THE FOUNDATION OF THE INTERNATIONAL CRIMINAL COURT THROUGH RATIONALIST LENSES

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ABSTRACT

THE FOUNDATION OF THE INTERNATIONAL CRIMINAL COURT THROUGH RATIONALIST LENSES

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In the literature on the International Criminal Court (ICC), the understanding that the Court was founded first and foremost thanks to the efforts of non-state actors (NSA), especially non-governmental organizations is predominant. This thesis advances a contrary argument and claims that one of the most significant factors for the foundation of the Court is the interest and initiative of state actors. As such, the thesis supports the literature on the foundation of the Court that argues that there should be more place for non-constructivist, neorealist, institutionalist, rationalist explanations. This thesis aimed at answering the question "Is the foundation process of the ICC, more of a result of rational state behavior or result of the global civil society/NGO effort?" It investigates the relationship between the foundation of the ICC and state interest in its foundation, as opposed to the more common view that relates it to norms. IR theories of neorealism, realism, and functionalism are consulted to make the argument. The thesis asserts that a state- centric approach best explains the foundation of the ICC. The analysis has shown with proof and detail and concludes that, the foundation of the ICC is a result of state interest in engaging international cooperation through international organizations.

Keywords: ICC, state cooperation, international organizations

ÖZ

RASYONALİST MERCEKTEN ULUSLARARASI CEZA MAHKEMESİ'NİN KURULUŞU

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Uluslararası Ceza Mahkemesi (UCM) literatüründe, UCM'nin, devlet dışı aktörlerin, özellikle de sivil toplum kuruluşlarının çabaları sayesinde kurulduğu konusunda daha baskın olan bir anlayış mevcuttur. Bu tez karşıt bir argüman ileri sürüyor ve Mahkeme'nin kurulmasında baskın unsurlardan birinin ulus devletlerin çıkarları ve inisiyatifleri olduğunu iddia ediyor. Bu tez, literatürde Mahkeme'nin kuruluşuyla ilgili konstrüktivist olmayan, rasyonel, neorealist, kurumsal açıklamalara daha fazla yer verilmesi gerektiğini savunarak literatürü destekliyor. Bu tez, "UCM'nin kuruluşu, daha çok rasyonel devlet davranışının mı yoksa küresel sivil toplum/devlet dışı aktör çabalarının bir sonucu mu?" sorusunu yanıtlamayı amaçlamaktadır. Bu tezde UCM'nin kuruluşuyla devletin kuruluştan çıkarı arasındaki ilişki, bu ilişkiyi normlarla ilişkilendiren genel görüşün aksi yönünde incelenmektedir. Argümantasyon için neorealizm, realizm ve işlevselcilik teorilerine başvurulmuştur. Bu tez, devlet merkezli bir yaklaşımın UCM'nin kuruluşunu en iyi şekilde açıkladığını iddia ediyor. Tezdeki analizler, UCM'nin kuruluşunun, devletin uluslararası kuruluşlar aracılığıyla uluslararası işbirliği gerçekleştirmeye olan ilgisinin bir ürünü olduğu sonucuna varmıştır ve bunu ayrıntılı şekilde kanıtlamıştır.

Anahtar Kelimeler: UCM, devletlerarası işbirliği, uluslararası kuruluşlar

For my Bilal, love and light of all of my lives.

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CHAPTER 1

INTRODUCTION

This thesis is an effort to answer the question "Is the foundation process of the ICC, more of a result of rational state behavior or result of the global civil society/NGO effort?". The International Criminal Court is a permanent international criminal tribunal that looks into genocide, war crimes, and crimes against humanity, and after 2010, crimes of aggression. The Court operates in six official languages: English, French, Arabic, Spanish, Russian, and Chinese since July 1, 2002 when it entered into force with 60 ratifications. The Court's founding charter is the Rome Statute adopted by 120 states on 17 July 1998. The Court does not have any retroactive effects, only investigates crimes committed after July 1, 2002. The ICC does not have jurisdiction on states, it has jurisdiction only on individuals.

1.1 Operation of the ICC

The ICC has no retroactive jurisdiction, meaning that it can only look into occurrences that happened on or after July 1, 2002. This turns otherwise only if a state desires otherwise and those who ratify the Statue after July 1, 2002, the ICC's jurisdiction starts from their own ratification date. The ICC operates on the principle of complementarity. The Court looks into crimes committed by a national of a member state, when a crime is committed in the territory of a member state, when the prosecutor refers a case to it, and when a non- member state asks for the Court's jurisdiction on an ad-hoc basis. In addition to that, the United Nations Security Council (UNSC) may refer cases to the ICC, more accurately to the prosecutor (www.icc-cpi.int). When this happens, the Court does not require any consent from any states parties which means immense power for the referring states. This principle foresees that the laws governing the Court are in coordination with national laws of member states and the Court is ready to help the member states whenever a member is unwilling or unable to proceed with convicting an accused person. This principle, although

thought to be at contrast with state sovereignty by some, is at contrast in compliance with it (Nouwen 2013) because it gives the states the opportunity to take matters in hand. Joining the Court provides members with other rights and powers too. A state has the right to submit amici curiae briefs, which are informative briefs in the event of a hearing, that provides the Court with information to shed light on the matter at hand. States also participate in the governance of the ICC through the annual assembly where they discuss matters from administration to budget. Through their votes in the assembly, states elect the prosecutor and judges of the Court (www.icc-cpi.int).

The Court is an intergovernmental organization that is a significant part of global governance, bringing solutions of global scale with contribution from all actors including states, NSAs, intergovernmental and transnational organizations (Zartman and Touval 2010). The ICC is a court but formally it is an IO and the evolution here will be done from the perspective of IR theories rather than international law perspective.

1.2 Current Discussions about the ICC

The Court is receiving negative and positive comments. On the positive side, the ICC is being encouraged to tackle "lack of access to justice at the national level, gender inequalityand sexual violence, the refugee crisis and internal displacement, conflict-driven famine, the destruction of humanity's cultural heritage, environmental destruction and land grabbing, and the exploitation and oppression of indigenous people" (CICC *ICC TacklingGlobal Challenges*). There are contrary arguments inthe literature that suggest nation state interest will not allow all theseto happen.

What is meant is that some (or all) of these challenges would not be allowed to come true by certain states who are benefiting from some such challenges in different parts of the globe. A good example is the Syrian crisis. It would harm Russia if its good ally Syrian government is upset by a legal intervention by an international criminal tribunal.

A negative commentary the ICC receives is the colonialism issue. The Court is being blamed for being an extension of colonial desires of certain states. This is maybe the largestdiscussion on the ICC I have encountered throughout the writing of this thesis. The fact that the overwhelming majority of the cases the Court is currently looking

into is from Africa, and the fact that political leaders who are strategic allies to very powerful states, or who are very powerful on their own do not fall under the ICC's jurisdiction are among arguments that support this claim (Huikuri 2019). Good examples are France, the UK, andSerbia. Since I discuss this colonialism argument, and use it myself too in the thesis, I willnot go into further details here.

1.3 Why States Engage in International Cooperation Through IOs?

1.3.1 A Perspective through Neorealism

Throughout this thesis, neorealism will form the theoretical basis and understanding intackling with global governance and IOs in general, and the ICC in particular (to contributetomy rational perspective, I also got inspired from realism and functionalism on the way).Neorealism sees the ways international institutions are of use to states. Powerful states use IOs to keep less powerful states at bay and control their actions and protect their hegemony in global politics.

The most traditional international relations theory, realism, had its days in the 1970's, but with the advent of new elements in international politics, IR theorists had to take them into account. "Realism is particularly weak in accounting for change, especially where the sources of that change lie in the world political economy or in the domestic structuresof states" (Keohane 1986, 159). In the 1980's new approaches and revisions to international relations have started to flourish in academia that incorporated newly emerging non-state actors and financial dimensions in global politics into account. Like realism, power and security are foremost considerations in human motivation (Gilpin 1984, 227) in neorealism.

IOs are of no significance comparable to those of states in international politics. They are only tools and forums to further their interest in international arena. The state is still and always the most powerful actor in international politics, "for a theory that denies the central role of states will be needed only if non-state actorsdevelop to the point of rivalling or surpassing the great powers, not just a few minor ones.They show no sign of doing that" (Waltz 1986, 89).

Therefore, until NSAs can come close to states as the primary actor in the international system, IOs will only be of secondary place. From a rational point of view, IOs bring legitimacy and support at home to states. Global image of government is in line with

domestic appearance, so one other aim to found them for states is “to maximize domestic political advantage” (Richards 1999, 9), IOs are created “when they are politically efficient (that is, increase electoral support) for national politicians” (Richards 1999, 3). The showsof strength and making appearances at IOs gatherings by political leaders, are much welcomed by citizens at home; the degree to which depending on the political culture of the country.

In addition, IOs are used by states as means for specific ends. Usually, sovereign states come together with a particular end, each with additional interests in mind. IOs are “nothing else and nothing more than a set of mutual promises of coordinated and synchronized national policy action” (Myrdal 1955, 8). Furthermore, an institutional framework makes the achievement and continuity of the common interest much more secured compared to ascenario where the interest is single-handedly achieved.

An institutional platform is quite handy for states to pursue their goals in international arena much easier. As the former Executive Secretary of the UN’s Economic CommissionforEurope Gunnar Myrdal has explained:

> IOs are nothing else than instruments for the policies of individual governments, means for the diplomacy of a number of disparate and sovereign national states. When an intergovernmental organization is set up; this implies nothing more than that between the states a limited agreement has been reached upon an institutional form for multilateral conduct of state activity in a certain field. The organization becomes important for the pursuance of national policies precisely to the extent that such a multilateral co-ordination is real and continuous aim of national governments. (Myrdal1955, 4-5)

IOs are perfect tools for states from neorealist and rational perspectives. According to neorealism, the state acknowledges the existence and handiness of IOs in global politics, while continuously going after her best interest. A rational state is aware of the fact that aninternational organization is a legitimate forum for her activities at lesser costs from all angles, and with more expertise on a given issue.

These legitimate international platforms make it much easier for states to extend their foreignpolicies overseas. The United Nations was mostly seen as an instrument and extension of U.S.diplomacy in the first eight years of its foundation (Archer 2001, 69). Likewise, Ethiopia, Egypt, and South Africa hold upper hand in the African Union and

are, by and large, able to implement their own foreign policy into that of the Organization. The interventions and deployments of troops in Sudan, Somalia and Burundi for peacekeeping and conflict resolution reasons are some of the few examples of states using IOs as tools to accelerate and legalize their intentions in certain other places where they have political, social, economic, or otherwise interests.

IOs are fora for extending one's national interests as much as it is an arena for bilateral, trilateraletc., diplomacy. Behind the doors or openly conducted meetings by two or more state representatives discuss their bilateral (or trilateral or otherwise) matters since the opportunity to meet has arrived. Almost like a custom, media and citizens impatiently wait for the encountersof their head of state and that of other particular states at the occasion of an IO meeting or summit type of occasions. Even a gesture, a handshake, a whisper, colors of clothes can mean a lot than more words between politicians at such occasions.

Other than comparatively immediate material gains, states found IOs to implement their norms i.e. policies and ways of conduct they have and want others to follow too, in global politics (Abbott and Snidal 1998, 4-24). IO ability or function to gather states with similar norms and values increases the interest and will of states in them since IOs help states cooperate with others who pursue similar interests.

1.4. Organization and Thesis Statement

This thesis deals with the ICC and its foundation. It looks into the foundation of the ICCin understanding state cooperation through intergovernmental organizations. This thesis answers the question "Is the foundation process of the ICC, more of a result of rational state behavior or result of the global civil society/NGO effort?". I bring a neorealist perspective, to the foundation of the ICC. I show that state behavior was overwhelminglythe dominant reason for the foundation compared to the NGO efforts. The chapter 2 is a review of the literature. The literature review consisted of two parts: the former is lookinginto international relations theories that explain international cooperation through IOs. These theories are: constructivism, classical liberalism, and neoliberalism/neoliberal institutionalism.

The latter part discusses the phenomenon of global governance and the place of non-state actors in the foundation of the ICC within the context of global governance.

Although there are rationalist arguments in the literature concerning the foundationof the ICC, I think that an overwhelming majority is located in the constructivist camp, and I restrict my review with them. Those like Köchler (2009), Steinke (2012), Eikel (2018), and Denk (2009) argue that the ICC was founded in a wayto "compromise international criminal justice" with powers vested in states, especially inthe UNSC. They posit that countries such as Turkey, China, India, and Israel are not stateparties and this undermines the power of the ICC (Köchler 2009, 2). Huikuri (2019) argues that states increase their relative powers with the Rome Statute and it is also arguedto be giving states the power to violate international law when it benefits them (Köchler 1995 & 2009). A case in point is the UNSC deferral rights that goes back to UN Chapter(Köchler 2009; Denk 2015). Others among them, Kelley (2005), Cooper (2002), Pape (2005), Arsanjani (1999), argue that middle powers calculated that the foundation of sucha court presented them an ooportunity to "soft balance" bigger powers like the USA, andinfluence weaker ones by increasing their relative powers. There are arguments that emphasize the availability of political context and state will for the foundation of the ICC(Zorlu 2016). Gray (2018), Miall, Ramsbotham, and Woodhouse (1999), Hopkins Burke (2009), Wood (2012), Fletcher and Weinstein (2002) present the ICC's foundation as wasto increase possibilities of peace and deterrence, and consequently, security, what states seek according to neorealism.

Chapter 3 is a theoretical framework where I explain the literature much more in depth compared to the literature review, this time limited to neorealism along with realism andfunctionalism since neorealism is the one I build my perspective on the matter and I benefit from the latter two.

Here I also explain IO foundation and state control over themin neorealist terms and briefly explain realist and functionalist perspectives on IOs because they add up to my rational explanation.

Chapter 4, the main section, introduces the ICC in greater detail and see the reader throughthe way to the foundation of it. I stress the importance of the Cold War period and later the advent of information technologies in the process and give details about it and talkedabout the general stages to the Rome Statute, and consequently, the foundation of the Court. Lastly, I examine three concepts: deterrence, accountability,

and the principle of complementarity as well as the relationship between the ICC and African Union, European powers, Germany, the United States of America, the Like-Minded States (LMS), the Non-Aligned Movement (NAM) to strengthen my argument and give supporting detail and proof. I then close with the conclusion. This work is restricted withthe 1998-2002 foundation process of the ICC.

CHAPTER 2

LITERATURE REVIEW

An international organization is an inter-state institution founded on an inter-state agreement.While they may have a single cause, they can also have multiple causes and be of regional orglobal scale. The two focus of this literature review are IOs theories and global governance through the ICC. While discussing foundation of IOs, the issue needs to be put on a theoretical framework to understand the possible rationale behind state cooperation through IOs. To do this, certain IR theories are visited, hence a conceptual basis for the substantial second section is presented. This literature review will form a significant part of the thesis because it demonstrates the fundamental answers given to "why states cooperate through IOs?" and "what is the place of the ICC in the global governance literature?"

In answering my research question, I first look into different answers to my question andthen identify the gaps in the literature. This literature review consists of two main parts: the first part being the international politics, and the second one being international and state- non-state actors in terms of IOs. The former looks into theories that explain international cooperation: constructivism, classical liberalism, and neoliberalism/neoliberal institutionalism. The latter part examines what is global governanceand what are the merits of non-state actors in it through examining the case ofICC. Lastly, gaps I find in the literature are presented.

2.1 Constructivists

Constructivism suggests that the decision to cooperate depends upon identities, practices, values, and environmental factors affecting states. Constructivists like Kratochwil and Ruggie (1986), suggest that only an interpretivist approach with norms to set up, rules to follow, and knowledge to gather can fully explain IOs. In this line of thought, social construction is the fundamental (Wendt 1992; Barnett 1993) of international politics and IOs

carry bits and pieces of social and political processes (Finnemore 1996; Kennedy 1987). Theyare not though, primary actors but only actors that -mostly- states act through them, consequently. Still, they are seen as full-fledged actors, only after states. Although they are not the primary actors in international politics, IOs possess a considerable autonomy. Unlike rationalist theories, constructivism thinks IOs are a nurturing part and actor of the society, notas a tool to further state interests.

IOs are not always faithful servants of states thanks to this autonomy and power resultingfrom it. IOs do not only serve state interests, they also serve themselves, serve their socio-political environment by affecting social dynamics by being a part of it, and shape public opinion on matters that in turn shape their political perspectives (Bayeh 2014). As mentioned in Mitchell (2006) they are not seen as mere tools for state interests, on the contrary, constructivists believe that IOs can shape and change state motives, regulate stateaction, and direct state behavior. Finnemore (1996) and Hobson (2003) suggest that IOs teach states how to act in accordance with and adapt to new norms and values of international political system and guide them through novelties in foreign and domestic policymaking (Bayeh 2014). This way, states find themselves cooperating without even realizing it because “the system” and “the way of things” push them to that point. This happens, regardless of cooperation is within the interest of the state or not. IOs keep stateswithin the confines of normative state behavior by limiting their actions and injecting newnorms into their mode of conduct, which always keeps states within cooperation mechanisms (Bayeh 2014). With regards to the idea that states are norm driven authors such as Babaian (2018) claim that it is a novelty for states to have established an international criminal tribunal through giving up on some of their sovereignty. I think otherwise, because it was not a novelty, necessary socio- political circumstances which was not been able realized sooner had come together. The Court is a novelty but not in the part regarding sovereignty. This type of an approach displays politicians of the time different from the previous ones which can be misleading, because circumstances may change, but the way of reasoning and behavior for politicians remain the same.

IOs are not always founded for effective work and loads of tasks to accomplish, but they are sometimes created to be decorations, window dressing because their purpose is to represent certain values and norms in the ever-changing social world (Christensen

1992). Global justice is one of those values and the ICC is seen as the epitome of it. “The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world…” (Bassiouni 1999, 468). When this ideais coupled with the constructivist argument that states are pushed to cooperate, the foundation ofthe ICC and NGO role in it as norm providers, constitute one of the momentsconstructivists think they prove themselves right. The literature gives too much emphasison the capabilities and experience of the NSAs. “The delegates at the conference did not begin negotiating with a blank slate, instead they built upon the efforts of the Ad Hoc Committe and PrepCom” (Struett 2016; Roach 2006; Bassiouni 1999, 455). This rhetoricmay overshadow state efforts. As it is detailed in the fourth chapter, middle to big powers, starting with the EU and the U.S.A. provided many smaller states with technical and otherwise expertise. They also had quite strong and stubborn policies from day one, and shifted and changed the fate of the Court over and over again on the way.

