Council. In this respect, Crispin Blunt observed that “within the Statute, greater account should have been given to the size and importance of countries.”⁸⁴⁵

In conclusion, for Conservatives, in a world in which the rule of law could not yet substitute political competition and conflict among states, the only guarantee against a potentially partial and biased use of international justice was to augment the control of states, especially permanent members of the Security Council, over the activities of the Court. An independent Prosecutor, elected by the majority of State Parties to the Treaty, was viewed as a moral and political hazard, likely to render the UK more vulnerable to the political calculations of rivals and enemies.

⁸⁴¹ Lord Goldsmith, *House of Lords, Official Report*, 8 March 2001, col. 353.

⁸⁴² Lord Lamont, *House of Lords, Official Report*, 8 March 2001, col. 355.

⁸⁴³ Cheryl Gillan, *House of Commons, Official Report*, 27 March 2001, col. 812.

⁸⁴⁴ Gerald Howarth, *House of Commons Public Bill Committee*, 3rd Sitting, 24 April 2001.

⁸⁴⁵ Crispin Blunt, *House of Commons, Official Report*, 3 April 2001, col. 273.

6.4.4 *Support and Contestation of the ICC in British Party Politics*

The ideological divide between supporters and opponents of the ICC reached its peak after the ICC Bill was introduced in the parliament in August 2000. Support and contestation of the ICC increasingly followed ideological lines, with Labour and Liberal Democrat MPs willing to ratify the Treaty in an expeditious way and Conservatives calling for substantial modifications, if not outright rejection.

Conservatives mainly feared the presence of an independent Prosecutor capable of starting his/her own prosecutions. In particular, the main concern was with the election of the Prosecutor that, according to Article 42 of the ICC Statute “shall be elected by a secret ballot by an absolute majority of the members of the Assembly of the State Parties.”⁸⁴⁶ This was contested by Conservatives, who criticized the attempt to apply democratic principles to an international institution in which the principle of equality was likely not to work.

Why do we have qualified majority voting in the European Union? Why do the five countries that are permanent members of the Security Council have a veto over its resolutions? It is because when reality and the actual exercise of responsibility start abutting such issues, there must be a balancing weight given to the countries that represent a large part of the world's resources and, usually, large populations I do argue that in selecting the people who are going to make the institution work, San Marino, with a population of 23,000, should not carry the same weight as China, which has a population of more than 1 billion.⁸⁴⁷

A prosecutor elected by a majority of states could easily become a political instrument in the hands of anti-Western states. For this reason, Conservatives argued that it was necessary to link his/her appointment to a decision of the Security Council and not to a democratic election by all Parties to the Rome Treaty.

Labour and Liberal Democrat MPs replied to these arguments by following a legalistic interpretation of the international system in which “nation states with sovereign governments ... have equal status in international law.”⁸⁴⁸ The appointment of the Prosecutor through a democratic election was considered consistent with a fundamental legal condition of international relations. Moreover, Labour and Liberal Democrat MPs often reminded that, according to Article 16 of the ICC Treaty, “the UN Security Council has the power to halt any prosecution”⁸⁴⁹ for a renewable period of 12 months. This was seen as sufficient guarantee against politically motivated prosecutions involving permanent

⁸⁴⁶ Rome Statute of the International Criminal Court, Art. 42, available at <http://www.un.org/icc/romestat.htm>.

⁸⁴⁷ Crispin Blunt, House of Commons Public Bill Committee International Criminal Court Bill, 3rd Sitting, 24 April 2001; Lord Howell, House of Lords, Official Report, 15 January 2001.

⁸⁴⁸ Mike Gapes, House of Commons Public Bill Committee International Criminal Court Bill, 3rd Sitting, 24 April 2001.

⁸⁴⁹ Jenny Tonge, *House of Commons, Official Report*, 27 October 1999, col. 942.

members of the Security Council.

Another important debate emerged over the risk of malicious prosecutions conducted by the ICC against British citizens and soldiers. According to the ICC Statute, the Court has jurisdiction over the “State on the territory of which the conduct in question occurred” or over “the State of which the person accused of the crime is a national.”⁸⁵⁰ However, the jurisdiction of the Court is complementary to those of national courts, meaning that the Court shall prosecute a crime only when “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”⁸⁵¹ This means that national courts would take precedence over the ICC, which would intervene only when a state is incapable or unwilling to prosecute its own citizens. For Labour and Liberal Democrat MPs, Article 17 constituted adequate guarantee against the risk of politicized or biased proceedings. Indeed, they often underscored that “the ICC could not proceed in such a case if the matter was being acted on in this country.”⁸⁵²

In contrast, Conservatives did not view Article 17 as a satisfactory barrier against the risk of proceedings motivated by political calculations. In particular, they were quite skeptical about the second comma of Article 17 that assigns on the Court the exclusive prerogative to determine whether a state was unwilling or unable to prosecute. This could pave the way for contrasts between the Court and the UK that needed to be avoided by taking appropriate countermeasures.

For these reasons, Conservatives proposed a series of amendments that aimed to augment the discretion of the Foreign Secretary and the British government in dealing with the Court. The logic behind these amendments was explained by Lord Howell in the House of Lords: “Where this nation genuinely felt that someone had done something for which no finger should be pointed at him and no investigation should take place, and where it was clear that he was acting under proper orders in a way necessary in the heat of war or even in the heat of peacekeeping, it would mean that the Secretary of State's discretion would be there to stop the proceedings.”⁸⁵³

These amendments originated from the perceived need to guarantee adequate safeguards for British troops involved in peace and security operations. For example, Conservative MP Garnier often recalled that several provisions contained in the ICC Treaty could “inhibit or in any way damage their

⁸⁵⁰ Rome Statute of the International Criminal Court, Art. 12.2, available at <http://www.un.org/icc/romestat.htm>.

⁸⁵¹ Rome Statute of the International Criminal Court, Art. 17.1 (a).

⁸⁵² Robert Maclennan, House of Commons, Official Report, 3 April 2001, col. 242; Lord Goldsmith, House of Lords, Official Report, col. 981; Mike Gapes, House of Commons Public Bill Committee International Criminal Court Bill, 10th Sitting 3 May 2001.

⁸⁵³ Lord Howell, House of Lords, Official Report, 8 March 2001, col. 370; see also Edward Garnier, House of Commons Public Bill Committee International Criminal Court Bill, 4th Sitting, 24 April 2001; Crispin Blunt, House of Commons, Official Report, 3 April 2001, col. 220-1; Francis Maude, 3 April 2001, col. 237;

ability to carry out their lawful duties on behalf of the people of this country in time of war.”⁸⁵⁴ Such arguments were reiterated in almost every single parliamentary debate and were all characterized by a concern with the necessity to protect British interests vis-à-vis international institutions.⁸⁵⁵ By proposing such amendments, Conservatives aimed to subject the Court’s investigations and prosecutions to the consent of the UK government, which was explicitly contrary to the spirit of the ICC Statute. These amendments were consistently rejected by Labour and Liberal Democrat MPs, who outvoted Conservatives during the sittings of the House of Commons Public Bill Committee and the plenary sessions of both Houses. By following a pattern that is typical of the British political system, Labour MPs rejected the amendments of the Opposition and secured, with the contribution of the Liberal Democrats, the view of the Labour government.

Having seen their amendments defeated, Conservatives focused their attention on a last-ditch effort to insert clauses that could allow Britain to opt out of some parts of the ICC Treaty. Specifically, they asked the parliament to insert into the ICC Bill a provision that would allow the UK to make use of Article 124, which establishes that a state can be exempted from the ICC jurisdiction over war crimes for a period of seven years after the entry into force of the ICC Treaty. According to Conservatives, this declaration was a “means of giving time to see how the Court progresses” by ensuring that “members of the armed forces are exempt from the jurisdiction of the Court for the offence of war crimes.”⁸⁵⁶ Consistent with a usual attitude of British Conservatives towards international institutions, various MPs and Lords tried to convince the majority of the parliament to either delay ratification of the ICC Treaty or to opt-out of some of its provisions. Moreover, they hoped that the example of France, which made use of Article 124, would convince the rest of the parliament.

Nevertheless, these attempts were eventually rejected by the Labour and Liberal Democrat majority. Their representatives always maintained that “no state should be allowed to introduce statutes of limitation for these crimes because that would mean that the international community could not investigate or prosecute persons who have successfully evaded justice for a prolonged period of time.”⁸⁵⁷

⁸⁵⁴ Edward Garnier, House of Commons Public Bill Committee International Criminal Court Bill, 2nd Sitting, 10 April 2001.

⁸⁵⁵ For example, Crispin Blunt, *House of Commons Public Bill Committee International Criminal Court Bill*, 3rd Sitting, 24 April 2001; Cheryl Gillan, 5th Sitting, 26 April 2001; Gerald Howarth, 10th Sitting, 3 May 2001.

⁸⁵⁶ Francis Maude, *House of Commons, Official Report*, 10 May 2001, col. 328; see also, Lord Howell, *House of Lords, Official Report*, 8 February 2001, col. 1271; Cheryl Gillan, *House of Commons, Official Report*, 3 April 2001, col. 280; Crispin Blunt, *House of Commons Public Bill Committee International Criminal Court Bill*, 1st Sitting, 10 April 2001; Gerald Howarth, *House of Commons Public Bill Committee International Criminal Court Bill*, 7th Sitting, 1 May 2001.

⁸⁵⁷ Lord Thomas, *House of Lords, Official Report*, 9 June 1998, col. 956.

Conservatives finally threatened to make their support for the Treaty conditional upon the government issuing a declaration in conjunction with ratifying the Treaty. This demand should be understood as an attempt to convince the parliament to adopt substantial changes or at least delay ratification of the ICC Treaty. This declaration would provide that the government “rejects attempts to interpret [Treaty] provisions in a politically motivated manner against actions of the United Kingdom and its citizens.”⁸⁵⁸ This rather vague language aimed to retain control by the British government over future actions taken by the ICC. Once again, the Labour Party and the Liberal Democrats rejected this attempt and the ICC Treaty was eventually ratified without the votes of the Conservative Opposition. On 10 May 2001, the House of Commons voted in favor of the ICC Bill by a 220 to 73 vote, with Conservatives mostly voting against it.

The analysis of the parliamentary debates shows that the main explanatory factors for the UK’s invocation and recognition of the norm of international criminal responsibility should be located in the institutional characteristics of the British political system and in the dynamics of its party politics.

The debate over the ICC mostly followed ideological lines, with Labour and Liberal Democrat MPs supporting the norm encapsulated by the ICC and Conservatives mostly opposing it. The Labour victory at the general elections of 1997 created a stable government sustained by a comfortable and disciplined majority, which, with the support of the Liberal Democrats, could dominate the debate over the ICC. Relying on the favorable institutional conditions provided by the formula of party government, executive leaders and norm entrepreneurs secured an expeditious ratification of the ICC Treaty and recognition of the norm of international criminal responsibility. Invocation of the norm embodied by the ICC Treaty was, thus, the result of a combination of favorable institutional conditions and prevalence of ideological stances that made the UK highly supportive of judicial and supranational institutions. Had the British government and the parliament been characterized by a different political majority, it is reasonable to expect that the ratification of the ICC Treaty would have encountered substantial obstacles and may have been postponed, if not rejected.

6.5 Conclusions

UK’s ratification process of the ICC Treaty triggered a large debate that involved civil society actors, the government, and the main parties represented in the parliament. In particular, the norm of international criminal responsibility contained in the Treaty led to a political battle that regarded the

⁸⁵⁸ Cheryl Gillan, House of Commons Public Bill Committee International Criminal Court Bill, 8th Sitting, 1 May 2001.

legitimacy of a supranational and permanent jurisdiction. Such a debate lasted for almost three years, from the 1998 Rome Conference to the passing of the ICC Bill in May 2001. This event represented the culmination of a process during which the UK became one of the most prominent sponsors of the ICC in the international community. During this period of time, civil society movements, governmental leaders, and political parties tried to impose their own interpretations of the norm and, more generally, of the international system. This process created winners and losers and allocated specific political results.

Civil society movements and British NGOs were incapable of determining the final outcome of invocation and recognition. Their involvement in the domestic debate was limited and their view only partially taken into account. In particular, several NGOs were unsatisfied with the ICC Statute since they considered it as the lowest common denominator between the positions of like-minded and skeptical states. For this reason, they lobbied the government and the parliament in order to obtain a Bill that could improve the political compromise that had been reached at the Rome Conference. These attempts mostly failed and both the government and the majority of the parliament preferred to stick with the Rome Treaty. If, on the one hand, civil society groups played a large role in campaigning for the Court and in the drafting of the ICC Statute at the international level, on the other hand, despite their effort to “influence governments at home, their results were disappointing.”⁸⁵⁹

British executive leaders and members of the government played an important role in the process of invocation since they acted as norm entrepreneurs. Several members of the government actively advocated the ratification of the Rome Treaty and showed their support for a permanent international tribunal in many foreign policy documents and parliamentary debates. In particular, Foreign Secretary Cook contributed to framing the issue of accepting international criminal responsibility as a legitimate and necessary action to improve respect for human rights and prosecute international crimes. This view was presented as consistent with the internationalist foreign policy of the New Labour leadership. However, even though they oriented the debate and contributed to the domestic prominence of the norm, executive leaders achieved their goals mostly thanks to the favorable institutional and political conditions offered by the Westminster system of government. When states deal with highly institutionalized international norms that can be invoked and recognized as legitimate only by resorting to domestic legislation, the difference between invocation and contestation depends on the institutional characteristics of the political system and on the structure of its party politics.

The norm of international criminal responsibility could be invoked and the ICC Treaty ratified

⁸⁵⁹ Fanny Benedetti, John L. Washburn, “Drafting the International Criminal Court”, 21.

mostly because the Westminster system provides a strong commonality of interests and ideological positions between the executive and the legislature. The government that wins the elections usually controls the majority of parliament and can have its proposals transformed into parliamentary bills. The large victory at the 1997 general elections allowed the Labour government headed by Tony Blair to rely on a large majority, composed of the Labour Party and occasionally reinforced by the Liberal Democrats. This majority was institutionally and politically loyal to the government and ideologically favorable to the ICC. These conditions secured ratification of the ICC Treaty and rendered the UK highly supportive of the establishment of an international jurisdiction for the prosecution of international crimes.

Acting as domestic vehicles of the norm, Labour and Liberal Democrat representatives consistently outvoted the Conservative Opposition during the most important plenary sessions of the parliament and during the debates in the Public Bill Committee. Conservatives put forward several arguments against the ratification of the ICC Statute. These arguments often led to amendments that, if passed, would have substantially modified and diluted the spirit and the letter of the ICC Treaty. Nevertheless, these attempts to stop or delay the process of ratification were deemed to fail in a political system that creates such a fusion of power and interests between the government and its parliamentary majority. Consequently, Conservatives could not really influence the process of invocation of the norm of international criminal responsibility and could not prevent the UK from becoming one of the main sponsors of the ICC.

The impact of institutional conditions on the process of recognition or contestation of highly institutionalized international norms will emerge even more clearly in the analysis of countries that present different governmental arrangements. In states, such as the U.S., in which the fusion of powers and interests between the executive and the legislature does not present itself, domestic dynamics of government and partisanship can exert even larger constraints on the views and strategies of leaders.

Chapter 7

7 “SLAY THIS MONSTER!”⁸⁶⁰

United States and Rejection of the ICC Treaty

On 31st December 2000, right before leaving office, President Clinton announced the decision to sign the International Criminal Court (ICC) Treaty in order to reaffirm U.S.’ “strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity.”⁸⁶¹ At the same time, the President made clear that “in signing we are not abandoning our concerns about significant flaws in the Treaty” and added that he did not command that his successor submit the Treaty to the Senate “until our fundamental concerns are satisfied.”⁸⁶²

After two years of intense negotiations and debate both at the international and domestic levels, the U.S. reached a middle-of-the-way position: On the one hand, with signature, the Administration committed the U.S. to refraining from acts that could hinder the scope of the Treaty and manifested its intention to remain “in a position to influence the evolution of the Court” and to “have the chance to observe and assess”⁸⁶³ its functioning. On the other hand, by refusing to submit the Treaty to the Senate for ratification, the Administration expressed the impossibility of reaching a domestic consensus over an international court that could potentially command investigations and prosecutions of U.S. citizens. In few years time, U.S. position on a permanent international court shifted from strong support to a mix of indecisiveness and open skepticism. This unsure attitude will soon be turned into aggressive opposition after 9/11 and during the George W. Bush Administration.

What are the reasons that pushed the Clinton Administration into this conundrum? What conditions led the Presidency to being stuck between general support and failure to accept a Treaty that had found the overwhelming approval of most U.S. closest allies? What domestic actors favored this political outcome? In order to answer these questions, I analyze the decision by the Clinton Administration not to accept the ICC. The events that took place from the UN Conference held in Rome in summer 1998 until the end of the Clinton Administration constitute the origins of the controversy between the U.S. and the ICC, which would become particularly disturbing after 9/11.

⁸⁶⁰ This particularly categorical statement was pronounced by Jesse Helms, Chairman of the U.S Senate Foreign Relations Committee during the debate on the ICC Treaty. It somehow became the slogan of the domestic opposition against the ICC Treaty. See, Jesse Helms, “We Must Slay This Monster: Voting Against the International Criminal Court is Not Enough. The US Should Try to Bring it Down”, *Financial Times* (31 July 1998): 18.

⁸⁶¹ President Clinton, “Statement on the Rome Treaty on the International Criminal Court”, *Daily Comp. Pres. Docs.*, December 31, 2000, 4.

⁸⁶² Cit.

⁸⁶³ Cit.

Moreover, they represent an interesting case study of the domestic determinants of U.S. foreign policy.

A significant part of the literature assumes that U.S. decision to vote against the ICC at the end of the Rome Conference and the subsequent failure to ratify its Treaty would be rooted in some general characteristics of U.S. political culture and would not necessarily depend on the type of Administration in office or on the type of political forces that are represented at the legislative level. From a domestic point of view, several scholars have noted that the U.S. Constitution contains provisions that would create powerful obstacles to the exercise of judicial powers over U.S. citizens by any institution or tribunal, which is not a U.S. court.⁸⁶⁴ Structural characteristics of its constitutional and political system would be at the basis of U.S. opposition to the ICC. From an international point of view, the hegemonic position that the U.S. occupies in contemporary international relations would vest it with special responsibilities that do not command the acceptance of an international jurisdiction that could seriously hinder its capacity of acting whenever fundamental national interests are at stake.⁸⁶⁵ These conditions would go beyond the partisan and ideological affiliations of U.S. politics and prevent the U.S. from joining the ICC regardless of the dominant political mood in the Administration or Congress.

Although they provide important insights on the interrelationships between U.S. domestic and foreign policy, these explanations show a tendency to reify U.S. attitudes on international politics, especially with regards to international norms and institutions. Presenting the U.S. as an exceptional political system whose characteristics are, at least partially, exempted from changing historical and political conditions, these analyses end up subscribing to a static view of U.S. politics and are not fully capable of explaining possible change in its policy attitudes.

The main aim of this chapter is to challenge this literature and explain how U.S. approach to the ICC is contingent upon specific institutional and political conditions that can change over time. Domestic factors, such as the dominant political orientation of Congress and the competition that might occur among different agencies within the same Administration, constitute important variables to explain support or opposition to international treaties, as for example the ICC.

This chapter does not go as far as to argue that President Clinton and U.S. diplomacy were strongly in favor of the ICC Treaty but could not see it ratified because of the opposition by Congress or the military community. Both the Presidency and the U.S. delegation at the Rome Conference had

⁸⁶⁴ See for example, Jason Ralph, *Defending the Society of States: Why America opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007).

⁸⁶⁵ See for example, Michael J. Struett and Steven A. Weldon, "Explaining State Decisions to Ratify the International Criminal Court", Paper presented at the American Political Science Association, Annual Meeting, Philadelphia, PA, September 2, 2006.

serious concerns about the newly created Court. Nevertheless, as Clinton's statement upon signature implies, the dominant position within the Administration was one of actively engaging with the Court and keeping on negotiating on its most controversial aspects in order to find a compromise that could make it acceptable. This was true not only during the actual Rome Conference but also in the two following years, which U.S. diplomacy devoted to improving the Treaty in a way that could be consistent with U.S. foreign policy goals. This diplomatic strategy of 'engaged opposition' encountered the resistance of the Republican-led Congress, especially the Senate, and to a certain extent of the Department of Defense. Such resistance significantly constrained the actions of the Administration and ultimately led to a position of rejection of the ICC Treaty.

7.1 The United States And The Icc Controversy

The U.S. has historically been a great supporter of international humanitarian law and the necessity to create international jurisdictions to enforce the principle of individual criminal responsibility. Its contribution to the development of the law of war has been large since the 19th century. In 1863, Congress passed the Lieber Code that regulates warfare in the U.S. armies, especially for what concerns the treatment of prisoners of war. Along these lines, in 1899 the U.S. largely contributed to the drafting and approval of the Hague Convention. Later, after WWII, the U.S. was the main sponsor of the establishment of the International Military Tribunals at Nuremberg and Tokyo to prosecute war criminals.⁸⁶⁶

During Cold War, international criminal justice was not among the priorities of the international community. Bipolar competition between the U.S. and USSR prevented states from considering the creation of mechanisms for prosecuting international crimes. The U.S. did not make exception and the first domestic initiatives in favor of the establishment of an international criminal court started to emerge only in the mid-1980s.

The election of the Clinton Administration in 1992 gave new energy to these initiatives. With the new Administration, the issue of international justice was back in the public debate. The U.S. was one of the main advocates of UN criminal tribunals for the prosecution of international crimes in the

⁸⁶⁶ For an analysis of the evolution of international justice and the contribution of the U.S, see for example: M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" *Harvard Human Rights Journal*, Vol. 10 (Spring 1997): 11-62; Bryan F. MacPherson, "Building an International Criminal Court for the 21st Century" *Journal of International Law*, Vol. 13, No. 1 (Winter 1998): 1-60; Howard Ball, "Prosecuting War Crimes and Genocide. The Twentieth Century Experience" (Lawrence, Kansas: University Press of Kansas, 1999); Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008): chap. 1-3; -Lee Feinstein and Tod Lindberg, *Means to an End. U.S. Interest in the International Criminal Court* (Washington, D.C., Brookings Institution Press, 2009).

Former Yugoslavia and Rwanda. Moreover, U.S. diplomacy fervently participated to debates at the UN level on the International Law Commission draft statute for an ICC (1994) and to the Six Sessions (1994-1996) of the Preparatory Committee on the establishment of the ICC. The PrepCom was a direct emanation of the UN General Assembly and paved the way for the Conference of Plenipotentiaries on the Establishment of an ICC that was held in Rome from June 15 to July 17 1998.⁸⁶⁷

The U.S. delegation in Rome actively contributed to the negotiations and especially to some specific aspects of the Statute, such as the definition of crimes, the procedure to select judges, due process guarantees for defendants, several provisions to guarantee the application of war crimes not only to international but also to internal conflicts, and the principle of complementary jurisdiction.⁸⁶⁸ Nevertheless, the U.S. expressed skepticism as to several other issues: jurisdiction of the Court over the crime of aggression, although conditional upon a definition to be devised in the future (Art. 5), jurisdiction of the Court over acts committed by nationals of non-party states in the territory of a state party (Art. 12.2a), and the possibility for the Office of the Prosecutor to initiate its own investigations (Art. 15), which allowed the Court to take action even without referrals by the Security Council or states parties.⁸⁶⁹ The Administration was concerned that these proposals could favor the initiation of politically motivated and frivolous prosecutions, especially against a country like the U.S. that has large contingents of troops deployed worldwide.

The U.S. delegation attempted to mitigate the positions of the most vehement supporters of the Treaty by proposing various compromises, in particular the exemption of citizens of states that have not ratified the Treaty from the jurisdiction of the Court. These efforts proved vain, especially because

⁸⁶⁷ For analyses of the various steps that led to the Rome Conference, see Leila Nadya Sadat and S. Richard Carden, “The New International Criminal Court: An Uneasy Revolution” *Georgetown Law Journal* Vol. 88, No. 3 (March 2000): 381-474; Dominic McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court. Legal and Policy Issues* (Oxford: Hart Publishing, 2004); Benjamin N. Schiff, *Building the International Criminal Court*, especially chapter 3; Roy S. Lee, *The International Criminal Court. The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999).

⁸⁶⁸ David Scheffer, “The United States and the International Criminal Court”, *The American Journal of International Law*, Vol. 93, No.1 (January 1999): 12-22; David Scheffer, “Staying the Course with the International Criminal Court” *Cornell International Law Journal*, Vol. 35 (2001-2): 47-100; William A. Schabas, “United States Hostility to the International Criminal Court: It’s All About the Security Council” *European Journal of International Law*, Vol. 15, No. 4, 701-720.

⁸⁶⁹ Bartram Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response”, *Journal of International Law and Politics*, Vol. 31, 1999 (854-891); Monroe Leigh, “The United States and the Statute of Rome”, *The American Journal of International Law*, Vol.95, No.1 (January 2001): 124-131; Dominick McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court*, cit; -Marc Weller, “Undoing the global constitution: UN Security Council action on the International Criminal Court”, *International Affairs*, Vol. 78, No. 4 (October 2002): 693-712); Jennifer K. Elsea, “U.S. Policy Regarding the International Criminal Court”, CRS Report for Congress (Washington DC: Congressional Research Service, Library of Congress, August 29, 2006); -Diane Marie Amann and M. N. S. Sellers, “The United States of America and the International Criminal Court”, *The American Journal of Comparative Law*, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002): 381-404.

most states refused to consider U.S. proposals as to the jurisdiction of the Court and its mechanisms of activation.⁸⁷⁰ The main constraints to the leverage and negotiating power of the U.S. were not only constituted by its concerns over important parts of the Treaty, but also, and above all, by the political mood in Washington, D.C. Opposition from the Republican-led Congress, together with resentment of the Pentagon against the Treaty, significantly isolated the U.S. and reduced the possibility of ever striking a compromise.⁸⁷¹

Facing these difficulties, the U.S. could only call for a vote on the all package of the Treaty. This vote resulted in a major diplomatic defeat. The Treaty was adopted by a 120-7 vote, with the U.S. voting against, together with Iraq, Israel, Libya, China, Qatar, and Yemen.⁸⁷²

Notwithstanding its opposition, the Administration maintained a positive approach toward the Treaty. In the subsequent months, the U.S. delegation actively participated to the meetings of the PrepCom that took place between March and June 2000 by decisively collaborating with the drafting of the Elements of Crimes and the Rules of Procedure and Evidence.⁸⁷³ Moreover, the Administration continued to oppose anti-ICC legislation, such as the American Service Members Protection Act that Republicans tried to pass in several occasions in order to prohibit any collaboration between the U.S. and the ICC and to guarantee full protection of U.S. soldiers from its jurisdiction.⁸⁷⁴

In the attempt to soften domestic opposition to the Treaty, the U.S. delegation presented two proposals to the PrepCom to exempt citizens and officials of non-party states from the jurisdiction of the Court. The aim was to guarantee U.S. citizens against a Treaty that could not be ratified by the Senate without, at the same time, prejudicing possible cooperation between the Court and the U.S. These proposals did not find the support of the other delegations and the Administration could only sign the Treaty without starting any procedure for ratification.⁸⁷⁵

7.2 The U.S. And The ICC: An Impossible Relationship?

The debate on the ICC Treaty has produced a vast literature that has investigated possible explanations for U.S. rejection. The reason for this interest has been twofold: first, the U.S. is still one of the most powerful states of contemporary international relations. Institutions, such as the ICC, need

⁸⁷⁰ David J. Scheffer, “The United States and the International Criminal Court”, 21.

⁸⁷¹ Lee Feinstein and Tod Lindberg, Means to an End. U.S. Interest in the International Criminal Court, 38.

⁸⁷² David J. Scheffer, “The United States and the International Criminal Court”, 21.

⁸⁷³ David J. Scheffer, “Staying the Course with the International Criminal Court”, 87; Lee Feinstein and Tod Lindberg, *Means to an End*, 38; “U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement”, Washington, DC, The American Society of International Law, 2009, 5.

⁸⁷⁴ Benjamin N. Schiff, Building the International Criminal Court, 172.

⁸⁷⁵ Dominic McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court*, 408-11.

its support in order to perform their functions more efficiently and with more legitimacy. Second, the historical record on the relations between the U.S. and international institutions shows an ambivalent pattern. Sometimes the U.S. has been able to support and accept international organizations, such as the UN, NATO, or the WTO, while at other times, it has refused to limit its sovereignty to carry out international action in a multilateral and cooperative way, as for example in the case of the League of Nations, and more recently of the Kyoto Protocol, the Comprehensive Test Ban Treaty, or the Anti Landmine Treaty.

As Stewart Patrick and Shepard Forman have argued, the roots of this ambivalent behavior are to be found in a domestic tendency to identify the U.S. as an exceptional nation. The belief in the “uniqueness, immutability, and superiority of the country’s liberal principles”, together with “a conviction that the United States has a special destiny”⁸⁷⁶ is still particularly strong within U.S. political culture. This political philosophy produces contradictory results.

On the one hand, exceptionalism “inspires a crusading zeal to recast international society in the United States’ domestic image.”⁸⁷⁷ Sponsoring international institutions would be a way to “transform an anarchic, conflict-prone world into an open, universal community under law, in which countries could pursue security, prosperity, and welfare.”⁸⁷⁸ Liberal values would be, especially for the most internationalist sectors of U.S. society, the instruments to make the world more cooperative, institutionalized, and eventually safe. On the other hand, exceptionalism can become a countervailing force, in the sense that it can sometimes be interpreted as a “determination to preserve the unique values and institutions of the United States from corruption or dilution by foreign contact and a vigilance to defend U.S. national interests, sovereignty, and freedom of action against infringement by global rules and supranational bodies.”⁸⁷⁹ Participation to multilateral bodies should be limited since it could both undermine U.S. capacity of pursuing fundamental interests and dilute the strong constitutional values that support its political culture.

Some scholars have relied on the latter interpretation of U.S. exceptionalism in order to argue that U.S. rejection of important international treaties, such as the ICC Statute, would be motivated by an innate isolationist attitude. This political sentiment activates powerful and structural domestic conditions that make the U.S. almost naturally reluctant to pool its sovereignty in favor of international

⁸⁷⁶ Stewart Patrick and Shepard Forman (eds.), *Multilateralism and U.S. Foreign Policy. Ambivalent Engagement* (Boulder, London: Lynne Rienner, 2002): 7.

⁸⁷⁷ Cit.

⁸⁷⁸ Cit.

⁸⁷⁹ Cit., 7-8.

institutions. An absolutist view of U.S. national interests and a restrictive interpretation of the Constitution would create strong domestic barriers to the ratification of international treaties, regardless of what political party dominates the executive or legislative branch. This is to say that it is not the presence of a certain political tendency to make the U.S. recalcitrant to accept the ICC or the Kyoto Protocol. Rather, the U.S. would be somehow constitutively and culturally reluctant to limit its sovereignty in favor of international legal arrangements.

As far as U.S. national interests are concerned, some analyses have underscored that “countries that have particularly strong militaries in their region of the world...are less likely to have ratified the ICC – including the United States.”⁸⁸⁰ Along these lines, Sarah Sewall and others have described U.S. policy toward the ICC as an example of “exemptionalism”: “U.S. leaders imply that because the United States is exceptional in international affairs today – assuming a unique responsibility for promoting international security – it deserves some exemption from rules applied to other states.”⁸⁸¹ According to these analyses, the main reason for opposition to the Court has to be located in the perception that U.S. executive and legislative leaders have of their country in the international system. Being a global power with special responsibilities and interests, the U.S. could not accept a Court that might limit its capacity of pursuing what is just and necessary for its survival and prosperity. Claiming jurisdiction over its foreign policy and the conduct of its military operations, the ICC could hinder U.S. ability to use force whenever defense and national interests dictate.

This type of explanation cannot certainly be ignored because it starts from an observation of the reality of international relations, in which, as a general rule, states, especially the most powerful, cannot afford to consider rules and normative behavior as the only aspiration of their foreign policy. States that deploy a large number of troops abroad and take part to most peace operations are automatically more exposed to the activities of international criminal tribunals and might be more reluctant to accept their jurisdictions. Nevertheless, these analyses only explain one part of the story. In particular, they seem to overlook the examples of countries with well-established traditions of interventionist military policies that did not hesitate to support the ICC, sometimes even enthusiastically. Some quantitative analyses of countries that are traditionally very committed to military intervention and peacekeeping have shown how the relationship between deployment of troops abroad and ratification of the ICC holds for some states, most notably the U.S., but not for others.

⁸⁸⁰ Michael J. Struett and Steven A. Weldon, “Explaining State Decisions to Ratify the International Criminal Court, 26.

⁸⁸¹ Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, “The United States and the International Criminal Court: An Overview,” in *The United States and the International Criminal Court. National Security and International Law*, ed. Sarah B. Sewall and Carl Kaysen (Lanham: Rowman & Littlefield Publishers, 2000): 3.

For instance, Eric Neumayer has suggested that “despite the notable opposition to the Court from the United States, Russia, India, China, and others, states that have been willing to intervene abroad and more willing to contribute to multinational peacekeeping in the past have been more, not less likely, to ratify the Rome Statute.”⁸⁸² This type of argument identifies that, as far as the relation between deployment of troops and ratification of the ICC is concerned, there is a lack of agreement in the literature. That countries often using military force are less prone to accept the ICC jurisdiction is all but clear.

Supporters of this ‘realist’ explanation tend, for example, to overlook the strong support to the ICC that came from the UK under the New Labour Government. British endorsement was notable not only for the widespread UK’s attitude to commit its troops abroad but also for its traditional contiguity to U.S. foreign policy. Something similar can be said with regards to France. Although it resorted to Article 124 exempting a state from the jurisdiction of the Court as to war crimes for seven years after its entry into force, France ratified the Treaty and never questioned its legitimacy. Analyzing the position of countries toward the ICC on the basis of “the number of soldiers countries had deployed overseas”⁸⁸³ is likely to underestimate other important explanatory factors.

Other analyses rely on the ‘exceptionalist argument’ by identifying U.S. constitutional culture as the main reason for its opposition to the Court. For example, Paul Kahn locates U.S. rejection of the ICC Treaty in the “myth of popular sovereignty”⁸⁸⁴, which is centered on the Constitution and profoundly informs its political system. Americans tend to believe that “unless an assertion of governmental authority can be traced to an act of popular sovereignty, it is illegitimate.”⁸⁸⁵ This makes for a “civic religion”, which constitutes a cultural barrier against the jurisdiction of courts that are not established by U.S. citizens through their representative bodies. Law is for Americans inevitably the “expression of popular sovereignty”⁸⁸⁶ and for this reason courts are legitimate only when they speak in its name.⁸⁸⁷

Along these lines, several scholars have highlighted how the main concern the U.S. had over the ICC Treaty was represented by the power of the Prosecutor of initiating its own proceedings,

⁸⁸² Eric Neumayer, “A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court” *Journal of Peace Research*, Vol. 46, No. 5, 2009: 660.

⁸⁸³ Joshua W. Busby, *Moral Movements and Foreign Policy* (Cambridge: Cambridge University Press, 2010): 222.

⁸⁸⁴ Paul W. Kahn, “Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order” *Chicago Journal of International Law*, Vol. 1, No. 1 (Spring 2000): available at www.allbusiness.com/legal/international-law/1170175.html.

⁸⁸⁵ Cit.

⁸⁸⁶ Cit.

⁸⁸⁷ For similar arguments, see also, David Wippman, “The International Criminal Court” in *The Politics of International Law*, ed. Christian Reus-Smith (Cambridge: Cambridge University Press, 2004): 151-188.

independently from single states and from the veto power of permanent members of the Security Council.⁸⁸⁸ For a country with such a constitutional culture, accountability, understood as the possibility that decision-makers respond for their actions to the will of U.S. citizens, is much more a guarantee of impartiality and just prosecutions than independence, which can easily degenerate into uncontrollable and unlimited power.

