2003

United States - United Nations (U.S. - U.N.) Relations - The International Criminal Court

Richard A. Gundling

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United States -- United Nations (U.S.-U.N.) Relations —
The International Criminal Court

RICHARD A. GUNDLING
Thesis Abstract

The International Criminal Court

Master of Arts
Graduate Department of the John C. Whitehead School of Diplomacy & International Relations

Seton Hall University

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The U.S. has been in the forefront concerning the development of previous international law conventions and recent international criminal tribunals established regarding human rights violations, war crimes, crimes against humanity and genocide in the Former Yugoslavia and Rwanda. Therefore, it was somewhat of a surprise that the U.S. would decide to be a non-party to the newly created permanent international Criminal Court or ICC.

This study seeks to determine potential underlying factors and understand: Why the current U.S. government administration of George W. Bush decided to nullify the Clinton administration’s signature of the Rome Statute of the ICC?

Issues ranching from the character of the accord itself, U.S. sovereignty and constitutionality concerns, and states’ economic and bureaucratic capacities regarding accord implementation and compliance will be among the variables examined.

Finally, the thesis will posit several conclusions based upon the level of influence the examined factors or variables may have produced in addressing the study's research question as well as the possible detrimental impact of the U.S.’s anti-ICC policy position upon its ongoing foreign policy initiatives and hegemonic influence.
APPROVAL PAGE

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DIRECTOR OF GRADUATE STUDIES
ACKNOWLEDGEMENTS

I am very grateful to my faculty adviser, Dr. Courtney Smith, for his patient advice, feedback, insightful constructive critique, and for keeping me focused on my research and writing. I am particularly thankful for the continued input and support of Dr. Robert Manley, thesis committee member, and of my brother, Dr. Thomas Gundling, Professor of Anthropology at William Paterson University in New Jersey.
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Chapter 1 - Introduction & Thesis Framework:

The new International Criminal Court (ICC) along with its jurisdictional mandate became operational as of July 1, 2002. Its permanent seat is located in The Hague, The Netherlands. As of Sept. 2002, 139 United Nations (UN) Member States have signed onto and 89 have ratified the Rome Statute, which is the primary document underlying the establishment of the ICC. “The court is the culmination of a concept that had its genesis in the Nuremberg trials of Nazi war criminals after World War II, and that gained currency recently during ongoing tribunals created to consider charges of genocide in Rwanda and the former Yugoslavia.”

However, a significant signature remains to be added to the list, that of the President of the United States of America, one of the five permanent members of the UN Security Council, the UN organ responsible for ensuring the maintenance of international peace and security as well as for debating and deciding whether an international criminal tribunal is established and funded. The United States has been in the forefront of insisting that international criminal tribunals be established to investigate the possible commission of genocide, war crimes, and crimes against humanity in both Rwanda and the Former Yugoslavia. Additionally, the U.S. has been a very vocal proponent of the Rwanda and Former Yugoslavia criminal tribunals and, in fact, acted as a primary impetus for the

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establishment of these institutions. The U.S. provides the majority of the funding associated with these two tribunals and frankly is one of their staunchest supporters among the community of nations.

1. *Importance of Topic:*

Given previous U.S. policy history and involvement in the negotiations and drafting of international law accords, this study will seek to identify potential factors which have resulted in the current U.S. administration's policy decision to nullify its predecessor's signature applied to the Rome Statute of the ICC.

Dinah Shelton succinctly summarized the importance of the U.S. ICC signature nullification decision within the auspices of international law, noting that, "... the aim of international criminal justice is essentially to deter crime and help restore international peace and security by punishing those responsible for international crimes committed during armed conflicts."²

This is a timely and important topic in today's current global environment for many of the following reasons:

1. The U.S. decision to be a non-party to the ICC could have important ramifications for the U.S. as a member of the UN and the impact upon its role in the organization, especially as a permanent member of the Security Council with veto power;

2. The ICC demonstrates the world community’s seriousness regarding: (a) the protection of basic individual human rights; (b) the need for the establishment of a permanent judicial institution to address the most serious humanitarian crimes and consequential

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issues concerning international peace and stability as well as issues of collective security; and (c) the establishment of strict compliance processes and procedures to ensure the viability of the ICC;

3. Issues of Sovereignty and the use of unilateral force vs. multilateral coalitions (e.g., UN-sponsored use of force resolution);

4. Constitutionality of the ICC particularly with respect to the 5th and 14th Amendments to the U.S. Constitution regarding due process;

5. Possible detrimental ramifications to U.S. foreign policy and the U.S. role and participation in future conflicts, UN-sponsored peacekeeping operations, and other major geopolitical issues; and

6. The possible contribution to the study of international relations regarding domestic politics and structures, the influence of non-state actors and alliances, leadership styles and the impact of social psychological aspects such as perceptions, behaviors, etc.

2. **Statement of Research Problem:**

Since playing a very important role in the creation of the United Nations International Organization in 1945 after the conclusion of the Second World War, the governmental leadership of the United States and that of other Member States as well as the Secretariat of the UN have at times experienced rather strained relations in a number of areas ranging from the scale of assessments to the use of force in order to ensure the enforcement of Security Council resolutions.

For example, some of the strain can be attributed to differences of opinion vis-à-vis the role and responsibilities of the U.S. in the U.N., U.S. assessment arrearages, and domestic
U.S. political influence and discourse. Additionally, there is a perception that the U.S. uses (some would say abuses) its position on the world stage as the lone remaining “superpower” due to the end of the Cold War and following the dissolution of the former Soviet Union and Warsaw Pact alliances. All of these situations have led to a decline in the working relationship between the U.S. and the United Nations, its membership and Secretariat.

Additionally, U.S. posture regarding the ICC including its efforts to negotiate Article 98(2) bilateral agreements with other UN Member States concerning immunity for U.S. service personnel has not been greeted with any level of enthusiasm by the UN, humanitarian and human rights organizations or prominent UN Member States, who believe the U.S. is attempting to undermine the viability of the ICC.

Given the involvement of the U.S. in the drafting and negotiation processes resulting in the creation of the Rome Statute of the ICC and in spite of its active participation within the Preparatory Commission (PrepCom) and Rome Diplomatic Conferences of the ICC, this study will seek to determine potential underlying factors and understand: Why the current U.S. government administration of George W. Bush decided to nullify the Clinton administration’s signature of the Rome Statute of the ICC?

3. Thesis Objectives (including the dependent variable and thesis hypothesis):

Given the statement of research problem posed above, the primary hypothesis of this study will be to: identify, investigate, and discuss various factors or independent variables within selected areas of relevant study to better understand the dependent variable (i.e., the U.S. ICC policy decision).
Broadly speaking, the dependent variable (DV) is the resultant outcome or action taken on the part of the United States regarding the ICC. Additionally, noting that a few of the identified independent variables cut across several of the key areas of the literature reviewed, this paper will attempt to understand the reasoning for the resultant U.S. decision and will examine several independent variables to address the study's dependent variable. Among these would be the following sets of independent variables (IVs):

1. *Process and/or treaty-oriented variables:*
   a. The character of the accord itself;
   b. Process, procedure, and negotiation issues associated with the drafting of the treaty;
   c. Access to and dissemination of pertinent information; and
   d. The role and influence of NGOs, particularly the nongovernmental coalition of the ICC (CICC).

2. *Country-oriented characteristics/variables:*
   a. Economic and social fabric aspects; and
   b. Political and legal institutional or bureaucratic factors.

3. *International treaty compliance variables:*
   a. Policy history; and
   b. Participation in and compliance with previous international law treaties; and
   c. Collective security issues.

4. *International relations theory variables:*
   a. Domestic politics;
   b. Domestic structures;
c. Role of non-state actors and/or epistemic communities;

d. Role of Perceptions, behaviors and other social psychological factors; and

e. Role of Leaders and their respective leadership styles.

5. *Precedence-setting law variables established vis-à-vis*:

a. The ICTY; and

b. The ICTR.

These IVs will be described in greater depth as they are integrated into the literature review portion of this introductory chapter.

In addition to understanding relevant decision influencing factors, this study will also seek to address to some extent—How this anti-ICC policy position could impact U.S. foreign policy, it’s negotiating position on the UN Security Council and it’s status within the world organization. (See chapter 7 for a discussion of the potential impact to U.S. foreign policy).

This study’s key objective is designed to draw upon several areas of literature as stipulated below in addressing the root causes underlying the dependent variable or more concisely:

To understand the Bush administration’s rational and the associative factors regarding its policy decision to “un-sign” the Rome Statute of the ICC.

In order to properly address this key objective, several areas of literature deemed to particularly insightful will be reviewed and analyzed resulting in several study by-products, which will be termed “sub-objectives”. These “sub-objectives” can be outlined as follows:
1. Examine and analyze the level of success of recent UN forays into judicially-oriented venues concerning:

a. The International Criminal Tribunal for the Former Yugoslavia (ICTY);

b. The International Criminal Tribunal for Rwanda (ICTR); and

c. The creation of the International Criminal Court as stipulated in the Rome Statute.

2. Examine and analyze the U.S. role, participation and level of influence in the drafting of the Rome Statute. Identify and understand what impact, if any, process-oriented and/or legal accord characteristics played in the U.S. policy decision to nullify its statute signature.

3. Identify and understand what impact, if any, specific country-oriented characteristics may have played in the U.S. policy decision-making process.

4. Understand the role of treaty compliance in general concerning adherence to international law accords. More specifically, to understand whether or not U.S. compliance concerns or other signatories lack of compliance capabilities may have entered into the decision equation in this unique situation.

5. Identify possible contribution points to the discussion of domestic politics and structures, the role of non-state actors (e.g., NGOs), the role of leaders and the impact of perception and social psychological aspects upon their respective leadership styles within the overall arena of international relations and international law policy formulation.

It is my intention to address these “sub-objectives” in order to arrive at a reasonably sound conclusion as to why the current Bush administration decided to not only forego ratification of the Rome Statute of the ICC, but to employ the unusual step of
nullifying the previous administration’s signature as well as its possible impact upon the future foreign policy influence of the United States.

4. Literature Review (including integrated independent variables with resultant hypotheses):

This literature review was primarily conducted and focused upon ascertaining reasons as to why the current U.S. federal government administration of George W. Bush decided to abrogate the previous United States administration’s signing of the Rome Statute of the ICC.

In general, this study will leverage from a few discreet areas of literature predicated upon their importance in providing insights to address the primary hypothesis of this study as noted earlier. Review of these selected writings was deemed to be applicable because of their ability to assist the author in addressing the key research question.