Although it is argued that NGOs used complex strategies to shape the law for the ICC (Dekker et al. 159-183), NGOs used simpler strategies compared to states, like campaigning, information providing, and norm elaboration, while interest-seeking states employed complex ones like threatening, lobbying, and sanctions. The process that led totheRome Statute was organized in conferences, groupings, caucuses, and managed by people from different states which made it easier for NGOs to access to state delegates aswatching and taking part in it, and it is argued that NGOs madegood use of this opportunity. The fact that the Rome Statute had proposals from certain number of NGOs as NSAs in it, may seem big, but it actually is not. While I acknowledge this NGOs perseverance, it nevertheless would go to waste if states had not wanted an ICC at the first place. This NGO work, it is argued (Çakmak 201), succeeded due to appealing to a universal audience for fundamental justice with the channel of the ICC and NGOs workedefficiently and impactfully throughout the process. NGO success is even thought to be workable as a remedy to the legitimacy crisis in global governance through mediating between state and non-state parties, given the proof that theycan most helpfully contributeand maybe even own the success of foundation of an ICC (Bassiouni 1999, 1-29).

For constructivists, the ICC is not only a court, it is an outcome of global problem solvingmechanism which included state and non-state party efforts and forged a sense of globalization (Akkaş 2012) on criminal justice matters. They think that emergence and globalacceptance of global civil society contributed the ingraining of democratic and civicvalues into international and local public opinion. This thematic and loosely organized global civil society that acted for the ICC, created a new type of diplomacy in which civilsociety actors, states, and IOs work together to pursue a common goal for this group of academics. ICC is as a work of NGOs, especially due to the argument that the idea of an international criminal tribunal was kept alive for a very long time, more than a century, thanks to International Red Cross and subsequent acts on universal human rights, they argue. Therefore, for them, it is thanks to endless global civil society effort, we have the ICC today. There are arguments contrary to the idea that the ICC being the output of NGOefforts because most of the time NGOs too, were directed and guided by strong states likeGermany (Huikuri 2019), who worked for convincing weaker states for the foundation ofthe ICC. Even the NGO effort happened under the auspices of nation states. A good example is the Siracusa meeting of 1990 at the International Institute of Higher Studies for Criminal Sciences happened under the auspices and financial as well as political support umbrella of Italy. I extensively support these arguments with abundant evidence in my third chapter.

During the Rome Conference, NGOs published a listing of their principles for the Court whose success lies in the extent to which they were realized in the Statute. The importanceof these principles for problem solving is that they did not mean limiting of the desires ofthe NGOs, on the contrary, they provided them with a threshold of fundamentals on whichtheycould work to build their own agendas. Civil societyactions before the ICC, were noteffective enough in changing the direction of world politics in terms of global problem solving. According to constructivists, the ICC case is seen as a case in point for global democracy deficit and NSAs acting as cure. NGOs were quite influential among states, the UN Secretariat, other NGO; the preparatory committee for the Court itself; they wentback and forth between all these actors and acted as transitory actors in policy making for an international criminal tribunal (Akkas 2012; Cakmak 2017). Especially regional caucuses are said to have worked vehemently among government delegates and big number of states were convinced this way: regional caucuses took steps specifically through working byspeaking ofthe

political language of the regions and addressing to theproblems in those regions to show that they understand and will be representing those regions. Academics like Van Der Vyver deem great importance the CICC's (Coalition forthe International Criminal Court) splitting off into working groups. This coalition was founded in 1995 in an effort to bring all the NGO work for the foundation of the ICC underone roof. They believe that although the CICC has done a group work, the Women's Caucuses and their success could be shown as the culmination and exemplary of the entireCICC work. All these moved NGOs from being important to vital to the ICC's existence.According to this group, CICC did not only work for the court, in fact the Court worked for the CICC too. It is argued that the ICC and the NGOs supported its creation have a mutually beneficial relationship in the sense that the CICC coordinates and organizes NGOs' efforts and help them bring together their influences on common issue areas, and the CICC makes the contacts and communicates with the organizations through its NGO contracts so that the ICC does not have to go one by one to every organization. Althoughnot all aims of the NGOs were able to be attained, with the CICC, NGOs were able to come together on common aims and increased their chances of putting their priorities on the agenda.

NGO (CICC) support is shown as invaluable to the establishment of the Court, the CICCcreated momentum with activities, conferences, media outlets, and interacting with grassroots organizations etc. There are certain tactics employed by NGOs for the creationof the Court like taking as big as possible of a part in every process, providing state and non- state parties with legal expertise for free, basing everything on legal knowledge andproof for legitimacy, referring to existing law while talking about other issues that are notin the law yetbut CICC wants them to be, shaped the decisions and ideas of smaller-scaledstates by manipulating and making use of the political void in the aftermath of the Cold War (1994- 1998), issued legal position papers with certain NGOs (Dekker and Werner 2004).

CICC also overcame certain difficulties on the way to the Rome Statute: state opposition,resentments of previous unpunished and unconvicted crimes that led some to question whether a new court could bring justice or things would remain the same, complexity of issues like deciding what is and what is not a war crime and to what extent we can put state sovereignty under an international institution, facing and

handling those who wanted to blockand/or postpone the establishment of an international criminal tribunal, United Nations Security Council's concerns about their crippling sovereignty.

According to constructivists, in the face of all these obstacles, immense NGO support andstubborn and effective justification of rational NGO arguments are the foremost reasons why so many states yielded authority (Steffek, Kissling, and Nanz 2008, 1-29) to an international court it is argued.

Previously experienced oppressions and cruelties strengthened the hand of the NGOs in convincing abstainer states (Akkaş 2012). While it is argued that the high number of smaller states who support the establishment of the court worked for the CICC because doing so appealed to fundamental fairness sense of other abstainer parties. The reason for that it reminded them of memories about unresolved issues of the international crimes" past by proposing normative grounds, the reality is smaller states joined because they found profit in doing so (Imoedemhe 2018). Unstoppable growth of global actors may be examined in their manifestation: the ICC case. NGOs were vital in establishment of the ICC, they constructed a new global politics through embedding unusual norms. While thediscursive and political environment helped NGOs, the CICC proved to be the most significant human rights NGO network because the only prerequisite to be in was the acknowledgment of the court, so it spread quickly. NGOs campaigned about highly varying issues from gender to usage of chemical weapons which created the second half of the Rome Statute and became the international voice of the local citizenry. They had different goals but united in the aim of an independent prosecutor and a role for the UN Security Council.

The NGO involvement in the ICC negotiations is even called a "new diplomacy" (Pearson2006, 251). In 1989, an NGO called The International Institute of Higher Studies in Criminal Sciences, in cooperation with a group of experts prepared a draft and presented it to the UN Crime Prevention Branch. It is argued that this document pushed the Eight Committeeof the UN to think that perhaps there is really a need for an ICC (Cakmak 2017, 105). In 1990 the International Law Commission (ILC) put forward good effort for a multilateral conference but the UN decided instead for an ad hoc committee to look into the matter. In 1994, the ILC presented a draft statute for an

ICC but the UNSC chose to form an ad hoc committee to review it instead of calling a conference of states. This presenting of drafts and reviewing would continue until a date is set for the Rome Conference for April the 3rd, 1998 to finalize the draft. In 1995, a group of NGOs who supported the foundation of an ICC came together and founded the CICC in an effort to gather all the NGO support and resources in one place and said "divided we fall, togetherwe stand". By 1998, there were over 800 members of the CICC (Pearson 2006, 255). This group carried out a pro-court campaign throughout the process going to the Rome Statute and provided states, especially those who were not certain about whether to support the court and those from the non-aligned movement, and those from the Third World. These states supposedly received legal experise, technical information, monitoring of the UN conferences, and communication services from the CICC. The constructivist explanation of the foundation of the ICC and the process going to it is said to entail certain important documents. One of these is the Amnesty International's (AI) position paper of 1994 concerning the necessity of an ICC. It is argued to be important especially on the matter ofwhat would the ICC's jurisdiction entail. Another document is the position paperby theInternational Commission of Jurists (ICJ) in August 1995 and posited the NGO demandsconcerning the prospective ICC. NGOs mainly had demands on the extent of the ICC's jurisdiction, the power of the prosecutor and his/her accountability, and the language anddefinition of the crimes under the Court's jurisdiction. The Lawyers Committee for Human Rights (LCHR) produced the other paper that was significant in pursuance of NGO aims Cakmak argues (2017). Another report bythe Committee on International Law and the Committee on International Human Rights of the Association of the Bar of the City of New York was all the more explanatory about the proposed ICC statute which wasto the benefit ofnot-so-much-informed states and other actors it is suggested. The report was released in 1996, and also gave suggestions of what type of a plan should the ICC follow on specific matter such as financing of the Court. Following that, again in 1996 theAmnesty International prepared a report for the UN and the challenges awaiting the PrepCom. It is argued that this report gave substantial advice to all parties involved in thedraft statute process. A last report by the American Bar Association (ABA) provided extensive formulation and advice for the final form of the proposed statute, especially about the scope of the crimes the Court would have jursidiction over (Cakmak 2017, 141- 166).

At the final step, the NGO coalition made it clear that they want a strong and independent court and not a weak institution under the shadow of nation-states. In the Rome Conference personal jurisdiction, court's jurisdiction, and trigger mechanism, werethe three issues the conference revolved around. Some of the NGOs wanted it to be retroactive along with a number of states, but the majority was in favorof the opposite. Onjurisdiction, almost everyone was in agreement that the court should try individuals only.This is mainly the constructivist perspective of how the ICC was founded from the constructivist perspective. The contructivist thesis gives a norm establishing role to IOs, and the ICC is one of them. For them, IOs (hence the ICC) are more than mere tools of state interets, and the NGO work helped the foundation of the Court.

2.2 Liberalism

Liberalism is quite optimistic about IOs for its main point of vantage is to prevent any possible wars and conflicts, and to do this, cooperation is perceived as a good start. Thereis always an individualistic tone with the argument that it is most natural for humans andstates to cooperate. Cooperation in accordance with common interests in liberal market economy is the solution that will work the best (Ozkan and Cetin 2016).

In order for peace to be sustained, an international organization that will ensure inter-statedialogue was deemed necessary. In this line of logic, the League of Nations was given greatresponsibility to further and sustain peace and cooperation (Sönmezoglu et. al. 2017,385). The arena of maneuver for IOs is rather limited by states according to liberal view,and that are lacks social context, cultural norms and behavioral patterns. The environmentin which IOs operate is treated like a financial market where there is a relation of principle-agent between IOs and states. Liberals, like Wilsonians approach IOs as peaceful, progressive, and freedom promoting agents of international political machinery

IOs are depicted as mediating structures who do not have a purposeful sense of existencebetween states. Rather than social structures, hierarchies, and behaviors, competition, dominance, and efficiency are usual concerns in liberal tradition when looking at IOs. Liberal academics do not perceive the information that international institutions possess as power that can shape politics and they see it as apolitical. Hence,

they do not attributeIOs autonomy to states, both their success andpossible dysfunction is because they have minimum autonomy. For liberals, IOs cannot markedly influence international politics and cannot bring about international peace, they matter rather little (Barnett and Finnemore 2004, 16-45).

Liberal perspectives approach the ICC from a human rights perspective. For them, everyindividual has a right to fundamental human rights including justice and fair trial. With fundamental human rights sustained, there can be a good environment for cooperation and states founded the ICC for it to serve this purpose. The ICC is an intermediary for states on the way to achieve common good (Fichtelberg 2006).

2.2.1 Neoliberalism/Neoliberal Institutionalism

Neoliberalism is a later interpretation of liberalism whose main concern is absolute gainsin a cooperation. It differs from liberalism in its belief for what causes states to cooperate.Neoliberal (institutionalist) thinking has focused its critical fire on realism (Baldwin et. al. 1993, 271). Situations where cooperation is unlikely is not very much the concern, butrather, it is thought that states display "goal directed behavior that entails mutualpolicy adjustments so that all sides end up better off than they would otherwise be" (Milner 1992,468). Huikuri (2019) is a good example of this type of thinking. She argues that powerfulstates like Germany went up to other smaller states with the argument that if they support the Court, they all would end up better off. In addition to that, those smaller states - especially underdeveloped ones- would have their place in a supposedly independent international justice institution(Huikuri 2019, 72-79).

International politics is mainly divided into two namely, security and political economy studies and IOs are of use/mostly set up for political economy issues. While on security matters cooperation seems "impoverished", on political economy "cooperation can be sustained among several self-interested states" (Lipson 1984, 18). They do not agree withrealists (and to some extent with classical liberals) on the notion that IOs can significantlyaffect international political stability and prosperity.

Neoliberal institutionalists assume that IOs can boost cooperation and prevent conflicts, but discussion as to why and how as well as merits and downsides of cooperation are notnecessarily detailed.

IOs are believed to prevent any possible spoilers of international cooperation, they provide states with rules to follow but they are not substitutes to them in any manner. They also accept the realist assumption that states operate in anarchy and are after their own interest. Neoliberals have an image of IOs as providers of continued international cooperation as well as solutions to collective action problems like prisoner's dilemma, tragedy of commons, mixed interest game, and burden sharing. Institutions can effectivelychange state decisions, influence state preferences, and may even prevent conflicts by distracting states away from self-interested moves. The ICC is explained by this group asa platform for states to pursue common wills concerning international criminal justice and insecurity, and as a checks and balances mechanism to control one another's actions in international justice (Turan 2015). Specifically, prisoner's dilemma is the most-cited example for it encourages cooperation to get out of difficult situations. For neoliberal institutionalism, "the focus is primarily on the role of institutions in solving the defection (cheating) problem" (Milner 1992, 475). With such games, the messages "you will be caught in one way or another, if you cheat you will cripple future possibilities of cooperation, and you will definitely be punished", are sent to states who tend to cheat. Nevertheless, preventing or defeating cheater is of no concern, the concern is to explain that despite anarchy, rules and procedures of institutions can prevent cheating and other types of possible problems in cooperation. IOs can change state thinking on how to best increase their absolute and/or relative interests. It is believed that international institutionsincrease international economic gains and economic prosperity can bring about peace. Therefore, they build, albeit weak, linkage between international cooperation and world peace.

2.3 Global Governance and Cooperation

Global governance is the sum of all activities between states, NSAs, and IOs that target problems of global reach, one of the earliest examples of which can be seen as the League of Nations (1920) which brought many sovereignties under its umbrella. Cooperation among states and multilateralism is among the most emphasized topics when it comes to global governance literature. It looks into why and how states cooperate and for what ends they do it. The overall perception of global governance in the literature is that it is the changing way of states acting together and make decisions on collective matters, which is by and large any decision involving people from different countries (Willets 2010). In a way, it isa challenge to the international

political order that lasts since the Peace of Westphalia (Sinclair 2013). The reason for this is global problems that require collective cooperation. For cooperation to take place there has to be a problem at first. Global politics then, it is commonly viewed, is collective decision-making. It is believed that international politics is more than inter-state relations because now there are NSAs. Global civil society is the vast web of actions taken by actors from all walks of life such as NSAs, activists, academics, non-profit organizations, individuals etc. This increasinglyheterogeneous group addresses global problems collectively and they are beyond bordersand above any regulations or governments (Lindsay et al. 2009). Global civil society challenges state sovereignty in that sense and NGOs are a significant part of global norm embedding process between states, IOs, NGOs themselves, and grassroots organizations (Roach et al. 2009, 1-29) in that regard. It promises this challenge to state and consequently a more democratized and globally governed world politics whose validity is yet to be examined (Baker and Chandler 2007). Although global governance perspective still acknowledges state, global cooperation is seen as a way for states' needto boost legitimacy vis-a-vis their citizens as well as the wider global audience. The cooperation between civil society and state institutions can be hybrid/multilateral and it shows up not only in setting agendas but also in deciding, implementing, monitoring, andevaluating these policies. These civil society actors may be external, such as lobbyists, but may also be consultants, partners, experts, protesters, even rebels (Marchetti 2017, 4).Increase of issues of global concern is one reason why global civil society has emerged at the first place. As the world recognized issues of common concern which involved countless boundaries and intersections of areas, global civil society emerged without a name at first. States and non-state actors started to act on behalf of the global communityout of growing necessity; without spelling out a title, and sometimes without even recognizing what they do. Then, this phenomenon got recognized in the academia as a new term too, IOs like the UN contributed to this popularization and global civil societytook its place in texts and it has come to start being analyzed. This marked the transformation of global civil society as a phenomenon adding up theoretical reality to its practical one. Bassiouni (1999) explains how the ICC was transformed into reality as a concept in academic circles and how figures from academia were key players in the proceeds leading to the Court.

2.4 Gaps in the Literature

2.4.1 Are Rationalist Explanations Negligible in Analyzing the ICC?

Throughout my review of the literature, constructivist explanations were more in quantity,compared to rationalist, state-centric ones to examine global civil society activity in generaland the ICC case in particular. I understand that it is because global civil society is consisted of new norms and their embedding to the socio-political culture, norms, identities, and social networks, terms and issues social theorists like, but there could be more place for angles of neo- realism or functionalism. Most of the time, literature on theglobal civil society and the case of the ICC is a smooth process and foundation of the Court is a success of the NGOs and there is lesser than expected mention of state interestin the majority of it. I think of this as something that can be altered on the side of IR and the entire literature. There are always multiple explanations of events, especially in socialsciences, and the Court should be studied from realist approaches too. Throughout this thesis, I aim to look at global governance and the ICC from a more realistic perspective and explain the foundation of the Court from many different and rational angles.

In some parts of the literature, there is an unconditional support and uncritical attitude towards the CICC and NGO contribution to the foundation of the ICC that results in negligence of the actual pushing factor behind the Court's foundation: states' need and will for such an organization and true timing for it in the global political scene. Majority of the sources on the ICC point out its establishment as the beacon and manifestation of global civil society and it gives the feeling that before the ICC global civil society was nothing but steady, but with the ICC and the CICC global civil society reared up and all of a sudden we have a full-fledged global civil society with no obstacles whatsoever as long as it unites. I aimto challenge that perspective and bring a fresh one to literature too.This thesis aims to showcase state will and state interest in the Court's foundation. This way, it will be seen that what really counts in the foundation process was state efforts, notthat of NGO's, and states do not enter into international cooperation if it does not suit theirinterest no matter the amount of non-state actor will.