In sum, according to these analyses, U.S. opposition to the ICC does not depend on the contingent presence of a specific political majority in Congress or on the ideological orientation of the Administration. As Jason Ralph has observed, the ICC represents a challenge to “the very idea of America” because it threatens its social contract “by holding American citizens accountable to a law they, or their government on their behalf, have not consented to.”⁸⁸⁹ Consequently, for Ralph, “officials from the Clinton and Bush Administrations...consider this a violation of the principle of sovereign consent.”⁸⁹⁰ There might be differences in the way Democrats and Republicans oppose the ICC that came out of the Rome Conference, some more aggressively than others, but in general the exceptionalist view that dominates U.S. political culture and that informs its “constitutional patriotism”⁸⁹¹ would make rejection a fundamentally bipartisan political outcome.

Once again, these analyses deserve attention, first of all because they rely on a considerable amount of historical evidence. Several times in history, the U.S. has been recalcitrant to access international treaties because of constitutional concerns with the possibility of losing sovereignty. As the next sections show, during domestic debates on the ICC Treaty many observers and politicians provided constitutional arguments against accepting the Rome Court. Nevertheless, this legal and political isolationism, which is based on a very restrictive interpretation of the Constitution, is neither the only political culture at play in the U.S., nor the only source of arguments during such debates.

The ICC Treaty triggered a debate between different positions, some decisively isolationist while others more internationalist and open to multilateral international justice. Important sectors of the Administration and the Democratic Party expressed their support for the ICC and, whereas they did not agree with some provisions of the Treaty, they argued in favor of an engaged position that could allow the U.S. to obtain modifications and eventually accept an institution that had been pursued for long time.

⁸⁸⁸ William A. Schabas, “United States Hostility to the International Criminal Court: It’s All About the Security Council”, cit.

⁸⁸⁹ Jason Ralph, *Defending the Society of States*, 121.

⁸⁹⁰ Cit. 130.

Consequently, the reasons for U.S. rejection are not merely to be found in some structural conditions, be they the national interest or the Constitution. Rather, U.S. attitude mostly depended on a complex mix of institutional and political conditions, namely the divided government, with Republicans controlling U.S. Congress before, during, and after the Rome Conference, and the divisions within the Administration itself, with the Pentagon decisively skeptical toward the Treaty.

As scholars, such as Lee Feinstein and Tod Lindberg, have argued, U.S. “concerns about surrendering sovereignty to an international judicial body have long been in competition with an American impulse to foster the rule of law everywhere.”⁸⁹² That anti-ICC views prevailed during the historical period under consideration was a consequence of specific political, institutional, and electoral contingencies, which swung the pendulum of U.S. politics toward supporters of isolationist interpretations of its foreign policy and Constitution.

Many professors and experts of law that were actively involved in the debate rejected the constitutional argument. As Professor Ruth Wedgwood noticed, “the constitutional arguments...have a special weight in American culture, for the Constitution is the center of American political philosophy...But the most persuasive answer is that there is no forbidding constitutional obstacle to U.S. participation in the Treaty.”⁸⁹³ These counterarguments were put forward in several occasions also by David Scheffer, head of U.S. diplomacy at the Rome Conference.⁸⁹⁴

In conclusion, pro-ICC positions or, at least, in favor of serious engagement with the Court were never considered either extraneous to the public debate or to mainstream U.S. political culture. Rather, they operated in a historical phase and a political environment in which they failed to win the support of key executive and legislative bodies. Instead of taking U.S. foreign policy community as a monolithic system centered around the idea of inviolability of the national interest or the Constitution, this chapter analyzes the battle of ideas that took place in the U.S. during and after the Rome Conference and explains the domestic mechanisms through which one specific position and group of actors prevailed over the others.

7.3 Inefficient Advocates: U.S. Civil Society Movements And Domestic Debate On The ICC

The impact of civil society movements on the process of negotiation and adoption of the ICC

⁸⁹² Lee Feinstein and Tod Lindberg, Means to an End. U.S. Interest in the International Criminal Court, 11.

⁸⁹³ Ruth Wedgwood, “The Constitution and the ICC”, in *The United States and the International Criminal Court*, ed. Sarah B. Sewall and Carl Kaysen, 121.

⁸⁹⁴ David J. Scheffer and Ashley Cox, “The Constitutionality of the Rome Statute of the International Criminal Court” *The Journal of Criminal Law and Criminology*, Vol. 98, No. 3 (2008): 983-1068.

Statute is undeniable. By contrast, the contribution of civil society to the acceptance and legitimacy of the ICC becomes less relevant when focusing on the domestic level. If, on the one hand, NGOs and advocacy movements achieved important results as to the construction of an international consensus on the ICC, the situation changed when the debate reached domestic systems. After the approval of the Rome Treaty, states needed to sign and ratify a controversial document in order to become party to the ICC system. As Struett and Weldon have suggested, among the various manifestations of state commitment to international treaties, “ratification...is the step that officially creates the Court and places a state under its jurisdiction.”⁸⁹⁵ The impact of civil society movements on this crucial step seems to be considerably lesser. This is, for example, the case of the U.S.

During the domestic debate on the ICC Treaty, many U.S. NGOs and think tanks devoted time and energy to campaigning in favor and against U.S. acceptance. They organized meetings, published articles and reports, wrote letters to members of the Administration and Congress, attended hearings and gave testimonies before legislative committees. Depending on their positions, they worked to create a favorable or non-favorable normative environment around the ICC. Nevertheless, their actions did not particularly influence decision-makers in the executive and the legislature. The main reason is that U.S. civil society movements soon divided in two groups: on the one hand, those strongly in favor of the Court dedicated most their efforts to harshly criticizing the undecided and skeptical position of the U.S. government. On the other hand, those against the Court put forward a comprehensive critique of the Administration, which was depicted as guilty of remaining engaged with the Court and dangerously trying to strike a compromise with it.

These positions ended up polarizing the debate in a way that could hardly have any relevant impact on the middle-of-the-way stance of the Administration. Both opponents and supporters of the ICC criticized the strategy of the Administration in a rather superficial way and misrepresented it as either completely in favor of the Court or irremediably and shamefully against. Differently from the international level, their positions were scantily taken into account by more influential domestic actors.

7.3.1 Attacking a ‘straw man’ I: U.S. Civil Society Movements in Support of the ICC

U.S. civil society movements were mostly strong advocates of the ICC and vehemently campaigned for it. Their support for an effective and independent ICC often caused their positions to clash against those of the Clinton Administration. Nevertheless, these disagreements only rarely led to

⁸⁹⁵ Michael J. Struett and Steven A. Weldon, “Explaining State Decisions to Ratify the International Criminal Court, 17.

an open and dialectic confrontation. Rather, the lobbying campaign for the ICC soon took the form of a *tout court* critique of the Administration's position of 'engaged opposition'.

Regardless of the domestic constraints that U.S. diplomacy and the Administration had to face both during and after the Rome Conference, advocacy movements praising the establishment of the Rome Court did not engage U.S. decision-makers into a serious debate on how to overcome the opposition of the Senate and the Pentagon. In their view, the decision by the Administration to vote against the Treaty in Rome almost became an unforgivable sin. From that moment on, the Administration was mostly portrayed as an irremediable opponent to the Court whose actions risked undermining a laudable initiative. Driven by a moralistic zeal in favor of international justice, civil society movements renounced to take into account the reasons of the Administration. Consequently, U.S. policy makers progressively ignored the arguments put forward by these movements and the debate came to look like a dialogue with the deaf that resulted in a substantial incapacity of influencing the policies of the Administration.

Human Rights Watch (HRW) was one of the most involved NGOs. One year before the Rome Conference, the leader of HRW campaign for the ICC Richard Dicker criticized the insistence of the U.S. government on a Court that could mostly be activated through referral by the Security Council. In a press release, he made clear that the international community had to decide whether "the Court will be an effective body or a judicial Potemkin Village" and declared that the organization was "deeply disturbed by the opposition of the Permanent Five to a Court free from Security Council interference and equipped with an independent Prosecutor."⁸⁹⁶ In a later comment, HRW explicitly talked of "U.S. arrogance" and invited the international community to "leave the United States behind" and "move ahead without the U.S."⁸⁹⁷ This aggressive critique continued during the Rome Conference when U.S. opposition on an independent Prosecutor was defined as a "minority position" driven by "efforts to sabotage" a necessary international action.⁸⁹⁸

HRW's criticism also reached U.S. Congress. In a statement submitted by Dicker to the Senate Foreign Relations Committee, the organization "profoundly regret[s] the failure of the United States to support the Treaty" and pointed out that "other world powers widely deployed abroad, such as France, the United Kingdom, and Russia, did not see this Treaty as exposing their nationals to frivolous or

⁸⁹⁶ Coalition for an International Criminal Court, Press Release, 13 August 1997.

⁸⁹⁷ Human Rights Watch World Report 1998, 3 December 1997.

⁸⁹⁸ Human Rights Watch, "Human Rights Watch Condemns United States' Threat to Sabotage International Criminal Court", 9 July 1998; for similar statements, see also "Rome Majority Favors Strong International Court: Human Rights Watch Appeals to Delegates to Resist U.S. Blackmail", 10 July 1998; "Human Rights Watch Welcomes Establishment of International Court", 17 July 1998.

malicious prosecution.”⁸⁹⁹ In sum, HRW renounced to engage with the reasons for U.S. impossibility of acceding the Treaty and greatly underestimated the domestic constraints that the Administration was facing. Misrepresenting the position of the Presidency and the State Department, HRW concluded that “there has been no real disagreement between the Administration and Congressional Republicans on the ICC.”⁹⁰⁰ Given the opposition of the Administration in Rome, attempts to engage with its objections were not even taken into account. The U.S. was treated as an opponent to the Court, which was “standing with the likes of the most regressive governments in the world.”⁹⁰¹

Amnesty International (AI) expressed similar opinions. After the Rome Conference, when civil society movements started to direct their efforts to campaigning in favor of ratification of the Treaty, AI did not seem to be willing to engage with U.S. objections. Since U.S. ratification was not seen as a feasible option, Amnesty preferred to limit itself to call “upon every state to make a public pledge” against U.S. bilateral agreements prohibiting the surrender of United States nationals.⁹⁰² This international campaign aimed to avoid that opposition against the ICC could spread in the international community. However, it almost completely ignored the efforts by the Administration to make the Treaty more acceptable for U.S. Congress and to make ratification a possible goal. Calling upon states to marginalize U.S. position was seen as a better strategy. This did not help influence U.S. policies and rather favored a situation of reciprocal indifference between the Administration and the organization.

A slightly more engaged position was the one taken by the World Federalist Movement. In a statement submitted to a Senate Committee in 1993, the organization addressed conservative opposition against the idea of an international criminal court by expressing confidence that “a permanent international criminal court can and will incorporate safeguards against the dangers mentioned by Senator Helms.”⁹⁰³ Such a statement seemed to identify the intention to distinguish between the total opposition of the Republican Party and the more welcoming position of the

⁸⁹⁹ Statement Submitted by Richard Dicker of Human Rights Watch to the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, Second Session, Washington, DC, July 23, 1998, 76-7.

⁹⁰⁰ Human Rights Watch, “Stop Threatening the International Criminal Court, U.S. Officials Told”, July 23, 1998; see also, “On 50th Anniversary, U.S. Lags on Human Rights Issues”, December 9, 1998; Human Rights Watch, “HRW World Report 1999: Special Programs and Campaigns – The International Criminal Court, 1999; Human Rights Watch, “Remarks of Kenneth Roth, Executive Director of Human Rights Watch, introducing HRW’s World Report 1999”, December, 14 1999; Human Rights Watch, “U.S. Government Efforts to Undermine the International Criminal Court”, May 25, 2000; Human Rights Watch, “U.S. Thwarted in Effort to Weaken War Crimes Court”, June 30, 2000.

⁹⁰¹ The International Criminal Court Monitor, Issue 10, November 1998, 9.

⁹⁰² Amnesty International, “International Criminal Court: Governments Should Mark Rome Statutes Anniversary by prompt signature and ratification”, IOR 40/14/99, 16 July 1999.

⁹⁰³ Statement of the World Federalist Association, submitted to “The United Nations: Establishment of an International Criminal Court”, Hearings Before the Subcommittee on Terrorism, Narcotics, and International Operations, Washington, D.C., May 12, 1993, 162.

Administration.

Nevertheless, condemnation and rejection of U.S. positions intensified as the Rome Conference approached. In a press release, Executive Director William Pace stigmatized the “iron-clad insistence of the U.S.” on the dependence of the Court on the Security Council and defined it as an attempt to make the ICC a “permanent victors’ court.”⁹⁰⁴ The clash between the Movement and the Administration became apparent after the Conference and negative U.S. vote on the Treaty. Pace defined U.S. decision as a “shadow upon this achievement.”⁹⁰⁵ The final appeal to the U.S. to “support the new court once the leaders...better understand the adopted status” seemed to pave the way for a commitment by the Movement toward working with the Administration in order to find a possible way to overcome domestic opposition. Nevertheless, this remained only an intention. The U.S. soon came to be considered as an opponent *tout court* and the Movement substantially renounced to campaign for U.S. ratification.

In sum, vehement advocates of the ICC mostly devoted their arguments to a far-reaching critique of the U.S. that tended to overlook the significant domestic constraints on the Administration, with Republicans controlling the Congress. Magazines and networks such as Terra Viva, the CICC Monitor, and ICC Update made sure that condemnation of the Administration could be heard by all participants to the international and domestic debates.⁹⁰⁶ This attitude did not favor any serious engagement with the positions of the Administration that maintained a middle-of-the-way stance between opposition and support. Instead of engaging in a constructive critique that could help the Administration find a domestic consensus, U.S. NGOs mostly depicted the Administration as an irremediable opponent to the Court and only rarely distinguished between the attitude of U.S. diplomacy and those of the Republican Party and the Pentagon.

This crystallized each other’s positions and made dialogue particularly difficult. Not surprisingly, representatives of these NGOs were seldom invited to the hearings of the relevant committee, their statements being merely submitted to the Congress without much debate. This did not facilitate the Administration’s attempt to find an international and domestic compromise on the ICC, augmented its international isolation, and reinforced the position of the Republican opposition. The

⁹⁰⁴ Coalition for an International Criminal Court, “Press Release”, August 13 1997.

⁹⁰⁵ William Pace, “The Day Peace Won”, *The International Criminal Court Monitor*, Issue 9, August 1998, 3.

⁹⁰⁶ See for example, *The International Criminal Court Monitor*, Special Edition, 52nd General Assembly; *The International Criminal Court Monitor*, Issue 10, November 1998; -*International Criminal Court Monitor*, Issue 13, December 1999; -*The International Criminal Court Monitor*, Issue 16 November 2000; Terra Viva, No. 2, June 16, 1998; -ICC Update, CICC Secretariat, New York, NY, 7 January 2000; ICC Update, CICC Secretariat, New York, NY, 18 April 2000; Coalition for an International Criminal Court, “The United States is still seeking an exemption from prosecution by the International Criminal Court”, April 12, 2000.

influence of pro-ICC NGOs and civil society movements on the U.S. domestic debate was consequently rather scant.

7.3.2 *Attacking a 'straw man' II: U.S. Civil Society Movements Against the ICC*

U.S. civil society movements were not all enthusiastic supporters of the ICC. A group of conservative think tanks harshly criticized the Court as it came out of the Rome Conference and, above all, attacked the Administration for its attempt to obtain modifications to the Treaty that could make it acceptable for the U.S.

The libertarian Cato Institute opposed the ICC on the basis that it had the potential for a “jurisdictional Leviathan.”⁹⁰⁷ Insufficient safeguards against politically motivated prosecutions, a too broad definition of crimes, and failure to guarantee a level of legal protection for defendants comparable to the one provided by the Constitution⁹⁰⁸ rendered the Rome Statute “a treaty of dubious merit and unconstitutional content.”⁹⁰⁹ For this reason, policy analyst Gary Dempsey criticized the “split personality”⁹¹⁰ of the Administration that, on the one hand, expressed its opposition to the Treaty but, on the other hand, remained engaged with it. Rather than attempting to modify the Treaty and finding a compromise with the other delegations, rejecting the Treaty was seen as the only way to “defend American sovereignty and the constitutional rights of the American people.”⁹¹¹ The strategy of engagement of the Administration was considered as particularly risky and needed to be substituted by a firm policy of resistance and boycott.

The Heritage Foundation put forward similar arguments. The main target of its criticism was the possibility that the Prosecutor starts its own investigations without referral by the Security Council. This created the conditions for “judicial omnipotence.” The unaccountability of the Prosecutor before any political body was seen as “fundamentally inconsistent with American legal tradition in which the functions of investigation, prosecution, trial, and appeal are clearly separated to ensure that the accused receives a fair trial and that corruption and politicization are avoided.”⁹¹² Moreover, the Court was considered unconstitutional in the sense that the Constitution does not allow “the U.S. government to

⁹⁰⁷ Gary T. Dempsey, “Reasonable Doubt: The Case Against the Proposed International Criminal Court”, *Cato Policy Analysis*, No. 311, 16 July 1998.

⁹⁰⁸ See for example, Ted Galen Carpenter, “Betrayal of Principle: Liberals and the War Crime Tribunals, 24 August 1998, available at www.cato.org.

⁹⁰⁹ Gary T. Dempsey, “Reasonable Doubt”, cit.

⁹¹⁰ Cit.

⁹¹¹ Cit.

⁹¹² Brett D. Schaeffer, “The International Criminal Court: Threatening U.S. Sovereignty and Security” *The Heritage Foundation Executive Memorandum*, No. 537, 2 July 1998.

permit U.S. citizens to be tried for alleged crimes committed on U.S. soil by a body that is not a Court of the United States.”⁹¹³ For these reasons, “the U.S. does not only have to reject but also strongly oppose the Court.”⁹¹⁴ The concept itself of an ICC was contrary to U.S. constitutional system and had to be rejected and undermined.

Finally, the American Enterprise Institute (AEI) constituted a thorn in the side of the Administration during the all debate on the ICC. Its Vice-President John Bolton provided several arguments against the Court and the Administration. For Bolton, opposition had to go beyond the mere result of the Rome Conference. The ICC responded to “an abstract ideal of an international judicial system...running contrary to sound principles of international crisis resolution.”⁹¹⁵ During his testimony before the Senate Committee on Foreign Relations, Bolton argued that “ICC’s advocates make a fundamental error by trying to transform matters of power and force into matters of law.”⁹¹⁶ By assuming responsibility for prosecution of massive violations of international law, the ICC could dangerously interfere with the work of the Security Council creating “confusion among the appropriate roles of law, politics, and power in setting international disputes.”⁹¹⁷

Moreover, by creating an independent and unaccountable Prosecutor, the ICC system ran against U.S. constitutional doctrine that separates judicial from adjudicative power and renders the former “politically accountable through Presidential elections and Congressional oversight.”⁹¹⁸ Given the anarchic nature of the international system and the lack of an international constitution providing for separation of power and accountability of the judiciary, the Court should only be based on the consent of state parties or the Security Council. Case-by-case and ad hoc jurisdictions under the control of the most powerful states represented a far better approach to the prosecution of international crimes.⁹¹⁹ Finally, the ICC jurisdiction threatened to limit U.S. sovereignty, which is “needed in order to be secure and preserve Americans’ liberties.”⁹²⁰ Doctrines of international justice favored a risky idea of “emerging new international norms that will make it harder and harder for the United States to

⁹¹³ Cit.

⁹¹⁴ Lee A. Casey and David B. Rivkin, Jr., “The International Criminal Court VS. The American People” *The Heritage Foundation Background Executive Summary*, No. 1249, 5 February 1999,

⁹¹⁵ Statement of Hon. John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute, Washington, D.C., Testimony Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, Second Session, July 23 1998, 28.

⁹¹⁶ Cit. 30.

⁹¹⁷ Cit. 30.

⁹¹⁸ Cit. 31.

⁹¹⁹ John R. Bolton, “Review of ‘War Crimes’ by Aryeh Neier and ‘Between Vengeance and Forgiveness’, by Martha Minow”, *Foreign Affairs*, 1 January 1999; John R. Bolton, William Schultz, “What Price Human Rights”, *National Interest*, 1 June 1999.

⁹²⁰ John R. Bolton, “Annan’s UN Power Grab”, AEI Online, 1 November, 1999.

act independently in its own legitimate national interests.”⁹²¹

These arguments rejected any possible compromise with the idea of a permanent international Court. Regardless of the decision to vote against the Treaty in Rome, the Clinton Administration was guilty of remaining “engaged behind the scenes activity to orchestrate American support for, and ultimate participation, in the ICC’s work.”⁹²² As Bolton argued before the Senate Foreign Relations Committee, instead of seeking modifications, the U.S. would have been far better off, “if we had simply declared our principled opposition in the first place.”⁹²³ The Administration should “ignore and isolate the ICC” since any “signals of deference to the legitimacy of the ICC...will add to the ICC staying in power.”⁹²⁴ Being an institution that is “objectionable on principle”⁹²⁵, the only possible way to deal with the Court was a ‘no-strategy’ based on a refusal to collaborate, further negotiate with other states in order to seek an improvement, and provide financial support. Bolton and the AEI consistently supported legislation to boycott the Court.

Anti-ICC civil society actors did not hesitate to condemn U.S. attempts to compromise with the Court. Any sign of collaboration or engagement with the Court was utilized to depict the Administration as an executive body animated by the will to “cooperate...in every occasion that was possible.”⁹²⁶ These arguments largely exaggerated U.S. position toward the ICC. Describing Administration’s policies as supportive of the Court was a misrepresentation that instrumentally aimed to reinforce opposition against the Treaty. Similarly to what happened with strong supporters, civil society opponents did not obtain much. Refusing to cooperate with the Administration and its policy, they just condemned any action without exerting any serious influence. For instance, the Administration always opposed proposals to pass legislation to prohibit collaboration between the U.S. and the ICC. Anti-ICC hawks were forced to wait for the Bush Administration in order to have its aggressive plans turned into legislation.

The strategy of conservative think tanks was opposite to the one put forward by civil society actors in support of the Court. Nevertheless, the goals of both camps somehow mirrored each other. On the one hand, most pro-ICC NGOs tended to present the Administration’s positions as disturbingly

⁹²¹ Cit.

⁹²² John R. Bolton, “No, No, No to International Criminal Court”, *Human Events*, Vol. 54, No. 32 August 21 1998.

⁹²³ Statement of Hon. John R. Bolton, Esquire, Senior Vice President, American Enterprise Institute, Testimony Before the Committee on International Relations House of Representatives, 106th Congress, Second Session, Washington, D.C, July 25, 2000, 3.

⁹²⁴ John R. Bolton, “No, No, No to International Criminal Court”.

⁹²⁵ Statement of Hon. John R. Bolton, Esquire, Senior Vice President, American Enterprise Institute, Testimony Before the Committee on International Relations House of Representatives, 106th Congress, Second Session, Washington, D.C, July 25, 2000, 7.

⁹²⁶ Cit. 31.

harmful, by highlighting its critiques and overlooking its attempts to make it acceptable for U.S. domestic actors. On the other hand, think tanks that campaigned against the ICC identified the Administration's failure to vehemently reject the Treaty as a sign of commitment, and sometimes even endorsement. They tended to minimize the Administration's objections and mostly focused on its search for improvement through further negotiation. Both supportive and opposing civil society actors misrepresented the wavering Administration's positions in order to obtain an opposite but similar aim: isolating the Administration and presenting it as the origin of all that was wrong with the ICC.

In conclusion, the civil society debate on the ICC came to be monopolized by these two polarized camps. They crystallized a situation of impasse in which their proposals had scant chance to be heard. In a situation in which the Administration was willing to find a compromise on an acceptable Treaty and the Congress was prejudicially against any ICC, simply campaigning for 'yes' or 'no to the Rome Treaty' did not promise to have a considerable impact on the debate. Most U.S. civil society movements abdicated to their function of shaping and influencing decision-making and left the floor to other domestic actors.

7.4 Walking Down The Middle-Of-The-Road: The Clinton Administration Between Endorsement And Opposition To The ICC

It is certainly not incorrect to argue that President Clinton and U.S. diplomacy had several disagreements with many delegations during negotiation for the Court. Important parts of the Treaty did not fulfill the expectations of the Administration and this caused the U.S. to vote against its adoption at the Rome Conference.

Nevertheless, it is not accurate to explain the position of the Administration on the ICC as opposition or rejection *tout court*. Although a certain degree of disagreement was undeniable, this section provides an interpretation of the Clinton Administration's policies toward the ICC as 'engaged opposition' or 'benign neglect'. These terms give account of a middle-of-the-road posture that was far from both unconditional acceptance and total opposition to the ICC and aimed to remain engaged and collaborate with the Court despite the disagreements that had emerged at the Rome Conference.

This position of neither support nor opposition certified the inability to find a compromise with the other delegations. The reasons for this inability have to be primarily found in the action of powerful domestic constraints, such as the Pentagon and the Republican-led Congress. Due to these domestic actors, any attempt to negotiate modifications of the Treaty that could make it acceptable for the U.S. proved vain.

The aim of this section is not to demonstrate that the Clinton Administration completely agreed with the Rome Treaty but could not see it ratified simply because of domestic opposition. The Administration was not particularly happy with some aspects of the new permanent court. Nevertheless, the Administration was at the same time willing to engage in a debate, both at the international and domestic level, on possible modifications that could pave the way for future ratification. The Administration disagreed with specific and important parts of the Treaty but never renounced to work for future U.S. accession into a Court that had been among the main aims of Clinton's diplomacy for long time. Unfortunately for the Administration, the situation of divided government, with Republicans controlling the organ that is vested with the authority to submit U.S. sovereignty to international treaties, and the competition between the State and Defense Departments frustrated these efforts. Consequently, the U.S became universally considered as an opponent *tout court* to the ICC.

7.4.1 *From Enthusiastic to Cautious Support: The Clinton Administration and the Road to Rome*

The U.S. under the Clinton Administration was one of the most advocates of a permanent international criminal Court. During his first mandate, Clinton decisively contributed to the establishment of the UN ad hoc jurisdictions to try Former Yugoslavia war criminals (ICTY) and responsible for the Rwandan genocide (ICTR).⁹²⁷ Moreover, in May 1997, he created the position of Ambassador at Large for War Crimes Issues, which was assigned to David Scheffer.⁹²⁸ Finally, in a speech given in September 1997 before the U.N. General Assembly, Clinton reminded about the necessity to “punish those responsible for crimes against humanity”, praised the work of the ad hoc jurisdictions, and admonished that “before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.”⁹²⁹ The Department of State agreed with this approach and took a rather favorable attitude toward the establishment of an ICC since the start of the debate.⁹³⁰

⁹²⁷ See for example, President Clinton, “Remarks at the University of Connecticut in Storrs”, *Daily Comp. Pres. Docs.*, 15 October, 1995, 1840-6; “Remarks at the Signing Ceremony for the Balkan Peace Agreement in Paris”, 14 December, 1995, 2184-6; “Statement on the Balkan Peace Process”, 20 February, 1996, 344; “Remarks Prior to a Meeting with Military Leaders and Exchange with Reporters in Arlington, Virginia”, 29 January 1997, 118-9; “Remarks at the Ceremony Honoring the 50th Anniversary of the Marshall Plan in The Hague”, 28 May, 1997, 788-91.

⁹²⁸ President Clinton, “Nominations Submitted to the Senate”, 22 May, 1997, 774.

⁹²⁹ President Clinton, “Remarks to the 52nd Session of the United Nations General Assembly”, 22 September, 1997.

⁹³⁰ See for example, “Statement of Secretary of State Warren Christopher”, Hearing Before the U.S. Senate Foreign Relations Committee”, January 13, 1993; “Statement of U.N. Ambassador Madeleine Albright”, Hearing Before the Foreign Relations Committee, January 13, 1993; United States Mission to the United Nations, “Statement by Ambassador Bill Richardson, United States Representative to the United Nations, Before the Sixth Committee of the 52nd General Assembly

It was with the appointment of Scheffer as responsible for U.S. diplomacy as to international justice that the Administration showed its large commitment to a permanent court. Few months after his confirmation, Scheffer provided that “the shield of sovereignty” and “the Cold War prevented the best-intentioned architects of the post-war international system from extending accountability or enforcement beyond state responsibility.”⁹³¹ In this sense, he argued that “nations all around the world who value freedom and tolerance should establish a permanent international court to prosecute...serious violations of humanitarian law.”⁹³² The establishment of an ICC was one of the main goals of the Administration’s foreign policy and U.S. diplomacy consistently took part to the PrepCom, which was created by the General Assembly in order to prepare a draft Treaty to be discussed and approved in an international conference of plenipotentiaries.

As the Rome Conference approached, the U.S. delegation started to have a more mixed approach that was the result of a complex combination of support and skepticism. On the one hand, Scheffer and the State Department continued to stress how “President Clinton and Secretary of State Madeleine Albright have long called for the establishment of a permanent international court, and they want it done by the end of the century.”⁹³³ With this aim, U.S. diplomacy was determined to “play a leading role in the UN talks and seek to resolve the differences among delegations.”⁹³⁴

As head of U.S. diplomacy negotiating the ICC, Scheffer was aware of the difficulties that could emerge in finding an agreement for an effective instrument of international justice. However, these difficulties could not become an excuse for inaction. For this reason, U.S. diplomacy was particularly active in the months before the Rome Conference and contributed to various parts of the draft Treaty during sessions of the PrepCom.

For example, the U.S. was one of the delegations that most strongly supported the notion of complementary jurisdiction: “the permanent court must ensure that national legal systems with the ability to prosecute persons who commit these crimes are permitted to do so, while guaranteeing that perpetrators of these crimes acting in countries lacking responsible, functioning legal systems

Regarding Agenda Item 150”, New York, 23 October, 1997.

⁹³¹ David J. Scheffer, “The Future of International Criminal Justice”, Address by U.S. Ambassador at Large for War Crimes Issues at the Peace Palace, The Hague, Netherlands, September 19, 1997, 23.

⁹³² Cit. 25.

⁹³³ David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Department of State, “U.S. Policy on International Criminal Tribunals”, Address at Washington College of Law, American University, Washington, D.C., March 31, 1998.

⁹³⁴ David J. Scheffer, “Challenges Confronting International Justice”, Address by the U.S. Ambassador at Large for War Crimes Issues at the New England School of Law, Boston, Massachusetts, January 14, 1998, 22; see also, David J. Scheffer, “The Clear and Present Danger of War Crimes”, Address by the U.S. Ambassador at Large for War Crimes at the University of Oklahoma College of Law, Norman, Oklahoma, February 24, 1998, 21; David J. Scheffer, “Responding to Genocide and Crimes Against Humanity”, Address by the Ambassador at Large for War Crimes Issues before the Committee of Conscience, Holocaust Museum, Washington, DC, April 22, 1998, 23.

nonetheless will be held accountable.”⁹³⁵ This principle became the main pillar of the ICC Treaty and today’s ICC.

Moreover, the U.S. advanced important proposals on witness and victim protection during trial,⁹³⁶ on the procedure to regulate appeal against sentence,⁹³⁷ on protection of the right of states to maintain secrecy on national security issues when dealing with the Court,⁹³⁸ on the application of war crimes not only in international but also internal conflicts,⁹³⁹ on determination by the Court of the inability or unwillingness of a state party to prosecute a certain crime,⁹⁴⁰ and on the adoption of the Elements of Crimes to make sure that the treaty “must not have standards of criminal justice that are less rigorous than those of its member states.”⁹⁴¹ Most these proposals will be accepted at the Rome Conference and turned into substantial provisions of the final Treaty.

Nevertheless, U.S. diplomacy also showed skepticism about the intentions of most delegations on other important parts of the future Treaty. The U.S. expressed doubts about the power of the Prosecutor to initiate its own investigations. From the very start, the U.S. proposed a Court operating after referral by a state party or by the Security Council and rejected the idea of an “independent prosecutor with unfettered authority to investigate and prosecute any individual anywhere in the world.”⁹⁴² According to this scheme, the future ICC should have been based on the recognition of the centrality of the Security Council and its exclusive responsibility to determine threats to peace and security. Moreover, the U.S. did not view with sympathy the intention by many delegations to prohibit reservations to the Treaty,⁹⁴³ and above all rejected any notion of universal jurisdiction. As U.S. diplomacy often argued, “a government that has not ratified the ICC Treaty” should not be subject to the jurisdiction of the Court, but rather “consent before there can be any prosecution of any of its

⁹³⁵ David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Department of State, “Seeking Accountability for War Crimes: Past, Present, and Future”, Address before the Commonwealth Club, San Francisco, California, May 13, 1998; see also, David J. Scheffer, “Address Before the Southern California Working Group on the International Criminal Court”, Baltimore, Los Angeles, California, February 26, 1998; James P. Rubin, “U.S. Department of State Press Statement”, April 2, 1998.

⁹³⁶ David J. Scheffer, U.S. Ambassador at Large for War Crimes Issues, “Witness and Victim Protection in International Criminal Courts”, Address at Fordham University School of Law New York, New York, January 28, 1998.

⁹³⁷ U.S. Delegation, “Appeal Against Judgement or Sentence”, 18 March 1998.

⁹³⁸ U.S. Delegation, “Proposal Regarding Sensitive National Security Information”, 19 March 1998; see also, U.S. Delegation, March 31, 1998.

⁹³⁹ United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court, “Statement”, March 23, 1998.

⁹⁴⁰ “Proposal by the United States Delegation on Article 11 (Preliminary Rulings Regarding Admissibility”, March 25, 1998.

⁹⁴¹ United States Delegation, Statement of the United States Delegation on Elements of Offenses”, April 3, 1998; see also, U.S. Reference Paper, “Rules of Evidence of the International Criminal Court”, 24 March 1998.

⁹⁴² David J. Scheffer, “U.S. Policy and the Proposed Permanent International Criminal Court”, Address by the U.S. Ambassador at Large for War Crimes Issues at the Carter Center, Atlanta, Georgia, November 13, 1997, 21.

⁹⁴³ David J. Scheffer, “Challenges Confronting International Justice”, 22.

nationals before the Court.”⁹⁴⁴

In sum, the U.S. went to Rome with mixed feelings. The commitment to a strong and effective international criminal court had to be accompanied by the necessity to defend vital national interests. As Scheffer observed, “the permanent court must not become a political forum in which to challenge controversial actions of responsible governments by targeting their military personnel for criminal investigation and prosecution.”⁹⁴⁵ Having large contingents of troops deployed worldwide and being one of the most contributors to peace operations, the U.S. wanted to avoid a Court that could become a political instrument subject to the influence of U.S. enemies. These perplexities would become a source of major debates during the Conference.

At the same time, the U.S. delegation manifested the intention to find a reasonable compromise and expressed confidence that “with an acceptable outcome to the negotiations and with the support of U.S. Senate, we will see a permanent international criminal Court with strong U.S. participation.”⁹⁴⁶ Driven by a sentiment of “cautious optimism”,⁹⁴⁷ the Administration went to Rome without being prejudicially against or in favor of a positive outcome.

7.4.2 Commitment, Opposition, and Domestic Constraints: U.S. Diplomacy at the Rome Conference

The U.S. sent to Rome one of the largest delegations, which was composed of a highly trained team of legal experts from the State and Defense Departments and from some of the best universities in the country. U.S. contributions were many and involved the most relevant parts of the final Treaty.

First, the U.S. highly committed to “a clear, precise, and well-established understanding of what conduct constituted a crime.” This meant that “acts not clearly criminalized under international law should be excluded from the definition.”⁹⁴⁸ This was considered as a necessary condition to have a well-functioning ICC capable of prosecuting international crimes while, at the same time, respecting fundamental principles of due process and protection of defendants. For this reason, Scheffer obtained that an annexed document on the Elements of Crimes and Rules of Procedure would have been drafted before the entry into force of the ICC. This document should have been “an integral part of the Statute”

⁹⁴⁴ David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Department of State, “Seeking Accountability for War Crimes: Past, Present, and Future”.

⁹⁴⁵ Cit.

⁹⁴⁶ David J. Scheffer, “U.S. Policy and the Proposed Permanent International Criminal Court”, 22.

⁹⁴⁷ David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Department of State, “Seeking Accountability for War Crimes: Past, Present, and Future”.