There is an explicit need to understand: (a) the world community’s need for a permanent international criminal court such as the ICC as it relates to human rights, perpetrator accountability, and State collective security; (b) U.S. hesitancy to sign onto the Rome Statute of the ICC and possible consequential foreign policy implications; (c) prior United Nations forays into the realm of the judiciary vis-à-vis the international criminal tribunals concerning Rwanda and the Former Yugoslavia and how these forays may act as possible precursors to ICC success – both institutionally and pragmatically as a venue for the development of international law; and (d) finally some thoughts as to the possible implications to international relations theory – particularly the interrelationship of domestic politics, game theory, and non-state actors.
This study will draw upon literature associated with selected areas of relevant and noteworthy importance including that of prominent authors within each respective area of literary review. There are 5 distinctive areas to be reviewed, noting why they are being focused upon, and their associative IVs (10 in total) as follows:

a. Treaty negotiations and processes:

This particular area of review will rely upon the Rome Diplomatic and PrepCom Conferences as described and discussed by Roy S. Lee, the UN Secretariat’s representative to the Rome Conference and John Washburn, a representative of the CICC, a prominent nongovernmental organizational alliance.

This is important as a means of understanding the ability of State and non-state participants at the Rome Diplomatic Conference to effectively participate in and influence the processes and procedures, which consequently resulted in the draft and adopted text of the Rome Statute of the ICC.

These authors’ works were reviewed because of their direct participation in both Conferences as well as a means of obtaining a deeper appreciation for process and/or treaty-oriented variables.

Both Lee and Washburn discussed influential independent variables such as the process, procedures, and negotiations associated with the drafting of the Rome Statute and were insightful regarding the role of the U.S. delegation. Additionally, Lee’s work included detailed discussions concerning various aspects of the statute including those the U.S. were wary of, such as prosecutorial latitude and the role of the international prosecutor, the principle of complementarity in relation to State national court
institutions, the ICC and the UN Security Council, the protection of national security information, and the ICC as it relates to non-party states.

Lee's work also provided insights as to the treaty-making processes utilized at the Rome Conference and the daunting task of managing the conference, which consisted of "a large group of 160 participating States which were actively assisted by more than 20 intergovernmental organizations, 14 specialized agencies of the UN, and a coalition of some 200 non-governmental organizations. In addition, 474 journalists were accredited to cover the event."3

Washburn's piece succinctly described many of the internal dynamics associated with both the PrepCom and the Rome Diplomatic Conferences. Among these dynamics were:

a. The leadership of the Committee and various working group chairpersons;

b. Organization of the PrepCom;

c. The role of the UN Secretariat, its lead representative Roy Lee, and its Office of Legal Affairs; and

d. States' delegations, NGOs, and the creation and influence of the Like-Minded Group (LMG).

Washburn (1999) noted the following with regard to NGOs:

The NGO coalition included private organizations, such as humanitarian, parliamentary, religious, and women's organizations, under the leadership and guidance of international human rights groups. . . . Through this process, the coalition developed an increasingly powerful role in the development of the statute. The NGOs became partners in the negotiations, especially through consultative

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roles with a growing number of governments. As the NGO coalition grew in strength, an alliance developed between it and the LMG.  

This is of particular interest as it relates to the domestic structure and non-state actor discussions contained in Chapter 5 of this study outlining possible international relations theory implications.

The independent variable and resultant hypotheses in this area will be:

IV #1 = The character of the legal accord itself: processes, procedures, and negotiations:

The resultant hypotheses =

(a). In general, the members of the U.S. delegation did not favorably view the internal workings of the Rome Conference including its organizational structure, its processes, and Committee and working group leadership, which it perceived as overreaching and at times misguided;

(b). Legal treaty language ambiguity and a lack of specificity can lead to a wider ambit of permissible interpretations resulting in an unacceptable range of judicial and prosecutorial latitude.

b. International treaty/accord compliance as researched by:

i. Abram and Antonia Chayes noting, “In an increasingly complex and interdependent world, negotiation, adoption, and implementation of international agreements is a major component of the foreign policy activity of every state.”

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ii. Harold K. Jacobson and Edith Brown Weiss as a means of better understanding potential factors that affect implementation and compliance including selected country characteristics or variables. Their research concerning the implementation of and compliance with international environmental accords was helpful in highlighting not only possible country characteristic independent variables, but also previous legal treaty compliance and information variables, which may help to explain the U.S. policy decision. As noted by Jacobson and Weiss (1995):

   International accords are only effective as the respective parties make them. Effectiveness is the result of not only of how governments implement accords (the formal legislation or regulations that countries adopt to comply with the accord) but also how they comply with them (the observance of those regulations and the commitments contained in the international accord).\(^6\)

Jacobson and Weiss' work in and hypotheses related to the effectiveness, implementation, and compliance in this controversial international accord area can be called upon to serve as a model to better understand how compliance with previous international law accords are potential factors which can affect and influence State policy decision-making regarding international law arrangements. These potential factors will be reviewed in an attempt to determine how these factors may have been integrated into or became part of the eventual Bush administration nullification choice.

iii. George W. Downs, David M. Rocke, and Peter N. Barsoom as a means of better understanding causes of noncompliance vis-à-vis "the extent to which compliance

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problems appear to be caused by the ambiguity of treaties,[and/or] the capacity limitations of state."

Reviewing literature in this area and applying it to the present situation is helpful in that it may assist in explaining why the U.S., which enjoys: (a) certain favorable levels of economic fortitude and resources; (b) a well recognized and fully functioning national judicial infrastructure; (c) adherence to democratic norms most other nations are envious of; (d) numerous available channels for disseminating information; and (e) a policy history supportive of international law initiatives, conventions and the required compliance with such accords, made its unwelcome abrogation decision regarding the ICC.

As noted, this study will pull from Jacobson and Weiss' piece in understanding potential factors that affect international accord implementation and compliance. "[In particular, I] am interested in how several interrelated factors affect the extent to and the way in which countries have met their commitments." Among the factors I will consider are: (i) country characteristics, (ii) policy history; (iii) information; and (iv) the role of NGOs.

Therefore, the independent variables and resultant hypotheses related to this area of the study would be as follows:

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\textit{IV \#2 = Country characteristics} – “The social, economic, political, and legal characteristics of countries can clearly influence state willingness and capability concerning international law accord implementation and compliance.

The resultant hypotheses =

(a). “Since implementation and compliance require monetary and bureaucratic resources, it would seem logical that the larger a country’s gross national product and the higher its per capita GNP, the greater the probability of implementation and compliance.”\textsuperscript{9}

(b). “... The more a country adheres to democratic norms concerning political rights, civil rights, and political participation, the greater the probability of implementation and compliance.”\textsuperscript{10}

(c). The greater the bureaucratic capacity of the political unit to implement the accord, the more likely it will comply.

\textit{IV \#3 = Policy History:}

The resultant hypothesis =

(a) Prior participation in international law accords is likely to lead to participation in future international legal treatises. See Table 1.3 (on page 70) for a listing of selected political unit adherence to international law accords.

\textit{IV \#4 = Information:}

The resultant hypotheses =

\textsuperscript{9} Ibid., pp. 413-414.

\textsuperscript{10} Ibid., pg. 415.
(a). "The more information there is about an international legal issue and the clearer the understanding of the issue, the more effective implementation and compliance will be."\textsuperscript{11}

(b). "The greater the flow of humanitarian and international law information about targeted activities in a form which is understood by governments and public pressure groups, the higher the likelihood of implementation and compliance."\textsuperscript{12}

IV \#5 = \textit{Non-governmental organizations (NGOs)}:

The resultant hypothesis =

(a). The more involved NGOS are in the preparation of an accord, the greater the probability of implementation and compliance.

c. \textit{International relations theory literature as expressed by:}

i. Thomas Risse-Kappens concerning the influence of domestic structures, politics, and officials on the subject of their impact upon governmental policy and decision-making, particularly with regard to treaty negotiation, implementation and compliance. Risse-Kappens discussion, along with those of William Zartman and James Rosneau, about the integration of non-state actors will be explored in order to better understand the influential role of NGOs in treaty negotiating, treaty drafting processes, and understanding how non-state actors or alliances attempt to and are able to influence policies in various issue-areas including international law. Risse-Kappens 1995 work is important within the discussion of this study from the perspective of understanding the mediating affect of domestic structures and noting that:

\textsuperscript{11} Ibid., pg. 413.

\textsuperscript{12} Ibid., pg. 417.
Differences in domestic structures determine the variation in the policy impact of non-state actors. Domestic structures mediate, filter, and refract the efforts by non-state actors and alliances to influence policies in the various issue areas. In order to affect policies, non-state actors have to overcome two primary hurdles:
- They have to gain access to the political system of their ‘target state’;
- They must generate or contribute to ‘winning’ policy coalitions in order to change decisions in the desired direction.\textsuperscript{13}

One must recognize that domestic constituencies in the guise of epistemic communities as well as other non-state actors or influencers as represented by strong nongovernmental organizations and alliances are important as a means to understanding their role, not only in effecting and participating in policy formulation or accord processes, but equally as important in helping to ensure and affect post signatory compliance by State parties to international law treaties.

Risse-Kappen (1995) noted that there were:

Three components of domestic structures [which] form a three-dimensional space with axes defined as:

1. State structure (centralization vs. fragmentation);
2. The societal structure (weak vs. strong); and
3. The policy networks (consensual vs. polarized).\textsuperscript{14}

Although Risse-Kappen hypothesized that six distinct types of domestic structures could emerge based upon the dichotomy of the these three components of domestic structures, this study will only seek to reference four of the potential emergent domestic structure types as a means to understanding the ability of different types of domestic structures to mediate the effectiveness of non-state actors – see Table 1.1 below.


\textsuperscript{14} Ibid., pg. 22.
The choice of four types of domestic structures was premised upon the states or political units identified for inclusion in the adherence to international law accords and relevant country-characteristic analyses as well as the distinguishing characteristics associated with the domestic structure chosen.
### Table 1.1 – Selected Propositions about the policy impact of non-state actors as mediated by domestic structures.