2.4.2 Foreign Policy Considerations Are Overlooked in the Literature

Secondly, in the literature, non-negligible number of scholars link the preference to join the ICC to domestic policies, mostly leaving foreign policy and getting influenced by external actors aside (Neumayer 2009), whereas foreign policy considerations are of no less importance than domestic ones while engaging in international cooperation. In fact, as will be demonstrated in the fourth section, economic and military help was a determining factor in joining/not joining the ICC for less powerful states, while it was anelement of threat for the most powerful ones vis-a-vis others. Also big powers like Germany supported the Court since they had influencing policies/behaviour of smaller states in mind. Along similar lines, the EU common policies and the road to commonality towards the Court has changed the balance for ratification numbers. Likewise, discontentsin the UN, especially the rift between the U.S.A. and other members of the U.N.S.C., have greatly affected the Court fate hence foreign policy played the bigger role for manystates for the ICC and its prospects. While the first gap can be summarized as prioritization of rational vs. constructivist explanations, this second one can be shortenedas prioritization of domestic vs. foreign policy choices explanations. This does not meanI choose domestic or foreign policy explanations over one another. But it means that realist explanations can (and sometimes does) entail domestic policy aspects.

2.5 Conclusion

In this section, I presented a review of the literature on the ICC. I have briefly explained some of the IR theories that shed light on international cooperation: constructivism, classical liberalism, and neoliberalism. I then explored the concept global governance since it is the platform the ICC is operating in, and the ICC through global governance lenses, and then I discussed two main gaps I found in the literature, which this thesis aimsto fill in. My overall conclusion of the literature is that the overwhelming majority explains the foundation of the ICC through constructivist analysis where realist arguments play very small to zero part and realisms teachings are seen old-fashioned for new formations.

CHAPTER 3

THEORETICAL FRAMEWORK

3.1 Theoretical Approach of the Work

This thesis looks at the foundation of IOs from a neorealist angle, which will be explainedbelow. I believe that states, as equal sovereigns, are the primary actors in international relations and non-state actors, including IOs, are below them. States' actions determine the balances and shifts in the international political system before any otheractors'. Statesact rationally and are always cautious in maximizing their - relative or absolute-power vis-à-vis other states. What differs this chapter from the previous literature review is that thispart is a detailed review of neorealism that supports my argumentation throughout the thesis. The chapter also provides an analytical framework by showing how neorealism explains IOs and control mechanisms for states on IOs. The main neorealism part analyzesIOs on levels of structure of the international system, relative gains and security, and the functions of IOs. Different than the literature review, this part informs and prepares the reader for the theoretical approach that will be used discussion towards the foundation ofthe ICC. While I adopt a neorealist approach, I also get inspiration from theories such as realism and functionalism to add up to my overall rationalist perspective. Therefore, afterthe neorealism debate, I discuss realist and functionalist takes of IOs.

3.2 How Does Neorealism Explain Formation of IOs and How Do States Control Them?

3.2.1 Structure of the International System

Structure of the *system* is what neorealist theory emphasizes in explaining international politics; systemic characteristics, pressures, and shifts are what make it function. The structure of the international system is defined by nation states as the unitaryactor.

Neorealism depicts an anarchic structure of the international system. Anarchy does not mean chaos; it rather means the "absence of a world government" (Waltz 1979, 88), meaning that there is not an overarching authority for states to answer to. States are sovereigns, there is no power above them.

> In the contemporary, sovereignty primarily has been linked with the idea that states areautonomous and independent from each other… sovereignty has meant that political authorities can enter into international agreements. They are free to endorse any contract they find attractive (Krasner 1999, 3).

This is where the anarchy is coming from: in international politics there is nobody to provide security as opposed to the domestic system where there is a government to do that. Since there is no government to provide security, states are alone in ensuring their own security; hence, it is a self-help system (Waltz 1979). In this self-help system, statesneed to look after themselves and try to survive the anarchy. States are in fear of an attackfrom otherstates because "no one commands by virtue of authority and no one is obliged to obey" (Ruggie 1983, 265) an authority. States enter into armament competition to feelsecure – explained below- and this competition results in each of them having different relative capabilities compared to one another. This relative distribution of capabilities and power results in varying types of polarities in international system at a given time period. Three types of polarities are suggested: unipolarity, bipolarity, and multi-polarity. Unipolarity is when there is a single superpower that dominates the international system, bipolarity is when there are two of these powers, and multi-polarity is when there are threeor more these powers. This domination and superiority is in terms of demographics, resource-wise, economic, military, and technological.

Neorealists suggest that "the international system is shaping national interests and states' international behavior: states will imitate each other and become socialized to their system"(Waltz 1979, 128). When certain states cooperate and receive gains from it, others will follow suit. States perceive IOs as new additions to the system that some others use, and if they use too this will keep them in the game and bring interest as I explain with this thesis. This is how neorealism sheds light to how different states with

varying internal dynamics imitate each other in international politics, and cooperation through IOs is no exception.

Neorealists see the world as a utility-maximizing space (Waltz 1979), they may see that IOs have an effect on norms, political-cultural behavior, and society and say that these features and leverage of IOs are merely a continuation and reflection of superpower interests. This is why, IOs cannot be dysfunctional because they are already the most-state- serving NSAs in international politics. If they happen to show dysfunctional behavior, it is due to badstate choices and obstacles in front of them.

Neorealism is one of the theories that draws a line between domestic and international politics and mostly deals with the latter. While doing so, neorealists like to present patternsof behavior for state actors for varying circumstances such as war and peace, and conflict and cooperation. As rationalists, they also like to test their patterns emprically, this strenghtens their arguments (Milner et al. 2011, 3-28). In this pattern-drawing, neorealismmainly focuses on relative power distribution between states, as opposed to liberals who mostly have absolute power as their focus. The international system presents opportunities as well as obstacles and states need to choose what strategy would suit them to acquirepower at a specific time period, so IOs are policy choices (Glaser 2010).

The structure of the international system also shapes and restricts foreign policy options ofstates (Waltz 1979). This could be likened to trends that are followed and accepted by all.How states evaluate these foreign policy options security-wise and interest-wise creates theprimary level for the formation of different IOs. If the structure has evolved to a stagewhere international cooperation through institutions is necessary and/or easier comparedto otherwise, then this is eventually what states are going to do. “Countries can at timescooperate; indeed, alliances and balancing are important forms of cooperation central to neorealism” (Milner et al. 2011, 19). This stage is where cooperation brings interest and other states are benefiting from cooperation. Then, cooperation becomes the imitated behavior as mentioned above. Over time, it is most natural for the structure to undergo certain changes and IOs experience changes of their own in accordance with the structure too. “Institutions change when the underlying balance of power among states changes. This causal path shows the

dependence of institutions on state power ultimately their epiphenomality" (Milner et al. 2011, 9). Those IOs who are flexible to change (www.britannica.com) and adapt to changes survive, and those who do not, either change name and/or form, or extinct from the scene. "Differences in international in the international problem structure or distribution of power within an issue area that predate the institution may expplain differences in international design and hence differences in state behavior" (Milner et al. 2011, 10). AnIO then before anything else, is an entity fit for its time in terms of political structure. Meaning that, an IO is and should be capable of adapting to and providing the needs of the socio-political environment of international politics. The League of Nations is a prime example of this. Most of its members claimed neutrality in the WWII and in "1940 France,the Netherlands, Belgium, Denmark, Norway, and Luxemburg fell to Hitler". Switzerlandwas uncomfortable about being the hostof an IO that looked like an Allied one and the League started to lose its offices one by one. Here, the socio-political environment couldnot handle united action any longer. Four years later, in San Francisco, seeds of a "fitting" IO would be sown (history.com). NATO is an example of the flexible ones. NATO was expected to be of no significance "after the USSR collapsed and the bipolar system no longer existed", but it "took different responsibilities" and adapted other missions and prevailed (www.britannica.com). Here, the socio-political environment could handle cooperation and the needed-flexibility was supplied.

Changes and shifts in the structure of international politics lead to foundation of new IOs.NATO is one of these examples; the institution was created at a critical juncture in the aftermath of the World War II, to contain Soviet expansionism, deter European military nationalism, and strengthen European integration and cooperation. NATO provides its members a relatively cheaper international cooperation with low risk because whatever they do, will be the decision of every member else. This way, the power and prestige of a supposed member state X gets higher compared to non-members. Furthermore, when thereis a crisis, NATO comes to help and intervene, a situation the state that is experiencing thecrisis might not have figured out on its own. Having an entire NATO (or another organization) behind makes member states look more powerful and not so easy to defeat (Ellyatt 2018).

3.2.2 Relative Gains and Security

An essential concept of the neorealist structure is relative gains. Since states are in a constantly in fear of an attack from one another, they seek relative gains in comparison to others. This way, they seek to increase their relative capabilities, expecting the worst. The worst scenario is war, and states get prepared for it in order to feel secure. This situation is called security dilemma and hence relative gains mentality of arms reduces cooperation. In the self-help system, states must never forget that they are surrounded by power- maximizing states, just like themselves, and they should always be cautious and even if they are going to cooperate, states must play the "defensive positionalists" at the very least to protect themselves (Grieco 1993, 138). The line of logic here is that, if a state acts too aggressively then others will follow suit, then, the power they already have will be spent in conflicts and arms races. Instead, if states cooperate, the power and legitimacy they accumulate will last longer. Relative gains come with cooperating for all parties enter into cooperation to increase their interests. Especially superpowers do not enter into cooperation where there are not much enough gains. Nevertheless, at times of peace and stability, there is less security competition. Therefore, states can lower their threshold of gains while entering into cooperation at these times, which increases the odds of cooperation. International anarchy does not necessitate armed conflict under sufficient material and conditions, instead, cooperation is a better option to obtain security. The reason for that is, if and when armed conflict is mostly unlikely to occur, instead of investing in arms races, states can use the otherwise-be-used-to-military money to economy and prosperity of the country. Furthermore, states can adopt more benign policies if possibility of conflict was quite low, and internationalpolitics would have a different face. "International anarchy does not generate a general tendency toward competitive international strategies; under a wide range of material and information conditions, cooperation is a state's best option…" (Glaser 2010, Preface).

With the power they gain from cooperation, states aim to influence other states and the political sphere they operate in as much as possible. This is done in an effort to shape thepolitical context in their good so that they can extent their interest in the long term. The longera state influences the political structure, the more settled her power position gets vis-à-vis others.

Neorealism, as opposed to classical realism is specifically interested in peace, and stabilitypossibilities and conditions. Classical realism prioritize power over every asset else, while neorealism may trade it with security. This comparison that can be simplified as realism vs. neorealism equals to power vs. security, when it comes to international cooperation. One may lose their power in pursuit of security, but if the environment is already secure, the powerstays still longer. Cooperation then, is tough to achieve but still possible with IOs who do not possess full authority and autonomy vis-à-vis states and restricted in power. IOs are not full- fledged actors in the international arena, but they are at most helpers of states to further their interests. Even though IOs may have their own agendas and motives, they cannot be considered as actors who shape international politics. "Statesset the scene in which they, along with non-state actors, stage their dramas or carry on their humdrum affairs. Though they may choose to interfere little in the affairs of non- state actors for long periods of time, states nevertheless set the terms of the intercourse" (Waltz 1979, 94). IOs are founded on the self-interested calculations of the great powers,and they have no independent effect on state behavior (Mearsheimer 1994-1995: 334).

3.2.3 Use of the IOs

Although states are the most important actors in the international system, neorealism does not reject NSAs and acknowledge that IOs hold, albeit incomparably small, sort of positionin it. IOs, as a member of this non-state actor group, act as extenders of state interests withtheir proper functioning. They prepare the groundwork for states and provide them with safe and neutral environment to operate in. This is the fundamental part of the theoreticalview of this thesis, I do not reject NSAs altogether. IOs like the ICC help sustain the orderin the anarchy; states can prevent unchecked behavior of others and succeed common aims with like-minded states (Donnelly 1986, 602). IOs, as agents of state power, boost national interests as long as and wherever they are allowed to do so (Baldwin 1993), so they do not have any independent functions to serve themselves and anyone other than states. Political power battles may be fought within the IOs but, their hierarchy with the states are never questioned because at the end of the day, reason d'être of an IO is to servea powerful state, or a number of those (Krasner 1991). Some like Kiewit and McCubbins (1991) discuss the ways how states make sure, as much as they can, that IOs are honest and loyal to tasks that serve state interests. States create IOs to increase their strength andreflectors of balance of power

in international politics, they are mere “arenas for acting outpower relationships” (Evans and Wilson 1992, 330).

3.2.4 Classical Realism and IOs

Realists have a cautious view to world politics. The international system is brutal, states look for survival and power opportunities and have little to none reason to trust each other (Van Evera 1992, 19). International system is anarchic, and since there is no central government, states are in fear of an attack from one another, and they look for ways to protect and preserve their sovereignty. According to classical realism, we all live in the state of nature, meaning that, interests of one override moral judgement, hence, interest-seeking is the primary action of any actor. Politics is a separate arena from economics and moral and it cannot be reduced to them. A political leader cannot act morally as a free citizen because s/he needs to keep national interest and security as the top priority (Morgenthau 1973). States in the international system, are no different from individuals in that regard. They are driven by interest and national interest is of utmost significance inthe pursuance of state survival (Machiavelli 2008). International cooperation is limited and there is security competition which is above all competitions and where states alwayscompete for absolute power, possibilities are, world peace is unlikely. The final destination for security is nation state, outside the confines of it, security is not possible (Morgenthau1973).

Anarchy and survival mentality increases the difficulty of cooperation between states. A state does not think whether others are gaining as well, she only cares about her own absolute gain. When it comes to relative gains how much others gain interests states as well, because they want to gain more than others do. Therefore, a state needs to have calculated either absolute or higher relative gains for herself in order to enter into cooperation.

3.2.5 Functionalism and IOs

This group of thinkers look into the reasons why IOs used by states in cooperation and diplomacy, the characteristics of such entities and what means do they use and try to fill the gap in the IR theory because there is not much room for IOs and their theoretical worthin contemporary literature. IOs are fundamental actors in international politics who spreadcommon goals and shared values. IOs have a wide range from small budget

ones to thosewho lend billions to states every year like the World Bank. Abbott and Snidal (1998) suggest that centralization and independence are two characteristics of IOs to be given room for maneuver. Since IOs gather collective activities under a substantial overarching roof and this administrative ease come handy in their endeavor in shaping international politics, this is what is meant by centralization. It enhances direct state interaction by linking different intermediaries at times of tradeoffs and assuring compliance with agreements. They also manage other sorts of activities, act as agents thanks to their centralized organization, theydo pool, joint production (prime example can be NATO),and norm elaboration. Some level of independence of IOs increases the efficiency and substantiality of international cooperation. This is usually done through binding interventions, laundering, information providing, acting as trustees, allocators, arbiters, community representative, enforcement manager, and authorizer (Abbot and Snidal 1998). Laundering is when "an action could not be acceptable in state-to-state form, so states do it through IOs. A good example is when the US wanted to reverse the Iraqi invasion of Kuwait, it turned to the UN to do it". As it happened with NATO intervention in Kosovo, states may want to intervene in incidents to control it but can hesitate to do italone; at this point, IOs help with cover and the intervention seems like a collective action.This is also a control mechanism for powerful states; they can shape and keep at check thebehavior of IOs. This way, powerful states retain some sort of control of international actions without receiving attention after all; it is the IO doing the job on the outside. Neutrality is the function of an IO that allows it to act like an outsider, an objective third eye on important issues. IOs provide neutral information and monitoring. In dealings between states, IOs can act as trustee like the UN in peacekeeping operations.

Arbitration and binding intervention is when IOs act as a referee between states like whenthe Permanent Court of Arbitration chose the head of US-Iran claims tribunal (Abbott and Snidal1998, 3-22). Like realists, functionalists acknowledge that IOs further the interests of states. The United States as a superpower, has the biggest share in NATO expenses. Then, IOs in one way or another provide "utility as instruments for regime and rule creation" (Karns and Mingst 1990, 29). Nevertheless, they are not replacements of states, but they act as supporters of the international cooperation.

3.3 Conclusion

This part presented a framework for my argumentation and how I see IOs in general and the foundation of the ICC in particular. I examined neorealism in how it explains the foundation of IOs and their relation with states. When analyzing any IO, there are three concepts to understand it in neorealist terms: structure of the international system, relativegains and security, and functions of the IOs. According to neorealism, IOs are one of the ways states can further their interests in international system. They can change or stop existing over time and that depends on their adaptability to shifting and changing conditions. IOs provide states with relative gains compared to those who do not cooperateand a secure environment since instead of conflict theychose to cooperate. Benefits of IOsinclude among others, increased legitimacy and power at home and abroad, smart investment of money, control over other states" actions, and taking part in as well as influencing global decision-making processes. I also got inspired by realism and functionalism. Specifically, realism's state-centric approach and functionalism's way ofseeing IOs as tools to increase state interests helped strengthen my rationalist arguments.

All in all, what this part mainly tells the reader is that states are rational actors who alwaysseek their (relative or absolute) best interest. If and when they enter into cooperation through IOs, this only means doing so benefits them. IOs are great tools for states for controlling other state and non-state actors, what norms and perspectives are entering into global politics, what actions are taken in places where they have interest and having a sayin and a chance to change the direction of global decision-making.

CHAPTER 4

THE FOUNDATION OF THE ICC AND STATE INITIATIVE

The foundation of the ICC in 2002 is the manifestation of evolution of international criminal justice (Kowalski 2011). This main part of the thesis introduces the ICC in detail and discusses what changed in the post-Cold War era and a way to the foundation of the Court opened. The advent of information technologies increased the need for responsibility of the states and since states' perception in the eyes of the public affects state power, IOs like the ICC are quite a way to sustain responsibility and power. One of the most visible examples of government's perception in the eyes of people affecting state power is ballots. Voters determine the flow of politics and consequently power. Although this thesis adopts a realist/neorealist stance, and while immediate material and. or military gains are perceived as power, in realism "calculations about power lie at the heart of how states think about the world around them" (Schmidt 2005, 523). While realism/neorealism has "power" as the foci, the definition of it is very ambigious and there are "varying and even clashing" definitions and measurements by individual realists from classical, structural, and modified realisms (Schmidt 2005, 524-525). While some realists define power by measurability, "others define it as the ability to exercise influence over others in the international system" (Schmidt 2005, 527). So relative powers like joining the ICC that will lead to material powers like taking part in decision-making processes, are recognized processes by the realists. The reason for that is the increasing ability of global citizenry to get to know what states do and donot and it is now easier for them to hold states responsible for their action or inaction.