⁹⁴⁸ United States of America Delegation, Statement by Bill Richardson, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 5th Plenary Meeting, June 17 1998, Official Records, Vol. III, A/Conf.183/DR.5, 95.

capable of devising a rigorous legal framework of what “should have priority in any applicable law applied by the Court.”⁹⁴⁹ Through this commitment, the U.S. achieved that the Court had jurisdiction only on war crimes, genocide, and crimes against humanity⁹⁵⁰ and that crimes would be applied following precise definitions and high thresholds.⁹⁵¹ This was seen as a crucial way of “clarifying the Court’s jurisdiction and protecting the human rights of the accused in future proceedings before this Court.”⁹⁵² Speaking before the Senate Foreign Relations Committee, Scheffer presented this development as a major victory for U.S. diplomacy in his attempt to convince the Republican majority of the effectiveness of the legal guarantees contained in the Treaty.⁹⁵³

Second, U.S. delegation was able to prevent the Conference from passing proposals that vested the Court with universal jurisdiction and decisively contributed to the incorporation into the Treaty of the principle of complementarity. According to this principle, the Court shall have jurisdiction only in case of unwillingness or inability of states to prosecute alleged individuals through their national courts. This guaranteed the preeminence of “national jurisdictions” in the prosecution of such crimes and was presented as an element that provided “significant protection”⁹⁵⁴ against politically motivated proceedings.

Third, the U.S. won the consent of most delegations as to other issues, such as “sovereign protection of national security information that might be sought by the Court”⁹⁵⁵, which limited the intrusiveness of the ICC in matters of vital national interest for states; the criminalization of acts committed not only during international, but also internal conflicts, “which comprise the vast majority of armed conflicts today”⁹⁵⁶; a better definition of the grounds on which to exclude criminal responsibility⁹⁵⁷; and the possibility that “all signatories to the Final Act should be invited as observers

⁹⁴⁹ United States of America Delegation, “Statement by David J. Scheffer”, 12th meeting, 23 June 1998, 223; see also, United States of America, “Statement by Ross L. Wilson, 20th meeting, June 30 1998, 261; United States of America Delegation, “Statement by David J. Scheffer”, 4th Meeting, 17 June 1998, 158-9.

⁹⁵⁰ The ICC Treaty also contained provisions that criminalized the crime of aggression (Art. 5.1d). Nevertheless, the initial Treaty provided that “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. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations” (Art. 5.2).

⁹⁵¹ United States of America Delegation, “Statement by David Scheffer”, 29th meeting, 9 July 1998, 317-8.

⁹⁵² James P. Rubin, “U.S. Department of State Press Statement”, June 22, 1998.

⁹⁵³ Statement of Hon. David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, Second Session, Washington, DC, July 23, 1998, 20.

⁹⁵⁴ Cit., 19.

⁹⁵⁵ Cit., 20.

⁹⁵⁶ Cit. 20; see also, United States of America Delegation, “Statement by Jamison J. Borek”, 6th Meeting, June 18 1998, 176.

⁹⁵⁷ United States of America, “Proposal regarding article 25”, A/Conf.183/C.1/L.2, 16 June 1998, 258.

since all participants in the Conference were potential parties to the Statute.”⁹⁵⁸ This last achievement might not seem particularly important but is, in fact, an indicator of U.S. will to cooperate with the Court even in case domestic opposition did not make ratification and full participation possible. The U.S. maintained this cooperative approach until the very end of the Conference.

Nevertheless, this commitment was accompanied by skepticism and opposition as to other important issues. The U.S. often reminded to the other delegations about the responsibility that the country has in maintaining peace and security worldwide. As the Department of State argued in a press briefing, “as a global power – a permanent member of the Security Council – we have responsibilities that many other governments don’t have.”⁹⁵⁹ In this sense, the main aim of U.S. delegation was to “make sure that any proposals that are put forward with respect to this Court don’t impinge on those responsibilities.”⁹⁶⁰ The U.S. was concerned that its officials, largely deployed around the world in various missions, could be tried for acts committed during humanitarian interventions and peace operations. Its large contribution to these types of military interventions overexposed U.S. soldiers to malicious prosecutions conducted on initiatives of rival states for anti-American reasons. The U.S. wanted a Treaty that could avoid indiscriminate criminalization of acts committed during military actions. This political posture was at the basis of the main disagreements with the other delegations.

For example, fearing politically motivated prosecutions, the U.S. aimed to have a Court, which could be activated only through referral by the Security Council and states parties. The U.S. considered “unwise to grant the Prosecutor the right to initiate investigations.”⁹⁶¹ For Scheffer, it was not correct to argue that “states act only on the basis of partisanship and self-interest while individuals and organizations...are per se beyond such motives or bias.”⁹⁶² A Prosecutor with *proprio motu* powers would have been subject to “considerable political pressure”⁹⁶³ from NGOs and individuals, which would have taken advantage of its self-initiating powers to suggest all sorts of investigations on the basis of their own political orientations. This would make the Office of the Prosecutor a sort of “human rights ombudsman”⁹⁶⁴. Flooded with information by organizations that “will want the Court to address every wrong in the world”, the Prosecutor would encounter serious limits in “its ability to investigate

⁹⁵⁸ United States of America Delegation, “Statement by David Scheffer”, 18th Meeting, 29 June 1998, 246.

⁹⁵⁹ “U.S. Department of State Daily Press Briefing”, July 15, 1998.

⁹⁶⁰ Cit.

⁹⁶¹ United States of America Delegation, Statement by Bill Richardson, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, cit.

⁹⁶² Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor, June 22 1998, in “Is a U.N. International Criminal Court in the U.S. National Interest?”, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, Second Session, July 23 1998, 148.

⁹⁶³ Cit., 148.

⁹⁶⁴ James P. Rubin, “U.S. Department of State Press Statement”, June 23, 1998.

the most serious crimes” and the Court would be left “open to frivolous and politically motivated complaints.”⁹⁶⁵ Independence and impartiality of the Court would have been better guaranteed by subjecting the power of initiating investigations to the will of states and the Security Council.

The other issue that caused several debates concerned the jurisdiction of the Court. The main disagreement was on the possibility that the Court has jurisdiction over citizens of a state “that was not a party to the Treaty or had not submitted to the Court’s jurisdiction in other ways.”⁹⁶⁶ This is provided by Article 12 according to which the Court has jurisdiction over citizens of state parties and nationals of other states that have allegedly committed crimes within the territory of a state party. For Scheffer, this provision violated “an elementary rule set out in the Vienna Convention on the Law of Treaties”⁹⁶⁷ according to which treaties only bind contracting parties.

The U.S. opposed Article 12 for two main reasons. On the one hand, it paradoxically created more obligations for non-parties than for states that had accepted the Court’s jurisdiction. For example, Article 124 allows parties to opt-out from the jurisdiction of the Court over war crimes for 7 years. States that do not ratify the Treaty cannot resort to this provision and face higher risks of being prosecuted for war crimes than states that are part to the Treaty. As explained by Professor Theodore Meron, former President of the ICTY and member of U.S. delegation at the Rome Conference, this “overreaches in extending the court’s sway over states that choose not to ratify the Statute.”⁹⁶⁸ On the other hand, the U.S. considered unacceptable that “U.S. Armed Forces operating overseas...could face prosecutions by the Court even if the United States does not [ratify the Treaty].”⁹⁶⁹ Being aware of the difficulty that the Administration would have faced at having the Treaty ratified by the Senate, the U.S. delegation could not accept this way of framing the ICC jurisdiction.

Despite these disagreements, the U.S. was not willing to renounce the possibility of finding a compromise on a Treaty to which it had so largely contributed. As reported by Scheffer, the U.S. initially proposed to delay the end of the Conference after the deadline of July 17 in order to correct those provisions that created the most disagreements.⁹⁷⁰ Facing opposition by other states, U.S. delegation advanced proposals that could avoid a final vote on the entire package and that could leave

⁹⁶⁵ “U.S. Department of State Daily Press Briefing”, July 20, 1998. See also, Statement of Hon, David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 21; Monroe Leigh, “The United States and the Statute of Rome”, 128.

⁹⁶⁶ United States of America Delegation, “Statement by David Scheffer”, 29th meeting, 9 July 1998, 296. See also, United States of America Delegation, “Statement by David J. Scheffer”, 9th meeting, 22 June 1998, 195.

⁹⁶⁷ United States of America, “A amendments proposed by the United States of America”, 42nd meeting, 17 July 1998, 361.

⁹⁶⁸ Theodor Meron, “The Court We Want”, *The Washington Post*, October 13, 1998.

⁹⁶⁹ “U.S. Department of State Daily Press Briefing”, July 20, 1998.

⁹⁷⁰ David J. Scheffer, “The United States and the International Criminal Court”, 21.

open a chance for dialogue.

For instance, whereas at the beginning the U.S. preferred a Security Council-activated Court, Scheffer “realized that a consensus was unlikely on that point.”⁹⁷¹ Although he remained convinced that “in view of the...responsibility under the Charter for restoring and maintaining international peace and security, the Security Council could not see its centrality undermined by an independent Prosecutor”, the U.S. delegation openly declared that “it was willing to work with others to find a compromise.” With this aim, on 9 July 1998, only one week before the end of the Conference, the U.S. advanced a proposal on the jurisdiction of the Court. This document rejected jurisdiction of the Court over non-party states and proposed to subject it to “the prior consent of the state of nationality of the accused if that state was not a party to the Treaty.”⁹⁷² This proposal was elaborated by a further document that was submitted to the other delegations only three days before the end of the Conference. As an indicator of the U.S. will to find a compromise on the issue, the proposal recognized, although in brackets, the power of the Prosecutor to initiate investigations, which had previously been a cause of major disagreement.⁹⁷³

These proposals did not encounter the support of most delegations, which delayed debate on them. On the very last day, the U.S., in a last-ditch attempt to find a compromise, proposed an amendment to Article 12 that allowed the Court to exert its jurisdiction only in case of “acceptance of jurisdiction by both the state on whose territory the crime had occurred and the state of nationality of the accused.”⁹⁷⁴ This attempt to devise a Treaty that could exempt citizens of states incapable of ratifying the Court was rejected by a negative vote of the majority of the Conference. Later, the U.S. called for a vote on the all package of the Treaty and suffered a major diplomatic defeat. Various members of the delegation later commented that “these results were not inevitable.”⁹⁷⁵ As Meron argued, “the respected Chairman of the Rome Conference, Philippe Kirsch of Canada”, and the other delegations, “could still try to save the Court by seeking a consensus to incorporate the U.S. proposals.”⁹⁷⁶

International opposition by other states was not the only reason for this diplomatic failure. The U.S. delegation also paid the price of the impossibility of finding a domestic consensus on the Court.

⁹⁷¹ United States of America Delegation, “Statement by David Scheffer”, 29th meeting, 9 July 1998, 297.

⁹⁷² United States of America Delegation, “Statement by David Scheffer”, 29th meeting, 9 July 1998, 296.

⁹⁷³ United States of America, “Proposal regarding article 7”, 14 July 1998, A/Conf.183/C.1/L.70, 247; United States of America: Proposal regarding Article 7 ter, A/Conf.183/C.1/L.90, 16 July 1998, 249.

⁹⁷⁴ United States of America, “Amendments proposed by the United States of America”, 42nd meeting, 17 July 1998, 361.

⁹⁷⁵ Theodor Meron, “The Court We Want”, *The Washington Post*, October 13, 1998.

⁹⁷⁶ Cit.

Leaders of the Republican Party manifested during the all time of the Conference their will to oppose the Court by any legislative means and closed the door to any chance of ratification. Moreover, the Administration was deeply divided, with the Pentagon not hiding its skepticism. As has been recalled, failure to find the support of such powerful domestic actors, “delayed the receipt of viable instructions for the U.S. delegation until the fourth week of the five-week Rome Conference.”⁹⁷⁷ When the U.S. put forward its last-ditch proposal that could exempt the citizen of non-party states from the jurisdiction of the Court, in exchange for acceptance of an independent Prosecutor, “the time for substantive negotiations had already passed.” As Wedgwood later noticed, “the White House gave no guidance to the U.S. delegation” for most the Conference. This allowed the U.S. to decisively contribute to the drafting of the Treaty on many less controversial parts but prevented “any real change in view” on the provisions that triggered the most disagreements.”⁹⁷⁸

7.4.3 “*Staying the Course with the ICC*”: *Opposition and Commitment After Rome*

After the Rome Conference, U.S. diplomacy maintained its attitude of positive engagement toward the ICC. Although it could not accept relevant parts of the Treaty, the Administration kept on negotiating with the other delegations in order to find a *modus vivendi* with the Court until U.S. concerns could be met and more favorable domestic conditions could pave the way for consideration by the Senate. Moreover, it worked to prevent Congress from passing legislation that aimed to frustrate the attempts to maintain a relation of collaboration with the newly created Court. Nevertheless, facing opposition both at the international and domestic level, ratification of the ICC remained a utopian project and the Administration could not obtain more than a position of benign neglect toward the Court, which found its main manifestation in the signature of the Treaty.

For the Clinton Administration, concerns with some aspects of the Treaty did not constitute enough an excuse to render the U.S. a permanent opponent to the Court. The U.S. needed to remain engaged and even work with the Court in the hope that some day the other states could accept its concerns and a new Senate could at least consider ratification.

On the one hand, the Administration continued to participate to the meetings of the PrepCom in order to reaffirm its critiques against the structure of the Treaty. As Scheffer and the State Department remarked, the most fundamental concern was the jurisdiction of the Court over nationals of states that

⁹⁷⁷ Bartram Brown, “U.S. Objections to the Statute of the International Criminal Court: A Brief Response”, 860-1.

⁹⁷⁸ Cit. 861. For a similar argument, see also Ruth Wedgwood, “Courting Disaster: The U.S. Takes a Stand”, Vol. 77, No. 3 *Foreign Service Journal* (March 2000): available at www.afsa.org/fsj/mar00/wedgwood.cfm.

were not part to the Treaty. Speaking before the Senate Foreign Relations Committee, Scheffer reported that “while much of the Treaty is very good, we strongly oppose certain critical elements.” In particular, “the Administration [opposed] the ‘extraordinary’ jurisdiction provisions of the Treaty, which purport to confer jurisdiction over official U.S. actions or actions within the United States without the consent of the United States.”⁹⁷⁹ The reason for opposing Article 12 was twofold.

First, the U.S. feared that Article 12 could soon become “a recipe for politicization of the Court.”⁹⁸⁰ Given the worldwide responsibilities that the U.S. held as a provider of security and peace through military force, Article 12 would create “the illogical consequence” 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.”⁹⁸¹ Being one of the largest contributors to peace operations, the U.S. could not accept to see its soldiers prosecuted during military interventions of international interest, without even being a member of the ICC.⁹⁸² This subjected U.S. forces to a number of legal risks that could hinder U.S. will and capacity of taking the political and financial burden of such operations.⁹⁸³

Second, jurisdiction of the Court over non-party states was rejected for a fundamental reason that regarded the domestic constraints that the Administration needed to face. Speaking after the end of the Conference, Scheffer touched upon the sensitive issue of domestic opposition to the Treaty by arguing that “it would have been irresponsible to have concluded these negotiations with the assumption that the United States would be immediately a full party to the Treaty.”⁹⁸⁴ Being aware of the positions of the Republican majority in Congress, Scheffer and the Administration could not accept to subject U.S. sovereignty to the ICC jurisdiction without being able to obtain domestic acceptance and ratification. Not only was this seen as a breach of existing international law, but it would also be extremely difficult to convince U.S. citizens and their representatives of a Treaty that could bind the

⁹⁷⁹ Statement of Hon, David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 46; For similar statements, see also David J. Scheffer, “David Scheffer, U.S. Ambassador-at-large for war crimes issues on-the-record briefing at the foreign press center”, July 31, 1998.

⁹⁸⁰ David J. Scheffer, Ambassador-at-Large for War Crimes Issues, “Statement on Creating an International Criminal Court”, Washington, D.C., August 31, 1998.

⁹⁸¹ David J. Scheffer, Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference”, Honolulu, Hawaii, February 23, 1999, 10.

⁹⁸² Burden of Proof Millennium 2000: Would and International Criminal Court Help or Hinder Pursuit of Global Justice?”, Transcript, January 2, 2000.

⁹⁸³ David J. Scheffer, Ambassador at Large for War Crimes Issues, “Address to I Corps Soldiers and Commanders”, Fort Lewis, Washington, May 4, 2000; Philip T. Reeker, “U.S. State Department Press Statement”, June 13 2000.

⁹⁸⁴ David J. Scheffer, “David Scheffer, U.S. Ambassador-at-large for war crimes issues on-the-record briefing at the foreign press center”, July 31, 1998, cit.

U.S. without its formal acceptance. For these reasons, Article 12 of the ICC Treaty remained until the end of the Clinton Administration “our most fundamental difficult with the Treaty.”⁹⁸⁵

Nevertheless, the relevance of the ICC for contemporary international affairs was never questioned and the Administration kept on working both at the international and domestic level to find a way of making the U.S. a participant or, at least, a collaborator to the Court. The mission of bridging the gap between the reasons of the other delegations and those of the U.S. Congress obviously proved delicate and extremely difficult. The dilemma was how to cooperate with the Court in a moment in which powerful domestic constraints were preventing acceptance.

Illustrating U.S. actions before a skeptical Senate, Scheffer did not hesitate to argue that despite the impossibility of finding an agreement, “the United States will continue as a leader in supporting the common duty of all law-abiding governments to bring to justice those who commit heinous crimes in our own time and in the future.”⁹⁸⁶ Far from approving Republican strategies to boycott the ICC, Scheffer suggested, first of all, to take “some time period in which we can witness how this Court operates.”⁹⁸⁷ For the Administration, the U.S. needed to follow a strategy of ‘wait-and-see’ in order to check whether the Court could possibly represent a threat to U.S. interests.

The subsequent step in the strategy of finding a *modus vivendi* with the Court and softening domestic opposition consisted of a detailed description of the positive aspects of the Treaty. Scheffer largely explained how the ICC Treaty, also thanks to U.S. commitment, contained sufficient guarantees against politically motivated prosecutions. Complementarity,⁹⁸⁸ provisions to protect national security information,⁹⁸⁹ a rigorous definition of crimes and rights of defendants,⁹⁹⁰ the necessity for the Prosecutor to obtain the approval of a Pre-Trial Chamber before starting a proceeding were all presented as good reasons for supporting the ICC system. Moreover, Scheffer rejected the widespread

⁹⁸⁵ David J. Scheffer, “Address to the Annual Meeting of the American Society of International Law”, Washington, D.C., 26 March 1999.

⁹⁸⁶ Statement of Hon, David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 22.

⁹⁸⁷ Cit, 18.

⁹⁸⁸ David J. Scheffer, Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference”, Honolulu, Hawaii, February 23, 1999; David J. Scheffer, Ambassador at Large for War Crimes and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, “Testimony before the House International Relations Committee, Washington, D.C., July 26, 2000, 52.

⁹⁸⁹ David J. Scheffer, Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference”, Honolulu, Hawaii, February 23, 1999, 8.

⁹⁹⁰ Statement of Hon, David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 20; United Nations Preparatory Commission for the International Criminal Court, “Proceedings of the Preparatory Commission at its second session”, PCNICC/1999/L.4/Rev.1, New York, 26 July-13 August 1999; David J. Scheffer, Ambassador-At-Large for War Crimes Issues, “Evolution of U.S. Policy Toward the International Criminal Court, Address at American University”, Washington, D.C., September 14, 2000.

argument put forward by many Republicans on the unconstitutionality of the ICC. In this respect, Scheffer reminded the Senate Committee that prosecution of U.S. citizens by a non-American court “is not unprecedented” and that “in the past crimes committed by U.S. citizens on U.S. territory have in fact been prosecuted elsewhere in the world with our consent.”⁹⁹¹ So long as the Senate voted in favor of ratification and accepted to submit U.S. sovereignty to the ICC jurisdiction, no provision contained in the Treaty could be considered against the Constitution.

In addition, the U.S. committed to finding compromises with the other delegations that could facilitate U.S. participation. With this aim, the U.S. partook to the meetings of the PrepCom after Rome with a constructive approach. For example, it “stopped calling for the amendment of Article 15, which permits the Prosecutor to initiate an investigation *proprio motu*,” and “for the amendment of Article 120, which prohibits reservations.”⁹⁹² Following this logic, the U.S. presented to the PrepCom several proposals to exempt citizens of non-party states from jurisdiction of the Court. In a press statement, the State Department announced the promotion of an international agreement between the Court and the U.S. in order to “prevent the ICC from requesting the surrender or accepting the custody of a non-party national where that national was acting under the overall direction of its state.”⁹⁹³ This agreement was not seeking “any amendment or other modifications of the Rome Treaty.”⁹⁹⁴ It was, rather, conceived as an instrument to guarantee cooperation between the U.S. and the ICC. Until it could become a full member of the ICC, the U.S. aimed to obtain protection of its “worldwide military deployments and peacekeeping operations”⁹⁹⁵ without being subject to the Court’s jurisdiction. In exchange, the Court could count on the technical, economic, and legal support of the U.S.

For Scheffer, this was a great opportunity to facilitate U.S. accession to the Treaty and favor a positive and fruitful collaboration with the Court that needed U.S. support in order to become “an effective engine for international justice.”⁹⁹⁶ As he later argued before the General Assembly, in a situation in which the U.S. could not accede the Treaty, this proposal ‘would open the door for the United States to become a good neighbor to the Court.’⁹⁹⁷ This proposal was accompanied by other

⁹⁹¹ Statement of Hon, David J. Scheffer, Ambassador at Large for War Crimes Issues, Testimony before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 27.

⁹⁹² Christopher Keith Hall, “The First Five Sessions of the UN Preparatory Commission for the International Criminal Court”, *The American Journal of International Law*, Vol. 94, No. 4 (October 2000): 788.

⁹⁹³ Philip T. Reeker, “U.S. State Department Press Statement”, June 13 2000.

⁹⁹⁴ Cit.

⁹⁹⁵ Cit

⁹⁹⁶ David J. Scheffer, “The Global Challenge of Establishing Accountability for Crimes Against Humanity, Remarks” Centre for Human Rights, University of Pretoria, Pretoria, South Africa, August 22, 2000.

⁹⁹⁷ David J. Scheffer, Ambassador-at-Large for War Crimes Issues, “Statement before the Sixth Committee of the UN General Assembly”, New York City, October 18, 2000.

attempts to make the PrepCom accept the notion of “consent of the non-state party before the Court could accept the surrender of one of its nationals acting under that state’s direction.”⁹⁹⁸ Once again, the U.S. was proposing to exempt U.S. citizens from the jurisdiction of the Court until it could guarantee full participation through ratification. Unfortunately for the Administration, the PrepCom massively rejected these attempts.

Finally, coherently with its policy of engagement, the Administration strongly opposed Republican proposals to prohibit any relations between the U.S. and the ICC and to boycott its functioning. Discussing the American Service Member Protection Act (ASPA) before the House Committee on Foreign Relations, Scheffer criticized a bill that, if implemented, would make illegal any kind of political, legal, or economic support for the Court. In the intentions of the Republican Party, the best way of protecting U.S. citizens from the jurisdiction of the Court was not to try to improve the Treaty but, rather, to unconditionally fight it. In a very different way, Scheffer reminded how the bill would “worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other government officials and continue our support for international justice.”⁹⁹⁹ Showing a political mindset that was far away from the boycotting strategy of the Republican majority in Congress, Scheffer provided that in order to achieve protection from the Court as a non-party state, the U.S. should “be able to offer, in exchange...the ultimate cooperation of the United States with the ICC.”¹⁰⁰⁰ Prohibition to cooperate with the Court was against U.S. interests in finding a necessary balance between protection of its citizens and prosecution of massive violations of human rights. Disagreements with the Court could not pave the way for U.S. indifference toward the enforcement of just principles of international law.

These acts demonstrated that the Clinton Administration was not the main responsible for U.S. opposition to the ICC. As Scheffer noticed, “those are not actions of a government retreating from the Treaty or waging opposition campaigning against it.”¹⁰⁰¹ Rather, the U.S. was “determined to remain engaged every step of the way to represent important U.S. interests in the process and to advance the cause of international justice.”¹⁰⁰²

⁹⁹⁸ Christopher Keith Hall, “The First Five Sessions of the UN Preparatory Commission for the International Criminal Court”, 786.

⁹⁹⁹ David J. Scheffer, Ambassador at Large for War Crimes and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, “Testimony before the House International Relations Committee, Washington, D.C., July 26, 2000.

¹⁰⁰⁰ Cit.

¹⁰⁰¹ David J. Scheffer, Ambassador-At-Large for War Crimes Issues, “Evolution of U.S. Policy Toward the International Criminal Court, Address at American University”, Washington, D.C., September 14, 2000.

¹⁰⁰² Cit.

Notwithstanding some clear objections, the Administration and the U.S. delegation agreed with most aspects of the Rome Treaty and were willing to compromise. More importantly, disagreements never became excuses for waging war against the ICC. As the Department of State provided after the Rome Conference, “we are going to try to correct the flaws before we conclude that they will not be accepted.”¹⁰⁰³ Total rejection of the Court was never an option. The Administration always went for “a policy of positive and forward-looking engagement.”¹⁰⁰⁴

Nevertheless, this policy encountered the opposition of both the Republican majority of Congress and the Pentagon. The Administration was aware of this situation and could not avoid taking into account the positions expressed by the organ that has the authority to ratify most treaties. As Scheffer had to remark, “we cannot credibly go in and negotiate treaties if we are certain that if we negotiate a particular outcome and support a particular outcome, the Senate then is vigorously opposed to that outcome even before we’ve presented the Treaty.”¹⁰⁰⁵ Almost eighty years after the controversy on the League of Nations, another Democratic Administration had to come to terms with the power of blocking international negotiations that the Constitution assigns to the Senate.

Senate’s opposition considerably influenced U.S. diplomatic action. When asked about the failure to sign the Treaty, Scheffer explained that “even if the Clinton Administration were in a position to sign the Treaty, U.S. ratification could take many years... Thus, the United States should have non-party status... for a significant period of time.”¹⁰⁰⁶ Recognizing the difficulty at having the Treaty passed by an unfriendly Senate, the Administration viewed with discomfort the possibility of being subject to the Treaty even without ratification. This intensified disagreements with the other delegations and made the chance of compromise more complicated. Delegations at the PrepCom were not willing to make concessions to a country whose Senate would have rejected the Treaty anyway.

In this political conundrum, the Administration wanted to be a partner of the Court “regardless of whether we achieve party status or not in the near future.”¹⁰⁰⁷ Few months before the end of the Clinton Administration, Scheffer was still negotiating and exploring any possibility for maintaining a relation with the ICC. Speaking about the possibility of finding a fix that could exempt U.S. citizens

¹⁰⁰³ “U.S. Department of State Press Briefing”, July 23, 1998.

¹⁰⁰⁴ David J. Scheffer, “Ambassador-at-Large for War Crimes Issues David J. Scheffer Delivers Remarks Before the 6th Committee of the 53rd General Assembly”, October 21, 1998.

¹⁰⁰⁵ David J. Scheffer, “David Scheffer, U.S. Ambassador-at-large for war crimes issues on-the-record briefing at the foreign press center”, July 31, 1998.

¹⁰⁰⁶ David J. Scheffer, Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference”, Honolulu, Hawaii, February 23, 1999, 11.

¹⁰⁰⁷ David J. Scheffer, “The Global Challenge of Establishing Accountability for Crimes Against Humanity, Remarks” Centre for Human Rights, University of Pretoria, Pretoria, South Africa, August 22, 2000.

until ratification, Scheffer admonished that “we have to exercise some patience in getting there” but “I want to go that final mile and see if I can accomplish this objective.”¹⁰⁰⁸

This strategy of engagement found its main manifestation in the last instrument at disposal of an Administration that was opposed by Congress and close to being out of office. On 31st December 2000, President Clinton announced the decision to sign the Treaty provoking the angry response of the Republican opposition. Consistently with previous positions, this decision had the goal to at least “keep the United States ‘in the game’ to finish the work that had to be done to ensure favorable consideration of the Treaty in the United States Senate some day.”¹⁰⁰⁹ In a situation of intense divided government between the President and Congress and with opposition stemming even from the Defense Department, this attitude of engaged opposition was all the Administration could obtain. Even though ratification was not a possibility at that point, the U.S. wanted to be “in a position to influence the future evolution of the Treaty.”¹⁰¹⁰ This decision guaranteed the possibility of partaking to the PrepCom and working for an international compromise that could soften domestic opposition and “would have greatly facilitated steps toward ratification.”¹⁰¹¹

Twenty days later the Bush Administration took office. Supported by an ideologically favorable Congress, the new Administration radically changed U.S. international posture on the ICC and started a campaign that led to the U.S. unsigning the Treaty and to the Senate passing aggressive anti-ICC legislation, which banned cooperation between the Court and the U.S. Commenting these developments, former President Clinton did not hesitate to criticize “America’s decision to withdraw from...the International Criminal Court” and expressed hope that a different Administration could submit the Treaty to the Senate for ratification.¹⁰¹²

This was the conclusion of a political trajectory that saw the U.S. shifting its position from being among the main supporters of a permanent mechanism of international justice in the 1990s to being one of its largest enemies after 9/11. The roots of U.S. total opposition to the ICC did not start with Bush’s election at the White House in November 2000. Rather, they are to be found in the isolationist and sovereignty-oriented Congress that dominated U.S. politics in the 1990s, and with

¹⁰⁰⁸ David J. Scheffer, Ambassador at Large for War Crimes and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, “Testimony before the House International Relations Committee, Washington, D.C., July 26, 2000, 57.

¹⁰⁰⁹ David J. Scheffer, “Staying the Course with the International Criminal Court”, 67.

¹⁰¹⁰ “U.S. Department of State Press Briefing”, January 2, 2001.

¹⁰¹¹ David Scheffer and John Hutson, “Strategy for U.S. Engagement with the International Criminal Court”, A Century Foundation Report, 2008, 4.

¹⁰¹² William Jefferson Clinton, “Our Shared Future: Globalization in the 21st Century”, Council on Foreign Relations, June 17, 2002; for a similar statement by Scheffer, see David Scheffer and John Hutson, “Strategy for U.S. Engagement with the International Criminal Court”, A Century Foundation Report, 2008.

which the Clinton Administration had to coexist for most of its staying in office.

7.5 Shaping U.S. Rejection Of The ICC: Bureaucratic Competition And Divided Government

The Administration's strategy of engaged opposition had two fundamental aims. On the one hand, the President and the State Department were trying to stay the course with the ICC because they were convinced that the most controversial aspects of the Treaty could be re-negotiated and a compromise reached. On the other hand, there was the attempt to at least collaborate with the ICC as a non-party state until more favorable conditions could allow for domestic consensus. This complex policy of engagement was consistently frustrated by powerful domestic actors that highly constrained the actions of U.S. diplomacy and eventually shaped U.S. positions toward complete rejection of the ICC Treaty. After a decade of intense commitment to the norm of international criminal responsibility, the Clinton Administration could only sign the Treaty and leave office without any serious prospect for Senate's consideration or ratification.

Two main conditions determined this political outcome. Both are typical of U.S. political system and its institutional setting and they periodically affect its domestic and foreign policy-making. First, the all debate on the ICC Treaty was characterized by an offstage competition between different foreign policy bureaucracies, namely the State Department and the Department of Defense. The Pentagon represented the interests of the military community and opposed the ICC since the first meetings of the PrepCom.

Second, the all negotiating process took place in a situation of intense divided government, with the Republican Party controlling both branches of Congress and competition along party and ideological lines strongly influencing the domestic debate. The Republican Party was openly against the ICC Treaty and could decisively determine the course of events thanks to its majority in Congress and in the powerful Senate Foreign Relations Committee. At the legislative level, a strongly skeptical political mood prevailed over the more accommodating one of the Democratic Party, which had substantially accepted the strategy of the Clinton Administration. These conditions led to the U.S. completely rejecting, if not boycotting, the Rome Court. Once again in American history, specific manifestations of its political system and policy-making prevented the U.S. from accepting widely recognized international treaties that had found the acceptance of its closest allies.

This finding confirms the argument that institutional conditions, such as party politics and the relationship between the executive and the legislature, exert a more intense impact on processes of domestic acceptance of highly institutionalized international norms. When states deal with norms that

are contained in international treaties or conventions, and consequently are not anymore in an emergent and undefined status, Presidents and executive leaders cannot autonomously determine their acceptance or rejection. These norms can usually be accepted by states only through complex processes of domestic ratification that trigger larger debates involving a higher number of actors. In these situations, legislative assemblies and governmental bureaucracies can be decisive to determine the attitude of a state toward these types of norms.

7.5.1 Tying the Hands of the Administration I: Department of Defense and Opposition to the ICC

The Pentagon significantly shaped U.S. positions toward the ICC Treaty. Although it did not officially express too differently opinions from the ones of the rest of the Administration, the Department of Defense was much more skeptical than the Presidency and the State Department on the Treaty that had been drafted and discussed during the Rome Conference. Moreover, it never showed particular enthusiasm for the Administration's policy of engagement, mostly because it considered the ICC as a political and legal risk that U.S. military forces could not afford. For this reason, various Pentagon officials did not hesitate to criticize the Rome Treaty both before and after the Conference. This attitude, which included offstage attempts to conduct a diplomatic action alternative to the one of the State Department, considerably affected U.S. negotiating position. Although the Department of Defense could not take any autonomous decision, its skepticism established an informal link with the Republican majority in Congress. This intensified domestic opposition to the Treaty and created a domestic anti-ICC front that significantly limited the room of maneuver of the President and the State Department.

Opposition of the Defense Department to the Rome Treaty started to manifest before the Rome Conference, at the time when delegations were discussing possible articles for a draft statute. From the very beginning of the debate, the main concern of the Pentagon regarded the possibility of an excessively independent Court, with proceedings autonomously initiated by the Prosecutor. The Department of Defense feared that a Court independent from the will of permanent members of the Security Council "could invite frivolous prosecutions of commanders and ordinary soldiers that are politically motivated by opposition to U.S. military actions."¹⁰¹³ For this reason, Pentagon officials expressed preoccupation for the proposal under discussion at the PrepCom to insert aggression among the crimes over which the Court could have jurisdiction. As the spokesman of the Department of

¹⁰¹³ Thomas Omestad, "The Brief for a World Court: A Permanent War-Crimes Tribunal is coming, but will it have teeth", *U.S. News and World Report*, 9/28/97.

Defense provided during a news briefing, the definition of the crime of aggression could only be vague and easily “confused with legitimate defensive action to protect our national security interests.”¹⁰¹⁴

In other words, an ICC with the authority to determine and prosecute aggression would have highly limited U.S. capacity of militarily intervening in situations that involved U.S. interests. Along these lines, Pentagon was only available to support an international court activated by states parties and, above all, by the Security Council in which the U.S. enjoyed the privilege of its veto power. This significantly influenced the negotiating action of the U.S. delegation that could not neglect the observations of its military establishment.¹⁰¹⁵

Also before the Rome Conference, U.S. diplomacy presented proposals to exclude the Prosecutor from the triggers of the Court. This position was “driven largely by heavy pressure from the Defense Department and its supporters in Congress”¹⁰¹⁶ This made Scheffer’s life at the PrepCom considerably more difficult in the sense that U.S. diplomacy needed to “meet the objections not only of American politicians, but also of the Pentagon, which fears legal action against American troops.”¹⁰¹⁷ As the *Washington Post* observed, the Clinton Administration “fearful of getting whipsawed domestically by its own generals” was forced to conduct negotiations in a particularly cautious way. Opposition to the Court from the U.S. military increasingly pushed the White House in a dead end: “The White House works to avoid being accused of opposing the court by its internationalist supporters as hard as it works to avoid being accused of supporting it by its foes. The result is fog on what Washington really wants.”¹⁰¹⁸

Moreover, there is evidence that before the Rome Conference, the Pentagon was trying to conduct a sort of backstage diplomacy, autonomous and alternative to the one of the State Department. In spring 1998, for example, the *New York Times* reported that the Pentagon “urgently called in more than 100 foreign military attaches from embassies” in order to warn of “a potential menace to their troops.”¹⁰¹⁹ At this meeting the Pentagon circulated a 3-page memorandum in which affirmed that “the U.S. is committed to the successful establishment of a Court...but we are also intent on avoiding the

¹⁰¹⁴ Kenneth H. Bacon, “DoD News Briefing”, April 14, 1998.