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<tr>
<td>State-controlled</td>
<td>Highly centralized political institutions, Weak level of societal organization, Polarized policy networks</td>
<td>Most Difficult</td>
<td>Profound if coalition with state actors predisposed toward non-state actor goals or empowerment of social actors.</td>
<td>China</td>
</tr>
<tr>
<td>State-dominated</td>
<td>Highly centralized political institutions, Weak level of societal organization, Consensual policy networks</td>
<td>Difficult</td>
<td>Profound if coalition with state actors predisposed toward non-state actor goals or empowerment of social actors.</td>
<td>Brazil</td>
</tr>
<tr>
<td>Corporatist</td>
<td>Highly centralized political institutions, Strong level of societal organization, Consensual policy networks</td>
<td>Less easy</td>
<td>Incremental, but long-lasting, if coalition with powerful societal and/or political organizations.</td>
<td>Japan</td>
</tr>
<tr>
<td>Society-dominated</td>
<td>Highly decentralized political institutions, Strong level of societal organization, Strong policy networks</td>
<td>Easy</td>
<td>Difficult coalition building with powerful societal organizations.</td>
<td>U.S.</td>
</tr>
</tbody>
</table>

Understanding the concepts posited by Risse-Kappen, is important as it highlights the political and institutional frameworks as well as the hurdles NGO alliances such as the CICC will encounter and need to overcome in order to effectively impact governmental policy decisions. This will help in addressing the primary study hypothesis in that it will demonstrate how domestic structures can constrain non-state actor strategies and activities.

The independent variable and resultant hypotheses in this area would be:

IV #6 = The impact of non-state actors, domestic structures, and international momentum:

The resultant hypotheses =

(a). A country’s domestic structures, governmental openness, and the associated level of access to the embedded political framework will lead to a higher level of implementation and compliance;

(b). “The greater the number of countries that have ratified an accord and the greater the extent of their implementation and compliance, the greater the probability of implementation and compliance by any individual signatory.”

ii. Game theory as espoused by Robert D. Putnam was examined as a possible complementary explanation for how policy decision-making is undertaken and effected due the inter-relationship between domestic and international relations, how NGOs or non-state actors can develop and integrate potential “win-sets” into the drafting and compliance processes associated with international accords so as to develop “winning coalitions.”

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15 Ibid., pg. 417.
Risse-Kappen's view will be complemented with an interrelated review of domestic processes and politics as investigated by Robert Putnam through the auspices of game theory. In his 1988 work entitled *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, Putnam discusses the entanglements of domestic and international politics.

Putnam theorizes that a "two-level game" that rules the decision-making process of foreign relations issues exists and operates as follows:

1. Level I: bargaining between the negotiators, leading to a tentative agreement; and
2. Level II: separate discussions within each group of constituents about whether to ratify the agreement.

Additionally, Putnam noted that two-level games can act as a metaphor for domestic-international interactions:

a. National level – address domestic group pressures for favorable policies;
b. International level – seek to maximize their ability to meet domestic concerns while minimizing the adverse consequences of international developments; and
c. Moves at one level could be contradictory with moves made at the other level.

Other important aspects of Putnam’s work to be considered in this study are the determinants and importance of "win-sets" and their respective impact upon international treaty negotiations. For example,

i. Larger “win-sets” make Level I agreement more likely.

ii. Smaller “win-sets” increase the risk that negotiations will break down.

iii. The size of the “win-set” will directly impact the distribution of joint gains from international negotiations.
This is important as it demonstrates the potential influential factor that domestic politics can be through the sponsorship of non-state actors, such as epistemic communities and NGO coalitions. The level of influence depends upon: (a) the permeability of domestic structures; (b) the viability of different “win-set” scenarios; (c) the effectiveness of non-state actors in disseminating their message and pertinent issue-area information; and (d) the ability of NGO leaders to build “winning coalitions.” This study will seek to understand how “win sets” may have been incorporated, if at all, within the decision-making processes utilized by the Bush Administration.

The independent variable and resultant hypotheses in this area would be:

_**IV #7 = Domestic politics and epistemic communities:**_

The resultant hypotheses =

(a). “The more a country’s domestic officials and bureaucracies are involved in the preparation, implementation, and oversight of an accord, the greater the probability of implementation and compliance;

(b). The greater the size, strength, and activism of epistemic communities, the greater the probability of implementation and compliance;”

(c). Development of strong and broad domestic “win-sets” will invariably impact negotiations at the international level and impact the “win-set associated with that level of relations.

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16 Ibid. pg. 417.
(d). A greater effort at creating synergistic linkages between negotiating parties towards reducing the political indifference curve differential will lead to stronger legal accords, and a greater probability of implementation and compliance.

Lastly, with regard to international relations theory, this study will seek to leverage from the work of Margaret Hermann and Charles Kegley to better understand the possible role states’ leaders and their leadership style may have with regard to pursuing involvement in and having a state be a party to an international legal accord. Additionally, the impact of social psychological and possible behavioral aspects or implications will be considered through an examination of the role of perception, behavior, and images as discussed by the likes of Alexander George and Robert Jervis.

Including the role of perceptions is of importance in the present case as it may reflect an undeniable factor in the U.S. policy decision-making process, particularly the differences between U.S. President George W. Bush’s ideological and political affiliation versus that of his predecessor, William Jefferson Clinton.

The independent variable and resultant hypotheses in this area would be:

$IV_{#8} =$ Leaders, social psychological factors, and leadership styles:

The resultant hypotheses =

(a). A leader’s perceptions of themselves and other leaders, be they heads of state, epistemic community leaders, can and does influence policy formulation and decision-making;
(b) A leader’s socially constructed perceptions and beliefs must be addressed in determining their impact upon information processing, advice gathering, and policy decision-making; and

(c) Relating social psychological aspects can and should be considered when seeking to understand how leaders respond to their political environments, relations with other leaders, policymakers and/or potential policy influencers such as NGOs, international organizations, and other constituencies.

d. Previous United Nations forays into the arena of international law:

Despite relative success in its established international criminal tribunals in the Former Yugoslavia and in Rwanda (see Chapter 2 for a discussion and analysis of these tribunals), it was clear to many that “creating more and more ad hoc tribunals was clearly impractical.”

Another significant concern of the U.S. was the impact the ICC might have upon the authority of the UN Security Council. Washburn (1999) highlighted the overall impact ICC negotiations had upon the UN Security Council as follows:

A majority of countries of the UN distrusted the Council as an instrument of its permanent members. Hope, anger, and this distrust combined to reinforce the demand for a strong, independent, representative, and permanent international criminal court.

Dinah Shelton’s work proved to be insightful regarding contributions made by the international criminal tribunals including precedents and lessons learned. Additionally,

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18 Ibid, pg. 4.
her work addressed substantive issues concerning human rights, amnesties, gender issues as well as the convergence of humanitarian and international criminal law.

This is important as it likely influenced the U.S. decision because of the political ramifications associated with its role as a permanent member of the UN Security Council.

Review of prior UN forays into judicial undertakings and international law in the guise of international criminal tribunals lends credibility to the potential for an effective permanent criminal court. The tribunals have demonstrated that heinous crimes can be properly investigated; those accountable can be indicted, tried, convicted, and appropriately punished.

The rule of law has been vindicated to some extent by the success of the international criminal tribunals and the creation of the ICC. Prosecution of the crimes defined within the purview of the tribunals and the ICC’s jurisdictional mandates serve to demonstrate that the international community is serious about dealing with such episodes, which could threaten international peace and stability.

Specifically, Dinah Shelton (2000) noted the following regarding the tribunals and the ICC:

Prosecutions for war crimes are rare. In 1993, the U.N. Security Council for the first time took action to make effective norms of international criminal law, by adopting the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY). A year later, it created the International Criminal Tribunal for Rwanda (ICTR). The Rome Statute builds on these precedents, . . . , the decision to create the ICC reflects the judgment of the international community as a whole that impunity for war crimes, crimes against humanity, and genocide is no longer acceptable.19

The independent variable and resultant hypotheses in this area would be:

IV #9 = *International Criminal Tribunals and the ICC*:

The resultant hypotheses =

(a). UN International Criminal Tribunals in Rwanda and the Former Yugoslavia have established judicial precedence upon which parts of the Rome Statute of the ICC have been predicated; and

(b). The creation of the ICC will result in a greater probability that human rights will be protected.

*e. Issues of collective security*:

Understanding extremely broad issues such as collective security as well as a State's previous policy history concerning international peace, stability and security is important in that it can act as a barometer of a State's possible policy position and the associative underlying factors to such a position, especially when integrated with the other noted areas of literary review and their respective importance.

Given the appalling humanitarian crimes committed recently in Rwanda and the Former Yugoslavia, the emergence of a permanent international criminal court is the long awaited institution that saw its beginnings in the war crimes trials of Nuremberg and Tokyo after World War II. Considering the tenets of maintaining international peace and security as described in Article 1 of the United Nations Charter (see Appendix A on page 159), the issue of collective security and its ties to the ICC are an important factor to understand and consider when addressing the research question posed in this paper.

Lynn Miller (1999) discusses the idea and reality of collective security by noting:
The all-for-one-and-one-for-all idea of collective security is dazzling in its simplicity. It asserts that the peace of the international community can be maintained through a binding, predetermined agreement to take collective action to preserve it.²⁰

The independent variable and resultant hypotheses in this area would be:

IV #10 = States’ Collective Security:

The resultant hypothesis =

(a). Increased state intolerance of war crimes, crimes against humanity, genocide, and perpetrator impunity are likely to result in states’ seeking more integrated and higher levels of global collective security through intensely negotiated international law accords, conventions, and the establishment and maintenance of viable international law judicial venues.

It is my belief that the aforementioned literary areas of interest and their correspondent authors being reviewed are not only helpful in addressing the present issue to be discussed and analyzed, but provide pertinent useful insight into the processes resulting in the creation of the Rome Statute of the ICC as well as relevant factors leading to the current U.S. administration’s ICC signature nullification decision.

As such, the identified independent variables and resultant hypotheses will be examined as an attempt to not only understand such factors, but also attempt to understand and perhaps rationalize the nullification decision and its implications for future U.S. foreign policy, while at the same time seeking to make a contribution to

existing international relations theory vis-à-vis treaty processes, accord compliance and the role of non-state actors.

As noted, several of the independent variables were “leveraged” from the Jacobson and Weiss compliance model concerning international environmental accords. The ten identified independent variables associated with the selected areas of literary review and integrated above each represent but one component piece of the argument to be constructed in addressing the overall study research question in a structured and cohesive framework.

This study seeks to address as many plausible independent variables with regard to the prevailing dependent variable so as to gain a broader and better understanding of possible factors or variables, which may have influenced governmental decision-making in the case at hand.

This research and literary review were helpful in highlighting U.S. concerns regarding the ICC, assisting the author in understanding the impact, if any, of particular process-oriented variables, country characteristic-oriented variables, previous legal treaty compliance variables, international relations variables, and precedent-setting law variables.

Given the research problem as outlined above, my study analysis is intended to be generally qualitative in nature, consisting of a review and analysis of the selected scholarly literature, United Nations Secretariat and United States Government documentation.
Despite the end of the Cold War, ethnic, political, and religious-based conflicts continue to be a problem for the international community. Since its inception in 1945, the United Nations has been involved in and at the forefront of efforts seeking to maintain international peace and stability. As the preeminent world organization, it is likely the international community will continue to look to the United Nations to act as a potential mediator in conflicts as a means of maintaining and ensuring the world community's pursuit of collective security and international peace and stability throughout the globe.