Following that, I examine the path to the foundation of the Court taking it from some time back. Then I discuss the reasons why a rational actor would choose to cooperate through

an institution like the ICC. In this context, deterrence, responsibility, and the principle of complementarity are examined. Lastly, to strengthen my main argument and provide more details and proof, I shed light on the relationship between the ICC and African states, Europe, the Like- Minded States (L.M.S.), the Non-Aligned Movement (N.A.M.), and the United States of America, and how and why they signed the Rome Treaty from neorealist and rationalist perspectives. States are rational actors, when it does not suit their interest; they leave, like Brundi did for the ICC in 2017. If they had not seen any interest in it, they can also not enter into cooperation at all.

4.1 Changing Times

Previously, convicting another sovereign state's citizen was unthinkable -unless the crime has been committed under the jurisdiction of that particular state- and seen as a breach of one's sovereignty. But the failure of Tokyo and Nuremberg Trials on "expressly outlawing war crimes, crimes against humanity, and crimes against peace" (Glossop 1999, 3) created a further urge for change international law which resulted in the "adoption of the Genocide Convention in 1948 and the Geneva Conventions dealing with the conduct of war in 1949" (Glossop 1999, 4). Nevertheless, this had not prevented the atrocities -not only because but mostly- because nationals of other states were still not being convicted by state parties.

What changed this is not non-state actors' presence; they have existed and were pressing; officially since February 1995, the establishment of the Coalition for the ICC (CICC). The key to change was the need to better one's global appearance through responsibility because with globalization came the easiness of monitoring state activity and with that came the ability of global shaming of states. And a perfect way to boost international responsibility is to join an international institution that is founded to bring justice. In the 1980's when 24-hours news entered our lives, peoples' hunger to know and tell others grew immensely (Robinson 2013). Following that, with the advent of the 21st century, social media and internet usage also intensified information gathering process even for the ordinary individual. Fast spread of information enabled citizens of one country to know what is going on in another. Differences in governance,

treatment to citizens, and citizen rights led to comparison of one's stateto other states which led to government being held responsible more and more. An evidence for this is the Arab Spring and how citizens of other countries of the Middle East started to assess their governments and governments had to take action; eitherto suppress them or meet them in the middle. States then, felt the pressure to look responsible and have a better image in front of other state and non-state actors as well as the global audience. Before the Word War II, global atrocities were of course well-known but after the War and the Cold War, global culture has emerged and states felt the need to upgrade their image. This of course, stays within the confines of secure action, meaning that, states do not take these actions if the particular action would be costlier than its benefits. Good examples can be stopping of chemical weapons production and getting rid of stock of them by the U.S.A. and the U.S.S.R. with the Chemical Weapons Accord (1990), prohibition of production, stockpiling, and any other use of chemical weapons by the Chemical Weapons Convention (1992), providing of safety regulations for civil nuclear energy ares (Convention on Nuclear Safety 1994), prohibition of any nuclear explosions for whatever purposes (Comprehensive Nuclear Test Ban Treaty 1996), all things that either still does not exist or did not exist at the time in most developing countries and the knowledge of them was easily accessible even through movies. The Chemical Weapons Accord of 1990 wasproposed by then US president Bush. It was in the interest of both sides because at the end of the Cold War when both sides were tired, they mutually eliminated a chemical weaponry accumulation risk, and consequently they did not need to keep racing on the matter. The benefit of the 1992 Chemical Weapons Convention was the ability for any state party to request a surprise inspection for another state party. The 1994 Convention on Nuclear Safety provides state parties with the ensurance that everyone needs to incorporate the convention into national legislation so that even domestic politics of states can be controlled on the issue. In 1996 all nuclear tests were banned which presented the same opportunity with 1990 Accord; because it was banned, no state felt the pressure to do better than others. Notwithstanding the NGO help in such instances, it is states who come together and take the particular action, if they had not wanted to do it, NGO campaigning would not have changed the outcome. It is the state will at the end. This thesis does not neglect NGO help in the foundationof the ICC either. This was also a checks and balances system for states; citizens become more and more conscious of what they could expect

from a government. This raised the stakes for international responsibility and some states started to go after cooperation opportunities that would increase their well-reception in international as well as domestic scene, provide them with opportunities to increase their interests, and meet the expectations from within the state and outside of it. IOs are perfectly functional tools for state responsibility. They make states look responsible to their citizens and to international audiance. Responsibility these days, comes also through cooperation: in most instances citizens perceive a state responsible when it is welcomed in the international scene and enters and exists agreements and organizations for the good of the country.

States and officials can often get away with their crimes and they do not enter into cooperation that can put their interests in danger. There are countless un-convicted crimes before and after the ICC was founded. Therefore, state interest always comes first, and states enter into cooperation when it benefits them, either directly or indirectly, and they never put themselves into sloppy positions deliberately. "…the most basic motive driving states is survival…States think strategically about how to survive in the international system, they areinstrumentally rational" (Mearsheimer 1994, 10). They may only misstep when "potential adversaries misrepresent their own strenght or weakness and to conceal their true aims" (Mearsheimer 1994, 10). So, no state entered the ICC unless it benefited her, and each state joined the Court because they thought the Court would extend their interests at home and abroad. Responsibility and seeking one's citizens' interests create a credible outlook forstates; masses tend to lean toward power. Certain states who are global and/or regional military powers such as Turkey, China, Russia, and Israel are not parties to the ICC because joining did not benefit them more than not doing so. China did not sign the Statute because inclusion of internal conflicts and crimes against humanity at times of peace were points china could not afford, mostly due to Uighur issue (Jianping and Zhixiang 2005). Russia saw it threatening for herself that the ICC decided that Russian activity in Crimea is "an ongoing occupation", hence withdrew the signature (https://www.bbc.com/). Turkey was afraid of the possibility that with increasing global

support for Kurdish cause in Southeast Turkey, the international perception towards the issue would change positively for the PKK (Kurdish Workers' Party) and Turkish soldiers would face jurisdiction of the ICC (https://www.al-monitor.com/).

4.2 The Post-Cold War Period and Political Void in International Political System

After the end of the World War II, a bipolar world system emerged in the international political arena. This system foresees states mainly grouping into two, around two rival superpowers politically. The international, and sometimes domestic, political behaviors and choices of these states are monitored to see if they are in accordance with the interests of the polar and the superpower they are liable to. At the beginning of the system, the rules and the number of states around the powers are high and as the demise approaches, they become lower (The Editors of Encyclopaedia Cold War).

In this bipolar world, the two superpowers were the Union of Soviet Socialist Republics and the United States of America; the former supported socialist ideals, led the Eastern Block, and the latter a capitalist world view, led the Western Block. With the fall of Germany after the end of the World War 2, Soviets compensated the socio-political void emerged in Middle and Eastern Europe and some part of Balkans. The period between Truman Doctrine (1947) (and 1989 the demise of Eastern Europe) and the demise of the United of Soviet Socialist Republics (U.S.S.R.) (1991) is called the Cold War.

The 1985-1991 period is crucial for the purposes of this thesis. This is the finale sceneof the Cold War, and Michael Gorbachev's glasnost (openness) and perestroika (rebuilding) brought the U.S.S.R. and the U.S.A. closer and broke the ice politically, economically, and socio-culturally. Following that, in his speech at the UN general meeting in 1988, Gorbachev decreased the Soviet effect on Eastern European countries by stating that ideological foreign policy should cease and states should be independent in their decision- making (Gorbachev 1988). Poland, East Germany, Hungary, Bulgaria, Romania, and Czechoslovakia shifted to democracy in 1989, the U.S.S.R. retreated from Afghanistan, the Berlin Wall was demolished on November 9th 1989, and two East and West Germany reunited on 3rd of October 1990. As the finale, on 25 December 1991 the U.S.S.R. was dissolved into 15 independent states.

The end of nuclear armament race (and consequently the decline of nuclear war threat) and many African colonies gaining their independence during the Cold War gave birth to a new international system in which states are more independent, there are relatively

less threatsfrom superpowers, and the number of fully-sovereign states is more than double compared to pre-World War II era. This reality made huge number of states enter into international, regional, and local political organizations which consequently affected the rules of conduct.

Now much smaller scaled states had bigger shares in decision making and everything else. Not to call the bipolar system a good order, but now there is less and less of an authorit y to answer to. This void in international system heightened the need for a power to regulate stateand non-state actor behavior.

The post-Cold War period has seen discussions for the foundation of certain institutions for the new order such as the World Trade Organization, among them is the ICC. Latin American states, who previously could not have a significant say in the international politics, now could propose the founding of an independent international criminal tribunal for the atrocities taking place. The ICC is distinguished from other international tribunals because it specifies in trying war criminals, criminals of aggression, and those who commit crimes against humanity. But most importantly, while only states can approach the International Court of Justice (ICJ), individuals can approach the ICC. This is one of the reasons why the ICC was founded so late and it is also one of the reasons why states wished its foundation. The ICC was founded as late as 2002, but it was still founded anyways, because the Court can try all individuals, given the prerequisites are satisfied. This means, while the ICJ cannot try political leaders who commit war crimes, crimes against humanity, and crimes of aggression, the ICC can. This way, governments could benefit from a court that can keep other governments at bay and call out previous political leaders, which is one of the incentives ofthe Court's foundation, which will be explained in detail below. This is why, officials who feared being convicted delayed foundation of such an institution.

4.3 The Road to the ICC

In 1948, the Convention on the Prevention of the Crime of Genocide was adopted and following the mass killings in the aftermath of the World War II, the United Nations General Assembly decided that an international criminal court was necessary to prevent crimes of genocide (The U.N. Convention on the Prevention and Punishment

of the Crime of Genocide). An unsuccessful attempt was made in 1953 by amending a statute for an international criminal court that was drafted in 1951.

Further, in 1972 there were efforts to convict those who are accused of the Apartheid, but that was never made into reality either. But in 1973, the UN adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (1) and the article 5 in it opened the way for an international criminal provision. The Genocide Convention in Article 6 "provides for jurisdiction of an international criminal court, in the event that one is established, but does not expressly call for it" (2) (Bassiouni 2015 1167). In 1975, the United Nations Congress on the Prevention of Crime and Treatment of Offenders was assembled for the fifth time and adopteda resolution on the prevention of torture and one on prevention and suppression of terrorism. In 1989, 17 countries led by A.N. Robinson, then president of Trinidad, asked for the establishment of an international criminal court at the UN General Assembly in 1989. So, the initiation for the ICC came from states, not non-state actors. He resurfaced the idea of founding an ICC in his address to the United Nations General Assembly. Robinson's efforts as a headof state to establish an international criminal tribunal led him to be remembered as "the grandfather" of the ICC. (The ICC Statement by the International Criminal Court on the Passing of Arthur Robinson) At the time, the U.S.A., France, the U.K., and some other European powers were opposed to the idea of an international criminal tribunal which resulted in prevention of a big step forward and the International Law Commission to further its "study" of the matter and prepare a second report (3). The lack of expertise on the issue, possibility of international humiliation, and the uncertainty about what to expect from a prospective ICC from an international politics point of view resulted in this opposition and skepticism towards the idea of an ICC. At the end of 1980's and the beginning of 1990's, the UN General Assembly asked the International Law Commission to prepare reports on international drug trafficking and two reports were drafted and discussed in the General Assembly at the end of 1992. These studies raised more questiones than answered. With that "stagnant" situation at hand but hopeful due to the albeit small number of political leaders pushing for an ICC, a committee met in Siracusa in 24-28 June 1990 with support of many including the USSR President Gorbachev, president of Trinidad and Tobago Robinson, and Italian Minister of Justice Giuliano Vassalli to revise the 1980 draft proposal (Bassiouni 2015, 1167).In 1991 the International Law

Commission issued the tenth report on the Draft Code of Crimes against the Peace and Security of Mankind (4) to the UN Committee. In 1992, the meeting of International Law Commission gave the signals of the acknowledgement by more states aboutthe need to have an ICC and adopted a Code of Crimes that prepared the ground for the establishment of an international criminal tribunal. In the same year, the European Parliamentary Assembly with all its members, drafted a proposal to cooperate with the United Nations in creation of an ICC that would look into war crimes (5). The ad hoc courts set up for Yugoslavia and Rwanda in 1994 contributed to development of international criminal law and added to the realization as to its relevance and the need to it. In 1994 there was, at last, a draft proposal for an ICC before the UNGA presented by the ILC. Later in the year 1996 a preparatory committee composed of the U.N.G.A. members came to existence and held six sessions between 1996-1998 to discuss the feasibility and conditions of a possible future ICC. In 1998, a conference, called the Rome Conference, of 8 sessions was convened to conclude and adapt a statute for the ICC. The Rome Conference saw two large groups in the work: The Like-Minded States (LMS) and The Non-Aligned Movement (NAM). 1998 brought the drafting of the Rome Statute and for four years international society wondered thefate of the Statute. For four years, the Statute waited to pass the threshold of 60 states, when in 2002, 10 more states –Bulgaria, Romania, Slovakia, Niger, Cambodia, Jordan, Mongolia, Bosnia and Herzegovina, Democratic Republic of Congo, Ireland- ratified it and the ICC was set to be realized. These states deposited their ratification on 11 April 2002, at the 9th PrepCom for the ICC, and a date -1 July 2002- for the Court to enter into force was set. This waiting period is the clearest and best proof that the ICC could not have been founded before. Entering into the Court benefited states no matter the amount of non-state actor efforts. One of the tricky features of the international system for realists is the misinformation that can be provided by other states to mislead, and such institutions prevent that to big extents “by providing more information of others. It also decreases the costs of delivering international criminal justice and boosts the credibility of these state actions because there will be reputational costs otherwise”. (Huikuri 2019, 35). The Court could not have been founded earlier because of the political contexts that led states to act for it (Zorlu 2016; Huikuri 2019). Meaning that, the above discussed matters show, socio- political context and timing were pushing factors for states to take action for the foundation of

an international criminal court. So, without drug problems of certain states and them being willing for an ICC to solve such issues, without 17 states pushing for a Court, without the U.S. and France opposing and thingsgetting stagnant thus a committee meeting in Siracusa, and without other developments, the ICC would not have founded on the day it was founded. It does not mean NGOs hijacked the process; it means state initiative worked best for this time.

4.4. Why States as Rational Actors Chose to Join the ICC?

The International Court of Justice is not a system completely strange to national jurisdictions; it is an extension of national legal systems. The principle of complementarity only is in effect when the state in question is unwilling or unable to try persons responsible forcrimes. It is a principle that does not cripple sovereignty but actually strenghtens it because it gives the chance to states who have weak legislations to better it so that they have more powerful judicial systems.

The Court is actually there to help states at times when state jurisdiction is short of solutions, which is functional for states as a last resort to go. This should not be seen as a breach of state sovereignty, rather, it should be perceived as an opportunity for states to pushthemselves for solving their domestic legal problems through national judiciary. This in turn,will strengthen the image of national governments at home in the eyes of citizens. Some states wher Muslims constitute the majority of the population, signed up for the ICC for this specific reason because they wanted toseen to be compliant with international judicial norms to their citizens while in reality they ruled the territories with Shari'a law (Gray 2018).

Institutions like the ICC provides states with the opportunity to intervene into places where they otherwise would not be able to, through initiatives like peace processes. With this, they can also influence other state parties' decisions and actions towards the interlocutor of these processes and add to a common international policy. This is done through the ICC by trying the responsible for crimes against humanity, crimes of genocide, and crimes of aggression and managing the peace process afterwards. The ICC gives states the chance to influence what is going on in another state through peace processes and what would be done to a hostile head of government who may be an obstacle for her own foreign policy. This takes place through mechanisms of

reconciliation, deterrence, and contribution to the nationallaw. States join, because all of them want to influence global politics regardless of the possibility of it.

On a different note, prosecution of responsible political leaders increases the odds of international legitimacy for countries undergoing the peace process as well as other countries for being an example. From a neorealist point of view, it is great for seeking one's interest in an ongoing situation in a foreign state because according to neorealism a state would not wantto miss a relative gain while other states are gaining through joining the ICC, and from a rationalist point of view, it gives the opportunity to participate in an international decision-making position. Rather than going on war or engaging in conflict, states ensure their common will regarding an international problem through a legitimate institution via deterrence, treaties, conviction, promotion of human rights, and ensuring the rule of law. Deterring punishment also contributes to conflict prevention. It is argued that international institutions such as the ICC are thought to help decrease the likelihood of wars and violent conflict (Miall, Ramsbotham and Woodhouse 1999). This is one of the reasons that attract state parties and the first proposal for an ICC which came from Trinidad and Tobago was because they thought it would deter criminals from engaging in drug trafficking. An international criminal justice system will be of interest of states, because it will deter individuals from committing offenses through its sanctions so that possibility of conflicts is thought to be reduced to minimum in theory (Hopkins Burke 2009; Wood 2012). International responsibility helps make a state's image more powerful at home, which is a long-term gain for governments. "The challenge is less about states involving in international organizations than about how responsibility can be exercised" (Civicus 2014) because it is a factor affecting the state image. Contributing to peace contribute to boost one's international responsibility and more and more this is becoming a phenomenon: responsibility through taking part in international cooperation for global justice and peace. Other than deterrence, states seek their interests through contributing decision-making in peace processes by joining into organizations like the ICC who provide reconciliation at times of conflict and dispute. Reconciliation is moving past conflicts and having victims and perpetrators meet on the same ground and move from a divided past to a shared future (Bloomfield, Barnes and Huyse 2003). The reconciliation processes done by the ICC are called peace processes and these type of processes are one of the legitimizations for any kind of

international justice mechanism (Fletcher and Weinstein 2002). Recociliation processes aredesigned to contribute to and help build peace (Bensouda 2013) which gives states stability, the main element neorealism looks for. The ICC engage with victim and affected communities and try to make them have "sense of ownership of the justice process" (www.icc-cpi.int), organize panels, discussions, and hold press conferences in those places. It communicates with local academia, media, NGOs, and politicians to ensure that the both victim and perpetrator parties are active participants of the justice process (www.icc-cpi.int).