¹⁰¹⁵ For an analysis of Pentagon’s scepticism toward a Court that could be used for political purposes against the ICC, see John M. Goshko, “A Shift on Role of U.N. Court? Envoy Suggests U.S. May Alter Demands on Proposed Tribunals”, *The Washington Post*, March 18, 1998.

¹⁰¹⁶ John M. Goshko, “U.S. Proposes Limit on Global Court; Critics Fear Curb Would Paralyze Prosecution of War Crimes”, *The Washington Post*, March 26, 1998.

¹⁰¹⁷ Barbara Crossette, “Helms Vows To Make War On U.N. Court”, *The New York Times*, March 27, 1998.

¹⁰¹⁸ Jim Hoagland, “Justice for All”, *The Washington Post*, April 19, 1998; see also, “Pentagon Criticism of World Criminal Court Raises Stakes”, *Terra Viva*, June 15, 1998, 9.

¹⁰¹⁹ Eric Schmitt, “Pentagon Battles Plans for International War Crimes Tribunal”, *New York Times*, April 14, 1998.

creation of the wrong kind.”¹⁰²⁰ With this action the Pentagon aimed to obtain larger involvement of militaries in the negotiations in order to demand stricter and more precise definitions of war crimes and to avoid Prosecutor’s “unbridled discretion to start investigation.”¹⁰²¹ In this delicate negotiating phase, Pentagon wanted to have a say in the international debate over the ICC.

This action continued with the start of the Rome Conference. In a press conference at NATO headquarters, Secretary of Defense William Cohen provided that “as far as the Pentagon is concerned, we are very much committed to making sure that there is one hundred percent protection for our forces, which, after all, are deployed all over the globe.”¹⁰²² Cohen’s words were clear enough. The U.S. had to make sure that the Court exclusively depended on the Security Council and that the U.S. delegation in Rome was not available to compromise on issues, such as jurisdiction, UN role, and independence of the Prosecutor. Only in case the Court could be answerable to the most powerful states could the U.S. be protected against politically motivated charges.¹⁰²³

Independence of the Prosecutor and attempts to promote an overreaching jurisdiction did not constitute adequate guarantees. As a legal expert from the Pentagon that took part to the Rome Conference as a member of the U.S. delegation later explained, the U.S. military community was particularly skeptical of an “international criminal court with coercive authority over states themselves.”¹⁰²⁴ As an indicator of the different approaches of the State and Defense Departments, he also criticized the regime of complementarity that had been accepted by most delegations in Rome, including the U.S. Whereas Scheffer often presented complementarity as one of the major achievements in order to guarantee protection of U.S. troops, for the Pentagon the Court’s authority to determine whether a state was unwilling or unable to prosecute a certain crime put member states in a position of disadvantage that could easily lead to abuses. As William Lietzau argued, “all checks and balances related to complementarity are still fatally inadequate because they are entirely self-judged and applied by the ICC.”¹⁰²⁵ The U.S. military could accept a Court complementary to national jurisdictions that left to single states the primary responsibility for the prosecution of international crimes. What could not be accepted was the attempt to vest the Court with the sole authority of

¹⁰²⁰ Cit.

¹⁰²¹ Cit.

¹⁰²² William Cohen, “Secretary Cohen’s Remarks at NATO Headquarters”, Brussels, Belgium, June 11, 1998; see also, Charles Trueheart, “U.N. Conference to Draft War Crimes Treaty”, *The Washington Post*, June 14, 1998; “Undermining an International Court”, *The New York Times*, July 15, 1998.

¹⁰²³ Alessandra Stanley, “U.S. Specifies Terms for War Crimes Court”, *The New York Times*, July 10, 1998; Helle Bering, “The Rest of the World’s Court”, *The Washington Times*, July 30, 1998, A23.

¹⁰²⁴ William K. Lietzau, “International Criminal Law After Rome: Concerns from a U.S. Military Perspective” *Law and Contemporary Problems* Vol. 64, No.1 (Winter 2001): 135.

¹⁰²⁵ Cit, 136.

deciding whether a state had been genuinely willing or able to prosecute. This became the cornerstone of the principle of complementarity as embodied in the Treaty but was always seen by the Pentagon as an unacceptable way of augmenting the discretionary power of the Court over single states.

These critiques considerably influenced U.S. negotiating position in Rome in the sense that they made its delegation appear even more skeptical than it was and rendered its objections more difficult to accept by the other delegations. The situation further worsened when the Department of Defense allegedly started to conduct an action of lobbying, which did not hesitate to make use of particularly aggressive arguments. According to unofficial reports, Secretary of Defense Cohen suggested that “if Germany succeeded in lobbying for universal jurisdiction for the Court, the United States might retaliate by removing its overseas troops, including those in Europe.”¹⁰²⁶ This allegation was reported by all the most important U.S. newspapers but was never confirmed by the Defense Department. On July 14, Bacon replied to a question on the issue by saying that Cohen had “expressed concerns about the International Criminal Court publicly and he [had] privately, but not in the terms that have been reported.”¹⁰²⁷ Regardless of the reliability of the news, this story augmented the atmosphere of suspect toward U.S. positions and further isolated its delegation during negotiations.

After the Conference, the Pentagon continued to express skepticism as to the Rome Treaty with particular regards to the figure of the Prosecutor. In June 2000, Cohen reminded that “we have the largest amount of troops in the world that are forward deployed...the notion that any of these troops could be hauled before the international court on charges...would seem to put our forces certainly in jeopardy from our perspective.”¹⁰²⁸ Pentagon could not accept a too independent Prosecutor that was detached from the will of states. As Cohen clarified, U.S. military community was not available to compromise on this issue: “Unless there can be some measure of either U.N. authorization, some sort of filter, in terms of the absolute power of a totally independent court, then we cannot support that.”¹⁰²⁹ For the Department of Defense, the possibility that a U.S. soldier involved in a peace operation could be “apprehended and brought before The Hague” would be “destructive to our international participation.” As the main provider of international security in U.N. operations, the U.S. military was ready to use all the available cards, including retaliation in the form of lesser participation in military

¹⁰²⁶ Alessandra Stanley, “U.S. Presses Allies to Rein In Proposed War Crimes Court”, *New York Times*, July 15, 1998; see also, Thomas W. Lippman, “America Avoids The Stand; Why the U.S. Objects To A World Criminal Court”, *The Washington Post*, July 26, 1998.

¹⁰²⁷ Kenneth H. Bacon, “DoD News Briefing”, July 14, 1998.

¹⁰²⁸ Secretary of Defense William S. Cohen, “Joint Press Conference with Secretary Cohen and Swedish MoD Von Sydow”, June 12, 2000.

¹⁰²⁹ Cit.

operations, in order to obtain a less overreaching Court.¹⁰³⁰

Pentagon officials did not hesitate to make use of harsh language in their critique of the Treaty. As Admiral Craig Quigley argued in an official press briefing, the ICC, “as it’s currently proposed, without some sort of supervisory oversight, would lead to a horrible circumstance of a possibility of all kinds of frivolous charges against U.S. service members around the world.” The version of the Treaty approved in Rome was irremediably defined as “not acceptable.”¹⁰³¹

An example of the different attitudes of Pentagon and State Department officials toward the Court is provided by the debate on war crimes that took place before the House Foreign Relations Committee. If, on the one hand, Scheffer devoted most his testimony to describing how the Treaty contained enough guarantees against frivolous proceedings (see previous section 4.3), Under-Secretary of Defense Walter Slocombe, on the other hand, was much more skeptical: “What I am concerned about...is that there could be a politically motivated prosecution based on what would...be a misrepresentation of the law of war...and once you concede the principle of jurisdiction, there are no guarantees as to the result.”¹⁰³² The main preoccupation was, as usual, with “prosecutions based not really on serious allegations of war crimes, but on disagreement with U.S. or other alliance policies.” Pentagon’s skepticism touched upon a larger number of issues than the ones underscored by the State Department. Opposition did not only concern the form of the Treaty. It was the notion itself of an international criminal jurisdiction with the power of prosecuting U.S. officials for war crimes that did not convince the Defense Department.¹⁰³³ This significantly constrained U.S. negotiating position to the point that “objections from the Pentagon...forced the Administration to demand guarantee that no American officer or civilian official on duty abroad [would] fall under its jurisdiction.”¹⁰³⁴

Competition between the State and Defense Departments and different attitudes as to the Rome Treaty eventually emerged more clearly at the very end of the Administration’s staying in office, in particular after Clinton’s decision of signing the Treaty. Critiques of this action did not come only from the Republican majority in Congress. As reported by the *Washington Post*, a Pentagon official commented U.S. signature by providing that “on the International Criminal Court Treaty, the [Defense]

¹⁰³⁰ Statement of the Honorable Walter Slocombe, Under Secretary of Defense for Policy, U.S. Department of Defense, Testimony Before the Committee on International Relations House of Representatives, 106th Congress, Second Session, Washington, D.C, July 26, 2000, 43.

¹⁰³¹ Rear Adm. Craig Quigley, “DoD News Briefing”, September 14, 2000.

¹⁰³² Cit., 55.

¹⁰³³ Barbara Crossette, “U.S. Envoy Tackles Objections to Tribunal on War Crimes”, *The New York Times*, December 12, 2000; “Revisiting the World Criminal Court”, *The New York Times*, December 13, 2000.

¹⁰³⁴ Barbara Crossette, “Time Is Short for U.S. to Join the International Criminal Court”, *The New York Times*, November 24, 2000.

Department's position has been clear...we were against signing it and still are."¹⁰³⁵ This did not merely remain the backstage comment of an anonymous official. Few days after, Secretary of Defense Cohen declared that "our recommendation...was 'don't sign it' because...under the circumstances we're going to see an independent criminal court that doesn't have any filters that will prevent these prosecutors from bringing charges."¹⁰³⁶

This was the last act of a story of competition and disagreement between the two bureaucracies that are most responsible for U.S. foreign policy. These disagreements were obviously neither apparent, nor explicit. However, they occasionally emerged in some particular delicate moments, such as the Rome Conference and the debate before Congressional Committees, creating embarrassment and even diplomatic incidents. This worsened both the position of U.S. diplomacy before the other delegations and the capacity of the Administration of influencing the domestic debate. The Department of Defense was by far the most skeptical agency within the Administration. Although it was not alone able to impose any specific course of action, its opposition united with the more explicitly aggressive stances of the Republican majority in Congress. This contributed to an anti-ICC atmosphere that determined U.S. complete rejection of the newly created Court both at the international and domestic levels.

7.5.2 *Tying the Hands of the Administration II: Divided Government and Dynamics of Party Politics*

U.S. rejection of the ICC Treaty was primarily determined by the institutional setting that characterized U.S. politics in the second half of the 1990s. The competition between the two parties represented in Congress and the situation of divided government between the executive and the legislature decisively shaped U.S. position on the ICC. This political situation considerably constrained the strategy of engaged opposition devised by the Clinton Administration and created the conditions for the impossibility of accepting and ratifying the Rome Statute. In November 1994, the Republican Party obtained a crucial victory at the Midterm Elections that allowed Republicans to be in control of both the House of Representatives and the Senate. This activated the dynamics of divided government, which is often typical of the U.S. system. From that moment on and until the end of its staying in office, the Clinton Administration had to coexist with a Republican majority in the legislative body that was not ideologically favorable to its foreign policy, especially with regards to international treaties.

The next section argues that this capacity depends on specific conditions that are related to the

¹⁰³⁵ Thomas E. Ricks, "U.S. Signs Treaty on War Crimes Tribunal; Pentagon, Republicans Object to Clinton Move", *The Washington Post*, January 1, 2001.

¹⁰³⁶ Secretary of Defense William S. Cohen, "Cohen Breakfast Meeting with Reporters in Washington, D.C., January 11, 2001.

types of issues at stake. For example, foreign policy strategies that involve the recognition of emergent and undefined international norms usually leave more room of maneuver to the arbitrary interpretations of Presidents and their closest collaborators. In case of decisions that concern the deployment of U.S. troops, especially for humanitarian interventions or peace operations, the recognition of the legitimacy of international norms, such as the responsibility to protect, is often left to the arbitrary will of Presidencies.

Processes of domestic acceptance or rejection of norms that have reached a high level of international institutionalization, in the sense for example that they have been incorporated into international treaties or conventions, usually require longer and time-consuming legislative activities, most notably the passing of legislation to ratify the international treaties in which they are contained. This allows participation of a larger number of domestic actors and augments the influence of domestic conditions, such as the structure of party politics and the type of relations between the executive and the legislature.

In the case of the debate on international criminal responsibility and international jurisdictions, the norms under discussion were contained in an international treaty, the one drafted at the Rome Conference. Recognition or rejection of such norms mostly depended on the ability and will of Congress, in particular the Senate, to ratify the ICC Treaty. As is well known, for international norms contained in an international agreement to become U.S. law, it is necessary to obtain the advice and consent of two-thirds of the Senate. This renders the Senate the main gatekeeper when it comes to consideration and possibly acceptance of norms that are contained in international treaties.

This is what occurred in the U.S. with the ICC Treaty. After the 1994 Midterm Elections, U.S. Congress was characterized by a Republican majority, which was ideologically opposed to the ICC, and a Democratic minority, which endorsed the position of engaged opposition put forward by the Clinton Administration. At that crucial point in time for the relations between the ICC and the U.S., the legislative organ that is vested with the authority to consider and ratify international treaties was dominated by an anti-ICC majority. This intensified the dynamics of divided government that is typical of U.S. politics. A Democratic Administration, which, notwithstanding some critiques and internal divisions, was committed to the creation of a permanent international jurisdiction, faced a Congress that was mostly driven by an isolationist, anti-internationalist, and sovereignty-oriented foreign policy mindset.

Congress successively opposed the more accommodating position of the Presidency and the State Department that were willing to find an international compromise on the ICC. This severely

limited the capacity of the Administration to perform its strategy of engagement and collaboration with the Court. Consequently, the Administration could only obtain the mere signature of the Treaty, which does not equal to acceptance. Under these conditions, consideration and ratification of the ICC Treaty remained only a political intention. Although the Administration showed more than one hesitation on the ICC and was not among the most favorable governments, with a more sympathetic congressional majority and a more cohesive relation between the executive and the legislature, it is reasonable to expect that U.S. position on the Rome Court could have been arguably more committed and could have at least considered ratification of the Treaty.

7.5.3 *The U.S. and the ICC: A Partisan Debate*

As has been explained in the second section, according to some scholars, U.S. rejection of the ICC did not merely depend on contingent events, such as the presence of an opposed congressional majority or the will of the Senate to undermine the relations between the U.S. and the Rome Court. U.S. opposition to the ICC would depend on a specific political culture that is centered on the supremacy of the Constitution and on a structural recalcitrance to submit U.S. sovereignty to international treaties. No significant domestic actor would question this political culture because it would constitute the basis of U.S. constitutional patriotism.

This argument usually excludes party politics from possible explanations for U.S. opposition to the ICC. U.S. failure to become a member of the Rome Treaty is seen as the result of a bipartisan consensus on the necessity to approach international law and any limitation to national sovereignty with extreme caution. For example, Douglas Becker has observed how “partisanship did not determine U.S. opposition to the Court.”¹⁰³⁷ Congressional opposition to the ICC was not limited to Republican senators, such as Jesse Helms, but rather involved the most prominent members of the Democratic Party. In this sense, it would be naïve to imagine a Democratic-led Congress willing to fully accept the ICC Treaty. Given the cultural resentment of the U.S. to international institutions that imply losses of sovereignty, it is unlikely that a committed generation of Democrats could lead the U.S. to ratification of the Court. The only way this could happen would be a radical “changed perception of the Court” that “holds to be in American interest.”¹⁰³⁸ The U.S. could accede the ICC Treaty only in case of an exceptional political event capable of changing a well-established attitude toward international law.

¹⁰³⁷ Douglas Becker, “The Bush Administration’s Campaign against the International Criminal Court” in *A Bird in the Bush: Failed Domestic Policies of the George W. Bush Administration*, ed. Dowling G. Campbell (New York: Algora, 2008): 151.

¹⁰³⁸ Cit., 151.

This argument captures one important part of the story, which is the difficulty that the U.S. system often shows with limiting sovereignty in favor of international institutions. However, this explanation tends to reify U.S. international attitudes and is not capable of accounting for changes in its positions on international norms and treaties. The main problem with this argument rests on a fundamental misunderstanding, which consists of a reduction of U.S. debate on the ICC to a choice between ‘yes’ and ‘no’ to the Court. As has been often recalled, it would be wrong to argue that the Clinton Administration and the Democratic Party were strong advocates of the ICC but could not see it ratified because of opposition by the Republican majority of Senate. Rather, the Administration did not hesitate to criticize important aspects of the Court and often manifested the impossibility of agreeing with the compromise that was found in Rome.

Nevertheless, it would be also incorrect to associate its positions with the aggressive arguments of the Republican Party. Far from unconditionally accepting the Court, the Clinton Administration was willing to put forward its objections to the Treaty. However, it wanted, at the same time, to remain engaged with the Court and always maintained a constructive approach that aimed to overcome disagreements and strike an acceptable compromise. This was the official strategy even after the debacle of the Rome Conference.

In a similar way, the Democratic Party mostly viewed with favor the creation of the Court and supported the attempt of the Administration to make it more acceptable for the U.S. This was radically different from the policy of total opposition devised by Republicans, for whom it was not only necessary to prevent U.S. participation but also to actively boycott the Court. This is to say that U.S. debate on the ICC followed clearly recognizable partisan lines. On the one hand, there was the positive engagement of Democrats, which refused both rejection and unconditional acceptance and endorsed the wait-and-see strategy of the Presidency and the State Department. On the other, there was the ‘no-strategy’ of Republicans that identified the Court as a threat to be fought. This led to a partisan struggle between these two competing views that concluded with the victory of the anti-ICC majority.

Indicators of an ideological division that followed recognizable partisan lines started to emerge during a hearing that was held before the Senate Committee on Foreign Relations in June 1993. At that time, Democrats still had the control of Congress and senators, such as Christopher Dodd, were particularly committed toward the issue of international justice. For example, the majority in the Committee allowed Democrats to pass a proposal that called for “the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal

court.”¹⁰³⁹ The Committee passed this Resolution by an 11-7 vote. All Democrats, including prominent senators such as Joe Biden and John Kerry, voted for the U.S. supporting an international negotiate on the establishment of an ICC, while the Republican minority opposed the resolution. Despite the strong critiques provided by Jesse Helms and other Republican senators, the Committee embraced an internationalist view of U.S. foreign policy, one in which instead of “proclaiming the virtues of national sovereignty”, it was necessary to “find a new approach, one based on multilateral cooperation and consensus.”¹⁰⁴⁰

This preliminary version of the debate continued to structure along party lines, with Democrats actively supporting legislative action in favor of the establishment of a permanent international criminal court¹⁰⁴¹ and Republicans expressing “serious reservations” and calling on the President to “examine carefully the relevant issues before coming to any conclusions.”¹⁰⁴² The only exception to this pattern was represented by Republican Senator Arlen Specter. Notwithstanding his membership in the Republican Party, Specter put forward various legislative proposals for the creation of mechanisms of international justice.¹⁰⁴³

At the start of 1994, the issue of international justice was back to the attention of Senate during consideration of the Foreign Relations Authorization Act, which authorized appropriations for fiscal years 1994 and 1995 for the Department of State and related agencies (S. 1254). Section 170(a) of the Bill provided that a permanent criminal court “would greatly strengthen the international rule of law” and “would...serve the interests of the United States and the international community.” Along these lines, it called on the U.S. delegation to “make every effort to advance this proposal at the United Nations.”¹⁰⁴⁴ This section found the approval of Democratic senators. Similarly to the Clinton Administration, they maintained an engaged position that, on the one hand, refused to “vote for any international treaty on an international criminal court”¹⁰⁴⁵, but, on the other, was willing to explore the possibility of creating an effective one able to adequately “serve the interests of the United States and

¹⁰³⁹ The proposal (S. J. Res. 32) was first introduced to the Committee by Senator Christopher Dodd in January 1993. See *Congressional Records*, Senate, 103rd Congress, First Session, 28 January 1993, 1586.

¹⁰⁴⁰ “International Criminal Court”, Hearings Before the Committee on Foreign Relations, U.S. Senate, Washington, D.C., June 29 1993, 16.

¹⁰⁴¹ See for example, Christopher Dodd (D-Connecticut), *Congressional Records*, Senate, 103rd Congress, First Session, 15 July 1993, 15790; 26 October 1993, 26274-5.

¹⁰⁴² *Congressional Records*, Senate, 103rd Congress, First Session, 23 September 1993, 22288; see also, Larry Pressler (R-South Dakota), 1 July 1993, 15139.

¹⁰⁴³ See for example, Arlen Specter (R-Pennsylvania), S.J. Resolution 93 “calling for the President to support efforts by the United Nations to conclude an international agreement to establish an international criminal court”, *Congressional Records*, 103rd Congress, First Session, 11 May 1993, (9644); 14 August 1993, 18579.

¹⁰⁴⁴ *Congressional Records*, Senate, 103rd Congress, Second Session, 25 January 1994, 11.

¹⁰⁴⁵ Christopher Dodd (D-Connecticut), *Congressional Records*, 103rd Congress, Second Session, 26 January 1994, 242.

the world community.”¹⁰⁴⁶ Far from unconditionally accepting any kind of ICC, Democrats were aware of the risks that such a court could potentially imply and supported the idea of an international negotiate precisely to “explore those fears, ... find out if they are justified...and...if there is a sufficient mechanism that we could put together that would address those fears, indeed eliminate altogether.”¹⁰⁴⁷

By contrast, Republicans harshly opposed these pro-ICC initiatives. For example, Helms presented an amendment to the Bill that aimed to “strike all language in section 170a relating to support for an International Criminal Court.”¹⁰⁴⁸ Helms and the Republican Party rejected the attempt of “turning over the sovereignty of the United States in the slightest degree to a world court.”¹⁰⁴⁹ The idea that U.S. citizens could be subject to the jurisdiction of a Court composed of judges from rival or enemy states was considered unacceptable in terms of both defense of U.S. interests and protection of U.S. constitutional liberties.¹⁰⁵⁰ In the end, the Democratic-led Senate rejected Helms’ amendment by a 55-45 vote confirming the tendency of the debate to divide into two opposing camps, one willing to see if the Court could be a good deal for the U.S. and one ideologically opposed to any international tribunal limiting U.S. sovereignty.¹⁰⁵¹

When Republicans eventually gained control of both branches of Congress in 1994, it became clear that life in the U.S. would not have been easy for the ICC. Even before U.S. diplomacy engaged in negotiations at the UN level, Republicans were determined to show that the political mood toward the ICC had profoundly changed. On 15 December 1995, they promoted section 312 of the Foreign Relations Revitalization Act, which provided that “none of the funds made available by this Act shall be used to pay the United States contribution to any international organization which engages in the direct or indirect promotion of the principle or doctrine of one world government or one world citizenship.”¹⁰⁵²

The only notable exception within the Republican camp was, once again, Senator Specter who, regardless of the official position of his party, did not hesitate to press the Administration by arguing that the U.S. “should have established an international criminal court a long time ago” and “ought to be

¹⁰⁴⁶ John Kerry (D-Massachusetts), *Congressional Records*, 103rd Congress, Second Session, 26 January 1994, 226; see also Joe Biden (D-Delaware), *Congressional Records*, 103rd Congress, Second Session, 26 January 1994, 238.

¹⁰⁴⁷ John Kerry (D-Massachusetts), 226.

¹⁰⁴⁸ Jesse Helms (R-North Carolina), *Congressional Records*, 103rd Congress, Second Session, 26 January 1994, 215.

¹⁰⁴⁹ *Cit.*, 215.

¹⁰⁵⁰ Orrin Hatch (R-Utah), *Congressional Records*, 103rd Congress, Second Session, 26 January 1994, 228; see also, Larry Pressler (R-South Dakota), 238; Jesse Helms (R-North Carolina), 216.

¹⁰⁵¹ See for example, the debate that took place in the Senate, *Congressional Records*, Senate, 103rd Congress, Second Session, 27 January 1994, 384; 2 February 1994.

¹⁰⁵² *Congressional Records*, Senate, 104th Congress, First Session, 15 December 1995, 37231.

moving to really put it into effect.”¹⁰⁵³ Similar exceptions could be found in the House where few Republican members, such as Jim Leach and Ben Gilman, occasionally supported legislative activities in favor of the ICC. This was the case, for example, of Resolution 89 that asked the President to continue to support and fully participate in negotiations at the United Nations to conclude an international agreement...and...provide any assistance necessary to the establishment of such a court.”¹⁰⁵⁴

Nevertheless, these exceptions did not represent the real voice of the Republican Party. The dominant opinion within the GOP continued to be one of total opposition to the Court. Few months before the Rome Conference, the newly elected Chairman of the Senate Foreign Relations Committee sent a letter to Secretary of State Madeleine Albright where he strongly criticized that “the United States is showing new flexibility in its negotiation position and it’s prepared to modify some of its demands about the independence of the proposed Court, and the scope of its jurisdiction.”¹⁰⁵⁵ In a particular delicate moment, when the Administration was examining the possibility of a compromise with the other delegations, the leader of the Committee that is vested with the authority of considering and possibly ratifying international agreements warned that “any treaty establishing a permanent U.N. international criminal court without a clear U.S. veto will be dead-on-arrival at the Senate Foreign Relations Committee.”¹⁰⁵⁶

Republican Senator John Ashcroft also questioned the policy of engagement of the Administration. Not completely satisfied with U.S. negative vote at the Rome Conference, Ashcroft found particularly dangerous that “the Administration is already coming under pressure from proponents of the Court to reconsider its opposition.”¹⁰⁵⁷ Understanding that voting against the Treaty in Rome did not necessarily mean the end of U.S. engagement with the Court, Ashcroft admonished that the Administration “should ‘just say no’ to any efforts to get the United States to recognize or to signal any formal compliance with the Court.”¹⁰⁵⁸ Instead of engaging in further debate, the Administration must “remain steadfast in its refusal to join a Court” that promised to “trade American sovereignty and the Bill of Rights so that international bureaucrats can sit in judgment of the United

¹⁰⁵³ Arlen Specter (R-Pennsylvania), *Congressional Records*, Senate 104th Congress, First Session, 3 November 1995, 31444.

¹⁰⁵⁴ *Congressional Records*, Senate, 105th Congress, First Session, 16962.

¹⁰⁵⁵ Jesse Helms, “Helms Declares U.N. Criminal Court ‘Dead-on-Arrival’”, *Congressional Press Releases*, March 26 1998.

¹⁰⁵⁶ Cit.

¹⁰⁵⁷ John Ashcroft (R-Missouri), *Congressional Records*, Senate, 105th Congress, 20 July 1998.

¹⁰⁵⁸ Cit.

States military and our criminal justice system.”¹⁰⁵⁹

The debate continued to follow partisan lines even in the aftermath of the Rome Conference, which coincided with the last two years of the Clinton Administration. While Democrats substantially agreed with the Court and look for any possibility of compromise, Republicans pushed for total rejection of the Treaty and for the boycott of the ICC. Democratic Senator from California Dianne Feinstein provided arguments that signaled how Democrats approved of the policy of engagement promoted by President Clinton and the State Department. On the one hand, for Feinstein, it was necessary to “share the concerns which ultimately led the United States to determine that it could not support the draft statute that emerged in Rome.”¹⁰⁶⁰ The possibility that U.S. citizens could be tried through politically motivated prosecutions provoked concern even within the Democratic camp. On the other hand, Democrats were willing to give further negotiation a chance. For Feinstein, the Rome Conference should not have been the end of U.S. commitment toward international justice. Rather, it had to be viewed as a ‘crossroads’ on the basis that “if other members of the international community go forward with the endeavor, the United States might still seek amendments and might one day be able to join.”¹⁰⁶¹

Of a different tone was the contribution of Republicans to the debate. Senator Rod Grams specifically targeted the policy of engagement: “Supporters of this treaty are banking on the fact that the United States will allow this court to flourish and gain legitimacy over time. We must not allow that to happen. Even if it is weak at its inception, the court’s scope and its power can grow and will grow. This will be an international institution without checks or balances, accountable to no state or institution for its actions.”¹⁰⁶² Grams primarily expressed concern with the proprio motu power of the Prosecutor, which created the conditions for a situation in which “there will be no effective screen against politically motivated prosecutions.”¹⁰⁶³ Consistently with these positions, Helms argued that “rejecting this treaty is not enough. The United States must fight this Treaty.”¹⁰⁶⁴

The determination of Republican senators to prevent the U.S. from acceding to or collaborating

¹⁰⁵⁹ Cit.

¹⁰⁶⁰ Dianne Feinstein (D-California), “Is a U.N. International Criminal Court in the U.S. National Interest?”, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, Second Session, July 23 1998, 4.

¹⁰⁶¹ Cit. 4-5.

¹⁰⁶² Rod Grams (R-Minnesota), “Is a U.N. International Criminal Court in the U.S. National Interest?”, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, Second Session, July 23 1998, 3.

¹⁰⁶³ Cit, 3.

¹⁰⁶⁴ Jesse Helms (R-North Carolina), “Is a U.N. International Criminal Court in the U.S. National Interest?”, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, Second Session, July 23 1998, 6.

with the Court pushed Helms to bring opposition even at the UN level. In a speech before the Security Council in which he recalled U.S. failure to ratify the League of Nations, Helms reminded that by signing the UN Charter, “we did not cede any syllable of American sovereignty to the United Nations.”¹⁰⁶⁵ Along these lines, he argued against “this brave new world of global justice, which proposes a system in which independent prosecutors and judges, answerable to no state or institution, have unfettered power to sit in judgment of the foreign policy decisions of Western democracies.”¹⁰⁶⁶ Threatening possible U.S. withdrawal from the UN, Helms re-proposed isolationist and sovereignty-oriented arguments, which were based on the notion that “the United States remains the sole judge of its own internal affairs...and...retains sole authority over the deployment of United States forces around the world.”¹⁰⁶⁷ At the basis of this reasoning, there was a clear will to avoid any concession of U.S. sovereignty to international institutions, be they the Security Council or the ICC.

In this uneasy political atmosphere, the Democratic minority kept on supporting the cautious pro-ICC policies of the Administration. Few weeks before the end of Clinton’s Presidency, Senator Patrick Leahy spoke before the Senate of “legitimate concerns about prosecutions of American soldiers” but also reminded how “the U.S. has been successful in obtaining important safeguards to prevent political prosecutions.”¹⁰⁶⁸ In line with the negotiating philosophy of Scheffer and the State Department, Leahy reminded that “its is simply not possible to be part of an international regime and get absolutely everything one wants.”¹⁰⁶⁹ Contrary to the ‘no-strategy’ of the Republican majority of Congress, the U.S. needed to understand the benefits of signing the ICC Treaty, which was seen as the only way to influence the works of the Court and make sure that it answered “to the United States, as its most significant state party.”¹⁰⁷⁰

In this respect, prominent Democratic senators, together with Republican Specter, strongly invited the President to sign the Rome Treaty. In a letter to the President that was sent on 15 December 2000, they affirmed that “the ICC represents an historic step forward in the international effort to punish and deter war crimes, crimes against humanity, and genocide.” Moreover, in line with the position of the State Department, they reminded how the U.S. delegation had “secured significant safeguards to ensure that American soldiers are not subjected to politically-motivated actions by the

¹⁰⁶⁵ Address by Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Before the United Nations Security Council, January 20, 2000, in *Congressional Records*, Senate, 106th Congress, First Session, 26 January 2000, 82.

¹⁰⁶⁶ Cit., 82.

¹⁰⁶⁷ Cit., 83.

¹⁰⁶⁸ Patrick Leahy (D-Vermont), *Congressional Records*, Senate, 106th Congress, Second Session, 15 December 2000, 27212.

¹⁰⁶⁹ Cit., 27212.

¹⁰⁷⁰ Cit., 27212.

Court.” The letter requested that the President remain engaged with the Court and indicated signature as fundamental to “enable the U.S. to continue to play a pivotal role in shaping the ICC”, especially “ensuring that those safeguards operate efficiently.” Most importantly, the long debated provision of the Treaty on jurisdiction over non-party states was presented for the first time as a good reason to join the Court: “We believe the U.S. will be in a far better position to protect the rights of its citizens if the Court must answer to the United States... We urge to sign the Treaty.”¹⁰⁷¹

The same day, a group of 32 Democratic members of the House sent a similar letter to President Clinton.¹⁰⁷² The underlying idea was that participation, rather than exclusion, would give “greater protection to American service members involved in peacekeeping operations and international military operations.” Without presenting the ICC Treaty as an “absolutely perfect instrument”, Democrats noticed that “its positives overwhelmingly outweigh its negatives.”¹⁰⁷³

These arguments indicate that Democrats mostly preferred a positive attitude toward the ICC and refused Republican unconditional opposition. Although they shared the concerns expressed by U.S. delegation in Rome and later at the PrepCom, Democrats agreed with the Presidency that ‘staying-in’ was the best way to protect U.S. interests and those of international justice. If ratification was considered a particularly difficult task, the U.S. had the duty to work for an amendment of the Treaty, or at least collaborate with the Court as a non-signatory. Under the unfavorable political conditions of the time, there was not much more Democrats could achieve. Representing the interests of the minority

¹⁰⁷¹ “Letter to President Clinton”, Congress of the United States, Washington, D.C., December 15 2000. Signatories of the letter were Patrick Leahy (D-Vermont, member of the Committee on Appropriations and Judiciary), Dianne Feinstein (D-California, member of the Judiciary Committee), Arlen Specter (R-Pennsylvania, only Republican Senator to sign the letter), Daniel Patrick Moynihan (D-New York, former U.S. Ambassador at the U.N. under President Gerald Ford), Christopher Dodd (D-Connecticut, member of the Committee on Foreign Relations and later candidate at the Presidential Primary Elections in 2008), John Kerry (D-Massachusetts, later candidate at the 2004 Presidential Elections), Joseph Lieberman (D-Connecticut, member of the Committee on Armed Services), James Jeffords (R-Vermont, soon to leave the Republican Party and sit in the Senate as Independent), Richard Durbin (D-Illinois, member of the Committee on Foreign Relations and later Senate Majority Whip), Tom Harkin (D-Iowa), Herb Kohl (D-Wisconsin), Charles Schumer (D-New York), Frank Lautenberg (D-New Jersey), Paul Wellstone (D-Minnesota), Barbara Boxer (D-California), Patty Murray (D-California, later President of the Democratic Senatorial Campaign Committee), Edward Kennedy (D-Massachusetts), Paul Sarbanes (D-Maryland).

¹⁰⁷² “Letter to President Clinton”, Congress of the United States, Washington, D.C., December 15 2000. Signatories of the letter were: Patrick J. Kennedy (D-Massachusetts, chair of the Democratic Congressional Campaign Committee), Sam Farr (D-California), Mike Capuano (D-Massachusetts), Pete Stark (D-California), Denis Kucinich (D-Ohio), James McGovern (D-Massachusetts), Sherrod Brown (D-Ohio), Albert Wynn (D-Maryland), Bill Pascrell (D-New Jersey), Janice Shakowsky (D-Illinois), Barbara Lee (D-California), Barney Frank (D-Massachusetts), Maurice Hinchey (D-New Jersey) Maxine Waters (D-California), Jerrold Nadler (D-New York), John Tierney (D-Massachusetts), Bobby Rush (D-Illinois), Lynn Woolsey (D-California), Carolyn Maloney (D-Connecticut), Jesse Jackson (D-Illinois), William Delahunt (D-Massachusetts), Sheila Jackson Lee (D-Texas), Tim Holden (D-Pennsylvania), Nancy Pelosi (D-California), Eddie Bernice Johnson (D-Texas), Chaka Fattah (D-Pennsylvania), Edolphus Towns (D-New York), Tammy Baldwin (D-Wisconsin), Lucille Roybal-Allard (D-California), Donald Payne (D-New Jersey), John Lewis (D-Georgia), Major Owens (D-New York).