This study's subsequent chapters will focus on:

1. Discussing previous UN legal-oriented undertakings in order to analyze and understand what level of success the UN has achieved with reference to international jurisprudence precedence and aspects of international legal institutions vis-à-vis the establishment of two prominent international criminal tribunals and their respective achievements to date;

2. Discussing and analyzing the U.S. role, participation, and influence in the drafting of the Rome Statute. Additionally, this section of the study will outline a few of the more prominent areas of concern the U.S. delegation needed to navigate during the Rome Diplomatic Conference including:
   a. The Principle of complementarity;
   b. ICC jurisdiction regarding non-party states and their respective nationals;
   c. The usurping of the UN Security Council's role, functions, and authority;
   d. Issues of sovereignty, protection of national security information, and constitutionality of certain Rome Statute provisions; and
e. ICC prosecutorial latitude, and the perceived lack of institutional checks and balances.

3. Discussing and analyzing international treaty compliance and states’ policy history as potential indicators in policy formulation and decision-making.

4. Outlining potential international relations theory contributions regarding:
   a. The role and impact of non-state actors, particularly NGOs and epistemic communities;
   b. The role and impact of domestic politics and domestic structures; and
   c. The role of leaders, their leadership styles and social psychological factors in foreign policy formulation and decision-making;

United States – United Nations (U.S.-U.N.) Relations –
The International Criminal Court (ICC)

CHAPTER 2 – Overview and analysis of the level of success the UN has achieved to date in legal undertakings:

The purpose of this study chapter is to provide a high-level outline of a few key precedence setting aspects of international criminal law, which are deemed to have had a direct impact on the establishment and drafting of the Rome Statute of the ICC.

"The real impetus behind the renewed interest in a permanent international criminal court with jurisdiction over war crimes, crimes against humanity and genocide came in the early to mid-1990s with the outbreak of hostilities and reported atrocities in the Former Yugoslavia and Rwanda, and the failure or inability of the relevant national systems to punish the perpetrators."21

In order to appreciate the UN’s catalyst for seeking to have the world community establish the ICC, one must understand to some extent the historical evolution of international crimes committed immediately prior to and since the creation of the UN as well as the reaction of the international community to such events as: (a) Nazi atrocities vis-à-vis the Holocaust; (b) Japanese atrocities committed against civilian populations at the outset of and during World War II; (c) ethnic cleansing in the Former Yugoslavia during the early-1990s; and (d) genocidal events in Rwanda in the mid-1990s. These events all represent major, well-documented occurrences of war.

crimes, crimes against humanity and in some cases genocide. There have been several serious and larger scale human rights violations that have taken place since the creation of the UN for which the international community has not provided an integrated, unified, or timely reaction (i.e., Bosnia, Rwanda, Cambodia, and Sierra Leone).

Additionally, this chapter of my study will seek to provide basic content designed to serve as an adequate baseline of information needed to properly examine a few of the more prominent recent efforts by the international community through the auspices of the UN in addressing two specific threats to international peace and stability, specifically the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). These two contemporary and ongoing tribunals demonstrate what the international community can achieve when motivated to address serious violations of human rights and humanitarian crises. The atrocities committed and the number of lives lost also demonstrates what can occur if the perpetrators of such atrocities are not met with timely, determined and prudent international resolve.

"Many States, though, viewed temporary, case-by-case international criminal tribunals such as the ICTY and ICTR as too limited in scope to be a solution to the problem. These bodies, it was thought, were too constrained by jurisdictional limitations and efficiency and logistical concerns associated with establishing, staffing and funding a special tribunal."\textsuperscript{22}

\textsuperscript{22} Ibid., pg. 5.
The following UN documents were reviewed as a means of understanding the need for the creation of a permanent judicial institution such as the ICC; having a comprehensive and generally agreed upon statute and jurisdictional mandate, organizational infrastructure, and operational processes and procedures in order to overcome the inherent constraints of ad hoc tribunals. Review of these documents will also serve as an attempt to further understand how previous international criminal tribunals such as ICTY and ICTR may have provided relevant precedence to the ICC.

Lastly, this study chapter will also seek to outline a few potential benchmarks by which the effectiveness of the ICC may need to be measured.

1. United Nations Charter:

First and foremost, the whole issue of international peace, security, and stability was eloquently stated and outlined within Article 1 of the United Nations Charter. One must recognize that the overriding issue for the creation of the UN in 1945 was seen to be the preservation and maintenance of international peace, especially after Two World Wars and their affiliated atrocities, which had occurred between 1912 and 1945.

See Appendix A (on pages 159-160) for a description of relevant UN charter and Article citings regarding the underlying principles and maintenance of international peace and stability as well as the role of the UN Security Council in ensuring such maintenance is preserved.

Understanding the intended role, functions, and authority of the UN Security Council is important as the perceived usurping of these aspects of one of the principal UN organs was a primary concern of the United States regarding the negotiated and adopted text of
the Rome Statute of the ICC. This concern will be addressed in more depth within Chapter 3 of this study.

2. **The Rome Statute of the ICC:**

   “A sustainable ICC cannot avoid learning from history. The experience of the Nuremberg Tribunal and the ICTY and later ICTR Tribunals is at the disposal of the ICC. The ICC has to look at global history in order to fortify itself for the important task ahead. World history is full of misunderstandings among nations. War as a necessity is still lawful. If the ICTR contributes to promoting international justice for victims and reconciliation in Rwanda, it is in fact the achievement of the global community in this direction.”

   After years of discussion and consideration, the world community developed the Rome Statute, which represents the comprehensive principle document outlining the creation, functionality and governance of the ICC. Refer to Appendix B (on pg. 161) for a listing of the Statute’s components.

   A few of the principle highlights of the Statute are as follows:

   1. Article 1 of the Rome Statute notes, An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The provisions of this Statute shall govern the jurisdiction and functioning of the Court."
2. Article 5(1) notes that "the crimes within the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a). The crime of genocide; [Article 6]
(b). Crimes against humanity; [Article 7]
(c). War crimes; [Article 8]
(d). The crime of aggression. – Article 5(2) notes, The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.\textsuperscript{25}

The Statute’s Articles 5-9 outlining the crimes the Court shall have jurisdiction over is supplemented by a detailed report which finalizes the text of the elements of crimes and notes that this text “shall assist the Court in the interpretation and application of Articles 6, 7, and 8, consistent with the Statute.”\textsuperscript{26}

A 2002 UN fact sheet concerning the ICC noted the following:

Many at the UN have long felt that there was a need for the ICC in order to act as a deterrent, and to put in place an institution with substantial jurisdictional authority such that individuals, armies or governments would not be able to commit serious crimes with impunity. Since the end of World War II and following the Nuremberg and Tokyo tribunals, the UN General Assembly first recognized the need for a permanent international court to deal with the kind of atrocities that had taken place. The scope, scale and hateful nature of atrocities that have taken place during the last 20 years in many parts of the world gave impetus to creating a permanent mechanism to bring justice to the perpetrators of such crimes as genocide, ethnic cleansing, sexual slavery and maiming, etc. and to finally put an end to the impunity so often enjoyed by those in positions of power.\textsuperscript{27}

\textsuperscript{25} Ibid., pp. 2-8.


The 2002 UN fact sheet concerning the ICC went on to discuss the need for the court as opposed to individual criminal tribunals as follows:

In the aftermath of events in Rwanda and the former Yugoslavia, the UN Security Council responded by creating tribunals [discussed below] to bring individual perpetrators to justice. However, tribunals established after the fact are typically bound by mandates that are specific in time and place. To establish such a tribunal is a challenging, lengthy and expensive undertaking. A permanent court with a mandate to bring to justice individuals responsible for the world’s most serious crimes, atrocities and mass murders will be more effective and efficient.\(^{28}\)

Although ad hoc tribunals had been deemed to be relatively successful to date from Nuremberg through and including the ICTY and ICTR, creating a permanent institution with credibility, resolve, strong world community support, and the ability to timely address serious crimes was viewed by many as the natural progression of the achievements made within this realm of international law.

Many states believed that only a permanent international criminal court would provide the best option available to the international community in not only addressing serious international crimes, but hopefully provide a sobering and deterring effect upon potential perpetrators of heinous crimes.

As a precursor to the ICC, the UN Security Council established two precedent setting criminal tribunals. One to investigate and prosecute serious crimes committed in the Former Yugoslavia and a second tribunal to do the same as well as promote reconciliation in war torn Rwanda in central Africa. Each of these tribunals is briefly reviewed below in order to highlight several pertinent facts about each – including

\(^{28}\) Ibid., pg. 1.
successes to date and precedent-setting provisions, definitions, organizational structure, and operational procedures leveraged by the drafters of the ICC.

3. Former Yugoslavia International Criminal Tribunal (ICTY):

On May 25, 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations passed Resolution 827, which established the ICTY. As a Security Council Resolution under Chapter VII of the Charter, it is generally binding on all UN Member States.

See Appendix C (see page 162), which outlines selected key facts about the ICTY, its role and jurisdiction, as well as some of its key achievements to date.

4. Rwanda International Criminal Tribunal (ICTR):

A tribunal fact sheet released by the ICTR (2002) noted the following regarding cooperation of the international community with the tribunal:

On November 8, 1994, the Security Council, acting under Chapter VII of the Charter of the United Nations passed Resolution 955, which established the International Criminal Tribunal for Rwanda (ICTR), As a Security Council Resolution under Chapter VII of the Charter, it is generally binding on all UN Member States. . . Co-operation of States with the ICTR has progressively increased since the tribunal first began its work. International co-operation with regard to witnesses has been essential. International governments have also shown co-operation in terms of the enforcement of sentences. . . . Member States have also co-operated with the tribunal by providing financial assistance. . . . The co-operation of various countries has been one of the main reasons for the progressive success of the ICTR. Several member states of the international community have helped make international justice for the Rwandan genocide a reality and the presence of such a strong international work force at the tribunal emphasizes the United Nation’s commitment to help establish justice and peace in Rwanda. 29

See Appendices D and E (see pages 163-165), which outline selected facts about the Rwandan tribunal, its role and jurisdiction, some of its key achievements to date including its relevance for Peace and Justice.

Benjamin Ferencz (2000) noted that prevention and deterrence were needed in order “to prevent crimes, [such as those committed by Nazi Germany and Imperial Japan,] from happening again. There’s a very simple answer to that. You prevent war . . . . It requires an international criminal court and much more, because the world is a very complicated place. It requires an improved United Nations. It requires disarmament. It requires another system of sanctioning, whether it be economic sanctions or other sanctions. It requires social justice.”