Both deterrence and reconciliation are perfectly legitimate opportunities for crippling hostile political leaders' maneuver power and interfere into states undergoing peace processes. This can be thought of as the U.S.A. interfering in the Middle East not on herself but under the disguise of United Nations peace operations; similar logic as explained by functionalists as laundering (Abbott and Snidal 1998). From a rationalist point of view, states benefit from peace more than they do from war and being a part of peace processes managed through institutions like the ICC is of great use to them. The ICC also comes as a pushing and monitoring factor for these changes to be made, so it is more organized and better with the Court's involvement than not. Above all, this is the Court's initiative to begin with, it initiates and supervises the process. While contributing to international peace, the main motivation for states as rational actors is that bydoing so, they would be having a say and impact on global socio-political norms of state conduct.

4.5 The Principle of Complementarity

The Rome Statute of the ICC is based on the principle of complementarity which tells that right to convict is there to respect, not overshadow the sovereignty of a member state. This is another reason why the ICC complements, not overrules national jurisdiction of member states. This means, the ICC is only a court of second resort and unless a state is unable or unwilling to proceed, it shall always have the right to proceed with jurisdiction on a case. The ICC's states choose international cooperation: it does not harm but even honor their sovereignty in principle and also there to help whenever it is needed. Complementarity principle provides that the ICC cannot and does not unjustly cripple the sovereignty of state parties (Nouwen 2013). Although it may still have costs, it is much less costly than (international) ad hoc courts which has harsher

conditions for responsible political leaders compared to a permanent(international) court which has predefined rules and prosedures. In determining what cases may be admissible to the Court,

> … the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or the inability of the state genuinely to prosecute (Malu 2019, 18).

A state is unwilling, according to the ICC when,

> ... the national proceeding was being made for the purposes of shielding the person concerned from criminal responsibility; whether there has been an unjustified delay in the proceedings, which is inconsistent with an intent to prosecute; and whether the proceedings were not or are not being conducted independently or impartially (Malu 2019, 18).

4.6 The ICC and the African Union

African states had given much support to the foundation of the ICC and constitute the largest number of states from a geographic region in the Court with its 34 members and 4 judges from African states. The first ever state to ratify the Statute is an African state, Senegal on February 2nd, 1999, and Democratic Republic of Congo was the 60th ratification that gave the Court with the number to begin to function. With a history full of human rights abuses and atrocities from the Apartheid to Sierra Leone civil war, to genocide in Rwanda, to bloodsheds in the Great Lakes Region (Fernandez, Lovell and Vormbaum 2014, 13), African states were one of the first groups to benefit from an international criminal tribunal. Before the United Nations Conference in Rome, African states in various regions of the continent have started to demonstrate non-negligible efforts, which included workshops, seminars, and conferences, for the establishment of an international criminal tribunal. In 1997 and 1999, the Southern African Development Community (SADC) hosted a conference in support of the ICC's foundation. In 1998, another conference in Dakar on the auspices of Senegal was held and the participant states highlighted their "commitment to the establishment of the ICC and underlined the importance that the accomplishment of this Court

implies for Africa and the world community as a whole" (The African Union Dakar Declaration for the Establishment of the ICC in 1998).

During the Rome Conference, the African states were quite active in debates and caucuses and African delegations were represented by the highest ranked delegates; Ministersof Foreign Affairs, Ministers of Justice, and Attorneys General. Of the 31 Vice- Presidents in the conference, 8 were of African states namely, Algeria, Nigeria, Sudan, Burkina Faso, Malawi, Egypt, Kenya, and Gabon. On top of that, the chair of the Drafting Committee was from Egypt (Fernandez, Lovell and Vormbaum 2014, 14).

Universal participation was quite important to and supported by the African Union members. delegation of Malawi said "The principle of universality, crucial to the proper functioning of the court, could be achieved only with the participation of all the stakeholders at all levels of the process, including the important preparatory phase" (A/C.6/51/SR.27).

Egypt also stated that "to ensure the universality of the court, as many countries as possible, particularly developing countries, must participate in the drafting of the statute" (A/C.6/50/SR.28). For Ghana, if the Prep Com missed developing countires, it "would havean adverse effect on the universality of the negotiations" (A/C.6/50/SR.31) (Gissel 2018, 735). Kenyan delegation stressed how indispensable full participation was to them:

> Equally important to the success of the Preparatory Commission was the full participation of all its members in its deliberations. It was in the interest of the long-term legitimacy of the Court not only that Governments support the work of the Preparatory Commission but also that different legal systems be taken into account from the outset ... Forthat reason, it was important to facilitate the participation of developing countries. (A/C.6/53/SR.10)

At the time of foundation of the Court, certain number of African states made sure that some provisions of the Rome Statute be incorporated into their domestic law (Fernandez, Lovell and Vormbaum 2014, 2) which further proves that the ICC was first and foremost founded thanks to sovereign nation-state carrying-out so much so that parts and parcels of its founding charter is desired in national laws. This step was

very much in line with state interestbecause compared to earlier times, now governments could convict individuals much easier.

On the way to ease their domestic legal procedures African states worked hard first, for building the conscious of the need for an ICC and then, for the establishment ofit. The headof the South African Delegation Abdulla Mohammed Omar stated that:

> The establishment of an ICC would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment ofinternational peace. In view of the crimes committed under the apartheid system, the ICCshould send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished (The United Nations United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC: Rome, 15 June - 17 July 1998: official records, p. 65.)

4.7 The ICC and the European Powers

States enter into a cooperation when it serves their interests more than it does when they do not. The same logic applies to the ICC as well. European powers found it quite functional to support the ICC's foundation so that they could continue colonial ideals of the past through a legal international institution where every member looks as equal sovereigns. Most of the cases the Court is looking into right now being African only strengthens the sharp criticisms and Kenyan political leaders being convicted by the ICC has been the peak point of these discussion. Furthermore, the ICC's investigation of Libyan to seewhether it is able to prosecute Muammer al-Gaddafi and al-Sanussi was also seen as a way of Western powers to intervene into and check on third world countries' domestic affairs like baby-sitters, or rather mandates. This is not only limited to the ICC; state interest has alwayscame first in international criminal justice matters. Previous experiences on the matter shows the powerful states' interest-driven choosing (Tokyo, Nuremberg, Rwanda, Yugoslavia) and not choosing (Syria's Bashir al-Assad, China's persecution of Uighur Turks, Russia's oppression of Crimean Tatars) of international criminal tribunal cases. At the time of all theseincidents, non-state actors supported and worked relentlessly for justice for war crimes, crimes of aggression, and crimes against humanity but it did not bear fruit. Why? Because it did not serve the interest of states enough; the benefit that came from not cooperating

surpassed that came from cooperating, what is more, cooperating could have even make themworse off.

4.7.1. Germany

Germany deserves a separate section because it shows how a country can be notorious for crimes against humanity not can, turn into a firm supporter of an international criminal tribunal thanks to political power it would receive by doing so.

The failures of Leipzig and Nuremberg trials as well as the increasing terror caused by various groups like May 68 protests, bombings, hijackings, and the RAF (Rote Armee Fraktion) crisis led Germany to look for a solution in rule of law and incorporating it in domestic as well as foreign policy. As cited in Huikuri (2019, 70), both Germany's joined theUN in the 1970's nevertheless the foreign policy considerations did not allow West Germany under Chancellor Helmut Kohl to vote in favour of the Draft Code for an international criminal court due to considerations about how much power would the Soviet Bloc gain from such an endeavor (documents.un.org A/C.6/36/SR.69 1981). With the Unification, the attitude towards the international criminal court on the German side got milder. This went so far as to German Foreign Minister Genscher expressed the need for an international criminal court at UNGA in 1988 and 1991, and the main reason behind this was the calculations for the possibility to have an international tribunal that would try SaddamHussein (Steinke 2012, 87). In autumn 1991, FM Genscher worked to "reinforce the instruments that ensure predominance of justice and law in the world" and support the foundation of an international criminal tribunal (Eikel 2018, 546). A foreing minister's such rhetoric is crucial in demonstrating how a state's foreign minister carries out policies that benefits his state and how much state will was in the process.

Furthermore, Germany made two constitutional changes only for the sake of the ICC so that Germany would have adopted its national law to the Rome Statute. One of them was the ratification law for the enactment of the Statute and the other one was a law to allow extradition of Germans to foreign courts the ICC (Huikuri 2019, 78). Germany was striving for having a respected place and increase its relative power vis-à-vis others in the post-Cold War political order with its notorious past on international law. Throughout, Germany's number one reservation had always been the soldiers, fearing

that if Germany becomes member of such an organization, what would be the fate of well-known (and other) military personnel who one way or another were involved in the atrocities of the past. What suppressed this fear was the liberal Head of Ministry of Foreign Affairs' International Law Department Kaul, who would later serve in the ICC as a judge. He suggested that the complementarity principle of the ICC would perfectly protect and preserve German sovereignty and domestic trials would always have the priority (Steinke 2012, 109; Kress 2006, 36). From a neo-realist perspective, Germany was well aware of power competition internationally, but it also realized that international institutions were of great use for that. As then German Minister of Justice Schmidt-Jortzig explained German position so well in the conference for the establishment of the ICC: "In an interdependent world and a global society, sovereignty will be served better by cooperation as by a futile attempt to stand alone" (Schmidt-Jortzig 1998). "Germany wanted to cooperate with other states and build a coalition, in order to gain legitimacy…" (Huikuri 2019, 73). For Germany, specifically at the beginning of the Unification, pressing for an ICC was power-maximizing because it was a step to find a place and a voice in the new world order and wider European society. Germany acting as the initiator would have further strengthen this wished-for power, especially since the U.S.A was staying out of the picture which meant more power room for other contenders. To increase its share of power, specifically over the ICC, Germany had always pressed for a court that is not under the UNSC control and influence. Siding with the L.M.S. hence the developing powers such as India, was one of the strategies Germany followed to sideline the UNSC.

4.8 The ICC and the United States of America

From the World War I until the 1990's, the U.S.A. was not interested in the idea of an international criminal court mainly because it never needed an international criminal tribunal (Feinstein and Lindberg 2011). Even at the height of drug trafficking, terror attacks, and hijacking G.H.W. Bush refused the possibility of having it on the agenda, saying that "were the courts to become politicized, we might find it acting contrary to U.S. interests on a whole range of issues […]" (Pickering et al. 2003, 128). The number one American concern about an ICC was the U.S. military bases all over the world; they feared that the Court could jeopardize their freedom to maneuver. Things have changed with Rwandan, Yugoslavian, and Cambodian experiences, and the Clinton

administration had grown interest in accepting an ICC (Huikuri 2019) because it was more logical to have a permanent international criminal tribunal than setting up one every time. There is an entire process going to an ad hoc court economically, politically, and effort-wise. So when it considered state interest, the USA preferred the idea of an ICC. "One of the main motivations behind that was to decrease transaction costs of delivering international justice through a permanent court rather than spending much more on ad hoc courts" (Scheffer 1999a, 13). The USA, like as a rational actor, leaned towards the less costly option. "By 2004 the United Nations ad hoc tribunals consumed more than $250 million per annum, which is about 15% of the UN's general budget" (Schabas 2006, 6), while in the same year the ICC budget was "just over 53 million euros" (justicehub.org). In addition to this, as a rational actor the U.S.A. wanted the UNSC to have the right to refer and defer cases to and from the ICC. This way, politically motivated cases that do not suit the interests of America and the UNSC could not have gone before the Court. This could also allow the US to bring cases to the UNSC. This way, a hegemon both secures its own power over international criminal justice and through cooperation with the UNSC secures its wider interest on the matter. Furthermore, the U.S. opposed the idea of states being able to refer individuals to the Court, they "should not be able to pick and choose who to investigate and to dictate this to the Prosecutor, by filing a selective complaint" (Richardson 1997; Borek 1995). By the time the Rome negotiations were continuing, things were not all smooth; the then Republican Head of Senate Foreign Relations Committee Jesse Helms said that the Rome Statute would be "dead on arrival" if exemption from jurisdiction of the Court is not ensured for all U.S. citizens (Helms 2001, 9). Although the American delegation made two other proposals against that of the Korean one which proposed "the ICC to have jurisdiction when the custodial state, or the territorial state was a state party" (Huikuri 2019), they stood no chance because when the custodial and territorial state are excluded, thenthe court would practically be of no use. They also refused to have the Statute with consensus and asked for a non-recorded voting for their proposals. In the end, it was a long hustle for its interests for the U.S.A. Nevertheless, the guarantee that the ICC would not be financed by the UNSC, the threshold of60 ratifications for the Court to become operational, the UNSC to have the right to veto the Court's investigations for a year for once, the including of domestic conflicts and gender related crimes into the treaty (Huikuri 2019, 109) shows the

persistence of the American delegation in pursuance of U.S. power and upper-hand vis- à- vis other parties. There were red-lines for the U.S. and they did not compromise as much as they could. Behind the 60 ratifications threshold idea was the aim to postpone the Court's activation as much as possible. These were important in seeing the American influence on the negotiations regardless of the fact that the initial and desired U.S. proposal was not accepted.

> Scheffer –the head of U.S. delegation- should be applauded; because, really, the United States bullied its way into getting the U.S. stamp on almost every single provision inthe ICC Statute. It is really a U.S. statute with just a couple of exceptions, a couple of thing that we did not get (Huikuri 2019, 109).

While the U.S. is protecting national interests, rationalist undertones projecting the never- ending power struggle in international politics is always clearly visible. Due to concerns that the ICC could undermine the power of the UNSC and sovereignty of the U.S., senators along with Helms thought that "the United States must fight this treaty. […] the United States will never allow its national security decisions to be judged by any international criminal court" (Huikuri 2019, 110). It was not only the Republicans; Clinton administration too "was not ready to go forward with this treaty in its current form" (huikuri 2019, 110). The core problem stayed as the immunity of U.S. citizens, and at the heart of this concernlied military bases of the U.S. all around the world. To solve this, the independent prosecutor problem, and the ICC being independent of the UNSC problem, the U.S. insisted for the establishment of and actively participated in the Preparatory Commission (PrepCommission), which would basically do the necessary corrections and revisions to the Rome Statute (Huikuri 2019). They introduced two amendments to the PrepCom, Elements of Crimes (EOC) and Rules of Procedure and Evidence (RPE), which were finally accepted in the summer of 2000. It was to surprise many states and thanks to time-to-time threatening calls for support from the U.S. delegation to other state parties. When Scheffer was signing the Statute on December 31, 2000, what Clinton had only two things in mind about the Statue: that it was able to protect U.S. interests, and that they still had a say on the way to the Court during procedures to come in the PrepCom (Murphy 2001, 399). In 2002, Bush signed ASPA (American Service Members' Protection Act) bills introduced by highly concerned Republican senators, which had powers to exempt all U.S. nationals from

the ICC's jurisdiction and restrict all U.S. means from cooperating with the ICC initiatives including peacekeeping operations (Huikuri 2019, 117). Even the UNSC got involved and issued Resolution 1422 to provide de facto immunity for US nationals in peacekeeping operations around the globe (http://unscr.com/). All these measures against the Court, most importantly the Bilateral Immunity Agreements (BIA), affected the U.S. position in international politics. BIAs were designed to provide US citizens with immunity from the ICC. Americans started to lose their allies to other powerful alternatives such as Europe and China which ultimately affected the balance of power between the US and these powerful alternatives. With Obama administration and his "smart power" (Koh 2012) foreign policy, the U.S. aspired to gain its partners back and increase its relative power in international arena. To do this, they looked into possibilities of mutual gain with the ICC through cooperation on certain matters. In that context, while the U.S. ambassador to the U.N. Susan Rice mentioned the ICC as looking "tobecome an important and credible instrument […]" (Rice 2009), the Legal Advisor to the Department of State Harold Koh added that they have a "pragmatic case-by-case approach tothe ICC" (Koh 2012).

The American attitude towards the ICC over time, gives important lessons about how rationally a state acts. The Rome Statute was signed during the tenure of President Bill Clinton and unsigned during the President George Washington Bush administration. This means, states do anything to refrain from actions that are not in their interest, consequently, they enter into cooperation if only doing so is in line with their interests. In his speech on the signature, Clinton made it clear that their intention was to secure nation state interest saying that: "…with signature, we will be in a position to influence the evolution of the Court. Without it, we will not…I will not and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied" (Clinton 2001). Usually, there was no such thing as unsigning an international treaty. Clinton coined it to international law literature with this move and it is a novelty in negative terms. Meaning that, the U.S. protected its interest to the extent that they created "unsigning". Following the U.S., Israel also swiftly unsigned the Statute "pointing that the inclusion of the crime of transferring population as an example of politicization that Israel could not accept" (Israel Ministry of Foreign Affairs www.mfa.gov.il).

Despite opposing to the tone and language of the Rome Statute, Bill Clinton made it clear that he would wait until certain changes to be made before he presents the Statute before the Senate. If it does not suit national interest, a country with such historical record of and ideational devotion to international justice championship can hesitate before ratifying the newICC. An independent prosecutor and inclusion of crimes of aggression into the ICC's mandate were main reasons of opposition for the U.S. administration that was stuck between a democrat White House and a republican congress. Nevertheless, they secured the principle of complementarity which reduced the ICC to a last resort statute and did not hurt state sovereignty. Bill Clinton waited until the last day of the year 2000, which was also the deadline, to sign the Treaty with much reservation. He also did not refer the Treaty to the Senate until their "fundamental concerns are satisfied". He explains the mentality behind signing the treaty in a very neorealist way and says the U.S. wanted to stay "in a position to influence the evolution of the Court" (Feinstein and Lindberg 2011, 38-39).