¹⁰⁷³ Cit.

of Congress, they could not hope for more than Clinton's signature, which took place on 31st December 2000.

With the Clinton Administration about to leave office, the Republican majority was in the position to block any further congressional initiative in favor of the ICC. In a comment on Clinton's last action, Helms announced that "this decision will not stand." Saluting the newly elected Republican Administration, Helms promised to work with the new Secretary of Defense Donald Rumsfeld and the new President George W. Bush to "make reversing this decision" and "to ensure once and for all that no American is ever tried by this global star-chamber."¹⁰⁷⁴ This was the prelude to Bush's decision to unsign the Rome Treaty. Counting on a comfortable majority both in the House and Senate, the new Administration could start its diplomatic and legislative war against the ICC.¹⁰⁷⁵ This was the peak of U.S. opposition against the ICC, which had started in 1994 with the Republican victory at the Midterm Elections. Managing the majority of Senate, Republicans made sure that neither the Clinton Administration nor the Democratic Party could obtain more than a strategy of engagement with the Court. This way, Republicans could successfully prevent the U.S. from either considering or ratifying the ICC Treaty.

Congressional debate over the ICC was essentially a partisan one. With few exceptions, Democrats and Republicans divided along party lines: the former always maintained their objections to the Treaty but were willing to remain engaged in the international negotiations; the latter took advantage of their majority in Congress to act as a counterbalance to the Administration and took actions that ultimately led to the U.S. completely rejecting the ICC.

¹⁰⁷⁴ Jesse Helms, "Helms on Clinton ICC Signature: 'This Decision Will Not Stand'", Statement by Jesse Helms, Senate Foreign Relations Committee Chairman, Washington, D.C., 31 December 2000.

¹⁰⁷⁵ For literature on the Bush Administration's policies against the ICC, see U.S. Department of State, Press Statement, Richard Boucher, Spokesman, "Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security John Bolton", 2002; Marc Grossman, "American Foreign Policy and the ICC", Remarks to the Center for Strategic and International Studies, Washington DC, 6 May 2002; "The National Security Strategy of the United States of America", The White House, Washington, D.C., September 2002; John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", *Law and Contemporary Problems*, 64 (Winter 2001): available at [http://www.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Prob.s.+167+\(Winter+2001\)](http://www.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Prob.s.+167+(Winter+2001)); "American Service-Members's Protection Act", July 30, 2003, available at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>; much material on the relations between the Bush Administration and the ICC can be found at www.iccnw.org; Dominick McGoldrick, "Political and Legal Responses to the International Criminal Court" in *The Permanent International Criminal Court. Legal and Policy Issue*, Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.) (Oxford: Hart Publishing, 2004): 389-449; Jennifer K. Elsea, "U.S. Policy Regarding the International Criminal Court", CRS Report for Congress (Washington DC: Congressional Research Service, Library of Congress, August 29, 2006); Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (New York: Penguin, 2006): 46-68; Jason Ralph, *Defending the Society of States: Why America opposes the International Criminal Court and its Vision of World Society*; Douglas Becker, "The Bush Administration's Campaign against the International Criminal Court" in *A Bird in the Bush: Failed Domestic Policies of the George W. Bush Administration*, ed. Dowling G. Campbell, 131-74; Benjamin N. Schiff, *Building the International Criminal Court*, 165-81.

7.5.4 *Dynamics of Divided Government as a Constraint on the Administration*

The arguments put forward by the Republican majority often turned into actual legislative action whose main aim was to constrain the strategy of engagement with the Court supported by the Presidency and the State Department, and to ultimately push the U.S. toward refusal to accede the ICC Treaty. During the all debate on the ICC, from the Rome Conference until the last weeks of the Clinton Presidency, the Republican majority in Congress represented a real thorn in the Administration's side. The power of the Senate to decide whether or not to submit U.S. sovereignty to international treaties is fundamental to explain U.S. rejection of the ICC. Controlling the majority of Congress allowed Republicans to activate the dynamics of divided government. Republicans oriented the political and legislative debate, constrained the negotiating position of the U.S., and forced the Administration to limit its policy to nothing more than engagement and signature.

Few days after the Rome Conference, Republican senators Helms, Judd Gregg, and Rod Grams presented a group of amendments to limit the possibility of collaboration between the U.S. and the ICC. Not satisfied with the negative vote by the U.S. delegation at the Rome Conference, Republican senators put forward a prohibition on using funds to extradite U.S. citizens to the ICC and on making public resources available “for the payment of any representation in or any contribution to...or provision of funds, services, equipment, personnel, or other support to the International Criminal Court.”¹⁰⁷⁶ Furthermore, in October 1998, Helms presented to the Senate Committee a proposal to prohibit U.S. assistance to the ICC “unless the treaty establishing the Court has entered into force for the United States by and with advice and consent of the Senate.”¹⁰⁷⁷ These legislative activities had both symbolic and practical goals.

On the one hand, they aimed to reaffirm that as to the issue of the ICC Treaty, it was for the Senate to make the real decisions. Everybody knew, even without some of the legislative proposals discussed above, that the U.S. could not accept such an international treaty without strictly following the procedure for ratification contained in Article 2.2. of the Constitution. The fact that Republican senators felt the necessity to underscore this crucial detail responded to a logic of affirming a legal and political superiority over the Administration.

On the other hand, they wanted to undermine the policy of engagement with the Court and the

¹⁰⁷⁶ *Congressional Records*, Senate, Second Session, 20 July 1993, 16959; see also, *Congressional Records*, Senate, Second Session, 1 September 1998, S9796.

¹⁰⁷⁷ Jesse Helms (R-North Carolina), *Congressional Records*, Senate, Second Session, 14 October 1998, 26211.

search for a compromise with the other delegations that the State Department was conducting at the PrepCom even after the Rome defeat. Republicans soon realized that the negative experience of the Rome Conference did not eliminate the commitment of Clinton and Scheffer to a Court that they could find acceptable. Observing with preoccupation the numerous attempts to keep on negotiating and proposing diplomatic deals, most notably the elimination of jurisdiction over third states in exchange for acceptance of the proprio motu power of the Prosecutor, the Republican majority wanted to be safe. These diplomatic attempts needed to be checked by aggressive anti-ICC policies that could send a clear message not only to the Administration but also to the other delegations. The message was that, even in case of a compromise that the Administration and the other delegations could find satisfactory, U.S. Senate remained determined to reject the ICC.

This significantly constrained the negotiating position of the U.S. delegation that proposed deals to states that understood too well that, regardless of whatever diplomatic compromise, the U.S. was not in the position to consider ratification of the Treaty. This made Senate, and especially its Republican majority, the real gatekeeper as to U.S. negotiation of the Treaty. Any negotiation at the international level took place at the presence of a ‘stone guest’. U.S. diplomacy could not put forward proposals and arguments without taking into account the opinion of the Senate, which had the last word over any decision related to the ICC Treaty.

This strategy intensified during the last two years of the Clinton Administration when Republicans started to fear that the President could have been still willing to sign the Treaty, as he eventually did, and when they understood that staying out of the Court could have not been enough to protect U.S. citizens. Especially on reason of the ICC jurisdiction over non-party states, non-ratification was seen as only the first step of a strategy that required zero collaboration and active boycott. For this reason, in June 1999, the Republican majority managed to pass a “Foreign Relations Authorization Act” (S. 886 2000-1), which contained two decisively anti-ICC sections. Section 821 provided that no funds could be appropriated for support of the ICC unless the U.S. became a party to the Treaty. The second incorporated into the Bill previous proposals to prohibit extradition of U.S. citizens to the Court.¹⁰⁷⁸ These provisions not only had the intention to limit the impact and the reach of the ICC on the U.S., especially for what concerned its foreign policy. They also made clear that no U.S. government could have legally collaborated with the Court as a non-signatory from any political,

¹⁰⁷⁸ “Foreign Relations Authorization Act” (S.886), Sections 821-2, *Congressional Records*, Senate, 106th Congress, First Session, June 24 1999, 14346.

economic, or technical point of view.¹⁰⁷⁹

All these intentions rally around the piece of legislation that soon became the flag of Republican opposition against the ICC. In June 2000, Helms introduced in the Senate a Bill whose title read: “Protection of United States military personnel and other elected officials of the United States government against criminal prosecutions by an international criminal court to which the United States is not party.”¹⁰⁸⁰ It was the ASPA Bill, which would become particularly famous during the Bush Administration. Committed to its approval, Republicans presented on the same day a similar version of the Bill in the House of Representatives.¹⁰⁸¹ Officially, the trigger was the will to protect U.S. citizens from a Treaty that was demanding enough to claim jurisdiction even over nationals of third states. In fact, it was much more than that.

ASPA soon became a symbol for all those isolationist forces that viewed with suspicion multilateralism, international institutions, and limitations of U.S. sovereignty. After eight years of Democratic Administration, which had conducted a foreign policy mostly based on integration of U.S. economy in the international system and on participation of U.S. military forces to peace and humanitarian operations, isolationists identified ASPA as a great opportunity to be back in the game of U.S. politics. Recalcitrance toward international norms and faith in a unilateralist foreign policy would find their definite legitimization with the Bush Administration.

ASPA basically prohibited any form of cooperation with the ICC: ““no agency or entity of the United States Government or of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court.”¹⁰⁸² This means the U.S. government could not work with the ICC as to arrest, extradition, and transit of suspects. Collaboration was also prohibited in terms of legal assistance and ICC investigations on U.S. soil. Moreover, in order to guarantee protection of U.S. service members deployed abroad during peace operations, the proposed Bill requested that the President make sure that “each resolution of the Security Council authorizing a peacekeeping operation pursuant to chapter VI or VII of the Charter of the United Nations permanently exempts United States military personnel participating in such peacekeeping operation from criminal prosecution by the International Criminal Court.”¹⁰⁸³ In case the President could not make evidence available to the Congress that this

¹⁰⁷⁹ See also, *Congressional Records*, Senate, 106th Congress, First Session, 1 July 1999, S8164; 3 November 1999, 28110.

¹⁰⁸⁰ Jesse Helms (R-North Carolina), *Congressional Records*, Senate, Second Session, 14 June 2000, 10675.

¹⁰⁸¹ Tom Delay (R-Texas), “American Service-Members Protection Act” (H.R. 4654), *Congressional Records*, House of Representatives, Second Session, 14 June 2000, 10903.

¹⁰⁸² *Congressional Records*, Senate, 106th Congress, Second Session, June 14 2000, 10676.

¹⁰⁸³ Cit, 10677.

exemption had been granted, participation of U.S. troops to this kind of operations would have been illegal.

The Bill also prohibited the “direct or indirect transfer of certain classified national security information” to the Court together with banning U.S. military assistance to parties to the ICC, except for NATO members and “major non-NATO allies.”¹⁰⁸⁴ Finally, the most controversial provision authorized the President to “use all means necessary and appropriate to bring about the release from captivity of any person...who is being detained or imprisoned against that person’s will by or on behalf of the International Criminal Court.”¹⁰⁸⁵ This Bill had Helms as main sponsor but found the support of most Republican leaders, such as Majority Leader Trent Lott, the Chairman of the Senate Armed Services Committee John Warner, Chairman of the Senate Judiciary Committee Grams Hatch, the Chairman of the Senate Intelligence Committee Richard Shelby. Moreover, it was endorsed by leading Republican members of the House.¹⁰⁸⁶

As Helms explained in the Committee, ASPA’s main goal was to “make certain that the United States does not acknowledge the legitimacy of the ICC’s bogus claim of jurisdiction over American citizens.”¹⁰⁸⁷ Republican leaders wanted to mark the difference between their policy of total rejection and the strategies of ‘good neighborhood’ and ‘benign neglect’ put forward by the Presidency and the State Department. As Helms argued, since the U.S. was dealing with a Court “without checks, without balances, accountable to no state or institution for its sanctions or actions”, it was necessary to affirm that “the United States will fight any institution, which claims to have the power to override the U.S. legal system.” Through ASPA, Republicans refused to “let our soldiers and government officials be exposed to trial for promoting the national security interests of the United States.”¹⁰⁸⁸

Republicans saw ASPA approved by Congress later in 2001, when the White House was occupied by a President who shared their opposition against the ICC. However, ASPA caused more than one difficulty to the Clinton Administration too, which had to devote considerable energy to

¹⁰⁸⁴ The Bill explicitly referred to Australia, Egypt, Israel, Japan, The Republic of Korea, and New Zealand; cit., 10677.

¹⁰⁸⁵ Cit., 10677.

¹⁰⁸⁶ The House version of the Bill was sponsored by: House Majority Leader Dick Armey (R-Texas), Chair of the House Republican Conference J. C. Watts (R-Oklahoma), Roy Blunt (R-Missouri), Tillie K. Fowler (R-Florida), Deborah Pryce (R-Ohio), Christopher Cox (R-California), David Dreier (R-California), Floyd Spence (R-South Carolina), Chair of House Committee on International Relations Benjamin A. Gilman (R-NY), Porter Goss (R-Florida), Henry Hyde (R-Illinois), Bob Stump (R-Arizona), Chris Smith (R-NJ), Bob Barr (R-Georgia), Robert Aderholt (R-Alabama). See also, “Statement of Chairman Benjamin A. Gilman”, Hearing on the International Criminal Court in “The International Criminal Court”, Hearings Before the Committee on International Relations House of Representatives, 106th Congress, Second Session, Washington, D.C, July 25 and 26, 2000, 78.

¹⁰⁸⁷ Jesse Helms (R-North Carolina), cit., 2.

¹⁰⁸⁸ Cit., 3.

counter-arguing against the proposed Bill.¹⁰⁸⁹ Moreover, it diminished the credibility of U.S. delegation at the PrepCom. For many delegations, ASPA became the proof of U.S. impossibility of considering ratification of the ICC Treaty and consequently the indicator of the pointlessness of any diplomatic concession to Washington.

This was the story of the impossibility of the Clinton Administration, which devoted much time and energy to international justice, of obtaining U.S. participation to the most important multilateral achievement on the issue. This impossibility found its origins in a combination of domestic factors that are typical of U.S. political system and are often able to constrain and shape its foreign policy-making. Competition among foreign policy bureaucracies, especially the State and Defense Departments, and dynamics of divided government decisively determined U.S. rejection of the ICC Treaty. The difficulties for the Administration to work on the issue by acting as a sole body, due to opposition coming from the military and defense community, united with a long period of Republican dominance of Congress. This was particularly unfortunate given Senate's authority to consider and ratify most international treaties.

These political contingencies prevented the President and the State Department from finding a diplomatic solution to their objections and allowed the Pentagon and the Republican Party to act as the ultimate gatekeepers and take responsibility of keeping the U.S. out of the Rome Court. The analysis of the actions, strategies, and arguments provided by the Presidency, the State Department, and most Democratic Party cannot automatically lead to arguing that different political conditions would have certainly allowed U.S. acceptance. But they constitute good leads to suspect that U.S. opposition to the ICC is not the result of supposedly persistent cultural conditions, such as the Constitution or its sovereignty-oriented dominant interpretation. It, rather, depends on what kinds of political forces and ideas find themselves in the position to have the last word in the decision-making process.

7.6 Conclusions

This chapter has explained that the main reason for U.S. rejection of the ICC has to be found in the 'institutional setting' that characterized U.S. political system in the second half of the 1990s. U.S. foreign policy-making is not always a centralized process in which the President and his closest collaborators are able to achieve the policies they choose. Especially after the end of the Cold War, presidential pre-eminence has probably not even been the main feature of U.S. foreign policy. As

¹⁰⁸⁹ See section 4.3.

Eugene Wittkopf and James McCormick have provided, U.S. foreign policy tends to be the result of the interaction between three concentric circles. The first is composed of the President and his closest political appointees. The second includes the various departments and agencies that constitute the executive branch, such as the Defense and State Departments. Finally, the third is composed of congressional actors, such as Majority and Minority leaders, the speakers of the House and Senate, and the Committees that deal with foreign and defense policies, namely the Foreign Relations and Armed Services Committees.¹⁰⁹⁰

This complex institutional structure can decisively determine the orientation of the state as to international norms and legal arrangements that involve the limitation of U.S. sovereignty. Competition among foreign policy bureaucracies and the type of relations that exist between the executive and the legislature become crucial explanatory factors, especially for processes of recognition or rejection of international norms that have reached a high level of international institutionalization. In those cases, the position of the country toward such norms depends on complex processes of domestic consideration and ratification that largely involve legislative actors.

In the case of the ICC Treaty, U.S. attitude decisively depended on those actors that are vested with the authority to submit U.S. sovereignty to international agreements. This mostly meant the Senate and its Committee on Foreign Relations. Given the role of gatekeeper that the Constitution assigns on the Senate as to international treaties and conventions, the situation of divided government, with Republican controlling both branches of Congress, fundamentally constrained the strategy of the Administration to remain engaged with the Court and find a diplomatic solution to its objections to the Treaty. Republican senators opposed the Rome Court and the policy of the Administration from the very start of the domestic and international debates. Thanks to the majority that they obtained at the 1994 Midterm Elections, they were in the position to determine U.S. attitude toward the issue. Thus, they decided to lead the country toward total rejection of this major international mechanism for enforcing the norm of international criminal responsibility.

Enjoying the informal support of the Defense Department, Republicans prevented the U.S. from finding a diplomatic compromise on the Court, undermined the Administration's strategy of engagement with the other delegations, and created obstacles to any form of external collaboration. Once again after the Anti-Landmine Treaty, the Kyoto Protocol, and the Comprehensive Test Ban Treaty, Congress determined U.S. rejection of widely recognized international norms, despite the internationalist mindset of the Clinton Administration. This conclusion has important implications not

¹⁰⁹⁰ Eugene R. Wittkopf and James M. McCormick, *The Domestic Sources of American Foreign Policy*, 129.

only for the study of processes of domestic acceptance of international norms but also for the analysis of domestic determinants of U.S. foreign policy.

The debate on the ICC shows that U.S. recalcitrance toward international legal arrangements and limitations of sovereignty does not necessarily depend on structural and persistent conditions of U.S. politics, such as the necessity to pursue global interests or the presence of a traditionally conservative constitutional culture. Although it is true that its status in the international system can make the U.S. more likely to oppose multilateral legal arrangements, 'realist' explanations locating the causes of U.S. rejection of the ICC in its national interests only tell one part of the story. For example, these arguments do not explain cases of U.S. acceptance, sometimes even with a leadership role, of important international treaties. Moreover, they do not explain why U.S. allies, such as the UK and France, that deploy large contingents of troops abroad and pursue national interests of international scale, did not manifest particular opposition against the ICC or other recent multilateral treaties. In a similar way, the undeniable high barriers that the U.S. Constitution creates against the limitation of sovereign powers in favor of international organizations cannot fully explain Washington's attitudes as to international treaties, which have been historically ambivalent but not universally negative.

Rather, U.S. attitude as to the ICC, and in general international treaties, is mostly the result of contingent conditions that can change over time. It depends on what kinds of political forces and ideological frameworks are able to win those political posts that allow acting as gatekeepers or ultimate determinants of U.S. will. Institutional conditions are somehow more relevant in the U.S., in which cohabitation of ideologically different Administrations and Congresses is often common and where competition among a vast array of foreign policy agencies tends to be the rule rather than the exception. By contrast, parliamentary democracies, such as the UK, where a stronger fusion of power between government and its parliamentary majority constitutes the most common feature of the decision-making process, present lower institutional barriers to the acceptance of international legal commitments. Such barriers are qualitatively higher in the U.S. system where most international treaties require the approval of a 2/3 qualified majority of Senate, which does not necessarily have the same political orientation of the Administration.

Nevertheless, even such a complex institutional structure is capable of providing change in the way international norms are viewed and confronted. As said, U.S. attitudes toward international law have certainly been characterized by ambivalence but have not been univocally skeptical or opposed. In 1920, the then Conservative-led Senate was the main domestic actor to prevent the Wilson Administration from fulfilling its internationalist projects. In 1945, the U.S. was among the main

supporters of the updated version of that Treaty, which is the U.N. Charter. In 1948, the U.S. failed to accede the Genocide Convention because of its objections to the way the Treaty envisaged the international prosecution of that crime. In 1988, after a 40-year battle in the Senate, Washington finally accepted the Convention, although with several reservations. In the 1990s, the Clinton Administration made the U.S. one of the most receptive states toward emerging norms of economic liberalization and consistently promoted and acceded the WTO and the NAFTA, notwithstanding bipartisan opposition from trade unions and neo-isolationists.

In the light of this evidence, U.S. attitude on the ICC is not deemed to be one of opposition. As with any other international treaty it will mostly depend on the degree of cohesiveness of the Administrations and on the type of relations between the executive and the legislature. In particular, it will depend on the political majority that characterizes Senate and on the type of collaboration and alliances that the Administration is able to build at the legislative level. The presence of a strongly isolationist Republican majority, such as the one that the Clinton Presidency had to face, is likely to frustrate the attempts of any Administration that is committed to the ICC. By contrast, the prevalence of a more internationalist political majority, available to submit U.S. sovereignty to widely accepted international norms, is likely to open opportunities for a change of policy.

For reasons whose explanation would go beyond the scope of this chapter, internationalist interpretations of the post-Cold War era, which identified international normative frameworks as the most viable instruments to create a more integrated and prosperous international community, did not find adequate domestic support in the late 1990s U.S.¹⁰⁹¹ Despite the presence of President Clinton and Secretary of State Albright, who strongly believed in the benefits of the international rule of law, important foreign policy issues were resolved according to the preferences of a new generation of Republicans that primarily focused on the protection of U.S. sovereignty and opted for more unilateral policies.

The reason why they won the debates on the ICC and other international treaties rested on their capacity to transform conservative and isolationist ideas in actual policies. Holding the keys of Senate and counting on the informal support of the military community put these forces in the condition to act as gatekeepers and determine the final outcome. The struggle between nationalist and internationalist interpretations of U.S. foreign policy could only conclude with the victory of the former.

Nevertheless, a change in the relations between the executive and the legislature or the electoral

¹⁰⁹¹ For an analysis of possible reasons, see Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Alfred A. Knopf, 2001): 289-90.

emergence of a more liberal and progressive congressional coalition could reverse these kinds of policies that are not usually prone to dramatic and sudden change but are not even characterized by indefinite and irreversible persistence.

8 CONCLUSIONS

The international system presents a large variety of international norms. From international trade to human rights enforcement, from environment protection to international monetary transactions, it would be wrong to view international politics as an exclusively anarchic realm in which force constitutes the only criterion to organize relations among states. However, in addition to the lack of a centralized authority of enforcement, one of the problems is that international norms are not equally developed and institutionalized. Some have reached a high level of precision and clarity and can potentially command international action in a fairly legitimate and efficient way, such as the articles contained in chapter VII of the UN Charter regulating the use of force. Others are still in an emergent status, meaning that they are yet to obtain full recognition in the form of an international custom or treaty. This is the case, for example, of the use of force across state borders for humanitarian purposes even in the absence of a Security Council resolution.

Experts of international norms have been aware of the different levels of institutionalization that characterize international norms and have reflected upon the results that such differences can produce. For example, Wiener has usefully distinguished between fundamental norms constituting the “glue” of the international community, such as sovereignty, human rights, and non-intervention, organizing principles, such as proportionality and mutual recognition, and finally standardized procedures, such as qualified majority voting or proportional representation.¹⁰⁹² Not too differently from Wiener, scholars of international legalization have highlighted important differences between institutionalized and softer forms of international norms. The former are mostly contained in international conventions that have obtained the ratification of most important states. The latter refer to basic guidelines and principles of action that do not formally bind international actors but can favor the diffusion of common practices and lead to further international institutionalization through the development of customs or the conclusion of new treaties.¹⁰⁹³

These authors usually identify such differences as the main reasons for contestation and recognition of international norms. Different levels of institutionalization would lead to different responses in terms of recognition and legitimacy. Basic and broad principles of human rights enforcement are still largely contested because of their scant level of international institutionalization.

¹⁰⁹² Antje Wiener, “Enacting Meaning-in-use” (2009): 184.

¹⁰⁹³ Miles Kahler, “Conclusion: The Causes and Consequences of Legalization”, 680.

By contrast, international agreements regulating for example trade or arms control can count on larger international consensus given their more advanced legal nature. The identification of a qualitative difference between institutionalized and emerging norms usually concludes with praise for the former as instruments capable of precisely and more legitimately guide international behavior.

This work contributes to the literature on state response to international norms and processes of norm diffusion. It does so by starting from the observation that even in the age of globalization and post-national speculations, the consensus of nation-states is the main condition for the legitimacy and prominence of norms at the international level. In particular, it agrees with the idea that different levels of international institutionalization can produce different results, especially in terms of state response to international normative frameworks. Nevertheless, it takes issue with the notion that fully or highly institutionalized norms would bring about more possibility for favorable state response, and in general larger international consensus. As the case of U.S. rejection of the ICC Statute shows, norms that have reached a high level of international institutionalization, such as international criminal responsibility, do not necessarily facilitate positive state response. Despite the worldwide prestige and recognition reached by the norm, various and important states did not give up the chance to forcefully contest the Rome Statute and opted for staying out of its jurisdiction.

In sum, being an emergent or institutionalized international norm neither precludes nor secures state and international support. Depending on the issue at stake and on the structure of the international debate, even institutionalized norms can encounter significant opposition. Equally, emerging international norms can at times be enthusiastically invoked by states and organizations. This means that different levels of institutionalization do not necessarily determine the legitimacy of international norms. Different levels of institutionalization, rather, have important effects on processes of domestic interpretation. In particular, they determine what type of domestic actors will be able to shape state positions toward international norms. In a way, different characteristics of international norms affect the capacity of domestic actors to determine the favorable or non-favorable response of states toward norms.

This work searches the conditions for state support and rejection of international norms through an analysis of the domestic actors that are capable of determining state positions toward international normative frameworks. It concludes that interpretation of emerging and partially undefined norms is mostly the prerogative of those who occupy key positions at the executive level. These characters have the resources and responsibility to interpret norms that, given their scant level of precision, especially in terms of procedures, often require the creation of innovative and unforeseen mechanisms of action.

For instance, the recognition of humanitarian intervention as a viable framework of behavior during the Kosovo crisis required the development of an unconventional normative discourse capable of commanding action even in the absence of Security Council support. NATO leaders, in particular President Clinton and Prime Minister Tony Blair, provided an interpretation that justified the legality of using force in terms of necessity and justice. Facing a lack of procedures to overcome Security Council opposition, especially the one of some permanent members, NATO governments presented intervention as a necessity to fill the gap between an insufficient legal framework that provides few instruments to solve ongoing and massive humanitarian crises and the morality of punishing gross human rights violators. This interpretative process involved a fairly large amount of arbitrariness and creativity to which leaders are generally more able to resort, especially in the foreign policy realm. Acting as normative entrepreneurs, leaders are the domestic actors that most likely make use of ‘destructively creative’ interpretations, capable of reaching those areas that emerging and incomplete norms cannot regulate.

Any normative system requires that choices be made between competing sets of norms. These choices can at times imply almost intractable issues. Domestic systems usually solve problems of interpretations by resorting to third party actors, such as courts and independent regulative agencies. In the international system these types of authorities are mostly lacking. This absence was apparent during the Kosovo crisis when the international community needed to decide between the duty to protect human rights and the obligation to use force only through a Security Council resolution. Existing international law did not provide a clear solution to solve the impasse. The two sets of norms – prohibition to intervene in the absence of proper authorization and transboundary action to enforce human rights – represented a dilemma whose resolution was not made available by adequate international procedures. Only state leaders had the force and authority to provide a winning and partially arbitrary interpretation and take action. Political leaders acting at the executive level are the domestic actors that most contribute to shape and determine the destiny of these emerging and partially undefined norms.

By contrast, international norms that are precisely codified and institutionalized into agreed upon international regimes, such as those contained in international treaties and conventions, trigger processes of domestic interpretation that involve a larger number of actors, most notably legislative institutions and political parties, which are the main vehicles of legislation within democratic regimes. Invocation or contestation generally depends on the passing of domestic legislation, which is necessary to determine the position of the state toward these types of norms. This favors the crucial participation

of actors that are responsible for consideration and ratification of international normative mechanisms. When interpreting these types of norms, the main gatekeepers of the process are located at the legislative level. Structure of party politics and characteristics of the relationships between the executive and the legislature can decisively shape state response in one sense or the other. This does not constitute an insurmountable problem in parliamentary democracies, such as the UK, where the strong fusion of interests between the government and its majority usually allows for non-traumatic approval of proposed legislation. It can become a serious constraint in those regimes, such as the U.S., in which the executive and the legislative powers are more neatly separated in terms of elections and functions.

A separate observation needs to be made for civil society movements. Contrary to popular impression, NGOs, think tanks, advocacy movements, and interest groups do not significantly contribute to processes of domestic interpretation of international norms. Some of them might contribute to the development and sponsoring of international norms but remain neutral as to their application and implementation, as was the case during the debate on whether to use force against the Federal Republic of Yugoslavia. In other cases, they show a tendency to dramatize interpretative debates, either toward recognition or rejection, to the point that their proposals remain difficult to implement and their voices consequently neglected. Even though they sometimes decisively contribute to the prominence of norms at the international level, civil society movements still manifest difficulties at facing the complexities of domestic mechanisms of interpretation. Their impact on domestic debates is, thus, often insufficient.

These conclusions mean that whether an international norm is characterized by a large level of precision and clarity or is it still in an emergent status makes considerable difference in terms of domestic recognition and state support. Since they trigger different mechanisms of domestic interpretation, some norms depend for their legitimacy on executive leaders, while others involve a larger number of actors and need to go through more routinized and established procedures of enactment or rejection. This poses important questions on the desirability of processes of international institutionalization as opposed to diffusion of softer and more flexible forms of international norms. What kinds of normative frameworks are more likely to contribute to the consolidation of an international system in which state actions are, at least partially, driven by rules and procedures? Is 'hard' institutionalization more functional to the diffusion and recognition of international norms? Or, given the complexity and decentralized nature of the international system, should we better consider softer, less intrusive, but also more arbitrary forms of international norms? The impact of differently

institutionalized norms can be observed by looking at normative frameworks, such as RtoP, that contain several international norms.

In the last few years, scholars and policy-makers had to face the issue of how to consider RtoP in international normative terms. Is it a precise and developed legal norm? Or is it rather a set of soft laws providing flexible guidelines for action? Skeptics have not hesitated to label RtoP as a “political catchword that gained quick acceptance because it could be interpreted by different actors in different ways.”¹⁰⁹⁴ Along these lines, Rtop needs further clarification and legislation and cannot be yet considered as a real international norm. This type of analysis was reinforced by the non-binding character of the resolution passed by the General Assembly in 2005 on the results of the World Summit Outcome. For others, such as Alicia Bannon, the World Summit Outcome has augmented the legal basis for the limited use of force in case of UN failure to intervene.¹⁰⁹⁵

Most observers, such as Bellamy and Luke Glanville, prefer to take a middle-of-the-road position that seems to better reflect the complexities of the international system. They disaggregate the content of RtoP in order to conclude that in terms of protection of their own population from massive violations of human rights, “states have a peremptory legal responsibility to protect.”¹⁰⁹⁶ By contrast, in terms of actual measures to be taken to prevent or stop violations, and especially with regards to the use of force across state borders, Rtop still suffers from problems of indeterminacy. This equals to say that as to enforcement, RtoP is still in an emergent and scantily institutionalized status, in the sense that “it is seldom – if ever – clear what RtoP requires in a given situation.”¹⁰⁹⁷ Problems of interpretation and lack of international consensus would make it that the set of norms concerning the solution of human rights crises requires further debate and agreement.

What is important to notice is that many states, especially the most powerful, tend to prefer a flexible approach to the use of force. During debates on the World Summit Outcome U.S. ambassador at the UN Bolton criticized the attempt to establish an obligation for states to intervene when another state fails to protect its own citizens. Instead of a legal responsibility, Bolton obtained that the use of force for humanitarian reasons be considered as a “moral responsibility” to stand ready for possible collective action under chapter VII.¹⁰⁹⁸ This position was substantially confirmed by Ambassador

¹⁰⁹⁴ Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, 102.

¹⁰⁹⁵ Alicia L. Bannon, “The Responsibility to Protect: The UN World Summit and the Question of Unilateralism” *The Yale Law Journal*, 115 (2006): 1157-65.

¹⁰⁹⁶ Alex Bellamy and Ruben Reike, “The Responsibility to Protect and International Law” in *The Responsibility to Protect and International Law*, 99-100.

¹⁰⁹⁷ Cit. 219.

¹⁰⁹⁸ Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome Document

Susan Rice, subsequently appointed by the Obama Administration.¹⁰⁹⁹ The result were articles 138-9 of the document that do not provide a legal obligation to intervene but rather a flexible principle to consider resorting to all means necessary in case of humanitarian crisis.¹¹⁰⁰ This approach presents both weaknesses and strengths that are discussed in the remainder of this conclusion.

The different effects of institutionalized and emerging norms of RtoP could be already noticed during the debate on the Darfur crisis. In particular, U.S. attitude reflected the different results that emerging and institutionalized norms can produce in terms of state response and domestic interpretation.

The civil war that started in 2003 between the Sudanese Liberation Movement and the Sudanese government soon reached a peak of violence that could have potentially justified intervention by the international community. The use by the government of the irregular *janjaweed* militias against the population of Darfur certainly qualified as failure to protect a part of the Sudanese population. Many conditions seemed to warrant a military intervention similar to the one carried out in Kosovo only four years before.

The issue was largely debated in the U.S. Important domestic actors, primarily the Congress, passed much legislation that strongly condemned the modus operandi of the Sudanese government in Darfur. Congress also authorized the President to impose a wide array of sanctions against the government, and most importantly declared that “the atrocities unfolding in Darfur, Sudan are genocide.”¹¹⁰¹ Concurrent resolutions denouncing genocide in Sudan were passed by the House of Representatives and the Senate alike.¹¹⁰² In both cases, they found the unanimous approval of the two branches of Congress.

During the confused debate on the Kosovo crisis, U.S. Congress had never passed a resolution containing the word ‘genocide.’ This could have an important impact on the debate for at least three reasons. First, genocide refers to a specific bulk of international legislation that can potentially trigger uncontested international action. The Convention against Genocide was concluded in 1948 and the U.S.

Being Prepared for the High Level Event on Responsibility to Protect, 30 August 2005, available at http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf.

¹⁰⁹⁹ Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the UN Security Council and the Responsibility to Protect, at the International Peace Institute Vienna Seminar, June 15, 2009, available at http://www.usunnewyork.usmission.gov/press_releases/20090615_126.html.

¹¹⁰⁰ United Nations General Assembly, “Resolution Adopted by the General Assembly on the 2005 World Summit Outcome”, 24 October 2005, para. 138-9.

¹¹⁰¹ *Congressional Records*, Senate, 108th Congress, 2nd Session, S. Con. Res. 133, July 22 2004, available at http://www.savedarfur.org/pages/passed_legislation.

¹¹⁰² In addition to the resolution cited in the previous note, see *Congressional Records*, 108th Congress, 2nd Session, H. Con. Res. 467, September 7 2004, available at http://www.savedarfur.org/pages/passed_legislation.

became part in 1988. Moreover, the Rome Statute of the ICC identifies genocide as one of the most obnoxious crimes of concern to the international community as a whole. Finally, genocide is clearly indicated by the General Assembly resolution on the World Summit Outcome as one of the main crimes from which each state has the duty to guarantee protection to its own population.¹¹⁰³ This would identify sufficient basis to promote military action at the Security Council.

Nevertheless, military action never took place. Despite the gravity of the situation and congressional responsibility as to the commitment of U.S. military force, the U.S. legislature operated in a similar way as to Kosovo. Responsibility for deciding how to interpret the right to intervention for humanitarian purposes was delegated to the Bush Administration, that is to say to the executive leadership. Given the emerging and undefined nature of the norms on the use of force to prevent or stop human rights violations, it was once again for world leaders to decide the destiny of an affected population. Despite President Bush and Secretary of State Colin Powell's recognition of the magnitude of humanitarian violations in the region¹¹⁰⁴, the Republican Administration did not call for the use of force. The large involvement of U.S. troops in Afghanistan and Iraq presumably constituted one of the main reasons for non-intervention. What is interesting to notice is that in this case too, the emerging norm of intervention for humanitarian purposes was mostly shaped and interpreted – this time toward non-intervention – by executive leaders that for various reasons did not warrant the development of troops.