For the most part, the limited information provided herein regarding the ICTY and ICTR demonstrates the hypothesized impact of these tribunals as suggested in independent variable # 9 in the introductory chapter of this study. They have provided very important precedence for the ICC regarding its statutory provisions, definitions of crimes, organizational infrastructure, and the Court’s operational processes and procedures.

For example, article 3 of Security Council Resolution (SCR) 955 and articles 4 and 5 of SCR 827 concerning Rwanda and the former Yugoslavia respectively, clearly outlined and defined the terms genocide and crimes against humanity and the types of acts, which would be deemed to be punishable under each by the tribunals. See Appendix F (on pages 37)

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166-168), for selected key definitions of the crimes and individual criminal responsibility under ICC purview. This is important as are the entire Statutes/tribunals developed by the Security Council in both the Rwandan and Former Yugoslavia cases. They created a clear and concise precedent upon which the ICC would be based/established and constituted jurisdictionally competent.

The remainder of this study chapter will serve as an analysis of the level of success achieved by the UN’s efforts in adequately addressing occurrences of crimes against humanity, war crimes, and genocide. It will also serve as a means of further addressing my independent variable and resultant hypotheses related to the tribunals and the provision of precedence for the ICC, and the increased probability of protecting human rights, while at the same time deterring violations of these rights and humanitarian law.

Since its establishment, the UN has been in the forefront of addressing human rights violations of an international nature as well as pursuing the creation of international law conventions and/or tribunals such as:

- The Nuremberg and Tokyo War Crimes Tribunals (established by the victorious World War II allied powers, who would later represent the “Permanent 5” of the UN Security Council);
- The Universal Declaration of Human Rights;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- The International Criminal Tribunal for the Former Yugoslavia; and
- The International Criminal Tribunal for Rwanda.
Dinah Shelton (2000) noted the following:

Despite the trials [in Nuremberg and Tokyo,] international crimes have continued to be committed in many of the hundreds of armed conflicts of the past fifty years. Some estimates count 250 armed conflicts since World War II with casualties numbering upwards of 170 million people. In most cases there has been little accountability for the crimes committed, despite the fact that nearly all states have incorporated prohibitions on war crimes into their national law. The Rome Statute builds upon these precedents. . . . The decision to create the ICC reflects the judgment of the international community as a whole that impunity for war crimes, crimes against humanity, and genocide is no longer acceptable. \(^{31}\)

The UN has undertaken a number of international legal institutional arrangements. Each of these efforts has met with certain levels of success in indicting, prosecuting and punishing perpetrators of crimes deemed to be of the most serious nature to the international community.

A 2001 ICTR Report to the UN General Assembly noted the following regarding the tribunal’s success:

Through its jurisprudence, the ICTR has shown that international criminal justice is a reality and that the establishment of an internationally recognized system of justice provides a new avenue of recourse in a world that desperately needs the rule of law, as an alternative to the use of force. The tribunal plays a significant role in developing international humanitarian and criminal law, as many of the substantive legal issues adjudicated by its Trial Chambers have not been decided before, and this emerging jurisprudence will serve as precedent and impetus for the International Criminal Court and the judicial tribunals being established by the UN for Sierra Leone and Cambodia. \(^{32}\)

However, Saadia Touval (1994) noted several constraints inherent in the UN organizational framework that could be deemed as hampering factors in its pursuit to achieve success in many of its legal undertakings:


i. UN procedural requirements are archaic and inefficient;
ii. The tortuous decision-making process saps the UN of necessary dynamism and its lack of flexibility can make it inherently difficult to proceed in a timely and effective manner;
iii. The UN lacks a necessary level of leverage since it has no readily accessible military or economic resources of its own. It is entirely dependent on Member States, or some of them, to provide the resources necessary for a successful mediation.

Alternatively, Touval notes, that leverage, is, of course, also a matter of legitimacy and credibility. This is the main U.N. asset: the aura of legitimacy its actions carry as representing the consensus of the international community. But U.N. credibility is consistently eroded by its inability to formulate and pursue the kind of coherent policy essential to mediation. A mediator must be able to pursue a dynamic negotiation, reacting to events quickly, seizing opportunities, and having the necessary flexibility to adjust positions and proposals as the situation unfolds. States often have difficulty in meeting those demanding requirements. For the United Nations, it is nearly impossible. 33

Despite precedence setting, indictments and convictions handed down under both of the international criminal tribunals, the ultimate success of these UN undertakings has yet to be fully determined in that the UN organization has not yet produced a report demonstrating and/or citing examples where the tribunals have truly acted as a deterrent. It is this aspect of deterrence, which is one of the keys to warranting the existence of a permanent international criminal court. The success of the newly created ICC will be its ability to effectively and efficiently investigate, prosecute, try, convict and punish perpetrators of serious humanitarian crimes. As previously noted, UN-sponsored tribunals have achieved some level of success under narrow and finite jurisdictional mandates. Although one cannot reliably or quantifiably state that they have resulted in the deterrence of humanitarian crimes or protected human rights on any relevant scale. However, in all fairness, it should be noted that measuring such an affect borders on the

near impossible. This does not mean that appropriate measures or benchmarks cannot or should not be developed. The effectiveness of the ICC must be reviewed on occasion in order to determine if it is truly meeting the mandates provided to it by the Rome Statute. If the court is not, this should provide the impetus within the world community to review and revise, if required, ICC statutory provisions in order to seek a higher level of credibility, resolve, and timely response to serious international humanitarian crimes and crises.

Until those individuals or governments inclined to commit serious humanitarian crimes truly believe that the consequences of doing so outweigh the perceived benefits derived from such crimes, the ICC’s success will not proceed to any recognizable level of fruition. Additionally, until the ICC is able to timely and readily deter the commission of serious humanitarian crimes and protect human rights globally, the vision of UN Secretariat personnel and the intentions of the world community are likely to be somewhat unfulfilled. The recent UN-sponsored tribunals have made inroads into the prospect of deterrence, but their inefficiencies, lack of timeliness, and at times ineffectiveness in doing so have limited the their respective levels of accomplishment.

In spite of UN Member States’ cooperation with the tribunals, the tribunals have had to operate under very constrained economic and personnel resource constraints. It can be indirectly inferred that the ICC may suffer from similar constraints, especially without U.S. financial, logistical, technological, informational, and personnel resource availability or assistance. Economic and bureaucratic constraints have surely hindered the existing
tribunals from achieving successes at a rate the international community desires. This may be a foreshadow of what the ICC may encounter.

The UN has failed to adequately address the recognized challenges common to both the ICTR and ICTY as noted in a 2001 General Assembly Report as follows:

1. The range of prosecutorial authority, strategy for conducting investigations and trial preparation;
2. The lack of sufficient human resources and the management thereof;
3. The inability to properly conduct investigations concerning claims of indigence;
4. The budgetary constraints resulting in rationalization of legal aid, inadequate administration in such areas as communications, information technology, transport/building maintenance/and security services.\(^{34}\)

Additionally, a further judicially oriented shortcoming has been that “issues such as the harmonization of the jurisprudence and procedure of both tribunals”\(^{35}\) have yet to be properly addressed and resolved. This is an area, which should be of immediate concern for both the UN Office of Legal Affairs as well as the Sixth Committee of the General Assembly of the UN.

The UN needs to do more than simply recognize that these constraints exist, it must convince its membership that ICC effectiveness, credibility, and overall future success in deterring and hopefully preventing humanitarian crimes and crises lies in the continuous resolve and support of UN Member States. Given the depth of the atrocities committed in Rwanda and the Former Yugoslavia, deterrence of similar events in the future should be one of the highest priorities for the UN and the world community.

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\(^{35}\) Ibid., pg. 3.
Benedetti and Washburn (1999) noted the following regarding UN success and the ICC:

At the simplest, the birth of a serviceable new international organization would itself confirm the need for and the relevance of multilateral institutions. The court’s central principles of the responsibility of individuals for their own participation in gross international crimes and of direct justice for victims fit well with the intense desire of many NGOs to bring persons and peoples within international law. Moreover, nations themselves had accepted these principles through the precedents of the Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals. Accordingly, the UN felt itself strongly supported by its two most important constituents in its activism on the ICC. Moreover, the court was a direct and straightforward response, conceived and promoted at the UN, to obvious and horrible crimes. People everywhere felt the same loathing and anger about such crimes. The UN had no need to walk softly around cultural relativism here. The UN would thus deserve much, and get a reasonable amount, of the credit for the success of the ICC negotiations as an inspiring and astonishing act of collective international creativity.36

Overall one could certainly argue that the UN has achieved a respectable level of success within the area of international law vis-à-vis the tribunals and establishment of the ICC. However, the ultimate benchmark of success will be when it can be credibly stated that the results derived from the ad hoc tribunals and the ICC have led to:

- A measurable increase in the protection of human rights;
- A measurable decrease in the commission of serious humanitarian crimes;
- A timely, efficient, effective, and consistently resolute response from the international community; and

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• A decrease in the need to resort to UN Charter Chapter VII Security Council resolutions and the correspondent decrease in the use of military force as a mechanism to enforce such resolutions; and

• Continued strong state cooperation with and support for their respective institutional activities;

The expectation of such standards is generally not overstated due to the capital and significance the UN is putting in the ICC.

The following chapters will seek to analyze different possible factors, which could have impacted the U.S. decision regarding the ICC. These possible factors will be analyzed while keeping in mind UN success to date including the involvement of the U.S. in assisting the UN in this endeavor.
CHAPTER 3 – Analysis of the U.S. role and participation in the drafting of the Rome Statute of the ICC (including discussion of U.S. issues and areas of concern):

As noted earlier, the U.S. has been one of the more vocal and prominent proponents of recent UN-Sponsored international criminal tribunals. As such, it is important to understand why the U.S. delegation at the Rome Diplomatic Conference was unable to influence or more satisfactorily negotiate several of its statutory proposals with other states, NGOs, etc. regarding some of its key concerns.

This study chapter seeks to determine if the level of participation and influence a state has regarding the negotiating and drafting of an international law accord matters in what is eventually drafted and/or adopted as part of the final statutory text.

As noted in the introductory chapter, treaty negotiations and processes was one of the five relevant areas of literary review. Preliminary thoughts are that the independent variable associated with this area of review, namely the character of the accord itself, the associated processes, procedures, and negotiations are very likely to be a significant factor and a key indicator behind the reasoning leading to the eventual U.S. ICC policy decision.