4.9 The Non-Aligned Movement (NAM)

The Non-Aligned Movement is the largest group of states that supported the foundation of the ICC. This group came together in an effort to not to get lost in the middle of middle to big power competition. What I mean by that is, while others, LMS, and states like the USA and Germany all sought a rather more specific agenda,in a nutshell, this grup did not want to the Court to be overshadowed by anyone, and they wanted their rights to be protected, and sovereignty respected. This group can said to have come together to create an objective platform as much as possible. They were mild towards the independence and power the ICC would hold, but still, they did not want it to be very powerful so that it could rely on member states. This group largely sought interests and benefit of developing countries and they did not want any superpower to overshadow the Court's independence. Since this group roughly had members who had been under powerful state oppression, they relentlessly work for an ICC who is binding, independent, and works in an environment where the rule of law is above all and ensured. From a neorealist point of view, since the UNSC can refer and defer cases before the Court, of course with the condition to act upon Chapter VII of the UN Charter, the ICC is quite advantageous for them for having some sort of upper-hand over international judicial matters.How this is done is through peace

processes (discussed prevously) and being in the Assembly of State Parties where they have a right to in even in matters of election of the judges (ICC Electıon of Six Judges).

USA under Bush during final negotiations, was against the final draft proposed by the Committee of the Whole and gained more time for themselves to convince states along with China, Israel, Cuba, Yemen, and Qatar to not to found an ICC. American hesitation mainly stemmed from inevitable UNSC-ICC cooperation, and the fact that the Court would now have jurisdiction over its citizens at home and abroad which would further mean an independent Prosecutor representing also all other member states, will have access to data belonging to theUS government, when and if necessary. The George W. Bush government went as far as to force some other states mostly with economic means, especially developing ones, to sign Bilateral Immunity Agreements (BIA) (Bush 2002, 1618).

Former colonial states can dominate and continue to control their former colonies through the ICC. They can choose the cases in accordance not with the scale of human rights violation, but with political considerations and interests of powerful members of the Court, after all the UNSC has the right to refer cases. They wanted to change this situation and they worked hard for the pursuance of it as much as possible. There have not been much results in that department since all the African convictions are continuing but there are now cases from other countries such as Afghanistan, Georgia, and Myanmar.

The EU went as far as to launch a global campaign in support of the ICC to protect its members' interests –so that those of the EU's would have been supported- in the Court. Theirmain interest was to use the Court as "a window of opportunity for the EU to profile itself in the international" decision-making and global justice, (Huikuri 2019, 147) as well as having a leverage on much smaller states. In 2001, the EU adopted a common policy for the ICC, having in mind:

> to support the effective functioning of the Court and to advance universal support for it bypromoting the widest possible participation in the Rome Statute. […] the European Unionand its member states shall make every effort to further this process by raising the issue of the widest possible ratification, acceptance, approval or accession to the Statute and the implementation of the Statute in negotiations or

> political dialogues with third States, groups of States, or relevant regional organizations, whenever appropriate. […] In furtherance […] the Union shall cooperate as necessary with other interested states, international institutions, non-governmental organizations and other representatives of civil society (Huikuri 2019, 16).

The balance of power principle came in as the EU sought to balance out the US hegemony that was starting to take form following the aftermath of the Cold War through engaging in international cooperation through intergovernmental institutions. European actors wished to "frustrate, undermine, and delay aggressive unilateral US military moves" (Pape 2005, 10) and present themselves as agenda setters in the eyes of developing countries who are more prone to look up to some state else (Kelley 2005, 154-155). So from a neorealist point of view, it is most natural for the EU to seek to maximize their power vis-à-vis day by day growing American hegemony, and stability in international politics. This can be thought as soft balancing, where a number of less powerful states try to balance out a more powerful one via non-military means (Pape 2005). To increase their power vis-a-vis the US, what the EU members could do also was to side with developing and some underdeveloped states, likethey did with the LMS, so that they could point their direction in accordance with their interests and prevented their unchecked and unwanted actions. They tried convincing them not to obey the BIA's of the U.S., to support certain caucuses and proposals at votings, and toconsult them and to move together with them in many steps of the way to the ICC. Overall, they did not want the power of majority the N.A.M. possesses to disperse.

4.10 The Like-Minded States (LMS)

The LMS comprised of middle powers and developing states, and they know that they are better-off under international cooperation in gaining interest in international politics. The group also included states such as Britain who joined because she protected her citizens against the Court's jurisdiction through interpretative declarations which provided immunity to UK citizens as well as introducing new laws that prove her judicial capacities and willingness, hence not needing the ICC's jurisdiction (Denk 2009, 3-4). EUMS members of the LMS such as the UK also had responsibilities towards the EU so they somehow had to act together as logna s it benefited them. Their, especially those of the EUMS', main aims were to have a well-functioning ICC and an independent prosecutor in the court. During the Rome

Conference, although most of the group wanted to have the American support, the EU states opposed the idea of compromising for it to have the ICC independent of the US hegemony (Kaul 1998, 30). The LMS states strived for changing norms globally, so that they could have parts and parcels of their political interest in the agenda of international politics; which issomething they could not have done individually (Cooper 2002, 7). Furthermore, the then UN Secretary General Kofi Annan had interests in line with that of most LMS states which also eased the EU states to achieve their ends much easier (Kirsch and Holmes 1999; Lee 1999, 10; Benedetti and Washburn 1999, 32-33; Schabas 2007, 19). The EU has never put up with American opposition and worked hard to convince as many states to sign the Statute. They were not aiming at being in conflict with the U.S. and stubborn policies of it. Nevertheless, especially the Bush administration's policies with the BIAs that were to provide American citizens with immunity from the Court, and others led the EU to draw their red lines clearly. "The EU was convinced that establishment of an ICC would help to create a more just international order, and urged as many [UN] member states as possible to participate in that endeavor" (A/C.6/50/SR.25 1995; COM (95) 567 1995; European Parliament 1995). For the Union the most important points to achieve were the clear demarcation of definitions of crimes, an independent prosecutor, as many ratifications as possible, and universal jurisdiction, along with an independent Court (A/C.6/50/SR.25 1995; A/C.6/51/SR.26 1996; A/C.6/52/SR.11 1997). International corporation through intergovernmental organizations in general and the ICC in particular, is quite advantageous for middle and small EU states to increase their relative power compared to non-cooperation and pursue, at least, their mutual interests with big European powers. Likewise, on issues of common threat to the EU, like region-wide terror attacks, the Union states will act together and thanks to powerful ones, theCourt may act upon their interest.

> the middle Powers –and especially the middle Powers in Europe – who controlled the ICC process were less concerned with punishing serious human rights abusers than they were with increasing their relative influence by inhibiting and controlling militarily powerful nations (Arsanjani 1999, 22-23).

Had the EU not supported the Rome Conference participants financially, NGOs and smaller states alike, they would be unable to participate and the ICC would never be

materialized (Huikuri 2019, 140). Each state who has joined the ICC saw the EU had started to fund many great numbers of NGOs as early as 1995 so that they could inform smaller statesin support of the ICC through legal assistance, Daily reports, and technical information (COM (95) 567 1995). This way, they joined the LMS group and helped the EU states to further theiragenda. This is a further proof of how much state encouragement there was for the Court and if it was not for state interests there would not be any of it at the first place no matter the amount of NGO will. To further their support to the Court, the EU adopted a common policy (Huikuri 2019, 142) towards the ICC in 2001 and 2002, and promoted the ideas of international secuirty, justice, human rights, and rule of law in and outside of the Union. This Common Position included what type of technical, material, financial, and cultural support theICC would get from the EU. When the U.S. released ASPA for immunity of American servicemembers from the ICC, the EU took it with resentment and detested it as quoted in Lee Roy (2009):

> the Council is particularly concerned about the current provision authorizing the President to use all means necessary and appropriate to bring about the release of any person who is being detained or imprisoned by, on behalf of, or at least at the request of the ICC, including on the territory of EU Member States. The Council urges the U.S. Administration to give full weight to these European Union concerns in considering whether to support ASPA (Thomas 2009, 380-381).

> we (the EU) will not allow the ICC to be handicapped from birth by excluding the work of the United Nations from its jurisdiction. There must be equality under the law, regardless of nationality (Byrne 2002).

BIAs were also met with anger among the EU circles, especially the agreement with Romania. Then, the EU adopted a common view towards them and urged all European and non-European states to not to sign them. The EU also announced that signing them would be inconsistent with the principles and responsibilites of the ICC. The BIA situation ledthe EU to widen its efforts for the universalization of the ICC. When in July 2002 the ICC hadreached the 60 ratifications threshold to become operational, all the EU members had ratified the Statute and were actively working to urge others to

do so; the aim was to reach 100 ratifications by April 2003. As seen here too, the joining/not-joining decisions were being affected by state policies and actions; NGOs did not have any significant affects on the matter. “While NGO participation was at play in Rome, the middle powers, specifically the EU members, and the economic assistance provided for small states played a more decisive role” (Huikuri 2019).

4.11 Conclusion

The ICC was founded at a time where socio-political culture was changing globally, in the sense that now all state actions were more visible and easier to follow thanksto 24/7 news and later to growing internet access. This gave states the need to be more responsible and theyused this to increase their responsibility at home and abroad, so that they could have more relative power vis-a-vis other states. The end of the Cold War brought about a (global) political void where there was no longer bipolarity and former colonies were becoming independent one by one. The increase in the number of fully-sovereing states without a uni/bi/multipolar system led to creation of international institutions which led every other state to have a say in global politics. Starting with the idea of Trinidad and Tobago, an international criminal court was set to be established, albeit through a long and tough road.

The Rome Conference saw many delegations, groups, and NSAs all working for their ends.States joined the ICC because it provided them with the opportunity to affect other states through peace processes, the principle of complementarity which gave states the chance to better their jurisdiction and not need and outside involvement, the opportunity to boost responsibility and legitimacy hence power, and with deterrence. A number of actors stand out as good examples for the purposes of this thesis. The African Union shared great sympathy to the ICC because they could strenghten national judiciary through principle of complementarity and they could go to the ICC whenever they suffer a crime under the ICCs jurisdiction. Most of the Europe joined the ICC beacuse they could have more influence in their former colonies and in states they have interets. This can be done through peace processes and votings in election of judges. Germany as a strong EU power wanted the Court to be out of the influence of the U.S. and to secure herself a strong place in global politics through influencing smaller states into the ICC.

With the right discourse, Germany increased her legitimacy in the eyes of less powerful states. The U.S.A. is a case in point for my main argument. They flirted back and forth with the idea of the ICC, first signed and then unsigned it. They always considered if it was in American interets to join the ICC and acted accordingly. Even when their proposal for the Court was rejected, they fought for their red- lines if there was to be a court afterall. The N.A.M. was consisted mostly of ex-colonies. So it was in their best interest to be under the umbrella of an objective institution where they can practically be protected from mis-conviction. The Court also gave them the power in global matters most of them never had before. The LM.S. saw joining the ICC profitable because now they could have the power and say and participate in actions in globalpolitics that they could not have done individually. It was also a great soft-balancing strategy for them.

CHAPTER 5

CONCLUSION

Majority of the global civil society thesis says that non-state actors, consequently the ICC, are changing the nature of sovereignty. Nevertheless, sovereignty is not changing beacuse, it is protected with the principle of complementarity. This thesis has sought an answer to "Is the foundation process of the ICC, the ICC, more of a result of rational state behavior or result of the global civil society/NGO effort?" The main reason for the foundation process of the ICC is the interest of states. Without state initiative and state encouragement, non-state actor effort would not have sufficed to found an international criminal tribunal. States join the ICC to increase their interests.

Notwithstanding the numerous views on why states cooperate and act through IOs, I have adopted a realist/neorealist view as opposed to a liberal and constructivist one. To stress the importance of my preference of theories, I have prepared a section as a theoretical framework and discussed the significance of theories for practice and explained abovementioned theories and their takes on state cooperation through IOs.

The Principle of Complementarity

The ICC cannot take the right to jurisdiction from national courts away, so the national courts are always in the first place when it comes to the right to trial. To protect this, there is aprinciple called the Principle of Complementarity. According to this principle, the ICC can only have the right to trial when and if the state in question is unable or unwilling to convict the person(s) who committed the crime. So the Court is a court of last resort, it respects the sovereignty of states. If the state is convicting the suspect, the Court cannot intervene anyways, and if it is not, then it is the sign of a problem. Such problems are one of the reasonswhy there is an ICC at the first place.

National and International Accountability

Although this thesis does not deny the significant efforts by non-state actors for the establishment of the ICC, it is the state who initiated, carried out, designed, shaped, signed, ratified, and put the Court into action. The non-state actors' role did not go beyond information spreading, monitoring, and making things go faster in terms of communication between parties because they were not in the place for decision-making like states. For example, when in 1998 a meeting was to be organized to inform nuch of state delegates, Italy funded and organized the meeting and two NGOs, the International Institute of Higher StudiesIn Criminal Sciences (ISISC) and the International Scientific and Advisory Professional Council (ISPAC) arranged the communications (Bassiouni 1999, 446-447). Although there had been attempts to have an international framework on gross human rights violations since the Convention on the Prevention of the Crime of Genocide (1948), a permanent international criminal court was established in 2002. One of the reasons for that is the effect of media and mass spread of information. People started to get to know what is going on in other countries thanks to 24-hour news broadcast first and spread of internet usage second. This created a pressure on states to have a good outlook before the global audience, hence they needed to increase their accountability. Political leaders could no longer commit mass atrocities and hide it, international pressure created the need to take a step about it. States realize that acquiring absolute power is close to impossible, so they logically get inclined to such opportunities that give them the change to increase their relative power in the international arena. Seeing other countries also increased one's expectations from their own state too; citizens became more and more conscious of their fundamental human rights. International cooperation through inter-governmental organizations is an easy way of gaining this accountability. States used this function of the ICC as a tool for window-dressing vis-à-vis their citizens and international spectators because they wanted to show that they address gross human rights violations as much as any other state does. While many states are making such

a commitment to international criminal justice, not making this commitment is something stateswould make them look lesser of others who does.

The Political Void in the Post-Cold War Period

I call this period a void because even on the way to the ICC, there was a political lack of enthusiasm and force due to the cold war's effects (Huikuri 2019, 6). What I mean is, during the post-Cold War period, because there was not a settled world order in political terms, there was not much action taken, and there was an emptiness, an odd situation. It was avoid from all angles. During the Cold War era, practically all states in the world belonged to either of the camps: the Western Bloc, and the Eastern Bloc. The end of the Cold War saw mushrooming of many big-small independent states hungry for something to hold onto, like they did during the Cold War. International cooperation through joining organizations is the most rational step to take in order to realize this "holding onto something" for a newly independent state to do in an anarchy where everyone else is after their own interest. Absence of one or more global political authorities also created the need for certain institutions to be responsible for specific sets of issues in global politics.

Why Do States Choose to Cooperate?

Neorealist theory tells us that competitors (states in this case) in a system will copy each other's moves, and joining an inter-governmental organizations is no exception. The reason for that is states are pushed by the system to behave in a similar fashion, so they do not stay behind other states, hence they are every bit as strong and capable as others. Furthermore, with an international organization like the ICC, states can influence other states' decisions, take part in global decision-making processes, and intervene into other states', which is a golden opportunity. Conflicts between states take place due to the structural features of the international political system (Waltz 1959). So it is not that states like conflicts, but they actually make use of stability through inter-governmental organizations. Along similar lines, an international justice system reduces the possibility of conflicts and wars, and states will benefit from global peace because peace brings stability and economic and socio-political activity flourishes under stable conditions. Also, because if a state acts aggressively, other states will respond likewise. They choose to cooperate since cooperation brings stability and peace and according to neorealism states may trade some power with

stability (Waltz 1979). Deterrence and reconciliation through the ICC are two opportunities for states to limit other governments whose members committed crimes. Deterrence and reconciliation protect the status-quo, and as long as the status-quo is protected, a state will beless interested in maximizing military power and be more interested in cooperation, economic gain, and welfare. The reconciliation efforts of the ICC is a perfect illustration of what the liberal institutionalist approach tells us about international cooperation. Without the ICC's reconciliation processes, states would engage in conflict to solve their problems. Instead, theyrefer their problems to the Court and solve their problems in a less costly manner and most importantly, without any clashes.

Why Did States Join the ICC?

With its 34 members, the African Union is the biggest bloc among the member of the ICC. Due to bitter experiences regarding mass atrocities in their pasts, African states had the need for an independent international criminal tribunal. African Union members, as states who by and large have similar objectives and interests in global politics, mostly joined the ICC because as a large group with similarities, they could be more straightforward and confident in what they do in and what they want from the Court. Some number of member states from the Union wanted the ICC chart to be incorporated into their national was, whichfurther proves that the Court was founded first and foremost thanks to state encouragement. Western powers are another group that benefited from the foundation of the ICC. They could now have the opportunity to further their interest in their former colonies and influence the occurrences going on in those places. Power does not come only in material terms, states also seek non-material, or soft power. What Western powers hope to gain from joining the ICC is partly related to this too. Germany realized how much there was to gain form cooperation through norm embedding, and pressed for the foundation of the Court, even though it had to confront the superpower

U.S. American politicians worked quite hard for defending what they thought is beneficial for the state and vehemently supported and backed their stance, republican or democrat. They also knew when to act and when to wait; the United States also waited to sign the Rome Treaty until their interests are fulfilled. The waiting period for the United States was the perfect example of a neorealist state who is aware of the

fact that she is surrounded by power maximizing states and always has to be cautious and stay as a ‘defensive positionalist’ (Grieco 1993, 138).

Other groups like the LMS all sought their best interest too. France and Russia sought after increasing the Court’s dependency to the UNSC, and further the power of the UNSC over the Court. The LMS thought if they could change thenorms and regulations in global political conduct so that they would have had a say in it. The N.A.M. was quite crowded mostly comprised of underdeveloped and developing countries with the main aim of getting rid of overshadowing of superpowers. They also did not want theCourt to be too powerful because they thought, then, the ICC would suppress them.

Future Prospects for the Studies on the ICC

Studies on the ICC mainly have a NSA perspective and work on demonstrating their efforts in the process of the Court’s foundation. Having found them missing and misleading since they do not appreciate state contributions enough and neglect the fact that states initiated the ICC in the first place, I have decided to depict a different picture than there is in the literature. Albeit limited, this thesis is a fresh perspective on the foundation of the ICC. SinceNSAs are newer compared to states as a concept in the literature, with new IR theories coming after classical realism and liberalism, there has been an enthusiasm to study these together. What is needed however, is not to forget incorporating newer phenomenon like IOsand NSAs into classical IR theories (mainly Carr and Morgenthau realism) and present varying approaches to these formations. If this is done, I believe that studies on the ICC will be more complete and objective, which in turn will give the literature on the Court a better outlook.