Violence in Darfur activated a further normative framework, which is international criminal responsibility. On 31 March 2005, Security Council passed Resolution 1593, which referred the Darfur situation to the Prosecutor of the ICC.¹¹⁰⁵ This outcome was mostly made possible by U.S. decision to abstain during the vote. Despite its strong opposition to the ICC, the Bush Administration did not prevent the international community from referring the situation to the newly created Court. Nevertheless, U.S. abstention came at the end of a debate that reflects diffused domestic attitudes toward the Court. Such attitudes are described in chapter 7 and are likely to undermine international support for the Court and its normative system.

When the Darfur issue started to be debated, the U.S. was characterized by a congressional majority that strongly opposed the ICC. In August 2002, Congress passed the American Service

¹¹⁰³ United Nations General Assembly, "Resolution Adopted by the General Assembly on the 2005 World Summit Outcome", cit.

¹¹⁰⁴ See for example, U.S. Secretary of State Colin Powell, 9 September 2004; U.S. President George W. Bush, 9 September 2004.

¹¹⁰⁵ United Nations Security Council, Resolution 1593 (2005), 31 March 2005, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>.

Members Protection Act, which banned any form of collaboration with the Court's jurisdiction. This aggressive attitude had already forced the previous Clinton Administration not to submit the ICC Treaty to the Senate for consideration. Antipathy against the Court maintained strong under the Bush Administration. For this reason, the U.S. initially proposed the creation of an ad hoc tribunal under UN authority in order to tackle the Darfur crisis.¹¹⁰⁶ In the end, the pragmatic attitude of Secretary of State Condoleeza Rice led to U.S. abstention and to the referral of the situation to the ICC.

U.S. failure to guarantee full support to ICC action in Darfur was the consequence of congressional opposition to the Court, which ruled out any possibility of U.S. participation. The outcome allowed by U.S. abstention should not delude about the future of the ICC and international criminal responsibility.

First, the price to be paid for U.S. abstention was the introduction in the resolution of a provision that recognizes that "states not party to the Rome Statute have no obligation under the Statute."¹¹⁰⁷ This passage legitimized one of the main grounds of U.S. opposition against the Court, such as rejection of ICC jurisdiction over citizens of states that have not ratified the Treaty. This indirectly undermined the ICC Statute itself that explicitly provides the Court with jurisdiction over any State party "on the territory of which the conduct in question occurred" regardless of the nationality of the accused¹¹⁰⁸. Second, the U.S. made sure that no UN funds could be appropriated in order to support ICC action in Darfur. In order to avoid the use of U.S. contributions to the UN budget, it was decided that the ICC could only rely on its own resources and on voluntary contributions.¹¹⁰⁹

Finally, U.S. non-participation certainly made ICC's life more difficult in spite of its benign behavior as to the Darfur resolution. As has been recalled, the Court depends for investigation and execution on the financial, police, and logistic support of member states. U.S. denial to ratify the Statute prevents the Court from taking advantage of the crucial support of one of the most powerful states. This has not facilitated ICC's action against the Sudanese government. Despite reiterate invitations by the ICC to arrest Sudanese Omar Al-Bashir, the leader is still President of his country.

In conclusion, without neglecting the pragmatism of its abstention on the issue, U.S. persistent opposition against the ICC risks compromising the prospects for the enforcement of one of the most developed human rights norms, such as international criminal responsibility. This outcome is partially the result of the characteristics of the norm itself. Its highly institutionalized character certainly gives

¹¹⁰⁶ Benjamin N. Schiff, *Building the International Criminal Court*, 176.

¹¹⁰⁷ United Nations Security Council, Resolution 1593 (2005), *cit.*

¹¹⁰⁸ Rome Statute of the International Criminal Court, art. 12.2(a).

¹¹⁰⁹ Benjamin N. Schiff, *cit.*, 176.

prominence to the norm but also subjects its recognition to the ratification procedures of domestic systems. In the U.S. case, this has so far meant rejection, given the constitutional provisions that allow Senate minorities to boycott a number of international treaties. Paradoxically enough, when international justice was still constituted by a set of emerging norms, the U.S. was among its main advocates, as in the case of the ICTY and the ICTR. Now that it has reached a high level of institutionalization and that participation requires domestic ratification of a complex treaty, the U.S. has come to be viewed as one of the main critics of international justice.

Events like Darfur help identify the main points of an international debate on the most efficient and legitimate way of consolidating an international normative system capable of adequately tackling the challenges of contemporary international relations. Such a debate requires further analysis able to clarify the advantages and disadvantages of highly institutionalized international norms and softer and more flexible forms of international legislation. Is norm-oriented behavior more facilitated by the former or by the latter?

Present scholarship seems to prefer international institutionalization as the main guarantee of compliance with and recognition of international norms. Wiener has for example observed that “the most contested norms are the least specific, that is the fundamental norms.”¹¹¹⁰ Emerging and undefined norms are often viewed as triggering larger processes of contestation and rejection, given their lack of precision and clarity that would pave the way for interpretative disagreements. Along these lines, scholars of legalization argue that “greater institutionalization implies that institutional rules govern more of the behavior of important actors.”¹¹¹¹ Permitting and prohibiting action in a more precise way, institutionalized norms are seen as a precondition for rule-based behavior.

Nevertheless, there is also awareness of the potential benefits of softer forms of international norms. For example, Kahler has observed that in some cases “harder legalization among a club of governments that share a normative consensus” can be difficult to achieve. This requires the consideration of soft law “to cast normative net more widely, building as broad a coalition as possible.”¹¹¹² This is the approach that state leaders seem to prefer. When asked about the possibility of developing precise norms of humanitarian intervention, for example through an international treaty, President Clinton provided that it would be difficult to devise “a requirement of international law or a

¹¹¹⁰ Antje Wiener, “Enacting Meaning-in-use”, 185.

¹¹¹¹ Judith Goldstein, Miles Kahler, Robert O. Keohane, and Marie Slaughter, “Introduction: Legalization and World Politics” *International Organization*, Vol. 54, No. 3 (Summer 2000): 387.

¹¹¹² Miles Kahler, “Conclusions: The Causes and Consequences of Legalization”, 679-80.

justification for military intervention.”¹¹¹³ This statement not only highlighted the impossibility for the U.S. to intervene in every civil conflict involving massive violations of human rights. It also underlay the difficulty at solving sometimes intractable issues, such as infringing sovereign borders for humanitarian purposes through the abstract and general principles of international legislation.

Precise and institutionalized international norms can theoretically provide for more ordered and legitimate behavior. But they also provide international law with tasks that can only be performed by finding domestic consensus for action. Intervening in far away contexts of war requires the deployment of troops that can only be committed through national decisions. This can be, and has often times been, a particular difficult goal. International law would find itself in the uneasy position of commanding actions that domestic systems need to legitimize. This risks making international law a legitimate international authority without instruments of enforcement. More importantly, it risks subjecting consensus for action to the complexities of extremely diverse institutional, political, and cultural systems.

By contrast, emerging and undefined norms can allow for more flexible action, less subject to the technicalities of domestic systems and more based on the will of resourceful and committed state leaders. This could potentially provide for a more problem-solving and case-by-case approach that, without needing to be subjected to the ratification procedures of a Senate or a parliament, could guarantee more decided action. Nevertheless, this could also augment the chance for interested and malicious use of force, enacted more to pursue hidden agendas than for impartial reasons of justice.

Further analysis of the pros and cons of both types of normative action is what should motivate scholars of norms and international law. A world of centralized authorities might be too much for present international system as well as a world in which the interpretation of norms is left to individual norm entrepreneurs might be too little. Wherever the final answer lies in this hypothetical spectrum of opportunities, policy-makers and scholars of norms alike will need to take into serious account the mixed blessing of any international system, which is its diversity of interests and conceptions of justice. Any effort to build a more democratic and norm-oriented international system cannot afford neglecting such a political reality.

¹¹¹³ President Clinton, “Remarks at a Democratic National Committee Luncheon in San Diego” *Public Papers of the President*, May 16 1999, 919.

9 BIBLIOGRAPHY

The empirical chapters are based on a large variety of documents that are not indicated in this bibliography for reasons of space. However, they are indicated in the footnotes of each chapter. Most sources come from national archives in the United States and the United Kingdom and include governmental documents, parliamentary proceedings, and civil society campaigns.

United Kingdom:

For Parliamentary debates in the House of Commons and Reports of the Foreign Affairs and Defence Committees, see www.parliament.the-stationery-office.co.uk/pa/cm/cmhansrd.htm.

For Parliamentary debates in the House of Lords, see www.parliament.the-stationery-office.co.uk/pa/id199697/pdun/home.htm

For collections of speeches and public statements by Government's members, see www.fco.gov.uk, www.direct.gov.uk, <http://www.number10.gov.uk/Page1297>, and <http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm>.

Most material in these archives is available on the internet. However, some can be only accessed via the British Library.

For civil society movements, most documents (memoranda, press statements, working and briefing papers, annual reports, statements before the Parliament, media appearances, and various other publications) have been recovered at the websites of the main organizations involved. Other documents giving account of the debate between civil society movements and governmental and parliamentary representatives have been obtained through direct requests to the British government under the Freedom of Information Act.

United States:

Proceedings of U.S. Congress and Defense, Foreign Affairs, and Armed Forces Committees, together with a large variety of statements and hearings by executive leaders, members of Congress, civil society movements and members of the Administration, belong to various collections held by the Library of Congress in Washington, D.C. The most important collections are *The Congressional Quarterly Almanac* (available at <http://library.cqpress.com/cqalmanac>), which contains articles and analyses on the main congressional proceedings, *Congress Press Releases* (available at www6.lexisnexis.com), and *Congressional Records* (available at www.gpoaccess.gov or

www.thomas.loc.gov). Note that most material in these archives can be only accessed via the Library of Congress.

Presidential and White House documents, including congressional statements, press releases, press conferences, executive orders, proclamations, appointments, remarks, communications to Congress, statements regarding bills and vetoes, and a large variety of speeches and media availabilities can be found in the collections called *Public Papers of the President* (available at <http://www.gpoaccess.gov/pubpapers/search.htm>.) and *Weekly Compilation of Presidential Documents* (available at <http://www.gpoaccess.gov/wcomp/about.html>). Both collections are held by the Library of Congress and material can be only accessed through the Library system.

Press releases, dispatches, diplomatic statements at the United Nations and NATO, daily and weekly press briefings, annual reports, and speeches by executive and diplomatic representatives can be accessed through the websites of the main bureaucratic agencies of the Administration. Material published by the Department of Defense can be found at www.defense.gov; material published by the Department of State can be found at www.state.gov or, alternatively, in the Library of Congress collection called *U.S. State Department Dispatch*. Note that not all material is accessible from the internet. Some needs to be accessed via the Library of Congress or the National Archives. Much material can be also found at <http://www.presidency.ucsb.edu/index.php>, which contains analyses and primary sources concerning the presidents of the United States.

Material concerning the actions of civil society, advocacy movements, interest groups, and think tanks (policy papers, media statements, annual reports, memoranda) has been retrieved from the main websites of the organizations involved. Their statements and hearings at the congressional and committee levels can be found in the proceedings and records of Congress. For the analysis of British and U.S. processes of ratification and rejection of the ICC Treaty, valuable sources are represented by www.iccnw.org and www.amicc.org, which contain attempted and implemented legislation, speeches and statements by the main actors involved, and civil society activities and campaigns.

Various statements by both British and U.S. leaders can be found at www.nato.int and www.un.org.

Newspapers articles have provided additional information on the issues under analysis. They are indicated in the following bibliography and can be accessed at www.nytimes.com, www.guardian.co.uk, www.washingtonpost.com, www.foreignaffairs.com. Note that most articles can be read in their full version only by accessing the websites via the Library of Congress or through any other authorized institution.

WORKS CITED

- "NATO Renews Threat of Force After Kosovo Civilians Killed." *CQ Weekly Online* (January 23, 1999): 200-200. <http://library.cqpress.com/cqweekly/WR19990123-04WORLDNOTES001> (accessed January 14, 2010).
- "Members Intensifying Pressure For Stronger Action in Kosovo." *CQ Weekly Online* (August 8, 1998): 2192-2192. <http://library.cqpress.com/cqweekly/WR19980808-32BSNOTES007> (accessed January 14, 2010).
- "A National Security Strategy: Engagement and Enlargement." The White House, (February 1996): <http://www.fas.org/spp/military/docops/national/1996stra.htm>.
- "A National Security Strategy for a New Century." The White House (May 1997): available at <http://www.fas.org/man/docs/strategy97.htm#preface>.
- "A National Security Strategy of Engagement and Enlargement." The White House (February 1996): available at <http://www.fas.org/spp/military/docops/national/1996stra.htm>.
- "A New Covenant with the American People: Democratic Party Platform." July 13 1992 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=29610>.
- "A Strong International Court." *The New York Times* June 18, 1998.
- "A Turn for the Better at the U.N." *The New York Times* January 3, 1999.
- "Clinton's Foreign Policy." *Foreign Policy*. November/December 2000, pp. 18-29.
- "Committee of Former Nuremberg Prosecutors for a Permanent International Criminal Court, Letter to President Clinton." December 6, 2000.
- "Developments in International Criminal Law." *American Journal of International Law*, Vol. 93, No. 1 (January 1999): 1-123.
- "Forging a World of Liberty Under Law: U.S. National Security in the 21st Century." Final Report of the Princeton Project on National Security, The Princeton Project Papers, The Woodrow Wilson School of Public and International Affairs, Princeton University, September 27, 2006.
- "Implementing the Responsibility to Protect, the 2009 General Assembly Debate: An Assessment" (August 2009): available at www.globalR2P.org.
- "Make the Difference." 1997 Liberal Democrat General Election Manifesto, available at <http://www.politicsresources.net/area/uk/e97/man/ld97man.htm>.
- "New Labour because Britain Deserves Better." 1997 Labour Party Manifesto, available at <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>.

- “Presidential Decision Directive 25, “Reforming Multilateral Peace Operations, May 5 1994, Executive Summary, available at <http://www.fas.org/irp/offdocs/pdd25.htm>.
- “Republican Contract with America” (1994): available at <http://www.house.gov/house/Contract/CONTRACT.html>.
- “Republican Party Platform.” August 12 1996, in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=25848>.
- “Revisiting the World Criminal Court.” *The New York Times* December 13, 2000.
- “Strategic Defence Review: Modern Forces for the Modern World.” Presented to Parliament by the Secretary of State for Defence by Command of Her Majesty, July 1998.
- “Strategic Defence review.” Presented to Parliament by the Secretary of State for Defence by Command of Her Majesty, July 1998.
- “The International Criminal Court: Questions and Answers.” Foreign and Commonwealth Office, London: Focus International, April 1999.
- “The New Progressive Declaration: A Political Philosophy for the Information Age.” Democratic Leadership Council, 10 July 1996.
- “The Report of the Quadrennial Defense Review.” (May 1997): available at <http://www.fas.org/man/docs/qdr/>.
- “The Vision Shared: The Republican Platform, Uniting our Family, Our Country, Our World.” August 17 1992, in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=25847>.
- “Time for a Global Court.” *The New York Times* November 21, 1994.
- “Today’s Democratic Party: Meeting America’s Challenges, Protecting America’s values.” Democratic Party Platform, August 26 1996, in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=29611>.
- “U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement.” Washington, DC: The American Society of International Law, 2009.
- “U.S. Signing of the Statute of the International Criminal Court.” *The American Journal of International Law*, Vol. 95, No. 2 (April 2001): 397-400.
- “Undermining an International Court.” *The New York Times* July 15, 1998.
- “Updated Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” (September 2008): available at

http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf.

- “Wavering on War Crimes.” *The New York Times* October 4, 1997.
- “You can only be sure with the Conservatives.” 1997 Conservative Party General Election Manifesto, available at <http://www.conservative-party.net/manifestos/1997/1997-conservative-manifesto.shtml>.
- A more secure world: Our shared responsibility Report of the High-Level Panel on Threats, Challenges, and Change*. United Nations (2004): available at <http://www.un.org/secureworld>.
- Abbott, Kenneth W. and Duncan Snidal. “Why States Act through Formal International Organizations.” *The Journal of Conflict Resolution* Vol. 42, No. 1 (February 1998): 3-32.
- Acharya, Amitav. “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism.” *International Organization* Vol. 58 (Spring 2004): 239-75.
- Adler, Emanuel and Peter M. Haas. “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program.” *International Organization* Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination (Winter 1992): 367-390.
- Agamben, Giorgio. *Stato di Eccezione*. Torino: Bollati Boringhieri, 2003.
- Akhavan, Payam. “Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* Vol. 95, No. 1 (January 2001): 7-31.
- Akhavan, Payam. “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal.” *Human Rights Quarterly* Vol. 20, No. 4 (1998): 737-816.
- Albright, Madeleine K. “Use of Force in a Post-Cold War World.” Address at the National War College, National Defense University, Fort McNair, DC, September 23, 1993, in *United States Department of State Dispatch*, 4, No. 39 (September 27 1993): 665-668.
- Albright, Madeleine K. *Madame Secretary*. New York: Miramax, 2003.
- Albright, Madeleine K., Anthony Lake, Wesley Clark. “The Clinton Administration’s Policy on Reforming Multilateral Peace Operations.” *U.S. Department of State Dispatch* Vol. 5, No. 20 (May 16 1994): 315-321.
- Allison, Graham T. *Essence of Decision: Explaining the Cuban Missile Crisis*. Boston: Little Brown and Company, 1971.
- Alston, Philip and Euan MacDonald (eds.) *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008).
- Amann, Diane Marie and M. N. S. Sellers. “The United States of America and the International Criminal Court.” *The American Journal of Comparative Law*, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002): 381-404.

- Amati, Enrico, Valentina Caccamo, Matteo Costi, Emanuela Fronza, Antonio Vallini, *Introduzione al diritto penale internazionale*. Milano: Giuffrè, 2006.
- Ambos, Kai. "Comment" on the articles by Bruno Simma, "Nato the UN and the Use of Force: Legal Aspects" and Antonio Cassese "Ex Iniuria Ius Oritur", available at <http://www.ejil.org/journal/Vol10/No1/coma.html>.
- Ambrose, Stephen E. "The President and Foreign Policy." *Foreign Affairs* Vol. 70, No. 5 (Winter 1991-2): 120-37.
- Andreas, Peter and Ethan A. Nadelmann. *Policing the Globe: Criminalization and Crime Control in International Relations*. Oxford: Oxford University Press, 2006.
- Angell, Norman. *The Great Illusion: A Study of the Relation of Military Power to National Advantage*. London: Heinemann, 1914.
- Aron, Raymond. *Pace e Guerra fra le Nazioni*. Milano: Edizioni di Comunità, 1962.
- Arsanjani, Mahnoush H. "The Rome Statute of the International Criminal Court." *American Journal of International Law*, Vol. 93, No. 1 (January 1999): 22-43.
- Art, Robert J. and Seyom Brown (eds.). *U.S. Foreign Policy: The Search for a New Role*. New York, Macmillan, 1993.
- Art, Robert J., "Geopolitics Updated: The Strategy of Selective Engagement." *International Security* Vol. 23 No. 3 (1998/1999): 79-113.
- Aspin, Lee. "Report on the Bottom-up Review." (October 1993): available at <http://www.fas.org/man/docs/bur/part01.htm>.
- Axelroad, Robert. "An Evolutionary Approach to Norms." *The American Political Science Review* Vol. 80 No. 4 (December 1986): 1095-1111.
- Ball, Howard. *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. Lawrence, Kansas: University Press of Kansas, 1999.
- Bannon, Alicia L. "The Responsibility to Protect: The UN World Summit and the Question of Unilateralism." *The Yale Law Journal*, 115 (2006): 1157-65.
- Barbara Crossette. "U.N. Chief Wants Faster Action To Avoid Slaughter in Civil Wars." *The New York Times* September 21, 1999.
- Barnett, Michael and Martha Finnemore. *Rules for the World: International Organizations in Global Politics*. Ithaca: Cornell University Press, 2004.
- Barnett, Michael N. "The UN Security Council, Indifference, and Genocide in Rwanda." *Cultural Anthropology* Vol. 12, No. 4 (1997): 551-578.
- Barnett, Michael. *Empire of Humanity: A History of Humanitarianism*. Ithaca and London: Cornell University Press, 2011.

- Barry, Brian. "Comments on the 'Pork Barrel' and Majority Rule" *The Journal of Politics* Vol. 33, No. 2 (May 1971): 530-1.
- Bass, Gary Jonathan. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton and Oxford: Princeton University Press, 2000.
- Bassiouni, Cherif M. "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court." *Harvard Human Rights Journal* Vol. 10 (Spring 1997): 11-62.
- Bassiouni, Cherif M. "Policy Perspectives Favoring the Establishment of the International Criminal Court" *Journal of International Affairs* Vol. 52, No. 2 (Spring 1999): 795-810.
- Bassiouni, Cherif M. and Christopher L. Blakesley. "The Need for an International Criminal Court in the New International World." *Vanderbilt Journal of International Law* Vol. 25, No. 2 (1992): 151-182.
- Beck, Ulrich. "World Risk Society and the Changing Foundations of Transnational Politics" In *Complex Sovereignty*, edited by Edgar Grande and Louis W. Pauly, 22-47. Toronto: University of Toronto Press, 2005.
- Becker, Douglas. "The Bush Administration's Campaign Against the International Criminal Court." In *A Bird in the Bush: Failed Domestic Policies of the George W. Bush Administration*, edited by Dowling G. Campbell, 131-74. New York: Algora, 2008.
- Bellamy, Alex J. "Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect After the 2005 World Summit." *Carnegie Council Policy Brief* No. 1, 2006.
- Bellamy, Alex J. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq." *Ethics and International Affairs* Vol. 19, Issue 2 (September 2005): 31-54.
- Bellamy, Alex J. "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit." *Ethics and International Affairs* Vol. 20, No. 2 (Summer 2006): 143-169.
- Bellamy, Alex J. *Global Responsibility to Protect: From Words to Deeds*. New York: Routledge, 2011.
- Bellamy, Alex J. *Responsibility to Protect: The Global Effort to End Mass Atrocities*. Cambridge: Polity Press, 2009.
- Bellamy, Alex J., Sara E. Davies, Luke Glanville (eds.). *The Responsibility to Protect and International Law*. Leiden, Boston: Martinus Nijhoff Publishers, 2011.
- Bellamy, Alex J. and Paul D. Williams. "On the Limits of Moral Hazard: The 'Responsibility to Protect', Armed Conflict and Mass Atrocities," *European Journal of International Relations* (published online 12 May 2011): 1-33.
- Belloni, Roberto. "Kosovo and Beyond: Is Humanitarian Intervention Transforming International

Society?" *Human Rights & Human Welfare*, Vol. 2, No. 1 (Winter 2002): 35-43.

- Benedetti, Fanny and John L. Washburn. "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Diplomatic Conference." *Global Governance* 5 (1999): 1-37.
- Benedetti, Fanny. "A Report on the negotiations for the creation of an International Criminal Court." Available at <http://www.wcl.american.edu/hrbrief/v5i1/html/icc2.html>.
- Berger, Samuel. "A foreign policy for a Global Age." *Foreign Affairs* 79 (November/December 2000).
- Bering, Helle. "The Rest of the World's Court," *The Washington Times* July 30 (1998): A23.
- Biersteker, Thomas J. "State, Sovereignty, and Territory." In *Handbook of International Relations*, ed. by Walter Carlsnaes, Thomas Risse, Beth A. Simmons, 157-176. London: Sage, 2002.
- Biersteker, Thomas J., Cynthia Weber (eds.). *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press, 1996.
- Biswas, Shampa and Sheila Nair. *International Relations and States of Exceptions: Margins, Peripheries, and Excluded Bodies*. New York: Routledge, 2010.
- Bjorkdahl, Annika. "Norms in International Relations: Some Conceptual and Methodological Reflections." *Cambridge Review of International Affairs* Vol. 15, No. 1 (2002): 9-23.
- Blair, Tony. "It is simply the right thing to do." *The Guardian* 27 March 1999.
- Blumenthal, Sydney. *The Clinton Wars*. New York: Farrar, Straus and Giroux, 2003.
- Bobbio, Norberto. *Il problema della guerra e le vie della pace*, Bologna, Il Mulino, 1997.
- Bolton, John R. "Bolton Critiques the International Criminal Court." *USA Today* January 18, 2000.
- Bolton, John R. "Clinton Meets International Law in Kosovo." *Wall Street Journal* April 5, 1999.
- Bolton, John R. "Courting Danger: What's Wrong With the International Criminal Court." *National Interest* No. 54 (Winter 1998-99).
- Bolton, John R. "John R. Bolton Reviews Geoffrey Robertson's Crimes Against Humanity: The Struggle for Global Justice." *Washington Times*, August 22, 2000.
- Bolton, John R. "No, No, No to International Criminal Court." *Human Events* Vol. 54, No. 32 August 21 1998.
- Bolton, John R. "Review of 'War Crimes' by Aryeh Neier and 'Between Vengeance and Forgiveness' by Martha Minow." *Foreign Affairs* January 1 1999.
- Bolton, John R. "Why an International Criminal Court Won't Work." *Wall Street Journal* March 30 1998.

- Bolton, John R. and William Schultz. "What Price Human Rights." *National Interest* June 1 1999.
- Bowers, Paul. *The International Criminal Court Bill [HL]*. Research Paper 1/39, 28 March 2001, International Affairs & Defence Section, House of Commons Library.
- Brenner, Neil. "Beyond state-centrism? Space, territoriality, and geographical scale in globalization studies." *Theory and Society* 28 (1999): 39-78.
- Brinkley, Douglas. "Democratic Enlargement: The Clinton Doctrine." *Foreign Policy* 106 (Spring 1997): 111-127.
- Brody, Reed. "One Year Later, The Pinochet Precedent Puts Tyrants on Notice." *The Boston Globe* October 14 1999.
- Broomhall, Bruce. "Toward U.S. Acceptance of the International Criminal Court." *Law and Contemporary Problems* Vol. 64, No. 1 (Winter 2001): 141-151.
- Brown, Bartram. "U.S Objections to the Statute of the International Criminal Court: A Brief Response." *Journal of International Law and Politics* Vol. 31 (1999): 854-891.
- Bruhl, Tanja and Volker Rittberger. "From international to global governance: Actors, collective decision-making, and the United Nations in the world of the twenty-first century" In *Global Governance and the United Nations System*, edited by Volker Rittberger. New York: United Nations University Press, 2001: available at <http://www.unu.edu/unupress/sample-chapters/GlobalGov.pdf>.
- Buchanan, Allen. "From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform." *Ethics* 111 (July 2001): 673-705.
- Budge, Ian and David McKay (eds.). *Developing Democracy Comparative Research in Honour of J.F.P. Blondel*. London: Sage Publications, 1994.
- Budge, Ian and Hans Keman. *Parties and Democracy Coalition Formation and Government Functioning in Twenty States*. Oxford: Oxford University Press, 1990.
- Bull, Hedley and Adam Watson (eds.). *The Expansion of International Society*. Oxford: Clarendon Press, 1984.
- Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. New York: Palgrave, 2002.
- Bull, Hedley (ed.). *Intervention in World Politics*. Oxford: Clarendon Press, 1984.
- Burch, Holliday. "The Blair Government and the Core Executive." *Government and Opposition*, 39:1 (2004): 1-21.
- Busby, Joshua W. *Moral Movements and Foreign Policy*. Cambridge: Cambridge University Press, 2010.
- Caporaso, James A. "Across the Great Divide: Integrating Comparative and International Politics." *International Studies Quarterly* Vol. 41, No. 4 (December 1997): 563-591.

- Carothers, Thomas. "The Clinton Record on Democracy Promotion." *Carnegie Endowment for International Peace*, September 2000.
- Carr E. H. *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*. London: Macmillan and Company, 2001.
- Carstairs, Charles and Richard Ware (eds.). *Parliament and International Relations*. Milton Keynes: Open University Press, 1991.
- Cassese, Antonio. "Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of International Law* 10 (1999): 23-30.
- Cassese, Antonio. "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" *European Journal of International Law* 9 (1998): 2-17.
- Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005.
- Cerny G. Philippe. "Globalization and the Changing Logic of Collective Action" *International Organization* Vol.49 No.4 (Autumn 1995): 595-625.
- Chairman of the Joint Chiefs of Staff. "National Military Strategy." (February 1995): available at http://www.fas.org/man/docs/nms_feb95.htm.
- Chalmers, David. *Kosovo: The crisis and beyond*. London, Saferworld, 1999.
- Chalmers, Michael and David Mepham. *British Security Policy: Broadening the Agenda*. Saferworld, London, 1997.
- Chandler, David. "The Responsibility to Protect? Imposing the Liberal Peace." *International Peacekeeping* Vol. 11 No. 1 (2004): 59-81.
- Chandler, David. "The Road to Military Humanitarianism: How the Human Rights NGOs shaped a new Humanitarian Agenda." *Human Rights Quarterly* 23 (2001): 678-800.
- Chandler, David. *From Kosovo to Kabul (and Beyond): Human Rights and International Intervention*. London: Pluto, 2006.
- Charter of the International Military Tribunal, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.
- Charter of the United Nations*, available at <http://www.un.org/aboutun/charter>.
- Checkel, Jeffrey T. "The Constructivist Turn in International Relations Theory." *World Politics* Vol. 50 No.2 (1998): 324-48.
- Checkel, T. Jeffrey. "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide." *European Journal of International Relations* Vol. 3, No.4 (1997): 473-95.
- Checkel, T. Jeffrey. "Norms, Institutions, and National Identity in Contemporary Europe." *International Studies Quarterly* 43 (1999): 83-114.

- Chesterman, Simon. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press, 2001.
- Christopher, Warren. "America's fundamental dedication to human rights." *US State Department of State Dispatch* 6/6 (February 1995): available at http://findarticles.com/p/articles/mi_m1584/is_n6_v6/ai_16797300/.
- Christopher, Warren. "Principles and Opportunities for American Foreign Policy." *US Department of State Dispatch*, 6/4 (January 23 1995.): http://findarticles.com/p/articles/mi_m1584/is_n4_v6/ai_16723916/.
- Christopher, Warren. "Statement at Senate Confirmation." Hearing of Secretary-Designate Christopher, Senate of Foreign Relations Committee, Washington, DC, (January 13, 1993): Available at <http://dosfan.lib.uic.edu/ERC/briefing/dossec/1993/9301/930113dossec.html>.
- Christopher, Warren. "U.S. strategy to defend human rights and democracy." Remarks at a State Department/NGO Conference on Human Rights, Washington,DC, April 3, 1995, in *United States Department of State Dispatch* (6/15 April 1995): 295-6.
- Clark Wesley C. *Waging Modern War: Bosnia Kosovo and the Future of Combat*. Oxford: Public Affairs, 2002.
- Claude, Inis L. Jr. *Power and International Relations*. New York: Random House, 1962.
- Clinton, Bill. "A Democrat Lays Out His Plan." *Harvard International Review* Vol. 92 Issue 4 (Summer 1992).
- Clinton, Bill. "American Leadership and Global Change." *US Department of State Dispatch*. 4/9, (1 March 1993).
- Clinton, Bill. "Confronting the Challenges of a Broader World." Address to the United Nations General Assembly. *U.S. State Department Dispatch* (September 27 1993).
- Clinton, Bill. "My vision for peace." *The Observer* September 8 (2002).
- Clinton, Bill. "Remarks by the President Clinton to the People of Detroit." (October 22, 1996): available at <http://www.nato.int/docu/speech/1996/s961022a.htm>.
- Clinton, Bill. "Remarks by the President on Foreign Policy." (February 26, 1999): available at <http://www.mtholyoke.edu/acad/intrel/clintfps.htm>.
- Clinton, Bill. *My Life*. New York: Alfred A. Knopf, 2004.
- Clinton, William J. "Our Shared Future: Globalization in the 21st Century." Council on Foreign Relations June 17, 2002.
- Clymer, Adam. "A Bipartisan Voice: William Sebastian Cohen." *New York Times*, December 6 1996.
- Coalition for an International Criminal Court. "Joint Statement by the Steering Committee members of the NGO Coalition for an International Criminal Court, calling on States to maintain the integrity

of the Rome Statute.” 23 June 2000.

- Coalition for an International Criminal Court. “Letter sent to Foreign Ministers regarding a rule to Article 98.” 21 June 2000.
- Coalition for an International Criminal Court. “Members of the Coalition for an International Criminal Court (CICC State their Support for an Effective and Credible Court and Challenge U.S. insistence on Security Council Jurisdiction.” 13 August 1997.
- Cohen, Benjamin J. “Balance-of-Payments Financing: Evolution of a Regime.” *International Organization* Vol. 36 No.2 (Spring 1982): 457-478.
- Cohen, Roberta and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*. Washington, D.C.: Brookings Institution Press, 1998.
- Coicaud, Jean-Marc and Nicholas J. Wheeler (eds). *National Interest and International Solidarity: Particular and Universal Ethics in International Life*. Tokyo: United Nations University Press, 2008.
- Cole, Wade M. “Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999.” *American Sociological Review* Vol. 70, No. 3 (June 2005): 472-95.
- Connors, Brenda. “Mission Possible: Making United Nations Peace Operations More Effective.” Paper Submitted to the Faculty of the Naval War College, Newport R.I., 17 June 1994.
- Cortell P., Andrew, James, W. Davis. “Understanding the Domestic Impact of International Norms: A Research Agenda.” *International Studies Review* Vol. 2 No. 1 (Spring 2000): 65-87.
- Cortell, Andrew P. and James W. Davis. “How do Institutions Matter? The Domestic Impact of International Rules and Norms.” *International Studies Quarterly* 40 (1996): 451-78.
- Cox, Michael and Doug Stokes (eds.). *US Foreign Policy*. Oxford: Oxford University Press, 2008.
- Cox, Michael, G. John Ikenberry, and Tagashi Inoguchi (eds.). *American Democracy Promotion: Impulses, Strategies, and Impacts*. Oxford: Oxford University Press, 2000.
- Cox, Michael. *US Foreign Policy After the Cold War: Superpower Without a Mission*. London: Royal Institute of International Affairs, 1995.
- Crawford C., Neta and Audie Klotz. *How Sanctions Work Lessons from South Africa*. London: Macmillan, 1999.
- Crossette, Barbara. “Clinton Weighing Options On World Criminal Court.” *The New York Times* December 1, 2000.
- Crossette, Barbara. “Crusader Hopes to Put Aggression on World List of War Crimes.” *The New York Times* December 31, 2000.
- Crossette, Barbara. “Helms Vows To Make War On U.N. Court.” *The New York Times* March 27,

1998.

- Crossette, Barbara. "Parsing Degrees of Atrocity Within the Logic of Law; To Punish War Criminals, the World Must Define War Crimes. It Isn't Easy." *The New York Times* July 8, 2000.
- Crossette, Barbara. "The World: Out of Time; Dictators (and Some Lawyers) Tremble." *The New York Times* November 29, 1998.
- Crossette, Barbara. "The World; Tying Down Gulliver With Those Pesky Treaties." *The New York Times* August 8, 1999.
- Crossette, Barbara. "Time Is Short for U.S. to Join the International Criminal Court." *The New York Times* November 24, 2000.
- Crossette, Barbara. "U.N. Seeking an Accord on a Permanent Court for War Crimes." *The New York Times* April 7, 1998.
- Crossette, Barbara. "U.S. Accord Being Sought On U.N. Dues And on Court." *The New York Times* December 7, 2000.
- Crossette, Barbara. "U.S. Budes at U.N. Talks on a Permanent War-Crimes Court." *The New York Times* March 18, 1998.
- Crossette, Barbara. "U.S. Envoy Tackles Objections to Tribunal on War Crimes." *The New York Times* December 12, 2000.
- Crossette, Barbara. "U.S. Gains a Compromise On War Crimes Tribunal." *The New York Times* June 30, 1999.
- Crossette, Barbara. "U.S. Pushes to Weaken World Court On Atrocities" *The New York Times* June 12, 2000.
- Crossette, Barbara. "War Crimes Tribunal Becomes Reality, Without U.S. Role." *The New York Times* April 12, 2002.
- Crossette, Barbara. "World Criminal Court Having a Painful Birth." *The New York Times* August 13, 1997.
- Daalder, Ivo H, and Michael E. O'Hanlon. *Winning Ugly: NATO's War to Save Kosovo*. Washington DC: Brookings Institution Press, 2000.
- De Tocqueville, Alexis. *Democracy in America*. New York: Harper & Row Publishers, 2007.
- Declaration of the South Summit, Havana (10-14 April 2000): available at <http://www.nam.gov.za/documentation/southdecl.htm>.
- Declaration on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (1991), GA Res. 46/182, UNGAOR, 46th Sess., UN Doc. A/RES/46/182 (1991).
- Deese David A (ed.) *The New Politics of American Foreign Policy*. New York, St. Martin's Press,

1994.