Throughout the negotiation processes and conferences leading to the Rome Statute of the ICC, it had become readily apparent that the United States was uncomfortable with several of the primary tenets of the ICC. It is definitely worth noting the areas of concern the U.S. government had regarding these primary tenets of the Rome Statute. These issues were at the crux of the U.S. policy concerns and included:
a. The principle of complementarity:

The drafters of the Rome Statute as well as state and non-state participants to both the PrepCom and Rome Diplomatic Conferences recognized from the outset that the eventual statutory text needed to incorporate the principle of complementarity between the ICC and states’ national judicial institutions. However, the wide provisional discretion given to the ICC to decide it does not believe a particular state has timely or effectively addressed a situation involving its own nationals and the commission of humanitarian crimes was particularly worrisome for the U.S, who to some extent viewed this as being nearly equivalent to ignoring the concept of double jeopardy as well as opening the Court up to the possibility of politically motivated manipulation on the part of the prosecutor.

Benedetti and Washburn (1999) noted:

The core issues of the proposed ICC were political and sensitive and included the court’s relation to national courts, how a case would come before the court, the subject matter jurisdiction of the court, and state cooperation with the court.37

Casey, et. al (2002) noted the following concerning the issue of complementarity as addressed within the ICC statute:

In theory, the basic principle of complementarity mitigates general U.S. concerns as it would guarantee that an American could only be brought before the Court if there were an inconceivable breakdown of the justice system in the United States. Unfortunately, due to broad carve-outs from the basic principle of complementarity and the almost complete discretion given to the Office of the Prosecutor and the Divisions of the Courts of the ICC, the desired effects of the complementarity provisions are not all guaranteed.38


These carve-outs would allow the ICC to "second-guess the decisions arrived at by states in their exercise of primary jurisdiction over an accused. To be sure, it is possible that the exceptions to complementarity may be interpreted quite narrowly. Unfortunately, there is no such guarantee in the text of the Statute or in its structure. Indeed, the text all but invites second-guessing where the Court is so inclined."³⁹

The U.S. perception that the sovereignty of their national judicial system could be circumvented by the ICC gave a certain level of credence to the possibility of prosecutorial manipulation, unchecked authority, and unacceptable ICC jurisdiction over non-party states and their respective nationals, which the U.S. negotiators and policy decision-makers simply could not overlook. Although the U.S. delegation made tremendous efforts in this area before, during and even after the Rome Diplomatic Conference, their overall position on the ICC including its Article 98(2) bilateral agreement attempts coupled with their inability to persuade other state delegations of the potential undermining affects and consequences associated with granting the ICC such broad authority made it difficult to have proposed language specificity on this important concept gain any sort of traction during the negotiations.

b. ICC jurisdiction regarding non-party states and their nationals:

Madeline Morris (2000) discussed the touchy issue of the ICC's jurisdiction over non-party states:

The ICC Treaty avoids the dismal prospect of an international criminal court that cannot obtain jurisdiction over nationals of states that are not parties to the Treaty and have not otherwise consented to jurisdiction. Article 12 of the Statute provides that the ICC will have jurisdiction to prosecute the nationals of any state when

³⁹Ibid., pg. 12.
crimes within the court’s subject-matter jurisdiction are committed on the territory of a state that is a party to the Treaty or that consents to ICC jurisdiction for that case. That territorial basis would empower the Court to exercise jurisdiction even in cases where the defendant’s state of nationality is not a party to the Treaty and does not consent to the exercise of jurisdiction.  

The U.S. believed that the mere opportunity for the Court to pursue the investigation into and possible prosecution of non-party states and their nationals even if under unique circumstances could once again lead to the possibility that the Court could decide to look into or hear disingenuous and politically motivated cases. The U.S. was concerned that its civilian officials or military personnel could become the target of frivolous and unsubsstantiated claims and prosecutions, which could infringe upon both the Sovereignty of the U.S. and the constitutional due process protections afforded U.S. nationals.

As Chayes and Chayes noted, “treaties are acknowledged to be legally binding on the states that ratify them. In common experience, people, whether as a result of socialization or otherwise, accept that they are obligated to obey the law. So it is with states. It is often said that the fundamental norm of international law is *pacta sunt servanda* (treatises are to be obeyed). In the United States and many other countries, they become a part of the law of the land. Thus, a provision contained in an agreement to which a state has formally assented entails a legal obligation to obey and is presumptively a guide to action.”

Since the U.S. did not sign onto or ratify the Rome Statute of the ICC, they felt no immediate need to fulfill the state obligations as contained in the accord. The U.S.

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believed that the ICC Statute violated the principle of the law of treaties as stipulated in the Vienna Convention on the Law of Treaties, which states that “treaties cannot ‘create . . . obligations’ for non-parties.”

Here again the treaty language ambiguity hypothesis as noted in chapter 1 associated with the character of the accord itself (IV #1) can be seen as a determinant in supporting the idea that the accord itself contained insurmountable flaws that the U.S. felt were not adequately addressed throughout the course of the Rome Statute negotiations. In fact, the U.S. delegation believed that many serious shortcomings in the treaty due to the language ambiguity and the lack of specificity in the operational details and authority incorporated within the ICC were clearly attributable to the seemingly haphazard organizational processes and procedures utilized during the negotiations at times.

c. The usurping of the UN Security Council role, functions, and authority:

Benedetti and Washburn (1999) noted, “The five permanent members of the Security Council had concerns about the relation of the ICC to the council and the possibility that the court might try members of peacekeeping forces.”

The U.S. was not alone in this concern. Finally, the U.S. found itself allied with other states’ parties in an area deemed to be of great concern. The U.S. and other permanent members had preferred to have the Security Council play a lead role in deciding which cases should be referred to the ICC. The U.S. believed that this was within the auspices of the role, function and authority of the Security Council as outlined within the UN

42 Ibid., pg. 234.

Charter. However, many non-permanent UN Security Council Member States felt that such a quasi oversight clause would intrude upon the Court's independence and would in fact result in a higher level of political "give and take" within the Security Council leading to untimely and ineffective action on the part of the international community in addressing humanitarian crises and violations of human rights.

d. Issues of sovereignty, protection of national security information, and constitutionality of the certain Rome Statute provisions:

The United States is a nation based upon the rule of law and principled representative government with a rich tradition of protecting individual human rights as outlined in the Bill of Rights and several amendments contained within the U.S. Constitution (i.e. the 5th and 14th amendments concerning due process rights).

"A serious question under the U.S. constitution --whether the U.S. can subject to the authority of any court not properly organized in accordance with its provisions a person accused of a crime taking place wholly within the United States."^44

The U.S. had raised questions concerning the level of due process rights contained within the ICC Statute. Although some rights are articulated: "(a) the presumption of innocence (Art. 66); and (b) the assistance of counsel (Art. 67). The overall process provided by the Rome Statute is in accordance with international standards of fairness, but it is not nearly of the same character or vigor as the fundamental procedural protections provided by the U.S. Constitution. . . . The Framers of the U.S. Constitution sought to eliminate forever the danger that Americans might be surrendered to a foreign

power for trial by specifically requiring in Article III and again in the sixth amendment that criminal trials be by jury and that they take place in the state and district where the crime was committed.\textsuperscript{45}

Anything less was deemed to equate to a breach of U.S. sovereignty, especially since the U.S. felt it possessed a model judicial system. Additionally, the U.S. was not comfortable with the idea of surrendering national security information should it be required during either the investigation or prosecution phases of a case. The U.S. did not believe that the Court’s statute adequately provided for the protection of such information and showed little regard for the onerous state cooperation obligations in light of national security requirements. It should be noted that Article 72 of the ICC Statute -- Protection of national security information was an area the U.S. delegation took the lead on. However, “it required many rounds of negotiations to achieve satisfactory results from the U.S. perspective.”\textsuperscript{46} The U.S. also did not want to have to disclose its processes of gathering intelligence information or their associated sources, given the current state of world affairs and the ever-increasing occurrence of terrorist-related attacks not to mention the ongoing U.S. led war on Terrorism against the likes of global terrorist organization’s such as Al-Qaeda.

e. \textit{ICC prosecutorial latitude, lack of checks and balances:}

Benedetti and Washburn (1999), noted that the proposition of having a “self-starting prosecutor” as one of the court’s triggering mechanisms was opposed by a varied cross

\textsuperscript{45} Ibid., pp. 24-26.
section of states’ delegations including the likes of China, the U.S., Russia, India, Indonesia, Iran, Japan, and Mexico.\(^{47}\)

In addition to the fundamental failure of providing stringent guidelines concerning the principle of complementarity, the U.S. believed the Rome Statute lacked appropriate checks and balances on prosecutorial discretion. Such relaxed checks and balances it was believed could result in: (a) politicized prosecutions; (b) unfettered prosecutorial latitude leading to an unaccountable prosecutor; and (c) rendering the ICC vulnerable to political manipulation.

Casey (2002) described the lack of checks and balances as follows:

The lack of practical constraints on the ICC’s Office of the Prosecutor is striking. [For example:]

- The Prosecutor will serve a nine-year term and during that time will be accountable to no particular national or international official.
- [Due to the crimes within the jurisdiction of the Court,] The Prosecutor almost surely will come under little [individualized] public scrutiny, but is likely to face possible interest group monitoring,[the effectiveness of such has yet to be determined and is likely to fault the prosecutor for not being aggressive enough in their role as opposed to being manipulative or politically motivated.]
- Preliminary investigations could continue indefinitely since these do not require any ICC Pre-Trial Division approval.\(^{48}\)

Additionally, “persons brought before the ICC will be judged by a panel of international judges in the civil law “inquisitorial” model. These judges need not even be unanimous in their verdict. Although the majority of states “shared a common goal” of


prosecuting the perpetrators of serious crimes, "at the same time [they did not intend to] inhibit states from contributing to efforts to help protect international peace and security." The U.S. had a fundamental concern with the outcome of Article 12—Preconditions for exercising jurisdiction.

In reality, a situation could arise in which United States personnel participate in a UN-sponsored coalition force to intervene and stop the killing of innocent dissident minority civilians by a tyrannical government of a non-party state. During the course of the operation, some civilians being used as human shields were mistakenly shot by U.S. troops. "The State responsible for the atrocities demanded that U.S. officials and commanders should be prosecuted by the ICC. The demand was supported by a small group of other states. Under the present terms of the Rome Treaty, in the absence of a Security Council referral, the Court could not investigate those responsible for killing thousands, yet the United States officials, commanders, and soldiers could face an international investigation and even prosecution."50

It should be noted the U.S. was far more concerned about the application of Article 12 as it would relate to unilateral U.S. use of force actions, than the U.S. role within UN peacekeeping operations (PKOs). As of May 31, 2003, there were nearly 35,000 personnel (i.e., civilian police, military observers, and troops) operating under UN-Security Council sponsored PKOs. See Figure 1.1 below for a listing of PKOs personnel

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49 Ibid., pg 27.
contributions made by the 15 countries selected for examination as part of my analysis concerning international treaty implementation and compliance factors (see chapter 4).
Figure 1.1 – Political Unit Personnel Contributions to UN Peacekeeping Operations as of May 31, 2003.