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APPENDICES

A. TÜRKÇE ÖZET/TURKISH SUMMARY

Küresel sivil toplum görüşü, devlet dışı aktörlerin, egemenliğin doğasını değiştirdiğini ileri sürmektedir. Ancak egemenlik değişmemekte, aksine egemenlik, Uluslararası Ceza Mahkemesi (UCM)'nin tamamlayıcılık ilkesi ile korunmaktadır. Bu tez, UCM'nin kuruluşu, daha çok rasyonel devlet davranışının mı yoksa küresel sivil toplum/sivil toplum kuruluşu çabalarının bir sonucu mu?" sorusuna cevap arıyor. Ben bu tezle UCM'nin kurulmasının ana nedeni devletlerin çıkarı olduğunu savunuyorum. Devlet inisiyatifi ve devlet teşviki olmadan, devlet dışı aktörlerin çabaları uluslararası bir ceza mahkemesi kurmayı başaramadı. Bir devletin UCM'ye katılması normatif nedenlerden değil, fonksiyonel nedenlerden kaynaklandı.

Devletlerin neden işbirliği yaptıkları ve neden Uluslararası organizasyonlar (UO)'lar vasıtasıyla hareket ettikleri konusunda çeşitli görüşler var. Ben bunlardan biri olan liberal ve konstrüktivist bir görüş yerine realist/neorealist bir görüşü benimsedim. Teorileri tercih edişimin önemini vurgulamak adına, teorik bir çerçeve olarak bir bölüm hazırladım ve teorilerin pratikteki önemini, inşacılık, klasik liberalizm, neoliberalizm, realizm, neorealizm ve işlevselcilik teorilerini ve UO'lar aracılığıyla devlet işbirliğine yönelik görüşlerini tartıştım.

UCM Üzerine Olan Literatür

İnşacılık, işbirliği kararının kimliklere, uygulamalara, değerlere ve devletleri etkileyen çevresel faktörlere bağlı olduğunu öne sürer. UO'lar, sosyal ve politik süreçlerin parçalarını taşır (Finnemore 1996; Kennedy 1987). Ancak bunlar birincil aktörler değil, yalnızca -çoğunlukla- devletler aracılığıyla hareket eden aktörlerdir. Yine de, sadece devletlerden sonra tam teşekküllü aktörler olarak görülüyorlar. Uluslararası siyasette birincil aktörler olmasalar da, UO'lar önemli bir özerkliğe sahiptir.

Rasyonalist teorilerin aksine, inşacılık, UO'ların daha ileri devlet çıkarları için bir araç olduğunu değil, toplumun besleyici bir parçası ve aktörü olduğunu düşünür.

İnşacılar için UCM sadece bir mahkeme değil, devletin ve devlet dışı tarafların çabalarını içeren ve ceza adaleti konularında bir küreselleşme duygusu (Akkaş 2012) oluşturan küresel sorun çözme mekanizmasının bir sonucudur. Küresel sivil toplumun ortaya çıkışının ve küresel olarak kabul edilmesinin, demokratik ve yurttaşlık değerlerinin uluslararası ve yerel kamuoyuna yerleşmesine katkıda bulunduğunu düşünüyorlar.

Liberal perspektifler UCM'ye insan hakları perspektifinden yaklaşır. Her bireyin adalet ve adil yargılanma dahil olmak üzere temel insan haklarına sahip olma hakkı vardır. Temelinsan haklarısürdürüldüğünde, işbirliği için iyi bir ortamolabilir ve devletler bu amaca hizmet etmesi için UCM'yi kurmuştur. UCM, ortak yarara ulaşma yolunda devletler için biraraçtır (Fichtelberg 2006).

UCM, neoliberaller tarafından, devletlerin uluslararası ceza adaleti ve güvensizlik konusunda ortak iradelerini sürdürmeleri için bir platform ve uluslararası adalette birbirlerinineylemlerini kontrol etmek için bir kontrol ve denge mekanizması olarak açıklanmaktadır (Turan 2015).

UCM'nin İncelenmesinde Rasyonalist Açıklamalar İhmal Edilebilir mi?

Literatürü inceleyiş sürecimde, genel olarak küresel sivil toplum faaliyetine ve özelde UCM örneğine yönelik çoğunlukla inşacılık olmak üzere belirli teorilerle karşılaştım ve realizm/neorealizmin arka planda kaldığını gördüm. Küresel sivil toplumun yeni normlardan ve bunların sosyo-politik kültüre, normlara, kimliklere ve sosyal ağlara, sosyal teorisyenlerin sık kullandığı terimlere ve konulara yerleştirilmesinden oluştuğunu anlıyorum, ancak literatürde bir eksiklik var: meselelere neo-realizm veya işlevselcilik gibi başka açılardan bakılmıyor. Çoğu zaman, küresel sivil toplum ve UCM hakkındaki literatür oldukça toz pembe bir süreç olarak anlatılıyor ve Mahkeme'nin kuruluşu, STK'ların mutlak başarısı olarak gösterilip literatürün ezici bir çoğunluğunda devlet çıkarına değinilmiyor. Bunu, Uluslararası İlişkiler ve tüm literatür açısından büyük bir eksiklik olarak görüyorum. UCM gibi önemli bir kuruluş, tek taraflı ele alınıyor. Özellikle sosyal bilimlerde olayların her zaman birden fazla

açıklaması vardır ve Mahkeme gerçekçi yaklaşımlardan da incelenmelidir. Bu tez boyunca yapmayı amaçladığım en büyük katkılardan biri, küresel yönetişime ve UCM'ye daha gerçekçi bir bakış açısıyla bakmak ve Mahkeme'nin kuruluşunu birçok farklı ve rasyonel açıdan açıklamaktır.

Literatürde, Mahkemenin kuruluşunun arkasındaki asıl itici faktör olan devletlerin böyle bir organizasyona olan ihtiyaç ve isteğinin ve küresel siyaset sahnesinde bunun için doğru zamanlama oluşunun ihmal edilmesine yol açan, UCM'nin kuruluşuna ve STK katkısına koşulsuz bir destek ve eleştirel olmayan bir tutum var. UCM ile alakalı karşılaştığım kaynakların çoğunluğu, kuruluşunun küresel sivil toplumun işaret ve tezahürü olduğunu ve UCM'den önce küresel sivil toplumun durağan olduğunu söylüyor. Bu düşünceye göre, devlet dışı aktörlerin UCM için çalışmasıyla küresel sivil toplum ayağa kalktı ve dünya birdenbire bir olduğu sürece hiçbir engeli olmayan tam teşekküllü bir küresel sivil topluma sahip oldu.

Bu bakış açısının takıldığı noktaları açıklamayı ve literatüre de taze bir bakış açısı getirmeyi hedefliyorum. Bu tez, Mahkeme'nin kuruluşunun bu yüzünü değiştirecek ve devlet iradesini ve ona olan ilgisini gösterecektir. Böylece kuruluş sürecinde asıl önemli olanın STK'ların değil, devletin çabası olduğu ve devlet dışı aktör miktarı ve niyeti ne olursa olsun devletlerin kendi çıkarlarına uygun değilse uluslararası işbirliğine girmediği görülecektir.

Literatürde Dış Politika Mülahazaları Göz ardı Ediliyor

Literatürde, çok sayıda akademisyen, UCM'ye katılma tercihini, dış politikayı birkenara bırakıp dış aktörlerden etkilenmeyi bir kenara bırakan iç politikalara bağlamaktadır (Neumayer 2009), oysa uluslararası işbirliğine girmeye karar verirken dış politika değerlendirmeleri iç politikadakilerden daha az önemli değildir. Aslında, ekonomik ve askeri yardım, daha az güçlü devletler için UCM'ye katılıp katılmamada belirleyici bir faktörken, en güçlüler için diğerlerine karşı bir tehdit unsuruydu. Almanya gibi büyük güçler de, daha küçük devletlerin politikalarını/davranışlarını etkilemeyi düşündükleri için Mahkeme'yi desteklediler. Benzer şekilde, Avrupa Birliği (AB)'nin ortak politikaları ve Mahkeme'ye karşı izlenen ortak yol, onay sayıları dengesini değiştirmiştir. Aynı şekilde, Birleşmiş Milletler (BM)'deki hoşnutsuzluklar, özellikle de Amerika Birleşik Devletleri (ABD) ile BM'nin diğer üyeleri arasındaki

anlaşmazlık, Mahkeme'nin kaderini büyük ölçüde etkilemiştir, dolayısıyla dış politika, UCM ve geleceği adına birçok devlet için daha büyük bir rol oynamıştır. İlk boşluk rasyonel ve yapılandırmacı açıklamalar olarak özetlenebilirken, bu ikincisi iç ve dış politika tercihleri açıklamaları olarak kısaltılabilir. Bu, iç veya dış politika açıklamalarını birbiri yerine tercih ettiğ im anlamına gelmiyor. Ancak bu, gerçekçi açıklamaların iç politikaya yönelik açıklamaları gerektirebileceği (ve bazen de içerdiği) anlamına gelir.

Kuramsal Bakış Açısı

Herhangi bir UO'yu analiz ederken, onu neorealist terimlerle anlamak için üç kavram vardır: uluslararası sistemin yapısı, göreceli kazanımlar ile güvenlik ve UO'ların işlevleri. Neorealizme göre, UO'lar devletlerin uluslararası sistemdeki çıkarlarını ilerletme yollarından biridir. Zamanla değişebilir veya var olmayı durdurabilirler ve bu, değişen sosyo-politik koşullara uyum sağlamalarına bağlıdır. UO'lar, işbirliği yapmayanlara kıyasla işbirliği yapan devletlere göreceli kazanımlar ve çatışma yerine işbirliği yapmayı seçtikleri için güvenli bir ortam sağlar. UO'ların faydaları arasında, diğerlerinin yanı sıra, yurtiçinde ve yurtdışında artan meşruiyet ve güç, akıllı para yatırımı, diğer devletlerin eylemleri üzerinde kontrol ve küresel karar alma süreçlerinde yer almanın yanı sıra bunları etkileme yer alır. Bu tezin kuramsal çerçevesinde ayrıca realizm ve işlevsellikten de ilham aldım. Spesifik olarak, realizmin devlet merkezli yaklaşımı ve işlevselciğin UO'ları daha ileri devlet çıkarları için araç olarak görme şekli rasyonalist argümanlarımı güçlendirmeye yardımcı oldu.

Tamamlayıcılık İlkesi

UCM ulusal mahkemelerden yargı yetkilerini alamaz, bu yüzden yargı hakkı söz konusu olduğunda her zaman ulusal mahkemeler ilk sırada yer alır. Bunu korumak için, Tamamlayıcılık İlkesi diye bir ilke vardır. Bu ilkeye göre, UCM'nin ancak ve ancak ilgili devletin suçu işleyen kişi veya kişileri yargılayamaması veya bu konuda isteksiz olması halinde yargılama hakkı mevcuttur. Yani Mahkeme bir son başvuru makamıdır, devletlerin egemenliğini mahkemenin üzerindedir. Devlet şüpheliyi yargılıyorsa, Mahkeme hiçbir şekilde müdahale edemez ve eğer devlet yargılamayı gerçekleşiremezse, o zaman bu bir sorun olduğunun işaretidir. Bu gibi sorunlar, UCM'nin var olmasının nedenlerinden biridir.

Ulusal ve Uluslararası Hesap Verebilirlik

Bu tez, devlet dışı aktörlerin UCM'nin kurulmasına yönelik çabalarını reddetmese de, UCM'yi başlatan, tasarlayan, şekillendiren, imzalayan, onaylayan ve faaliyete geçiren devlettir. Devlet dışı aktörlerin rolü, bilginin yayılmasını, izlenmesini ve devletler gibi karar alma mekanizmalarına dahil olmadıkları için, taraflar arasındaki iletişim açısından işlerin daha hızlı ilerlemesini sağlamaktan öteye geçmedi. Örneğin, 1998 yılında bir devlet delegesini bilgilendirmek için bir toplantı düzenleneceği zaman, toplantının finansmanı ve organizasyonu İtalya tarafından sağlandı ve iletişim ise iki STK, Uluslararası Ceza Bilimleri Yüksek Öğrenimleri Enstitüsü (ISISC) ve Uluslararası Bilim ve Danışma Meslek Konseyi (ISPAC), tarafından gerçekleştirildi (Bassiouni 1999, 446- 447). Soykırım Suçunun Önlenmesi Sözleşmesinden (1948) bu yana, ağır insan hakları ihlallerine ilişkin uluslararası bir çerçeveye sahip olma girişimleri olmasına rağmen, ancak 2002 yılında bir uluslararası ceza mahkemesi kurulabilmiştir. Bunun nedenlerinden biri, medyanın ve bilginin kitlesel olarak yayılmasıdır. İnsanlar başka ülkelerde neler olup bittiğini ilk olarak 24 saat süren haber ve ikinci olarak ise internet sayesinde öğrenmeye başladılar.

Bu durum, devletlerin küresel hedef kitleye karşı iyi bir imaja sahip olmaları için baskı yarattı ve bu nedenle de hesap verebilirliklerini artırmaları gerekti. Siyasi liderler artık toplu katliamları gizleyemiyorlardı, çünkü uluslararası baskı bu konuda adım atma gereğini doğurdu. Devletler mutlak gücün elde edilmesinin neredeyse imknsız oluğunun farkındalar ve rasyonel olarak bu tür fırsatlara yönelirler çünkü bu onlara uluslararası arenada göreceli güçlerini artırma imkanı verir. Başka ülkelerdeki insan haklarını görmek de vatandaşların kendi devletlerinden beklentilerini artırdı ve temel insan haklarıyla alakalı giderek daha fazla bilinçlendiler.

Sivil kuruluşlar aracılığıyla uluslararası işbirliğ i bu hesap verebilirliği kazanmanın kolay bir yoludur. Devletler, UCM'nin bu işlevini vatandaşlarına ve uluslararası izleyicilere karşı birvitrin dekorasyonu aracı olarak kullandılar çünkü kendilerinin de diğer devletler gibi temel insan hakları ihlallerine değindiklerini göstermek istiyorlardı. Birçok devlet uluslararası ceza hukukuna bu bağlılığı gösterirken, bu vaadi vermeyen devletler diğerlerine daha az sorumluluk sahibi gözükeceklerdi.

Soğuk Savaş Sonrası Dönem Siyasi Boşluğu

Bu dönemi boşluk olarak nitelendiriyorum çünkü UCM'ye giden yolda bile soğuk savaşın (Huikuri 2019, 6) etkilerinden kaynaklanan siyasi irade ve güç eksikliği vardı. Demek istediğim, Soğuk Savaş sonrası dönemde, politik olarak yerleşik bir dünya düzeni olmadığı için çok fazla şey yapılmadı, ve bir boşluk, garip bir durum vardı. Her açıdan bir boşluktu.

Soğuk Savaş döneminde, neredeyse dünyadaki tüm devletler iki kamptan birine aitti: Batı bloğu ve Doğu bloğu. Soğuk Savaş sona erdiğinde, tıpkı Soğuk Savaş'ta olduğu gibi tutunacak bir şeye aç olan bir çok büyük ve küçük bağımsız devlet ortaya çıktı. Uluslararası işbirliğinin örgütlere katılma yoluyla gerçekleşmesi, yeni bağımsız olmuş bir devletin herkesin kendi çıkarlarının peşinde olduğu anarşi ortamında bu "bir şeye tutunmasını" gerçekleştirmek için atması gereken en mantıklı adımdır. Bir veya daha fazla küresel siyasi otoritenin olmaması, küresel politikadaki belirli konulardan bazı kurumların sorumlu olması ihtiyacını doğurmuştur.

Devletler Neden UCM'ye Katılmayı Seçiyor?

Neorealizm, bir sistemdeki rakiplerin (bu durumda devletler) birbirlerinin hareketlerini taklit edeceğini ve hükümetler arası organizasyonlara katılmanın istisna olmadığını söyler. Bunun nedeni de, devletlerin diğer devletlerin gerisinde kalmamak için benzer şekilde davranıp onlar kadar güçlü ve yetkin olmak istemeleridir.

Ayrıca, UCM gibi uluslararası bir kuruluşla devletler, diğer devletlerin kararlarını etkileyebilir, küresel karar verme süreçlerinde yer alabilir ve başka devletlerin müdahalesinde bulunabilir ki bu da altın bir fırsattır. Ülkeler arasındaki çatışmalar, uluslararası siyasi sistemin yapısal özellikleri nedeniyle meydana gelmektedir (Waltz 1959). Yani devletler çatışmayı sevmezler, ama hükümetler arası organizasyonlar aracılığıyla istikrardan yararlanırlar.

Benzer bir mantıkla, uluslararası bir adalet sistemi çatışma ve savaş olasılığını azaltmakta, barışın istikrar getirmesi ve ekonomik ve sosyo-politik faaliyetlerin istikrarlı şartlarda yeşermesi nedeniyle devletler küresel barıştan yararlanmaktadır. Ayrıca, bir devlet agresif şekilde davranırsa diğer devletler de aynı şekilde tepki verir. Işbirliği istikrar ve barış getirdiğinden işbirliğine yönelirler ve neorealizme göre

devletler bazen istikrarla gücü takas edebilirler (Waltz 1979). UCM yoluyla caydırıcılık ve uzlaşma, üyelerine, suç işleyen hükümetleri cezalandırmak için iki fırsat sunuyor. Caydırıcılık ve uzlaşma statükoyu korur, ve statüko korunduğu sürece bir devlet askeri gücü en üst seviyeye çıkarmakla daha az ilgilenir.

Böylece işbirliği, ekonomik kazanç ve refaha daha çok eğilir. UCM'nin uzlaşma çabaları liberal kurumsal yaklaşımın bize uluslararası işbirliği hakkında söylediklerinin mükemmel bir örneğidir. UCM'nin uzlaşma süreçleri olmadan devletler, sorunlarını çzömek için çatışmalara girerler. Bunun yerine, sorunlarını mahkemeye götürebilirler ve onları daha ucuz bir yöntemle ve en önemlisi de çatışmaya girmeden çözebilirler.

Devletler Neden UCM'ye Katıldı?