- Demandt, Alexander. *Processare il nemico: Da Socrate a Norimberga*. Torino, Einaudi, 1996.
- Deng, Francis M, Donald Rothchild, William Zartman, Sadikiel Kimaro and Terrence Lyons. *Sovereignty as Responsibility: Conflict Management in Africa*. Washington, D.C: Brookings Institution Press, 1996.
- Deng, Francis M. *Protecting the Dispossessed*. Washington, D.C: The Brookings Institutions, 1993.
- Deputy Secretary Talbott. "The European Answer to the Balkan Question." March 17 1998, Address to the Macedonian Academy of Sciences and Arts, Skopje, the Former Yugoslav Republic of Macedonia, in *U.S. State Department Dispatch* (April 1998): 25-29.
- Dick, Morris. *Behind the Oval Office: Winning the Presidency in the Nineties*. Random House: New York: 1997.
- Dillon, Michael and Julian Reid. "Global Liberal Governance: Biopolitics, Security, and War." *Millennium: Journal of International Studies* 30 (2001): 41-66.
- Diprizio, Robert C. *Armed Humanitarians: U.S Interventions from Northern Iraq to Kosovo*. Baltimore and London: The Johns Hopkins University Press, 2002.
- Dobbs, Michael. *Madeleine Albright: A Twentieth Century Odyssey*. New York: Henry Holt and Company, 1999.
- Doherty, Carroll J. "FOREIGN AFFAIRS: Two GOP Leaders Personify Party's Rift Over Kosovo." *CQ Weekly Online* (April 10, 1999): 835-836. <http://library.cqpress.com/cqweekly/WR19990410-15SENATORS001> (accessed January 15, 2010).
- Dole, Bob. "Peacekeepers and Politics." *New York Times*, January 24 1994, available at <http://www.nytimes.com/1994/01/24/opinion/peacekeepers-and-politics.html?page-wanted=1>.
- Donini, Massimo and Michele Papa. *Diritto penale del nemico: Un dibattito internazionale*. Milano: Giuffrè, 2007.
- Donnelly, Jack. *Universal Human Rights in Theory and Practice*. Ithaca and London: Cornell University Press, 2003.
- Dorsen, Norman and Morton H. Halperin. "Justice After Genocide." *The Washington Post* May 13, 1998.
- Doyle, Michael W. "Dialectics of a global constitution: The struggle over the UN Charter." *European Journal of International Relations* (published online before print October 17 2011): 1-24.
- Doyle, Michael W. "Kant, Liberal Legacies, and Foreign Affairs." *Philosophy and Public Affairs* Vol. 12, No. 3 (Summer/Autumn 1983): 205-235.
- Doyle, Michael W. "Kant, Liberal Legacies, and Foreign Affairs." *Philosophy and Public Affairs* Vol.

12, No. 4 (Autumn 1983), pp. 323-53.

- Doyle, Michael W. "Liberalism and World Politics." *American Political Science Review* Vol. 80, No. 4 (Summer/Autumn 1986): 1151-1169.
- Duffield, Mark. "Human Security: Linking Development and Security in the Age of Terror." Paper prepared for the GDI Panel "New Interfaces between Security and Development" Eleventh General Conference of the EADI, Bonn, 21-24 September 2005: available at http://eadi.org/gc2005/conweb/papersps/Mark_Duffield.pdf.
- Dumbrell, John. "Was there a Clinton Doctrine? President's Clinton Foreign Policy Reconsidered." *Diplomacy and Statecraft* 13, 2002: 43-56.
- Eade, Deborah (ed.) *From Conflict to Peace in a Changing World: Social Reconstruction in Times of Transition*. Oxfam Working Paper, Oxford, 1998.
- Elsea, Jennifer K. "U.S. Policy Regarding the International Criminal Court." CRS Report for Congress. Washington DC: Congressional Research Service, Library of Congress, August 29, 2006.
- Erlanger, Steven. "Albright may be facing unfamiliar tests," *New York Times*, December 7, 1996.
- Erlanger, Steven. "NATO Was Closer to Ground War in Kosovo Than Is Widely Realized." *New York Times*, November 7, 1999.
- Evangelista, Matthew. *Unarmed Forces: The Transnational Movement to End the Cold War*. Ithaca: Cornell University Press, 1999.
- Evans, Gareth and Mohamed Sahnoun. "The Responsibility to Protect." *Foreign Affairs* Vol. 81 No. 6 (November/December 2002): 99-110.
- Evans, Gareth. *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*. Washington, D.C: Brookings Institution Press, 2008.
- Evans, Peter B., Harold K. Jacobson, Robert D. Putnam (eds.). *Double-Edged Diplomacy: International Bargaining and Domestic Politics*. Berkeley, Los Angeles, London: University of California Press, 1993.
- Fabbrini, Sergio (ed.). *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance*. London: Routledge, 2005.
- Fabbrini, Sergio. "A Single Western State Model? Differential Development and Constrained Convergence of Public Authority Organization in Europe and America." *Comparative Political Studies* 36 No.6 (August 2003): 653-678.
- Fabbrini, Sergio. "The American System of Separated Government: An Historical-Institutional Interpretation." *International Political Science Review* XX No. 1 (1999): 95-116.
- Fabbrini, Sergio. "The European Union in American Perspective: The Transformation of Territorial Sovereignty in Europe and the United States." In *Restructuring Territoriality*, edited by

- Christopher K. Ansell, Giuseppe Di Palma, 163-87. Cambridge: Cambridge University Press, 2004.
- Fabbrini, Sergio. "The Semi-Sovereign Prince: The Dilemma of an Independent President in a Presidential Government." In *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, edited by Thomas Poguntke and Paul Webb, 313-335. Oxford: Oxford University Press, 2005.
 - Fabbrini, Sergio. *Compound Democracies. Why the United States and Europe Are Becoming Similar*. Oxford: Oxford University Press, 2007.
 - Fehl, Caroline. "Explaining the International Criminal Court." *European Journal of International Relations*, Vol. 10, No. 3 (September 2004): 357-394.
 - Feinstein, Lee and Tod Lindberg. *Means to an End: U.S. Interest in the International Criminal Court*. Washington, D.C., Brookings Institution Press, 2009.
 - Feinstein, Leo and Anne-Marie Slaughter. "A Duty to Prevent." *Foreign Affairs* Vol. 83, No. 1 (January/February 2004): 136-150.
 - Finnemore, Martha and Kathryn Sikkink, "International Norm Dynamics and Political Change." *International Organization* Vol. 52 No. 4 (1998): 887-917.
 - Finnemore, MArtha and Kathryn Sikkink. "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics." *Annual Review of Political Science* 4 (2001): 391-416.
 - Finnemore, Martha, "Constructing Norms of Humanitarian Intervention." In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter J. Katzenstein, 153-185. New York: Columbia University Press, 1996.
 - Finnemore, Martha, *National Interests in International Society*. Ithaca: Cornell University Press, 1996.
 - Finnemore, Martha, *The Purpose of Intervention*. Ithaca: Cornell University Press, 2003.
 - Finnemore, Martha. "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism." *International Organization* Vol. 50 No. 2 (Spring 1996): 325-47.
 - Fisher, Louis. *Presidential War Power*. Lawrence: University Press of Kansas, 2004.
 - Florini, Ann. "The Evolution of International Norms." *International Studies Quarterly* 40 (1996): 363-389.
 - Foreign and Commonwealth Office Mission Statement, 12 May 1997.
 - Foreign and Commonwealth Office. *International Criminal Court Bill Report on the Responses to the Draft Legislation*. London: The Stationery Office, January 2001.
 - Forsythe, David P. *Human Rights and U.S. Foreign Policy: Congress Reconsidered*. Gainesville: University of Florida Press, 1988.

- Franck, Thomas M. *Recourse to Force: State Action Against Threats and Armed Attacks*. Cambridge: Cambridge University Press, 2002.
- Franck, Thomas M. *The Power of Legitimacy Among Nations*. New York, Oxford: Oxford University Press, 1990.
- Friedman, L. Thomas. *The Lexus and the Olive Tree*. New York: Farrar, Straus and Giroux, 1999.
- Friedman, Thomas. "The 1992 Campaign: Foreign Policy; Turning His Sights Overseas, Clinton sees a Problem at 1699 Pennsylvania Avenue." *New York Times* April 2, 1992.
- Frost, Mervyn. *Global Ethics: Anarchy, Freedom, and International Relations*. New York: Routledge, 2009.
- Frye, Alton. *Humanitarian Intervention: Crafting a Workable Doctrine, Three Options*. Council on Foreign Relations, 2000.
- Fukuyama, Francis. *The End of History and the Last Man*. New York: Avon Books, 1992.
- Gallagher, Michael, Michael Laver, Peter Mair. *Representative Government in Modern Europe*. New York: Macmillan, 2006.
- Galli, Carlo. "Il pensiero politico internazionalistico di Carl Schmitt e la Guerra globale." In *Conflitti*, ed. by Alessandro Arienzo and Dario Caruso, 339-368. Napoli: Libreria Dante & Descartes, 2005.
- Galli, Carlo. "Spazio e consenso nella politica globale." in *Politica, consenso, legittimazione: Trasformazioni e prospettive*, ed. by Raffaella Gherardi, 49-59. Roma: Carocci, 2002.
- Gamberini, Alessandro and Renzo Orlandi. *Delitto politico e diritto penale del nemico*. Bologna: Monduzzi Editore, 2006.
- Garamone, Jim. "Albanians Agree to Accord; Serbs Still Holdouts." *American Forces Press Service*, February 25 1999.
- Gellman, Barton. "The Path to Crisis: How the United States and Its Allies Went to War." *Washington Post* April 18, 1999.
- George, Alexander L. and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. Cambridge: MIT Press, 2005.
- Gilpin, Robert. *Global Political Economy: Understanding The International Economic Order*. Princeton: Princeton University Press, 2001.
- Glanville, Luke. "Ellery Stowell and the Enduring Dilemmas of Humanitarian Intervention." *International Studies Review* 13 (2011): 241-58.
- Glanville, Luke. "The Antecedents of 'Sovereignty as Responsibility.'" *European Journal of International Relations* Vol. 17, No. 2 (2010): 233-55.

- Gladius, Marlies. *The International Criminal Court: A Global Civil Society Achievement*. London: Routledge, 2006.
- Glennon, J. Michael. "The New Interventionism" *Foreign Affairs* 78 (1999).
- Goldstein, Judith, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter. "Introduction: Legalization and World Politics." *International Organization* Vol. 54, No. 3 (Summer 2000): 385-99.
- Gordenker, Leon and Thomas G. Weiss. "Pluralising global government: analytical approaches and dimensions." *Third World Quarterly* Vol. 16 No. 3 (1995): 357-87.
- Goshko, John M. "A Shift on Role of U.N. Court? Envoy suggests U.S. May Alter Demands on Proposed Tribunal." *The Washington Post* March 18, 1998.
- Goshko, John M. "U.N. Moving Toward Creation of Criminal Court; But Advocates Fear Severe Limits, Backed by U.S., Will Be Imposed on Its Independence." *The Washington Post* April 21, 1996.
- Goshko, John M. "U.S. Proposes Limit on Global Court; Critics Fear Curb Would Paralyze Prosecution of War Crimes." *The Washington Post* March 26, 1998.
- Gourevitch, Peter. "The Second Image Reversed: The International Sources of Domestic Politics." *International Organization* Vol. 32, No. 4 (Autumn 1978): 881-912.
- Grieco, Joseph M. "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism." *International Organization* Vol. 42, No. 3 (Summer 1988): 485-507.
- Gurowitz, Amy. "Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State." *World Politics* Vol. 51 No.3 (April 1999): 413-445.
- Haas, Peter M. "Introduction: Epistemic Communities and International Policy Coordination." *International Organization* Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination (Winter 1992): 1-35.
- Haas, Peter M. "When does power listen to truth? A Constructivist Approach to the policy process." *Journal of European Public Policy* Vol. 11 No. 4 (August 2004): 569-592.
- Haas, Richard N. "Fatal Distraction: Bill Clinton's Foreign Policy." *Foreign Policy* (Fall 1997): 112-123.
- Haas, Richard N. *Intervention The Use of American Military Force in the Post-Cold War World*. Washington, D.C.: Brookings Institution Press, 1999.
- Haas, Richard N. *The Reluctant Sheriff: The United States After the Cold War*. Council on Foreign Relations, 1997.
- Habermas, Jurgen. "Bestiality and Humanity: A War on the Border Between Law and Morality." *Die Zeit* 29 April 1999: available at <http://www.theglobalsite.ac.uk/press/011habermas.htm>.
- Halberstam, David. *War in a Time of Peace*. New York: Scribner, 2001.

- Hall, Peter and Rosemary Taylor. "Political Science and the Three New Institutionalisms." *Political Studies* 44 (December 1996): 958-62.
- Hammond, Philippe and Edward S. Herman. *Degraded Capability: The Media and the Kosovo Crisis*. London: Pluto Press, 2000.
- Hartigan, Kevin. "Matching Humanitarian Norms with Cold, Hard Interests: The Making of Refugee Policies in Mexico and Honduras, 1980-1989." *International Organization* Vol. 46 No. 3 (1992): 709-730.
- Helms, Jesse. "And After Pinochet?" *The Washington Times* (December 10, 1998): A31.
- Helms, Jesse. "We Must Slay This Monster: Voting Against the International Criminal Court is Not Enough. The US Should Try to Bring it Down." *Financial Times* (31 July 1998): 18.
- Hendrickson, David C. "The Democratist Crusade: Intervention, Economic Sanctions, and Engagement." *World Policy Journal* Vol. 11 (Winter 1994/95): 18-30.
- Hendrickson, Ryan C. *The Clinton Wars: The Constitution, Congress and War Powers*. Nashville: Vanderbilt University Press, 2002.
- Hennessy, Peter. "The Blair style and the requirements of 21 century premiership." *Political Quarterly* 71:4 (2000): 386-95.
- Hill, Christopher. *The Changing Politics of Foreign Policy*. New York: Palgrave, 2003.
- Hix, Simon. *The Political System of the European Union*. New York: Palgrave, 2005.
- Hoagland, Jim. "Justice for All." *The Washington Post* April 19, 1998.
- Hobson John M, J. C. Sharman. "The Enduring Place of Hierarchy in World Politics: Tracing the Social Logics of Hierarchy and Political Change." *European Journal of International Relations*, Vol. 11 No. 1 (March 2005): 63-98.
- Hocking, Brian (ed.). *Foreign Relations and Federal States*. London, New York: Leicester University Press, 1993.
- Hodge, Carol. *Britain and the Balkans 1991 Until Present*. NY: Routledge, 2006.
- Holsti, Ole R. and James N. Rosenau. "The Domestic and Foreign Policy Beliefs of American Leaders." *Journal of Conflict Resolution* Vol. 32, No. 2 (June 1988): 248-94.
- Holzgreffe J.L. "The Humanitarian Intervention Debate" In *Humanitarian Intervention Ethical, Legal, and Political Dilemmas*, edited by J.L. Holzgreffe and Robert O. Keohane, 15-52. Cambridge: Cambridge University Press, 2003.
- Hombach, Bodo. *The Politics of the New Centre*. Cambridge: Polity Press, 2000.
- Hooghe, Liesbeth and Gary Marks. *Multi-level Governance and European Integration*. Oxford: Rowman and Littlefield, 2001.

- Hopf, Ted. "The Promise of Constructivism in International Relations Theory." *International Security* Vol. 23 No. 1 (Summer 1998): 171-200.
- Hovi, Jon, Detlef F. Sprinz, and Guri Bang. "Why the United States did not become a party to the Kyoto protocol: German, Norwegian and U.S. Perspectives." *European Journal of International Relations* (published online 7 December 2010): 1-22.
- Humanitarian Intervention*. Report prepared by the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs, 2000.
- Humanitarian Intervention: Legal and Political Aspects*. Danish Institute of International Affairs, 1999.
- Hyland, William G. *Clinton's World: Remaking American Foreign Policy*. Westport, London: Praeger, 1999.
- ICRC "Working Paper on other serious violations of the laws and customs applicable in international armed conflict." 18 June 1999.
- Ignatieff, Michael. *The Warrior's Honor: Ethnic War and the Modern Conscience*. New York: Metropolitan Books, 1997.
- Ikenberry, John G. (ed.). *American Foreign Policy: Theoretical Essays*. New York: Longman, 2005.
- International Court of Justice (ICJ). *Reparation for Injuries Suffered in the Service of the United Nations*. ICJ, Advisory Opinion (11 April 1949): ICJ Reports 1949 (available at www.icj.cij.org).
- International Court of Justice. "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)." (27 June 1986): available at <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>.
- International Criminal Court Consultation on Draft Legislation*. London: The Stationery Office, August 2000.
- Jackson, Robert. *The Global Covenant: Human Conduct in a World of States*. Oxford: Oxford University Press, 2000.
- Jakobsen, Peter Viggo. "National Interest, Humanitarianism or CNN: What Triggers UN Peace Enforcement after the Cold War?" *Journal of Peace Research* Vol. 33 No. 2 (1996): 205-215.
- Jervis, Robert. "Realism, Neoliberalism, and Cooperation: Understanding the Debate." *International Security* Vol. 24, No. 1 (Summer 1999): 42-63.
- Jervis, Robert. "Security Regimes." *International Organization* Vol. 36 No.2 (Spring 1982): 357-78.
- Jones, Charles O. *The Presidency in a Separated System*. Washington DC: Brookings Institution, 1994.
- Judah, Tim. *Kosovo: War and Revenge*. New Haven and London: Yale University Press, 2002.

- Judah, Tim. *Kosovo's Road to War. Survival* Vol. 41 No.2 (Summer 1999): 5-18.
- Kahler, Miles (ed.). *Liberalization and Foreign Policy*. New York: Columbia University Press, 1997.
- Kahler, Miles. "Legitimacy, Humanitarian Intervention, and International Institutions." *Politics, Philosophy & Economics* (2010): 1-26.
- Kahn, Paul W. "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order." *Chicago Journal of International Law*, Vol. 1 No. 1 (Spring 2000): available at www.allbusiness.com/legal/international-law/1170175.html.
- Kampfner, John. *Robin Cook*. London: Orion Books, 2004.
- Kampfner, John. *Blair's wars*. London: Free Press, 2003.
- Kant, Immanuel. *Perpetual Peace and Other Essays*. Indianapolis/Cambridge: Hackett Publishing Company, 1983.
- Kaplan, Lawrence F. "Dollar Diplomacy Returns." *Commentary* (February 1998): 52-4.
- Kapstein, Ethan B. "Is Realism Dead? The Domestic Sources of International Politics." *International Organization* Vol. 49, No. 4 (Autumn 1995): 751-774.
- Katzenstein, Peter. "Alternative Perspectives of National Security". In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter Katzenstein, 1-32. New York: Columbia University Press, 1996.
- Katzenstein, Peter. *The Culture of National Security: Norms and Identity in World Politics*. New York: Columbia University Press, 1996.
- Kaufman, Natalie Hevener. *Human Rights Treaties and the Senate: A History of Opposition*. Chapel Hill, The University of North Carolina Press, 1990.
- Keck, Margaret E. and Kathryn Sikkink. *Activists Beyond Borders*. Ithaca: Cornell University Press, 1998.
- Keith Hall, Christopher. "The First Five Sessions of the UN Preparatory Commission for the International Criminal Court." *The American Journal of International Law* Vol. 94, No. 4 (October 2000): 773-789.
- Keith Hall, Christopher (Amnesty International). "Challenges Ahead for the United Nations Preparatory Committee Drafting a Statute for a Permanent International Criminal Court." February 1996.
- Kelley, Judith. "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements." *American Political Science Review* Vol. 101, No. 3 (August 2007): 573-589.
- Kelsen, Hans. *Il problema della sovranita'e la teoria del diritto internazionale. Contributo per una dottrina pura del diritto*. Milano: Giuffre', 1989.

- Kelsen, Hans. *Peace Through Law*. Chapel Hill: The University of North Carolina Press, 1944.
- Kennan, George F. *American Diplomacy*. Chicago: The University of Chicago Press, 1984.
- Kennan, George, "Morality and Foreign Policy." *Foreign Affairs* Vol. 64 No.2 (Winter 1985/86): <http://www.foreignaffairs.org/19851201faessay8456/george-f-kennan/morality-and-foreign-policy.html> (accessed December 2007).
- Kennedy, David. "International Humanitarianism: The Dark Sides" *International Journal of Not-for-Profit Law* Vol. 6 No.3 (June 2004): available at http://www.icnl.org/knowledge/ijnl/vol6iss3/special_2.htm.
- Kennedy, David. "Reassessing International Humanitarianism: The Dark Sides." Conference given at The Allen Hope Southey Memorial Lecture, University of Melbourne Law School (June 8, 2004): <http://www.law.harvard.edu/faculty/dkennedy/speeches/TheDarkSides.pdf>.
- Keohane Robert O. *International Institutions and State Power: Essays in International Relations Theory*. Boulder: Westview Press, 1989.
- Keohane, Dan. "The Debate on British Policy in the Kosovo Conflict: An Assessment." *Contemporary Security Policy* Vol.21 No.3 (December 2000): 78-94.
- Keohane, Robert O. "Political authority after intervention: gradations" in *Humanitarian Intervention Ethical, Legal, and Political Dilemmas*, edited by J.L. Holzgrefe and Robert O. Keohane, 275-298. Cambridge: Cambridge University Press, 2003.
- Keohane, Robert O. (ed.). *Neorealism and Its Critics*. New York: Columbia University Press, 1986.
- Keohane, Robert O. "The Demand for International Regimes." *International Organization* Vol.36 No.2 (Spring 1982): 325-355.
- Keohane, Robert O. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press, 1984.
- Keohane, Robert O. "International Institutions: Two Approaches." *International Studies Quarterly* Vol. 32 No.4 (1988): 379-396.
- Keohane, Robert. "Ironies of Sovereignty: The European Union and World Order." *Journal of Common Market Studies* 40, No. 4 (2002): 743-65.
- Khagram, Sanjeev, James V. Riker and Kathryn Sikkink. *Restructuring World Politics Transnational Social Movements, Networks, and Norms*. Minneapolis and London: University of Minnesota Press, 2002.
- King, Henry T. and Theodore C. Theofrastous. "From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy." *Case Western Reserve Journal of International Law*, Vol. 31, No. 1 (Winter 1999): 47-106.
- Kirsch, Philippe and John T. Holmes. "The Rome Conference on an International Criminal Court: The Negotiating Process." *The American Journal of International Law* Vol. 93, No. 1 (January 1999):

2-12.

- Klotz, Audie. *Norms in International Relations: The Struggle Against Apartheid*. Ithaca: Cornell University Press, 1995.
- Koskenniemi, Martti. "The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law." *The Modern Law Review* Vol. 65 No. 2 (March 2002): 159-175.
- Kowert, Paul and Jeffrey Legro. "Norms, Identity, and their Limits: A Theoretical Reprise." In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter Katzenstein, 451-497. New York: Columbia University Press, 1996.
- Kozaryn, Linda D. "NATO Officials Wary of Kosovo." *American Forces Press Service*, January 28 1998.
- Kozaryn, Linda D. "Peace Grows in Bosnia; Violence in Kosovo." *American Forces Press Service* May 26 1998.
- Kozaryn, Linda D. "Refugee Exodus Spurs NATO Strikes." *Armed Forces Press Service* March 30 1999.
- Kozaryn, Linda D. "Serb Terror, Ethnic Cleansing Reach New Heights." *American Forces Press Service* March 30 1999.
- Kozaryn, Linda D. "Solana Says Time's Running Out." *American Forces Press Service* June 29 1998.
- Kozaryn, Linda D. "Southeastern Europe Forms Peace Unit." *American Forces Press Service* September 30 1998.
- Kozaryn, Linda D. "U.S., NATO Turn Thumbs Down on Milosevic Offer." *American Forces Press Service* March 31 1999.
- Krasner, Stephen D. (ed.). *International Regimes*. Ithaca: Cornell University Press, 1983.
- Krasner, Stephen D. "Regimes and the Limits of Realism: Regimes as Autonomous Variables." *International Organization* Vol. 36 No. 2 (Spring 1982): 497-510.
- Krasner, Stephen D. "Sharing Sovereignty: New Institutions for Collapsed or Failed States." *International Security* Vol. 29, No. 2 (Fall 2004): 85-120.
- Krasner, Stephen D. "Structural Causes and Regimes Consequences: Regimes as Intervening Variables." *International Organization* Vol. 36 No. 2 (Spring 1982): 185-205.
- Krasner, Stephen. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.
- Kratowil, Friedrich V. "How do Norms Matter?" In *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. by Michael Byers, 35-68. Oxford: Oxford University Press, 2000.
- Kratowil, Friedrich V. "Norms vs. Numbers: Multilateralism and the Rationalist and Reflexivist

- Approaches to Institutions, A Unilateral Plea for Communicative Rationality.” In *Multilateralism Matters*, ed. by John G. Ruggie, 443-474. New York: Columbia University Press, 1995.
- Kratochwil, Friedrich V. “On the Notion of Interest in International Relations.” *International Organization* Vol.36 No.1 (Winter 1982): 1-30.
 - Kratochwil, Friedrich V. and John G. Ruggie. “International Organizations: A State of the Art on an Art of the State.” *International Organization* Vol. 40, No. 4 (Autumn 1986): 753-775.
 - Kratochwil, Friedrich V. *International Organization: A Reader* (London: Longman, 1997).
 - Kratochwil, Friedrich V. *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press, 1989.
 - Kratochwil, Friedrich. “On the Notion of Interest.” *International Organization* Vol. 36 No.1 (Winter, 1982): 1-30.
 - Kratochwil, Friedrich. “The Force of Prescriptions.” *International Organization* Vol. 38 No. 4 (Autumn 1984): 685-708.
 - Kreb, Claus and Leonie von Holtzendorff. “The Kampala Compromise on the Crime of Aggression.” *Journal of International Criminal Justice* 8 (2010): 1179-1217.
 - Kuusisto, Riikka. "Framing the Wars in the Gulf and in Bosnia: The Rhetorical Definitions of the Western Power Leaders in Action." *Journal of Peace Research* Vol. 35 No. 5 (1998): 603-620.
 - Lake, Anthony. “American Power and American Diplomacy.” *US State Department Dispatch*, 5/46 (November 14 1994): available at http://findarticles.com/p/articles/mi_m1584/is_n46_v5/ai_16415699/.
 - Lake, Anthony. “From Containment to Enlargement.” Johns Hopkins University School of Advanced International Studies, Washington, D.C., September 21, 1993, <http://www.mtholyoke.edu/acad/intrel/lakedoc.html>.
 - Lake, Anthony. “The need for engagement.” *US State Department of State Dispatch*, 6/15 (December 5 1994): available at http://findarticles.com/p/articles/mi_m1584/is_n49_v5/ai_16038737/.
 - Lake, David. “The New Sovereignty in International Relations” *International Studies Review* 5 (2003): 303-323.
 - Lantis, Jeffrey S. “Leadership Matters: International Treaty Ratification in Canada and the United States.” *The American Review of Canadian Studies* (Autumn 2005): 383-421.
 - Lapid, Yosef and Friedrich V. Kratochwil (eds.). *The Return of Culture and Identity in International Relations Theory*. Boulder: Lynne Rienner Publishers, 1996.
 - Larner, Wendy and William Walters. *Global Governmentality: Governing International Spaces*. London: Routledge, 2004.

- Lee, Roy S. (ed.). *States' Responses to Issues Arising From the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*. New York: Transnational Publishers, 2005.
- Lee, Roy S. (ed.). *The International Criminal Court: The Making of the Rome Statute*. The Hague: Kluwer Law International, 1999.
- Legro, Jeffrey W. "Which Norms Matter? Revisiting the Failure of Internationalism." *International Organization* Vol. 51 No. 1 (Winter 1997): 31-63.
- Legro, Jeffrey W. and Andrew Moravcsik. "Is Anybody Still a Realist?" *International Security* Vol. 24 No. 2 (Fall 1999): 5-55.
- Leigh, Monroe. "The United States and the Statute of Rome." *The American Journal of International Law* Vol. 95 No.1 (January 2001): 124-131.
- Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome Document Being Prepared for the High Level Event on Responsibility to Protect (30 August 2005): available at http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf.
- Lewis, Anthony. "Abroad at Home: Foreign Policy Morass." *New York Times* October 11 1993.
- Lietzau, William K. "International Criminal Law After Rome: Concerns from a U.S. Military Perspective." *Law and Contemporary Problems* Vol. 64, No.1 (Winter 2001): 119-140.
- Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven and London: Yale University Press, 1999.
- Lippman, Thomas W. "America Avoids The Stand; Why the U.S. Objects To A World Criminal Court." *The Washington Post* July 26, 1998.
- Lippman, Thomas W. *Madeleine Albright and the New American Diplomacy*. Boulder: Westview Press, 2000.
- Lipschutz, Ronnie and James Rowe. *Globalization, Governmentality and Global Politics: Regulation for the Rest of Us?* London: Routledge, 2005.
- Lipset, Seymour Martin and Stein Rokkan. *Party System and Voters Alignments: Cross-National Perspectives*. Toronto: The Free Press, 1967.
- Little, Richard and Mark Wickham-Jones. *New Labour Foreign Policy: A New Moral Crusade*. Manchester: Manchester University Press, 2000.
- Livingston, William S. "Britain and America: The Institutionalization of Accountability" *The Journal of Politics* Vol. 38 No. 4 (November 1976): 879-894.
- Lloyd, John. "Cook declares total war on fascism." *New Statesman*, 3 May 1999.
- Lohmann, Susanne and Sharyn O'Halloran. "Divided Government and U.S. Trade Policy: Theory and

- Evidence.” *International Organization* Vol. 48 No. 4 (Autumn 1994): 595-632.
- Luck, Edward C. “The Responsible Sovereign and the Responsibility to Protect.” In *Annual Review of United Nations Affairs*, ed. by Joachim W. Muller and Karl P. Sauvant, 1-13. Oxford: Oxford University Press, 2008.
 - Luck, Edward C. “The United Nations and the Responsibility to Protect.” *Policy Analysis Brief*, Stanley Foundation (August 2008): 1-11.
 - Luck, Edward C. “The United States, International Organizations, and the Quest for Legitimacy.” In *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, ed. by Shepard Foreman, Stewart Patrick, and Joanne J. Myers, 47- 74. Boulder: Lynne Rienner, 2002.
 - Luck, Edward C. *Mixed Messages: American Politics and International Organization, 1919-1999*. Washington, D.C: Brookings Institution Press, 1999.
 - Lutz, Ellen L. and Kathryn Sikkink. “International Human Rights Law and Practice in Latin America.” *International Organization* Vol. 54 No. 3 (Summer 2000): 633-659.
 - Lynch, Column. “GOP Bill Would Bar U.S. Cooperation in War Crimes Tribunal.” *The Washington Post* June 14, 2000.
 - Macfarlane, Neil S. and Thomas G. Weiss. "Political Interest and Humanitarian Action." *Security Studies* Vol. 10 No. 1 (2000): 120-152.
 - Macfarlane, Neil S., Jennifer Welsh, Carolin Thielking. “The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty.” *International Journal* Vol. 57, No. 4 (Fall 2002): 489-502.
 - MacFarlane, Neil. *Intervention in Contemporary World Politics*. Oxford: Oxford University Press, 2002.
 - MacPherson, Bryan F. “Building an International Criminal Court for the 21st Century.” *Journal of International Law* Vol. 13, No. 1 (Winter 1998): 1-60.
 - Mandelbaum, Michael. "The Reluctance to Intervene." *Foreign Policy* No. 95 (1994): 3-18.
 - Mandelbaum, Michael. “Foreign Policy as Social Work.” *Foreign Affairs* 75, No.1 (January/February 1996): 16-32.
 - Mandelson, Peter and Roger Liddle. *The Blair Revolution: Can New Labour Deliver?* London: Faber and Faber, 1996.
 - March, James G. and Johan P. Olsen. “The Institutional Dynamics of International Political Orders.” *International Organization* Vol.52 No.4 (Autumn 1998): 943-69.
 - Martin, Lisa. “Legislative Influence and International Engagement.” In *Liberalization and Foreign Policy*, ed. by Miles Kahler, 67-103. New York: Columbia University Press, 1997.
 - Martinez, Gebe. “Campbell Maneuvers to Force an Ambivalent Congress to Choose.” *Congressional*

Quarterly Weekly April 24, 1999.

- Mastanduno, Michael, John G. Ikenberry, David Lake. "Toward a Realist Theory of State Action." *International Studies Quarterly* Vol. 33 No. 4 (1989): 457-474.
- McCormick, George M. *American Foreign Policy and Process*. Toronto, Wadsworth, 2005.
- McCormick, James. "Assessing Clinton's foreign policy at Midterm." *Current History* 94 (November 1995).
- McGoldrick, Dominick, Peter Rowe and Eric Donnelly. *The Permanent International Criminal Court: Legal and Policy Issues*. Oxford and Portland: Hart Publishing, 2004.
- McGovern, Cindy. "Threat Reduction Agency Dozen Lead Kosovo Observer Force." *American Forces Press Service*, February 23 1999.
- McInness, Colin. "Labour's Strategic Defence Review." *International Affairs* Vol.74 No.4 (October 1998): 823-45.
- McNamara, Kathleen. "Consensus and Constraint: Ideas and Capital Mobility in European Monetary Integration." *Journal of Common Market Studies* Vol. 37 No.3 (1999): 455-476.
- McNamara, Robert S. and Benjamin B. Ferencz. "For Clinton's Last Act." *The New York Times* December 12, 2000.
- McNerney, Patricia. "The International Criminal Court: Issues for Consideration by the United States Senate." *Law and Contemporary Problems* 181 (Winter 2001): 182-191.
- Mearsheimer, John J. "The False Promise of International Institutions." *International Security* Vol. 19 No. 3 (1994/95): 5-49.
- Meckled-Garcia, Saladin and Basak Cali (eds.). *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*. London and New York: Routledge, 2006.
- Meernik, James. "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia." *Journal of Peace Research* Vol. 42 No. 3 (2005): 271-289.
- Meernik, James. "Victors' Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia." *The Journal of Conflict Resolution* Vol. 47 No. 2 (April 2003): 140-162.
- Menon, Anand, Martin A. Schain. *Comparative Federalism: The European Union and the United States in Comparative Perspective*. Oxford: Oxford University Press, 2006.
- Mernik, James D. "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia." *Journal of Peace Research* 42 (2005): 271-290.
- Mernik, James D. "Victor's Justice or the Law: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia." *Journal of Conflict Resolution* 47 (2003): 140-162.