<table>
<thead>
<tr>
<th>Country/Political Unit</th>
<th>Civilian Police</th>
<th>Military Observers</th>
<th>Troops</th>
<th>Total</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>60</td>
<td>23</td>
<td>815</td>
<td>898</td>
<td>0.0025</td>
</tr>
<tr>
<td>Brazil</td>
<td>2</td>
<td>12</td>
<td>59</td>
<td>73</td>
<td>0.0021</td>
</tr>
<tr>
<td>Canada</td>
<td>43</td>
<td>20</td>
<td>199</td>
<td>262</td>
<td>0.0075</td>
</tr>
<tr>
<td>China</td>
<td>41</td>
<td>49</td>
<td>185</td>
<td>275</td>
<td>0.0079</td>
</tr>
<tr>
<td>France</td>
<td>85</td>
<td>32</td>
<td>209</td>
<td>326</td>
<td>0.0093</td>
</tr>
<tr>
<td>Germany</td>
<td>355</td>
<td>3</td>
<td>44</td>
<td>402</td>
<td>0.0115</td>
</tr>
<tr>
<td>Hungary</td>
<td>5</td>
<td>16</td>
<td>116</td>
<td>137</td>
<td>0.0039</td>
</tr>
<tr>
<td>India</td>
<td>483</td>
<td>37</td>
<td>2241</td>
<td>2761</td>
<td>0.0791</td>
</tr>
<tr>
<td>Japan</td>
<td>0</td>
<td>0</td>
<td>525</td>
<td>525</td>
<td>0.0150</td>
</tr>
<tr>
<td>Mexico</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Russia</td>
<td>136</td>
<td>82</td>
<td>115</td>
<td>333</td>
<td>0.0095</td>
</tr>
<tr>
<td>South Africa</td>
<td>0</td>
<td>7</td>
<td>154</td>
<td>161</td>
<td>0.0046</td>
</tr>
<tr>
<td>Sudan</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>124</td>
<td>24</td>
<td>447</td>
<td>595</td>
<td>0.0170</td>
</tr>
<tr>
<td>United States</td>
<td>524</td>
<td>13</td>
<td>2</td>
<td>539</td>
<td>0.00154</td>
</tr>
</tbody>
</table>

Total for all Contributing Countries of the UN

|                           | 4854          | 1669             | 28424  | 34947 | 100%       |


Given the rather miniscule number of personnel the U.S. contributes to UN-sponsored PKOs, it is clear the concern regarding ICC jurisdiction over non-party states was tied to the U.S. government’s desire to not be constrained in flexing its military muscle when it felt it was necessary, especially in defense of its sovereignty and national security interests.

The lackluster level of U.S. personnel contributed to UN PKOs undoubtedly made it more difficult to negotiate its position concerning the ICC’s jurisdiction over treaty non-party nationals.

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According to John Washburn, the U.S. delegation was vocal in expressing its concerns and objections and was "extensively and actively involved in the negotiating processes leading to the text of the Rome Statute."²⁵¹ Benedetti and Washburn (1999) noted the following regarding the U.S. participation in ICC negotiations:

The United States never accepted the idea of international criminal responsibility for, and the focus of the court on, individuals. The U.S. delegation repeatedly expressed its government's feelings that the process had been unfair and that compromise had not been sought hard enough. The U.S. delegation complained that it had been confronted at the last minute with fresh text that contained new and unacceptable provisions. These provisions offered the chance for countries to choose to be exempt from the court's jurisdiction over war crimes for seven years from the date of depositing their ratification, included terrorism and drug trafficking as crimes after further definition, and forbad reservations to the statute. ... The tone of the delegation even became threatening at the turning point of the negotiations. In what came to seem an irony, representatives of the U.S. Justice Department made genuinely important contributions to several sections of the statute (penalties, procedure, enforcement).²⁵²

However, various positions taken by the U.S. delegation resulted in disputes with many of its traditional allies, who saw the U.S. as seeking to protect its ability to decide upon unilateral action instead of coalition-type alliances. It should be noted that U.S. positions on many key tenets led to several disagreements with other states delegations and NGOs as well as its inability to become a member of the influential Like-Minded Group (LMG). "The U.S. opposed many of the guiding principles and objectives of the LMG including:

- The independence of the ICC from the Security Council;
- The independence of the prosecutor;

²⁵¹ Interview conducted on March 4, 2003, with John Washburn, CICC representative to the Rome Diplomatic Conference.

The extension of the inherent jurisdiction of the ICC to cover all core crimes;
The full cooperation of states with the ICC;
The power of the ICC to finally decide on the unavailability or unwillingness of national systems to proceed with a case.\textsuperscript{53}

David Scheffer, U.S. Ambassador at large for war crimes and head of the U.S. delegation to the Rome Diplomatic Conference, would concur with Washburn noting:

The United States has been deeply engaged, from the very beginning, in promoting the establishment of a Permanent International Criminal Court. The United States advanced the idea, was involved in all of the discussions, and sought ways to structure the ICC Statute so that it would have the support not only of the U.S. government but also of other governments... In fact, it has been the determined policy of the United States to have such a court.\textsuperscript{54}

Some would argue that the ICC is inadequate in its current jurisdictional mandate and capacity since it does not presently include acts of aggression, terrorism or drug trafficking within its statutory purview. However, it has the capability of considering these crimes at future court review conferences should the ICC Assembly of states’ parties decide to do so. It should be noted that as a non-party to the ICC, the U.S. is not a member of the ICC Assembly of states’ parties and as such would not formally participate in any future ICC review conferences.

David Scheffer (2000) discussed the problem of not having the term aggression or the crime of an act of aggression within the present Statute as follows:

The Preparatory Commission has a difficult task ahead of it to address the issue of aggression. It must agree upon a definition, which can be brought to a review conference seven years after the treaty enters into force, so that the treaty can be amended to include the actual count of aggression in the Statute of the Court.\textsuperscript{55}

\textsuperscript{53} Ibid., pp 15-21.

is] a major problem that must be resolved, so that the United States and other major
powers that use their military for good reason do not come under unwarranted
attack. The U.S. is constantly being asked to deploy its forces, particularly by those
who want their rights protected. Aggression must be defined in a way that those
who are prepared to use military force in defense of human rights, to prevent the
spread of weapons of mass destruction, and to enforce international law are not
subjected to spurious claims of violations of international law for having done so.\textsuperscript{55}

In addition to these aforementioned pointed differences, the U.S. differed with many
UN Member States and NGOs concerning the overriding need for the Court in light of
the fact that the UN already had two principal organs (the Security Council and the
Economic and Social Council or ECOSOC) whose role and functions as described in the
Charter were created to address threats to international peace and humanitarian issues,
respectively. In this regard, Benedetti and Washburn (1999) noted:

This Court would punish acts that the broad UN community, including nations, the
Secretariat, and NGOs, has usually perceived simultaneously as threats to peace, as
particularly serious crimes, and as violations of human rights. However, neither the
Security Council (responsible for dealing with threats to peace and creator of the ad
hoc tribunals) nor the Economic and Social Council (ECOSOC—responsible for the
principal human rights bodies of the UN) had any role whatsoever in the process of
creating the ICC.\textsuperscript{56}

This concerned the U.S. as it viewed some of the steps being taken during the ICC
negotiations as attempts to circumvent aspects of the UN Charter itself or at an even more
devious level seeking to amend selected provisional aspects of the Charter without going
through the requisite amendment protocols and procedures.

With regard to negotiating techniques utilized in drafting the Rome Statute, Benedetti
and Washburn (1999), discussed the following:

\textsuperscript{55} Ibid., pg. 206.

\textsuperscript{56} Benedetti, Fanny and Washburn, John L. (1999). "Drafting the ICC Treaty: Two years to Rome and an
The newly elected officers of the Rome Diplomatic Conference identified an initial, broadly defined strategy, part-by-part, issue-by-issue. Participants determined which issues would most likely prompt major debate and difficulties and then earmarked them to be dealt with mainly through informal negotiations. This approach involved private sessions organized on the chair’s initiative to address specific issues or articles, in order to facilitate compromise or agreement when such could not be found in a formal session. They determined that Part 2 of the Statute (Jurisdiction, Admissibility and Applicable Law articles), which contained core political issues, would be dealt with both in the committee of the whole and informally. As far as other issues were concerned, discretion was left to the working group chairs to decide whether and when they would convene informal meetings on specific issues or articles. After the first two weeks of negotiations, the PrepCom turned into a marathon. This process managed at times to foster a bond and sense of common enterprise among all actors. Being in the same boat and suffering together favored a relaxed etiquette. It also soon triggered complaints that the process was unfair. Smaller delegations once again felt excluded because they were absolutely unable to cover all meetings.\footnote{Ibid., pp. 28-29.}

Although the U.S. delegation favored strong and dynamic conference, committee and working group chairmanship, they also believed that some of the negotiation leaders, albeit dynamic and effective, did not utilize fair processes or procedures and at times made uninformed and unilateral decisions simply to expedite the proceedings, but to the detriment of consensus building and agreement on very important provisions contained in the overall statute. The U.S. felt such decisions were not within the authority of the respective chairs especially due to the fact that many aspects of the statute represented technical legal materials and certain legalese for which they were not properly informed or knowledgeable enough.

As the negotiations proceeded, it became quite apparent that governments were falling back on old traditional alliances or regional groupings that were usually evident during other UN negotiation processes, which influenced negotiation procedures and the
progress of the actual negotiations. A few of these groups were: (a) The Non-Aligned Movement headed up by a strong Indian delegation; (b) Europe, minus France, because of its "Permanent Five" vision of the jurisdiction and powers of the court; (c) African countries; and (d) Arab Nations.

As a means of addressing some of these aforementioned concerns, the Bush Administration went on a concerted campaign seeking blanket immunity for U.S. personnel – both military and governmental. They sought to get approvals from other states under Article 98(2) of the statute regarding cooperation with respect to waiver of immunity and consent to surrender.