Afrika ve Avrupa

Afrika Birliği 34 üyesiyle, UCM üyesi ülkeler arasında en büyük bloktur. Geçmişteki toplu zulümlerle ilgili acı tecrübeler nedeniyle, Afrika ülkeleri bağımsız bir uluslararası ceza mahkemesine ihtiyaç duydular. Küresel siyasette benzer amaç ve çıkarlara genel olarak sahip olan devletler olarak Afrika Birliği üyeleri, benzer niteliklere sahip büyük bir grup olarak, Mahkeme'de ne yaptıkları ve ne istediklerine dair daha açık ve emin olabilecekleri için UCM'ye katıldılar. Birlikten bazı üye ülkeler, Roma Statüsü'nün kendi ülkelerinde de kullanılmasını istemişlerdir. Bu da Mahkeme'nin her şeyden önce devlet teşviki ile kurulduğunu kanıtlamaktadır.

UCM'nin kurulmasından fayda gören bir diğer grup da Avrupalı güçler. UCM ile birlikte, eski kolonilerine olan ilgilerini daha da artırma ve bu yerlerde olup bitenleri etkileme fırsatına sahip olabileceklerdi. Güç sadece maddi değildir, devletler de maddi olmayan ya da yumuşak güç arıyor. Batılı güçlerin UCM'ye katılmaktan kazanmayı umdukları da bununla kısmen bağlantılı.

Amerika Birleşik Devletleri

Ruanda, Yugoslavya ve Kamboçya deneyimleriyle, Clinton yönetimi bir UCM'yi (Huikuri 2019) kabul etmeye ilgi duymuştu çünkü her seferinde bir uluslararası ceza mahkemesi kurmaktansa kalıcı bir uluslararası ceza mahkemesine sahip olmak daha

mantıklıydı. Ekonomi, siyaset ve harcanan çaba açısından geçici bir mahkemeye giden bütün bir süreç var. Bu nedenle ABD, devlet çıkarlarını dikkate aldığında UCM fikrini tercih etti.

"Bunun arkasındaki ana motivasyonlardan biri, geçici mahkemelere çok daha fazla harcamak yerine, kalıcı bir mahkeme aracılığıyla uluslararası adaleti sağlayarak maliyeti azaltmaktı" (Scheffer 1999a, 13). ABD, herhangi bir rasyonel aktör gibi, daha az maliyetli seçeneğe yöneldi. "2004 yılına kadar Birleşmiş Milletler özel mahkemeleri, BM genel bütçesinin yaklaşık %15'i olan yılda 250 milyon dolardan fazla tüketti" (Schabas 2006, 6), aynı yıl UCM bütçesi ise "53 milyon euronun biraz üzerindeydi". (justicehub.org). Buna ek olarak, ABD rasyonel bir aktör olarak Birleşmiş Milletler Genel Kurulu (BMGK)'nun davaları UCM'ye sevk etme ve davaları erteleme hakkına sahip olmasını istedi. Böylece Amerika'nın ve BMGK'nın çıkarlarına uymayan siyasi saikli davalar Mahkeme'ye gidemeyecekti. Bu aynı zamanda ABD'nin davaları BMGK'ya getirmesine de izin verecekti. Bu şekilde, bir hegemon hem uluslararası ceza adaleti üzerindeki kendi gücünü güvence altına almış hem de BMGK ileişbirliği yaparak bu konudaki daha geniş çıkarlarını güvence altına almış olacaktı. Ayrıca ABD, devletlerin bireyleri Mahkeme'ye sevk edebilme fikrine karşı çıkarak, "kimse kimin soruşturulacağına karar verememeli ve bunu taraflı bir şikayette bulunarak Savcıya dikte edememeli" dedi (Richardson 1997; Borek 1995). Roma müzakereleri devam ederken her şey yolunda gitmedi; Dönemin Cumhuriyetçi Senato Dış İlişkiler Komitesi Başkanı Jesse Helms, tüm ABD vatandaşları Mahkeme'nin yargı yetkisinden muaf olmazsa, Roma Statüsü'nün "ölü doğacağını" söyledi (Helms 2001, 9). Amerikan delegasyonu, "koruyucu devlet veya bölgesel devlet taraf devlet olduğunda UCM'nin yargı yetkisine sahip olmasını" (Huikuri 2019) öneren Kore delegasyonunun önerisine karşı iki öneride bulunsa da, hiçbir şansları yoktu çünkü emanetçi devlet ve toprak devleti hariç tutulursa, mahkeme pratikte hiçbir işe yaramaz. Ayrıca Statü'nün oybirliğiyle kabulünü reddettiler ve teklifleri için kayıt dışı bir oylama istediler. Sonunda, herhangi bir rasyonel devletin yapacağı gibi UCM'ye karşı oy kullanacağı gibi, ABD için çıkarları yolunda uzun bir koşuşturma oldu. Bununla birlikte, UCM'nin BMGK tarafından finanse edilmeyeceği garantisi, Mahkeme'nin faaliyete geçmesi için 60 onay eşiği, BMGK'nın iç hukuk da dahil olmak üzere Mahkeme'nin soruşturmalarını bir yıl süreyle veto etme hakkına sahip olması, domestic ve cinsiyetle alakalı suçların da dahil edilmesi, (Huikuri 2019, 109)

Amerikan delegasyonunun güçlü bir ABD'nin ve diğer partilere karşı üstünlük peşinde koşma ısrarının göstergesidir. ABD için kırmızı çizgiler vardı ve ellerinden geldiğince taviz vermediler. UCM, BM tarafından finanse edilseydi, ABD ağır bir pay ödeyecekti, bundan kaçındılar. BMGK UCM'yi finanse etmese de, ABD yine de Kurul'a yılda bir veto hakkı gibi bazı özel yetkiler vermeyi başarabilirdi. 60 onay barajı fikrinin arkasında Mahkeme'nin faaliyete geçmesini mümkün olduğu kadar erteleme amacı vardı. Bunlar, başlangıçtaki istenen ABD teklifinin kabul edilmemesine rağmen, müzakereler üzerindeki Amerikan etkisini görmek açısından önemliydi.

> ABD delegasyonunun başkanı Scheffer alkışlanmalı; çünkü, gerçekten, Birleşik Devletler, UCM Statüsündeki hemen hemen her hükümde ABD damgasını almak için zorbalık yaptı. Birkaç istisna dışında gerçekten bir ABD tüzüğü, sadece birkaç şey alamadık. (Huikuri 2019, 109).

ABD ulusal çıkarlarını korurken, uluslararası siyasette bitmeyen güç mücadelesini öngören rasyonalist imalar her zaman açıkça görülmektedir. UCM'nin BMGK'nın gücünü ve ABD'nin egemenliğini baltalayabileceği endişeleri nedeniyle, senatörler Helms ile birlikte "ABD bu anlaşmayla savaşmalı. […] Amerika Birleşik Devletleri, ulusal güvenlik kararlarının herhangi bir UCM tarafından yargılanmasına asla izin vermeyecektir" (Huikuri 2019, 110) diye düşündü. Sadece Cumhuriyetçiler değildi; Clinton yönetimi de "mevcut haliyle bu anlaşmayı sürdürmeye hazır değildi" (Huikuri 2019, 110). Temel sorun ABD vatandaşlarının dokunulmazlığı olarak kaldı ve bu endişenin merkezinde ABD'nin tüm dünyadaki askeri üsleri yatıyordu. Bunu çözmek için, bağımsız savcı sorununun ve UCM'nin BMGK sorunundan bağımsız olması nedeniyle ABD, temel olarak Roma Statüsü'nde gerekli düzeltmeleri ve revizyonları yapacak olan Hazırlık Komisyonu'nun kurulmasında ısrar etti ve aktif olarak katıldı. (Huikuri 2019). Hazırlık Komitesi'ne, 2000 yazında nihayet kabul edilen Suçun Unsurları ve Usul ve Delil Kuralları olmak üzere iki değişiklik getirdiler. Bu, ABD delegasyonuna diğer devletlerden destek için zaman zaman gerçekleşen tehdit telefonları sayesinde oldu. Scheffer, 31 Aralık 2000'de Statü'yü imzalarken, Clinton'un Statüyle ilgili aklında sadece iki şey vardı: ABD'nin çıkarlarını koruyabildiği ve Mahkeme'ye giden süreçte PrepCom'da hâlâ söz hakları olduğu (Murphy 2001, 399). ABD, yakın bir BM-UCM ilişkisini önlemek için oldukça uğraştı. Bunda başarısız olmasına rağmen, en azından bir BM-UCM ortaklığı durumunda BM üyelerinin herhangi bir mali sorumluluk taşımayacağını garanti edebildi. 2002'de Bush, tüm ABD

askeri personelini UCM'nin yargı yetkisinden muaf tutma ve tüm ABD kurumlarının barışı koruma operasyonları dahil tüm UCM girişimleriyle işbirliği yapmasını kısıtlama yetkisine sahip olan ve son derece ilgili Cumhuriyetçi senatörler tarafından sunulan ASPA (Amerikan Hizmet Üyelerini Koruma Yasası) yasa tasarılarını imzaladı (Huikuri 2019, 117). Mahkeme aleyhine alınan tüm bu önlemler, en önemlisi İkili Dokunulmazlık Anlaşmaları (BIA) ABD'nin uluslararası politikadaki konumunu yavaş ama emin adımlarla etkiledi. Bu anlaşmalar, ABD vatandaşlarına UCM'den muafiyet sağlamak için tasarlandı. Amerikalılar, ortaklarını Avrupa ve Çin gibi diğ e güçlü alternatiflere kaybetmeye başladılar ve bu da nihayetinde önemli ölçüde göreceli güç kaybetmelerine yol açtı ve güç dengesini etkiledi. ABD, Obama yönetimi ve onun "akıllı gücü" (Koh 2012) dış politikası ile ortaklarını geri kazanmayı ve uluslararası arenada göreli gücünü artırmayı hedefliyordu. Bunu yapmak için, belirli konularda işbirliğ i yoluyla UCM ile karşılıklı kazanç olanaklarını araştırdılar. Bu bağ lamda, ABD'nin BM büyükelçisi Susan Rice, UCM'nin "önemli ve güvenilir bir araç haline geldiğini […] söyledi ve Harold Koh ise "UCM'ye vaka bazında pragmatik yaklaşım" takındıklarını ekledi (Koh 2012).

Amerika'nın zaman içinde UCM'ye yönelik tutumu, bir devletin nasıl rasyonel davrandığı konusunda önemli dersler vermektedir. Roma Statüsü, Başkan Bill Clinton'ın görev süresinde imzalandı ve Başkan George Washington Bush yönetimi sırasında bu imza geri çekildi. Bu, devletlerin uluslararası bir kuruluşa imza atıp ondan sonra çekilebileceği, dolayısıyla çıkarlarına uygunsa işbirliğine girebileceği anlamına gelir.

Bill Clinton, Roma Statüsü'nün tonuna ve diline karşı çıkmasına rağmen, Statü'yü Senato'ya sunmadan önce bazı değişikliklerin yapılmasını bekleyeceğini açıkça belirtti. Ulusal çıkarlara uymuyorsa, uluslararası adalet konusunda bu kadar tarihsel bir geçmişe ve düşünsel bağlılığa sahip bir ülke, yeni UCM'yi onaylamadan önce tereddüt edebilir. Bağımsız bir savcı ve saldırı suçlarının UCM'nin görev alanına dahil edilmesi, demokrat Beyaz Saray ile cumhuriyetçi bir kongre arasında sıkışıp kalan ABD yönetimine muhalefetin ana nedenleriydi. Bununla birlikte, UCM'yi son çare statüsüne indirgeyen ve devlet egemenliğine zarar vermeyen tamamlayıcılık ilkesini güvence altına aldılar. Bill Clinton, Antlaşma'yı imzalamak için son tarih olan 2000 yılının son gününe kadar bekledi. Ayrıca, "temel endişeleri giderilene" kadar

Antlaşma'yı Senato'ya göndermedi. Anlaşmanın imzalanmasının ardındaki zihniyeti çok neorealist bir şekilde açıklıyor ve ABD'nin "Mahkemenin evrimini etkileyecek bir konumda" kalmak istediğ ini söylüyor (Feinstein ve Lindberg 2011, 38-39).

Almanya

Leipzig ve Nürnberg davalarının başarısızlıkları ve Mayıs 68 protestoları, bombalamalar, uçak kaçırma olayları ve RAF (Rote Armee Fraktion) krizi gibi çeşitli grupların neden olduğu artan terör, Almanya'yı hem iç hem de dış politikada çözümü hukukun üstünlüğ ünde aramaya ve hukuk devletine dahil etmeye yöneltti. Huikuri'de (2019, 70) belirtildiği gibi, her iki Almanya da 1970'lerde BM'ye katıldı, ancak dış politika değerlendirmeleri, Sovyet Blok'unun böyle bir çabadan ne kadar çok güç kazanabileceğini göz önünde bulundurduğu unda Şansölye Helmut Kohl'la Batı Almanya'nın bir uluslararası ceza mahkemesi için Taslak Kanun lehinde oy kullanmasına izin vermedi (documents.un.org) (A/C.6/36/SR.69). Birleşme ile birlikte Almanya'nın uluslararası ceza mahkemesi fikrine yönelik tutumu yumuşadı. Bu, Alman Dışişleri Bakanı Genscher'in 1988 ve 1991'de BMGK'nda UCM'ye olan ihtiyacı dile getirmesine kadar gitti ve bunun arkasındaki ana neden, Saddam Hüseyin'i yargılayacak bir uluslararası mahkemeye sahip olma olasılığının hesaplanmasıydı (Steinke 2012, 87).

Almanya, uluslararası hukukta kötü şöhretli geçmişiyle Soğuk Savaş sonrası siyasi düzende saygın bir yere sahip olmak ve diğerleri karşısında göreli gücünü artırmak için çabalıyordu. Baştan sona, Almanya'nın bir numaralı çekincesi her zaman askerler olmuştu; Almanya böyle bir örgüte üye olursa, geçmişteki vahşete şu ya da bu şekilde karışmış olan tanınmış (ve diğer) askeri personele ne olacağından korkuyordu. Bu korkuyu bastıran, daha sonra UCM'de yargıç olarak görev yapacak olan Dışişleri Bakanlığı Uluslararası Hukuk Dairesi'nin liberal Başkanı Kaul'du. UCM'nin tamamlayıcılık ilkesinin Alman egemenliğini mükemmel bir şekilde koruyacağını ve muhafaza edeceğini ve yerel davaların her zaman önceliğe sahip olacağını öne sürdü (Steinke 2012, 109; Kress 2006, 36). Neo-realist bir perspektiften bakıldığında, Almanya uluslararası güç rekabetinin çok iyi farkındaydı, ancak aynı zamanda uluslararası kurumların bunun için büyük fayda sağladığını da fark etti. O zamanki Alman Adalet Bakanı Schmidt-Jortzig, UCM'nin kurulmasına yönelik konferansta

Almanya'nın tutumunu çok iyi açıkladı: “Birbirine bağımlı bir dünyada ve küresel bir toplumda, egemenliğe, tek başına boş bir çaba ile değil, işbirliği ile daha iyi hizmet edilecektir” (Schmidt-Jortzig 1998). “Almanya, meşruiyet kazanmak için diğer devletlerle işbirliği yapmak ve koalisyon kurmak istedi…” (Huikuri 2019, 73). Almanya için, özellikle Birleşmenin başlangıcında, bir UCM için baskı yapmak, yeni dünya düzeninde ve daha geniş Avrupa toplumunda bir yer ve ses bulmak için bir adım olduğu için gücü maksimize ediyordu. Öncü olarak hareket eden Almanya, özellikle ABD resmin dışında kaldığından, bu arzu edilen gücü daha da güçlendirebilirdi. Almanya, özellikle UCM üzerindeki güç payını artırmak için her zaman

BM Güvenlik Konseyi'nin kontrolü ve etkisi dışında bir mahkeme için baskı yaptı. L.M.S. ve dolayısıyla Hindistan gibi gelişmekte olan güçlerle işbirliği yapmak, Almanya'nın BMGK'yı devre dışı bırakmak için izlediği stratejilerden biriydi.

L.M.S. (Benzer Fikirdeki Devletler) ve N.A.M. (Bağlantısızlar Hareketi)

LMS gibi diğer gruplar da bu konuya ilgi gösterdiler. Rusya ve Fransa, Mahkeme’nin BMGK’ya olan bağımlılığını ve BMGK’nın Mahkeme üzerindeki yetkisini artırmasını istemiştir. LMS, küresel siyasi idarenin normlarını ve düzenlemelerini değiştirip bu konuda söz sahibi olabileceklerini düşündü. N.A.M., çoğunlukla gelişmemiş ve gelişmekte olan ülkelerden oluşuyordu, esas amacı süper güçlerin gölgelerinden kurtulmaktı. Ayrıca, Mahkemenin çok güçlü olmasını da istemediler çünkü, o zaman, UCM'nin onları bastıracağını düşündüler.

UCM Üzerine Gelecekteki Çalışmalardan Beklentiler

UCM’ye ilişkin çalışmalar ağırlıklı olarak devlet dışı aktör perspektifine sahiptir ve literatürde çoğunlukla Mahkeme’nin kuruluş sürecinde onların çabalarını gösterme üzerine çalışmalar var. Devlet katkısını yeterince takdir etmedikleri ve UCM’yi devletlerin kurduğu gerçeğini göz ardı ettikleri için literatürün eksik ve yanıltıcı olduğu sonucuna vardıktan sonra, literatürde olduğundan farklı bir tablo çizmeye karar verdim. Bu tez sınırlı da olsa, UCM’nin kuruluşuna dair yeni bir bakış açısı sunuyor. Devlet dışı aktörler literatürde devletlere göre daha yeni bir kavram olduğu için, klasik realizm ve liberalizmin ardından gelen yeni uluslararası ilişkiler teorileriyle birlikte bu yeni aktörleri araştırmak için bir heves oluştu diyebiliriz. Ancak ihtiyaç duyulan şey,

UO'lar ve devlet dışı aktörler gibi yeni kavramları klasik Uluslararası İlişkiler teorilerine (daha çok Carr ve Morgenthau realizmi) entegre etmeyi unutmamak ve bu oluşumlara farklı yaklaşımlar sunmaktır. Bu yapıldığında UCM'ye ilişkin çalışmaların daha eksiksiz ve tarafsız olacağını ve bunun da Mahkeme'yle alakalı literatüre daha iyi bir görünüm kazandıracağını düşünüyorum.

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