- Meron, Theodor. "The Court We Want." *The Washington Post* October 13, 1998.
- Michelmann, Hans (ed.). *Foreign Relations in Federal Countries*. Montreal, London, Ithaca: McGill-Queen's University Press, 2009.
- Michelmann, Hans and Panayotis Soldatos. *Federalism and International Relations: The Role of Subnational Units*. Oxford: Clarendon Press, 1990.
- Moravcsik, Andrew and Kalypso Nicolaidis. "Explaining the Treaty of Amsterdam: Interests, Influence, and Institutions." *Journal of Common Market Studies* Vol. 37 No. 1 (March 1999): 59-95.
- Moravcsik, Andrew. "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51 No. 4 (Autumn 1997): 513-553.
- Moravcsik, Andrew. "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community." *International Organization* Vol. 45 No. 1 (Winter 1991): 1-56.
- Moravcsik, Andrew. "Preferences and Power in the European Community: Towards A Liberal Intergovernmental Approach." *Journal of Common Market Studies* 31 (1993): 473-524.
- Moravcsik, Andrew. *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell University Press, 1998.
- Morgenthau J. Hans. *In Defense of the National Interest: A Critical Examination of American Foreign Policy*. New York: Knopf, 1952.
- Morgenthau, Hans. "Another Great Debate: The National Interest of the U.S." *American Political Science Review* Vol. XLVI, No. 4 (December 1952).
- Morgenthau, Hans. *Scientific Man Versus Power Politics*. Chicago: University of Chicago Press, 1946.
- Morgenthau, J. Hans. "The Mainsprings of American Foreign Policy: The National Interest vs. Moral Abstractions." *American Political Science Review* Vol. 44 No. 4 (1950): 833-854.
- Morgenthau, J. Hans. "To Intervene or Not to Intervene?" *Foreign Affairs* Vol. 45 No. 3 (1967): 425-436.
- Morgenthau, J. Hans. *Politics Among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill, 1985.
- Mueller, John. *Retreat From Doomsday: The Obsolescence of Major War*. Rochester, NY: University of Rochester Press, 1989.
- Murphy, John F. "The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court." *International Lawyer*, Vol. 34, No.1 (2000): 45-64.
- Myers, Steven Lee. "Kosovo Inquiry Confirms U.S. Fears of War Crimes Court." *New York Times*

January 3, 2000.

- Myers, Steven Lee. "Making Sure War Crimes Aren't Forgotten." *The New York Times* September 22, 1997.
- Nadelmann, Ethan A. "Global Prohibition Regimes: The Evolution of Norms in International Society." *International Organization* Vol. 44, No. 4 (Autumn 1990): 479-526.
- Naim, Moses. "Clinton's Foreign Policy: A Victim of Globalization." *Foreign Policy* (Winter 1997-98): 34-45.
- Nardin, Terry and Melissa S. Williams (eds.). *Humanitarian Intervention*. New York: New York University Press, 2006.
- Nathan, James A. and James K. Oliver. *Foreign Policy Making and the American Political System*. The Johns Hopkins University Press: Baltimore and London, 1994.
- Neack, Laura. "UN Peace-Keeping: Community or Self?" *Journal of Peace Research* Vol. 32 No. 2 (1994): 181-196.
- Neumayer, Eric. "A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court." *Journal of Peace Research* Vol. 46, No. 5, 2009: 659-671.
- Neustadt, Richard E. *Presidential Power: The Politics of Leadership from FDR to Carter*. New York: Macmillan, 1980.
- Newman, Edward. "Humanitarian Intervention, Legality and Legitimacy." *International Journal of Human Rights* Vol. 6, No. 4 (Winter 2002): 102-120.
- Nitsch, Carlo. "La teoria giuridica del conflitto come strategia politica della pace: Un itinerario nella riflessione internazionalistica di Hans Kelsen." In *Conflitti*, ed. by Alessandro Arienzo and Dario Caruso, 289-338. Napoli: Libreria Dante & Descartes, 2005.
- Nye, Joseph, "Redefining the National Interest." *Foreign Affairs* Vol. 78 No. 4 (1999): 22-35.
- Omestad, Thomas. "The Brief for a World Court: A Permanent War-Crimes Tribunal is coming, but will it have teeth?" *U.S. News and World Report* 9/28/97.
- Orford, Anne. "Muscular Humanitarianism: Reading the Narratives of the New Interventionism." *European Journal of International Law* Vol. 10 No. 4 (1999): 679-711.
- Outline of the Report of the Commission on Human Security* (May 2003): available at <http://www.humansecurity-chs.org/finalreport/>.
- Panebianco, Angelo. *Guerrieri Democratici: Le Democrazie e la Politica di Potenza*. Bologna: Il Mulino, 1997.
- Panke, Diana and Ulrich Petersohn. "Why International Norms Disappear Sometimes." *European Journal of International Relations* (published online 14 June 2011): 1-24.

- Patrick, Stewart and Shepard Forman (eds.). *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*. Boulder, London: Lynne Rienner, 2002.
- Pauly W. Louis and Edgar Grande. "Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Order". In *Complex Sovereignty*, edited by Edgar Grande and Louis W. Pauly, 3-21. Toronto: University of Toronto Press, 2005.
- Pearson, Frederic S., Robert A. Baumann, and Jeffrey J. Pickering. "Military Intervention in Realpolitik." In *Reconstructing Realpolitik*, ed. by Frank W. Wayman and Paul F. Diehl, 205-25. Ann Arbor: University of Michigan Press, 1994.
- Pearson, Frederick S. et al., "Military Intervention and Realpolitik." In *Reconstructing Realpolitik*, edited by Frank W. Wayman and Paul F. Diehl, 205-225. Ann Arbor: University of Michigan Press, 1994.
- Pennock, Roland J. "Responsible Government, Separated Powers, and Special Interests: Agricultural Subsidies in Britain and America." *The American Political Science Review* Vol. 56, No. 3 (September 1962): 621-33.
- Pennock, Roland J. "The 'Pork Barrel' and Majority Rule: A Note" *The Journal of Politics* Vol. 32 No. 3 (August 1970): 709-16.
- Pennock, Roland J. "The Author Responds" *The Journal of Politics* Vol. 33 No. 2 (May 1971): 531-33.
- Perlez, Jane. "Clinton and the Joint Chiefs of Staff to Discuss Ground Invasion." *New York Times*, June 2 1999.
- Perlez, Jane. "Crisis in the Balkans: War Options. Clinton and the Joint Chiefs to Discuss Ground Invasion." *New York Times* June 2, 1999.
- Perlez, Jane. "Doubts on Nato Air Raids as the Talks on Kosovo End." *New York Times*. March, 19, 1999.
- Perlez, Jane. "Doubts on NATO Air Raids as the Talks on Kosovo End." *New York Times* March 19, 1999.
- Perlez, Jane. "With Time Short, Albright Stays Aloft." *The New York Times* July 3, 2000.
- Peterson, John. "In Defence of Inelegance: IR Theory and Transatlantic Practice." *International Relations* 20, 1 (March 2006): 5-25.
- Pisik, Betsy. "Global Court is no deal." *The Washington Times* June 15 1998, A15.
- Pisik, Betsy. "Word Criminal Court Created: U.S. Takes stand, but Loses in Rome." *The Washington Times* July 18 (1998): A1.
- Pomper, Miles A. "DEFENSE: Reluctant White House Urged To Send Troops To Province of Kosovo." *CQ Weekly Online* (June 13, 1998): 1628-1629. <http://library.cqpress.com/cqweekly/WR19980613-24KOSOVO001> (accessed January 14, 2010).

- Pomper, Miles A. "FOREIGN AFFAIRS: Congress Wants a Bigger Voice On Sending Troops to Kosovo." *CQ Weekly Online* (February 27, 1999): 499-499. <http://library.cqpress.com/cqweekly/WR19990227-09KOSOVO001> (accessed January 14, 2010).
- Pomper, Miles A. "FOREIGN AFFAIRS: Lawmakers Cautious of Kosovo Deal." *CQ Weekly Online* (October 17, 1998): 2835-2835. <http://library.cqpress.com/cqweekly/WR19981017-41KOSOVO001> (accessed January 14, 2010).
- Pomper, Miles A. "FOREIGN AFFAIRS: Lawmakers Step Up Criticism Of Clinton's Policy on Kosovo As Serbians Fail To Withdraw." *CQ Weekly Online* (October 24, 1998): 2916-2916. <http://library.cqpress.com/cqweekly/WR19981024-42KOSOVO001> (accessed January 14, 2010).
- Pomper, Miles A. "FOREIGN AFFAIRS: Members Rally Around Kosovo Mission Despite Misgivings About Strategy." *CQ Weekly Online* (March 27, 1999): 763-765. <http://library.cqpress.com/cqweekly/WR19990327-13KOSOVO001> (accessed January 15, 2010).
- Pomper, Miles A. "FOREIGN POLICY: Lawmakers Press Clinton On Kosovo." *CQ Weekly Online* (September 26, 1998): 2602-2602. <http://library.cqpress.com/cqweekly/WR19980926-38KOSOVO001> (accessed January 14, 2010).
- Power, Samantha. *A Problem from Hell: America and the Age of Genocide*. New York: Basic Books, 2002.
- Prantl, Jochen and Ryoko Nakano. "Global Norm Diffusion in East Asia: How China and Japan Implement the Responsibility to Protect." *NTS Working Paper Series* No. 5, Singapore: RSIS Centre for Non-Traditional Security (NTS) Studies, January 2011.
- Presidential Decision Directive 56, "Complex Contingency Operations" (PDD 56) May 1997.
- Priest, Dana. "A decisive battle that never was." *Washington Post*, September 19, 1999.
- Puchala, Donald J. and Raymond F. Hopkins. "International Regimes: Lessons from Inductive Analysis." *International Organization* Vol. 36 No.2 (Spring 1982): 245-75.
- Puetter, Uwe and Antje Wiener. "Accommodating Normative Divergence in World Politics: European Foreign Policy Coordination." *Journal of Common Market Studies* Vol. 45 No. 5 (2007): 1063-86.
- Punnet, R. M. *British Government and Politics*. London: Heinemann, 1970.
- Putnam, Robert D. "Diplomacy and Domestic Politics: The Logic of Two-Level Games." *International Organization* Vol. 42 No. 3 (Summer 1988): 427-60.
- Putnam, Robert D. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, 2000.
- Ralph, Jason. *Defending the Society of States: Why America opposes the International Criminal Court and Its Vision of World Society*. Oxford: Oxford University Press, 2007.
- Rathbun Brian C. *Partisan Interventions: European Party Politics and Peace Enforcement in the*

Balkans. Ithaca: Cornell University Press, 2004.

- Rawnsley, Andrew. *Servants of the People: The Inside Story of New Labour*. London: Hamish Hamilton, 2000.
- Reagan, Patrick M. "Choosing to Intervene: Outside Interventions in Internal Conflicts." *Journal of Politics* Vol. 60 No. 3 (August 1998): 754-779.
- Recchia Steven P. "International Environmental Treaty Engagement in 19 Democracies." *Policy Studies Journal* Vol. 30 No. 4 (2002): 470-494.
- Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the UN Security Council and the Responsibility to Protect, at the International Peace Institute Vienna Seminar (June 15, 2009): available at http://www.usunnewyork.usmission.gov/press_releases/20090615_126.html.
- Rentoul, John. *Tony Blair Prime Minister*. London, Little, Brown and Company, 2001.
- Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, 11 April 1949, ICJ Reports (1949): available at www.icj.cij.org.
- Reus-Smith, Christian. "The Constitutional Structure of International Society and the Nature of Fundamental Institutions." *International Organization* Vol. 51, No. 4 (1997): 555-89.
- Ricks, Thomas E. "U.S. Signs Treaty on War Crimes Tribunal; Pentagon, Republicans Object to Clinton Move." *The Washington Post* January 1, 2001.
- Risse, Thomas, Stephen C. Ropp, and Kathrin Sikkink. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press, 1999.
- Risse, Thomas. "To Euro or Not to Euro? The EMU and Identity Politics in the European Union." *European Journal of International Relations* Vol. 5 No.2 (1999): 147-87.
- Risse-Kappen, Thomas (ed.). *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*. Cambridge: Cambridge University Press, 1995.
- Risse-Kappen, Thomas. "Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War." *International Organization* Vol. 48 No. 2 (Spring 1994): 185-214.
- Risse-Kappen, Thomas. "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies." *World Politics* Vol. 43 No. 4 (July 1991): 479-512.
- Roberts Timmons J., Bradley C. Parks, and Alexis A. Vasquez. "Who Ratifies International Treaties and Why? Institutionalism, Structuralism and Participation by 192 Nations in 22 Treaties." *Global Environmental Politics* Vol. 4 No. 3 (August 2004): 22-64.
- Roberts, Adam. "NATO's Humanitarian War over Kosovo." *Survival* Vol. 41 No. 3 (Autumn 1999): 102-123.
- Robertson, George. "I say to the left: our bombs are not making it worse. We must win this." *The*

Guardian 16 April 1999.

- Rokkan, Stein, Angus Campbell, Per Torsvik, and Henry Valen. *Citizens, Elections, Parties: Approaches to the Comparative Study of the Processes Development*. ECPR Press, 2010.
- Rome Statute of the International Criminal Court, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.
- Rose, Gideon. "Neoclassical Realism and Theories of Foreign Policy." *World Politics* Vol. 51 No. 1 (October 1998): 144-172.
- Rosenau, James N. (ed.). *Domestic Sources of Foreign Policy*. New York: The Free Press, 1967.
- Rosenau, James N. (ed.). *International Politics and Foreign Policy: A Reader in Research and Theory*. New York: The Free Press, 1969.
- Rosenau, James N. *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*. Cambridge: Cambridge University Press, 1997.
- Rudolph, Christopher. "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals." *International Organization* Vol. 55 No. 3 (Summer 2001): 655-691.
- Ruggie, Gerard John. "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis." In *Neorealism and Its Critics*, ed. by Robert O. Keohane, 131-57. New York: Columbia University Press, 1986.
- Ruggie, John Gerard. "Multilateralism: The Anatomy of an Institution." *International Organization* Vol. 46 No.3 (Summer 1992): 561-98.
- Ruggie, John. "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge." *International Organization* Vol. 52 No. 4 (Autumn 1998): 855-885.
- Ruggie, John. *Constructing the World Polity: Essays on International Institutionalization*. London and New York: Routledge, 1998.
- Russell Mead, Walter. *Special Providence: American Foreign Policy and How It Changed the World*. New York: Alfred A. Knopf, 2001.
- Sadat, Leila Nadya and S. Richard Carden. "The New International Criminal Court: An Uneasy Revolution." *Georgetown Law Journal* Vol. 88, No. 3 (March 2000): 381-474.
- Sadat, Leila Nadya. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. New York: Transnational Publishers, 2002.
- Sandholtz, Wayne. "Dynamics of International Norm Change: Rules Against Wartime Plunder." *European Journal of International Relations* Vol.14 No.1 (2008): 101-31.
- Sandholtz, Wayne. *Prohibiting Plunder: How Norms Change*. Oxford: Oxford University Press, 2007.
- Sands, Philippe. *Lawless World: Making and Breaking Global Rules*. New York: Penguin Books,

2005.

- Sartori, Giovanni. *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*. London: Macmillan, 1994.
- Schabas, William A. "United States Hostility to the International Criminal Court: It's All About the Security Council." *European Journal of International Law* Vol. 15 No. 4 (2004): 701-720.
- Scharf, Michael P. "The Politics Behind U.S. Opposition to the International Criminal Court." *Brown Journal of World Affairs* Vol. 6 Issue 1 (Winter/Spring 1999): 97-105.
- Scheffer, David J. "America's Stake in Peace, Security, and Justice." *Journal of International Law and Practice* Vol. 8 (1999): 1-7.
- Scheffer, David J. "International Judicial Intervention." *Foreign Policy* No. 102 (Spring 1996): 34-51.
- Scheffer, David J. "Staying the Course with the International Criminal Court." *Cornell International Law Journal* Vol. 35 (2001-2): 47-100.
- Scheffer, David J. "The United States and the International Criminal Court." *The American Journal of International Law* Vol. 93 No.1 (January 1999): 12-22.
- Scheffer, David J. and Ashley Cox. "The Constitutionality of the Rome Statute of the International Criminal Court." *The Journal of Criminal Law and Criminology* Vol. 98 No. 3 (2008): 983-1068.
- Scheffer, David J. and John Hutson. "Strategy for U.S. Engagement with the International Criminal Court." A Century Foundation Report, 2008.
- Scheffer, David J., Richard Cooper, and Juliette Voinov Kohler. "The End of Exceptionalism in War Crimes." *Harvard International Review* (August 12, 2007): available at <http://hir.harvard.edu/the-end-of-exceptionalism-in-war-crimes>.
- Schier, Steven E. (ed.). *The Postmodern Presidency: Bill Clinton's Legacy in U.S. Politics*. Pittsburgh, University of Pittsburgh Press, 2000.
- Schiff, Benjamin N. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 2008.
- Schlesinger Arthur M. Jr. *War and the American Presidency*. New York: W.W. Norton, 2004.
- Schlesinger, Stephen. "The End of Idealism: Foreign Policy in the Clinton Years." *World Policy Journal* (Winter 1998-99): 36-40.
- Schmidt, Vivien. *Democracy in Europe: The EU and National Politics*. Oxford: Oxford University Press, 2006.
- Schmitt, Carl. "Il concetto di politico" in *Le categorie del politico*, ed. by Gianfranco Miglio and Pierangelo Schiera, 87-208. Bologna: Il Mulino, 1972.
- Schmitt, Carl. "Teologia politica" in *Le categorie del politico*, ed. by Gianfranco Miglio and

Pierangelo Schiera, 33-86. Bologna: Il Mulino, 1972.

- Schmitt, Eric. "Pentagon Battles Plans for International War Crimes Tribunal." *New York Times* April 14, 1998.
- Schmitt, Eric. "U.S. set to limit role of military in Peacekeeping." *New York Times* 29 January 1994.
- Secretary Albright, "Foreign Policy: Strategic Goals, Address Before the American Association of Newspaper Editors, Washington, DC, April 2 1998, in *U.S. State Department Dispatch* (May 1998): 10-13.
- Secretary Albright. "A New NATO for a New Century." Remarks at the Brookings Institution, National Issues Forum: A New NATO for a New Century, Washington, DC, April 6, 1999, in *U.S. Department of State Dispatch* (April 1999): 6-10.
- Secretary Albright. "Challenges Facing U.S. National Interests at Home and Abroad." Remarks at the Center for National Policy, Washington, DC, January 21, 1999, in *U.S. State Department of State Dispatch* (January/February 1999): 15-8.
- Secretary Albright. "NATO Preparing for the Washington Summit." Prepared Statement for the North Atlantic Council, Brussels, Belgium, December 8, 1998, in *U.S. State Department Dispatch* (December 1998): 1-5.
- Secretary Albright. "The Importance of Kosovo." Remarks at the U.S. Institute for Peace, Washington, DC, February 4 1999, in *U.S. Department of State Dispatch* (January/February 1999): 4-7.
- Secretary Albright. "U.S. Efforts to Promote The Rule of Law." Remarks at the Condon-Falknor Distinguished Lecture, University of Washington School of Law, Seattle, Washington, October 29, 1998, in *U.S. State Department of State Dispatch* (December 1998): 6-9.
- Secretary-General Kofi A. Annan. "Secretary-General Presents his Annual Report to the General Assembly." United Nations General Assembly (20 September 1999): available at http://www.un.org/News/press/docs/1999/sg/statements_search_full.asp?statID=28.
- Seldon, Anthony. *Blair*. London: Simon & Schuster, 2004.
- Seldon, Anthony. *The Blair Effect: The Blair Government 1997-2001*. London: Little Brown and Company, 2001.
- Sewall Sarah B. and Carl Kaysen (eds.). *The United States and the International Criminal Court: National Security and International Law*. Lanham: Rowman & Littlefield Publishers, 2000.
- Shalikashvili, John M. "National Military Strategy, Shape, Respond, Prepare Now – A military strategy for a New Era," 1997.
- Shawcross, William. *Deliver Us from Evil: Peacekeepers, Warlords and a World of Endless Conflict*. London: Bloomsbury, 2000.
- Sikkink, Kathryn and Carrie B. Walling. "The Impact of Human Rights Trials in Latin America"

Journal of Peace Research Vol. 44 No.4 (2007): 427-45.

- Sikkink, Kathryn. "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America." *International Organization* 47, 3 (Summer 1993): 411-41.
- Simma, Bruno. "NATO, the UN, and the Use of Force: Legal Aspects." *European Journal of International Law* 10 (1999): 1-22.
- Simmons, Beth A. *Who Adjust? Domestic Sources of Foreign Economic Policy During the Interwar Years*. Princeton, New Jersey: Princeton University Press, 1994.
- Singer, Peter. *One World*. New Haven & London: Yale University Press, 2004.
- Small, Melvin. *Democracy and Diplomacy: The Impact of Domestic Politics on U.S. Foreign Policy, 1789-1994*. Baltimore and London: The Johns Hopkins University Press, 1996.
- Smith, Jackie. "Characteristics of the Modern Trans-national Social Movement Sector." In *Trans-national Social Movements and Global Politics: Solidarity Beyond the State*, ed. by Jackie Smith, Charles Chatfield, and Ron Pagnucco, 42-58. Syracuse, NY: Syracuse University Press, 1997.
- Smith, Karen and Margot Light (eds.). *Ethics and Foreign Policy*. Cambridge: Cambridge University Press, 2001.
- Snider, Don M. and John A. Nagl. "The National Security Strategy: Documenting Strategic Vision" in *U.S. Army War College Guide to Strategy*, edited by Joseph R. Cerami and James F. Holcomb Jr., February 2001, available at <http://www.au.af.mil/au/awc/awcgate/army-usawc/strategy/index.htm>.
- Snyder, William J. Jr. "Command versus Operational Control: A Critical Review of PDD-25", available at <http://www.ibiblio.org/jwsnyder/wisdom/pdd25.html>.
- Stahn, Carsten. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" *The American Journal of International Law* Vol. 101 No. 1 (January 2007): 99-120.
- Stanley, Alessandra. "Conference Opens on Creating Court to Try War Crimes." *New York Times* June 15, 1998.
- Stanley, Alessandra. "U.S. Dissents, but Accord is Reached on War-Crime Court." *The New York Times* July 18, 1998.
- Stanley, Alessandra. "U.S. Presses Allies to Rein In Proposed War Crimes Court." *New York Times* July 15, 1998.
- Stanley, Alessandra. "U.S. Specifies Terms for War Crimes Court." *The New York Times* July 10, 1998.
- Starobin, Paul. "The Liberal Hawk Soars." *National Journal* (May 15 1999): 1310.
- Stein, Arthur A. "Coordination and Collaboration: Regimes in an Anarchic World." *International Organization* Vol.36 No.2 (Spring 1982): 299-324.

- Stephens Philippe. *Tony Blair: The Making of a World Leader*. NY: Penguin, 2004.
- Stonesweet, Alec, Wayne Sandholtz, and Neil Fligstein (eds.). *The Institutionalization of Europe*. Oxford: Oxford University Press, 2001.
- Struett, Michael J. and Steven A. Weldon. "Explaining State Decisions to Ratify the International Criminal Court." Paper presented at the American Political Science Association, Annual Meeting, Philadelphia, P.A., September 2, 2006.
- Struett, Michael J. *The Politics of Constructing the International Criminal Court: NGOs, Discourse, Agency*. NY: Palgrave, 2008.
- Sudetic, Chuck. "Justice is Better than Revenge." *New York Times* October 29, 2000.
- Suhrke, Astri. "Human Security and the Interests of States." *Security Dialogue* Vol. 30 No. 3 (1999): 265-276.
- Szamuely, George. "Clinton's clumsy encounter with the world." *Orbis* Vol. 38 Issue 3 (Summer 1994): 373-395.
- Talbot, Strobe. "Democracy and the National Interest." *Foreign Affairs* Vol. 75 Issue 6 (November/December 1996): 47-63.
- Tanguy, Joelle. "Redefining Sovereignty and Intervention." *Ethics and International Affairs* Vol. 17, No. 1 (2003): 141-148.
- Tannebaum, Nina. *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons*. Cambridge: Cambridge University Press, 2008.
- Taulbee, James A. "A Call to Arms Declined: The United States and the International Criminal Court." *Emory International Law Review* 14 (Spring 2000): 105-57.
- Taylor, Andrew. "APPROPRIATIONS: Paying for the Kosovo Air War: How Much Is Too Much?" *CQ Weekly Online* (May 1, 1999): 1013-1015. <http://library.cqpress.com/cqweekly/WR19990501-18SUPP001> (accessed January 16, 2010).
- Teson, Fernando. *Humanitarian Intervention: An Inquiry into Law and Morality*. New York: Transnational Publishers, 1988.
- The Report of the Independent International Commission on Kosovo*. Oxford: Oxford University Press, 2000.
- The Responsibility to Protect Report of the International Commission on Intervention and State Sovereignty*. Ottawa: International Development Research Center, (2001): available at <http://www.iciss.ca/menu-en.asp>.
- The Responsibility to Protect: Report for the International Commission on Intervention and State Sovereignty*. Ottawa: International Development Research Center, 2001: available at <http://www.iciss.ca/menu-en.asp>.

- Thomson, Janice E. "State Practices, International Norms, and the Decline of Mercenarism." *International Studies Quarterly* Vol. 34 (1990): 23-47.
- Thornton, Rod. "A welcome revolution? The British Army and the changes of the strategic defence review." *Defence Studies* Vol. 3 No.3 (Autumn 2003): 38-62.
- Towell, Pat. "FOREIGN AFFAIRS: Congress Set To Provide Money, But No Guidance, for Kosovo Mission." *CQ Weekly Online* (May 1, 1999): 1036-1040. <http://library.cqpress.com/cqweekly/WR19990501-18KOSOVO001> (accessed January 16, 2010).
- Trueheart, Charles. "U.N. Conference to Draft War Crimes Treaty." *The Washington Post* June 14, 1998.
- UN General Assembly. "Convention on the Prevention and Punishment of the Crime of Genocide." Adopted by Resolution 260 (III) of the UN General Assembly (9 December 1948): available at <http://www.preventgenocide.org/law/convention/text.htm#VI>.
- United Nations General Assembly. "Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." Resolution 77 (21 November 1947): available at <http://www.un.org/documents/ga/res/2/ares2.htm>.
- United Nations General Assembly. "Resolution Adopted by the General Assembly on the 2005 World Summit Outcome" (24 October 2005): Sixtieth Session, A/60.L.1.
- United Nations General Assembly. "We the Peoples: The Role of the United Nations in the twenty-first century." Report of the Secretary-General, Fifty-Fourth Session (27 March 2000): UN Document A/54/2000.
- United Nations General Assembly. *In Larger Freedom: Towards Development, Security, and Human Rights for all. Report of the Secretary-General*. Fifty-Ninth Session (21 March 2005): available at <http://www.un.org/largerfreedom/contents.htm>.
- United Nations Secretary-General. "Implementing the Responsibility to Protect: Report of the Secretary-General" (12 January 2009): UN A/63/677.
- United Nations Security Council. Resolution 1556, 30 July 2004.
- United Nations Security Council. Resolution 1674 (28 April 2006): available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>.
- United Nations Security Council. Resolution 1970, 26 February 1970.
- United Nations, "Observations of Governments on the report of the Working Group on a draft statute for an international criminal court." *Yearbook of the International Law Commission* Vol. II (1) 1994.
- United Nations, General Assembly. "Report of the Working Group on a Draft Statute for an International Criminal Court." International Law Commission, Forty-Sixth Session, 2 May-22 July 1994, A/CN.4/L.491/Rev.2, 14 July 1994.

- United Nations, ICTY. Prosecutor v. Dusko Tadic (15 July 1999): available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.
- United Nations. "Early Warning, Assessment and the responsibility to protect." Report of the Secretary General, 14 July 2010.
- United Nations. "Report of the Secretary-General on the Work of the Organization, General Assembly." Official Records, Fifty-Fifth Session, Supplement No. 1 (A/55/1), 30 August 2000.
- United Nations. "Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the Assembly." 5 August 2005, A/59/HLPM/CRP.1/Rev.2.
- United Nations. "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court." Official Records. United Nations, New York, 15 June-17 July 1998: Vol. 1-3.
- Van der Maat, Eelco. "Sleeping Hegemons: Third Party intervention following territorial integrity transgression." *Journal of Peace Research* 48 (2) (2011): 201-15.
- Vickers, Rhiannon. "Blair's Kosovo Campaign." *Civil Wars* 3:1 (2000): 63-6.
- Vile, M. J. C. *Constitutionalism and the Separation of Powers*. Indianapolis: Liberty Fund, 1998.
- Von Hebel, Herman A. M., Johan G. Lammers, Jolien Schukking (eds.). *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*. The Hague: T.M.C. Asser Press, 1999.
- Von Hippel, Karin and Michael Clarke. "Something Must Be Done." *World Today* Vol. 55 No. 3 (1999): 4-7.
- Von Hippel, Karin. *US Military Intervention in the Post-Cold War World*. Cambridge: Cambridge University Press, 2000.
- Walt, Stephen. "Two Cheers for Clinton's Foreign Policy." *Foreign Affairs* (March/April 2000): 63-79.
- Waltz, Kenneth N. "Theory of International Relations." In *Handbook of Political Science*, ed. by Fred I. Greenstein and Nelson W. Polsby, Vol. 8, 2-15. Reading: Addison-Wesley Publishing Company, 1975.
- Waltz, Kenneth N. "Kant, Liberalism, and War." *American Political Science Review* Vol. LVI, No. 2 (Summer 1962): 331-40.
- Waltz, Kenneth N. "Structural Realism After Cold War." *International Security* Vol. 25, No.1 (Winter 1994/95): 5-41.
- Waltz, Kenneth N. *Foreign Policy and Democratic Politics: The American and British Experience*. Boston: Little Brown and Company, 1967.

- Waltz, Kenneth, *Theory of International Politics*. New York: [McGraw-Hill](#), 1979.
- Waltz, Kenneth N. *Man, the State, and War: A Theoretical Analysis*. New York: Columbia University Press, 2001.
- Walzer, Michael, *Just And Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977.
- Wayman, W. Frank and Paul F. Diehl. *Reconstructing Realpolitik*. Ann Arbor: University of Michigan Press, 1994.
- Wedgwood, Ruth. "Courting Disaster: The U.S. Takes a Stand." Vol. 77 No. 3 *Foreign Service Journal* (March 2000): available at www.afsa.org/fsj/mar00/wedgewood.cfm.
- Wedgwood, Ruth. "Fiddling in Rome." *Foreign Affairs* (1998): Accessed 9 October 2010.
- Weiner, Tim. "Clinton as a Military Leader: Tough on-the-job training." *New York Times* October 28, 1996.
- Weiss, Thomas G. "Researching Humanitarian Intervention: Some Lessons." *Journal of Peace Research* Vol. 38 No. 4 (July 2001): 419-428.
- Weiss, Thomas G. "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era." *Security Dialogue* Vol. 35 No. 2 (June 2004): 135-53.
- Weiss, Thomas G. *Humanitarian Intervention: Ideas in Action*. Cambridge, UK and Malden, MA: Polity Press, 2007.
- Weiss, Thomas G. "The Politics of Humanitarian Ideas." *Security Dialogue* Vol. 31 No. 1 (2000): 11-23.
- Weldes, Jutta. "Constructing National Interest." *European Journal of International Relations* Vol. 2 No. 3 (1996): 275-318.
- Weller, Marc. "The Rambouillet Conference on Kosovo." *International Affairs* Vol. 75 Number 2 (April 1999): 211-251.
- Weller, Marc. "Undoing the global constitution: UN Security Council action on the International Criminal Court." *International Affairs* Vol. 78 No. 4 (October 2002): 693-712.
- Weller, Marc. *International Documents and Analysis: The Crisis in Kosovo 1989-1999*. Vol. I. Cambridge: Cambridge University Press, 1999.
- Weller, Marc. *The Crisis in Kosovo: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*. Cambridge: Documents and Analysis Publishing Ltd, 1999.
- Welsh, Jennifer M. (ed.). *Humanitarian Intervention and International Relations*. Oxford: Oxford University Press, 2004.
- Welsh, Jennifer M. "From Right to Responsibility: Humanitarian Intervention and International

- Society.” *Global Governance* 8 (2002): 503-521.
- Wendt, Alexander. “Anarchy is What States Make of It.” *International Organization* Vol. 46, No. 2 (Spring 1992): 392-425.
 - Wendt, Alexander, Ronald L. Jepperson, Peter Katzenstein. “Norms, Identity, and Culture in National Security”. In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter Katzenstein, 33-75. New York: Columbia University Press, 1996.
 - Wendt, Alexander. *Social Theory of International Politics*. Cambridge: Cambridge University Press, 1999.
 - Wendt, Alexander. “The Agent-Structure Problem in International Relations Theory.” *International Organization* Vol. 41 No. 3 (Summer 1987): 335-70.
 - Wheatley, Steven. “The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention.” *Journal of Conflict and Security Law* Vol. 5 No. 2 (2000): 261-73.
 - Wheeler, Nicholas J. *Saving Strangers*. Oxford: Oxford University Press, 2000.
 - Wiener, Antje and Thomas Diez. *European Integration Theory*. Oxford: Oxford University Press, 2005.
 - Wiener, Antje. “Contested Meanings of Norms: A Research Framework.” *Comparative European Politics* No.5 (2007): 1-17.
 - Wiener, Antje. “Enacting meaning-in-use: qualitative research on norms and international relations.” *Review of International Studies* 35 (2009): 175-193.
 - Wiener, Antje. “The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms.” *Journal of International Law and International Relations* Vol. 5 No. 1 (2009): 1-16.
 - Williams Paul D. *British Foreign Policy Under New Labour 1997-2005*. NY: Palgrave, 2005.
 - Williams, Michael. “Why Ideas Matter in International Relations: Hans Morgenthau, Classic Realism, and the Moral Construction of Power Politics.” *International Organization* 58 (Fall 2004): 633-665.
 - Wippman, David. “The International Criminal Court.” In *The Politics of International Law*, edited by Christian Reus-Smit, 151-88. Cambridge: Cambridge University Press, 2004.
 - Wittkopf, Eugene R. and James M. McCormick (eds.). *The Domestic Sources of American Foreign Policy: Insights and Evidence*. Lanham: Rowman and Littlefield Publishers, 2004.
 - Young, Oran R. “Regimes Dynamics: The Rise and Fall of International Regimes.” *International Organization* Vol.36 No.2 (Spring 1982): 277-97.
 - Youngs, Tim and Tom Dodd. *Kosovo*. Research Paper 98/73 7 July 1998, House of Commons Library, International Affairs and Defence Section.

- Youngs, Tim, Mark Oakes & Paul Bowers. *Kosovo: NATO and military action*. Research Paper 99/34 24 March 1999, House of Commons Library, International Affairs and Defence.
- Youngs, Tim. *Kosovo: The Diplomatic and Military Options*. Research Paper 98/93 27 October 1998, House of Commons Library, International Affairs and Defence.
- Youngs, Tim, Mark Oakes and Paul Bowers. *Kosovo: Operation 'Allied Force.'* Research Paper 99/48 29 April 1999, House of Commons Library, International Affairs and Defence Section.
- Zakaria, Fareed. "The Rise of Illiberal Democracies." *Foreign Affairs* (November 1997): available at <http://www.fareedzakaria.com/ARTICLES/other/democracy.html>.
- Zanotti, Laura. "Normalizing democracy and human rights: discipline, resistance and carceralization in Croatia's Euro-Atlantic integration" *Journal of International Relations and Development* (2008): 1-29.
- Zanotti, Laura. "Taming Chaos: A Foucauldian View of UN Peacekeeping, Democracy, and Normalization" *International Peacekeeping* Vol. 13 No.2 (June 2006): 150-167.
- Zoellick Robert B. "Congress and the Making of US Foreign Policy." *Survival* (Winter 1999-2000): 20-41.
- Zolo, Danilo. "Gli spazi della politica." in *Politica, consenso, legittimazione: Trasformazioni e prospettive*, ed. by Raffaella Gherardi, 60-66. Roma: Carocci, 2002.
- Zolo, Danilo. "Hans Kelsen: International Peace through International Law." *European Journal of International Law* 9 (1998): 306-324.
- Zolo, Danilo. *Chi dice umanità': Guerra, diritto e ordine globale*. Torino: Einaudi, 2000 (English version: *Invoking Humanity: War, Law, and Global Order*. London: Continuum, 2002).
- Zolo, Danilo. *La giustizia dei vincitori: Da Norimberga a Baghdad*. Bari: Laterza, 2006.