Human Rights Watch, an important and influential nongovernmental organization disagreed with the U.S decision regarding the ICC and its attempt to include exemption status for the U.S. as noted in the following material:

The Bush Administration is attempting to negotiate bilateral impunity agreements with numerous countries around the globe. The goal of these agreements is to exempt U.S. military and civilian personnel from the jurisdiction of the ICC. . . . Article 98(2), which provides that the ICC may not proceed with a request for surrender that would require the requested state to act inconsistently with its obligations under international agreements. . . . Article 98(2) cannot be read to permit a non-state party to benefit by removing its nationals from the ICC's jurisdiction. This would undercut the jurisdictional regime established in the Rome Statute.\(^{58}\)

Keith Richburg (2003), reporting on the ICC for the Bergen Record newspaper noted:

Since abrogating the Clinton administration's signature last year, the Bush administration has persuaded 24 countries to sign bilateral agreements with the United States, pledging not to surrender to the court U.S. nationals or foreigners working under U.S. contract. Congress has passed legislation authorizing the

president to take ‘all means necessary’ to free Americans taken into custody by the court. Human rights activists say the bilateral agreements pressed by the United States risked undermining a core founding principle of the court — that no one is immune from prosecution for war crimes.  

The U.S. delegation both at the PrepCom and Rome Diplomatic Conferences, albeit large in size, found it increasingly difficult to parlay its voice into the very complex organizational framework of the Conferences, its numerous formal and informal open and at times closed working group sessions, and intersessional meetings. These sessions covered such important elements as crimes definitions, the principle of complementarity issue, consolidation of substantial portions of the draft text, general principles of criminal law, the composition and organization of the court, relations with the UN, specifically the Security Council, and financing of the court.

The U.S. had process-based complaints about the unmanageable size of several of the working groups, [including the fact that] “the early conduct of negotiations was not planned strategically in advance, and that informal working groups were created haphazardly, in response to different issues as they cropped up. The members of the bureau, assisted by the UN Secretariat, improvised on how to handle various problems and issues as they arose in the course of the negotiations.”  

The U.S. was not alone in these complaints. [During the negotiations,] “a new dilemma arose. It reflected a tension between the need to ensure universal support for the draft statute, which could be

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achieved by strengthening participation of all regions of the world, and the need to achieve results through working groups of manageable size. The lack of expertise, financial constraints and small size of a number of delegations were also seen as major obstacles to the progress of the working groups.  

It is clear that the character of the treaty itself, processes, procedures, and negotiations were a factor, which impacted the Bush administration decision. Although the previous administration had voiced many similar concerns, it concluded that the best interest of the U.S. was to acquiesce to the tenets of the drafted ICC text. This is apparently where ideological and politically based philosophical differences between Clinton, Bush and their respective advisers came to bear.

Lee (1999) noted other concerns of the U.S. as follows:

a. The provision for the adoption and application of amendments to crimes. In its current form, the amendment process for the addition of new crimes and/or revisions to the definitions of existing crimes within the jurisdiction of the ICC would create an extraordinary and unacceptable consequence. After the States parties decided to add a new crime or change the definition of an existing crime, any State that was a party to the treaty could decide to immunize its officials from prosecution for the new or amended crime. Officials of non-parties, however, were subject to immediate prosecution. For a criminal court, that was an indefensible overreach of jurisdiction.

b. The relationship between international law and Statute article 12. The U.S. concern was that, in the absence of a Security Council referral, the Court would be able to assert jurisdiction over non-party nationals.

c. Some could regard the idea that States parties could opt out of prosecution for war crimes for seven years, while non-parties could not, as an incentive to join the court statute.  

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61 Ibid., pg. 12.

Another issue to be resolved was the "need to represent the main criminal justice systems of the world, while at the same time ensuring that a universal court could not be perceived as favoring one legal system over the other. It was also necessary to ensure that the resulting procedural mechanisms and hybrid institutions would enable the Court to discharge its international functions effectively [while at the same time remaining complementary to States' national judiciaries]."\(^{53}\)

In response to "What were the primary reasons for the Bush administration nullification of the Clinton administration signature of the Rome Statute?\(^{54}\), John Washburn noted several as follows:

- The Bush administration nullified the Clinton administration signature as a means of distancing itself from the issues/perceptions of Clinton;
- The Bush administration wanted to send a signal that it was not enamored with the ICC; was in fact in a disengagement mode from the ICC and was not under the Court's jurisdiction since it was not a member of the Assembly of states' parties.
- The Bush administration wished to make clear its strong political and ideological objection to the Court vis-à-vis:
  - The potential pitfalls awaiting military personnel and governmental officials within the chain of command; and
  - Due process/constitutionality issues and the perceived infringement upon the sovereignty of the U.S.\(^{64}\)

In addressing the character of the accord itself as an independent variable with several resultant hypotheses as outlined in Chapter 1, the previous discussion demonstrates that the U.S. delegation at both PrepCom and the Rome Diplomatic Conference were not fond with the organizational processes, procedural rules utilized, and the ad hoc decision-making made by dynamic conference and working group leadership. They felt that voices

\(^{53}\) Ibid., pg. 220.

\(^{64}\) Interview conducted on March 4, 2003 with John L. Washburn, CICC representative at the Rome Diplomatic Conference of the ICC.
of concern or objection, particularly that of the U.S. were being ignored or glossed over for the sake of rapidly developing a draft text upon which an acceptable level of agreement could be reached, albeit not necessarily consensual in nature.

A problem with shortcutting negotiation processes and formal organizational procedures by having Conference leaders dictate the progress of the proceedings is that the legal treaty language may be construed ambiguously and lacking enough specificity so as to result in a wide ambit of permissible interpretations with an unacceptable range of judicial and prosecutorial latitude.

Additionally, the Statute is not very clear regarding the standards the Court is to invoke in determining the willingness, or lack thereof, of states’ national judicial systems to prosecute suspected criminal perpetrators, commence proceedings, or the pace at which such proceedings should progress in order to bring people to justice. “The vague and imprecise statutory language makes it all too possible that any state’s exercise of the so-called primary jurisdiction that results in a decision not to prosecute or does not punish the accused harshly enough in the Court’s eyes would not be respected. The Statute, therefore, cannot possibly be said to give significant and guaranteed respect for the primary jurisdiction of States. At the very least, the “independence” and “impartiality” conditions provide the Prosecutor and judges of the ICC a convenient way around respecting the primary jurisdiction of the U.S. in respect of every prosecution brought by the U.S. against a military officer or civilian official of the United States.”

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One must ask whether or not the U.S. was simply bucking a trend in international law and international relations; Or did it believe that the creation of the ICC with a less than “perfect” Rome Statute as its underlying basis, quasi-threatened its role in not only the UN, but as the sole remaining “superpower” within the world community.

The U.S. negotiating position was one, which could be viewed as adversarial to the ICC despite its agreement with the basic principles of the Statute. It appears to be a case of “the devil is in the details.” The general premise of addressing threats to international peace and security was not an issue for the U.S. The issues arose as the statute took shape and its organizational and operational processes and procedures became readily apparent. Given the U.S. role, participation and influence in the ICC negotiations, the next chapter will analyze possible international treaty compliance factors including country characteristics, policy history, information, and NGOs and how they may have affected the Bush administration ICC nullification decision coupled with its concerns about the character of the accord itself.
United States – United Nations (U.S.-U.N.) Relations –

The International Criminal Court (ICC)

CHAPTER 4—International treaty compliance as an indicator/precursor for state participation in the ICC and ICC success:

This study chapter seeks to determine if selected characteristics of states’ can provide insights into a country’s ability and/or willingness to implement and comply with international law accords.

Jacobson and Weiss (1995) noted that, “many factors may affect a country’s implementation of and compliance with international accords.”66 Several countries, both ICC signatories and non-signatories, across different economic, political, social and legal spectra, were chosen to scrutinized as part of this study analysis with the goal of outlining a possible standardized country profile that could act as an indicator of a country’s potential policy position concerning international law treatises.

Many of the countries chosen to be part of this study, were selected because of their respective abilities to influence some important aspect of the global environment or have “anthropogenic effects that bring about global change (Japan, Russia, the United States, and [prominent EU members—France, Germany, and the UK]) and others that have the potential of making major contributions to anthropogenic effects ([Australia,] Brazil, [Canada,] China and India).”67

Other countries were chosen so as to be more globally representative (South Africa and Sudan—African representation, Mexico—additional Latin American representation] or because of their smaller size (Hungary). As with the Jacobson and Weiss environmental accord study, the

67 Ibid., pg. 419.
countries selected “included both developed and developing countries, some with mixed-market economies and others that were restructuring centrally planned economies. Finally, some of these countries could be particularly affected by global change.”

Additionally, “the ability to comply is necessary to make a credible commitment. Accordingly, the commitment is likely to be useful only to those countries with a good chance of complying.” Hence the review of selected country characteristics as a means of determining whether certain characteristics generally need to be present for a state to realistically be in a position to actually comply with treaty obligations they sign onto.

Chayes and Chayes (1993) noted the following regarding compliance with treaties:

The care devoted to fashioning a treaty provision no doubt reflects the desire to limit the state’s own commitment as much as to make evasion by others more difficult.

It is very likely that the U.S. attempted to influence the text of statutory provisions in this regard. Their attempt at obtaining Article 98(2) waivers with other countries speaks volumes to this type of effort.

**Country Characteristics:**

Several country-based characteristics across various dimensions for the 15 selected countries are outlined below in Figure 1.2 and Table 1.2. Examination of the contents of this figure and table was done in order to address several hypotheses concerning whether or not certain characteristics can be associated with international treaty adherence.

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68 Ibid., pg. 419.


**Figure 1.2** – Study of adherence to International Law Accords; Political Units: Their Economic and Social characteristics

<table>
<thead>
<tr>
<th>Type of Characteristic</th>
<th>Economic</th>
<th>Economic</th>
<th>Social</th>
<th>Social</th>
<th>Social</th>
<th>Social</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>$24,000</td>
<td>2%</td>
<td>19.5 million</td>
<td>10.63 million</td>
<td>98%</td>
<td>7458</td>
</tr>
<tr>
<td>Brazil</td>
<td>$7,400</td>
<td>2%</td>
<td>176 million</td>
<td>13.98 million</td>
<td>83.3%</td>
<td>13214</td>
</tr>
<tr>
<td>Canada</td>
<td>$27,700</td>
<td>2%</td>
<td>32 million</td>
<td>16.84 million</td>
<td>97%</td>
<td>10918</td>
</tr>
<tr>
<td>China</td>
<td>$4,300</td>
<td>7.0%</td>
<td>1.3 billion</td>
<td>45.8 million</td>
<td>81.5%</td>
<td>131</td>
</tr>
<tr>
<td>France</td>
<td>$25,700</td>
<td>1.0%</td>
<td>60 million</td>
<td>16.97 million</td>
<td>99%</td>
<td>6404</td>
</tr>
<tr>
<td>Germany</td>
<td>$26,600</td>
<td>0%</td>
<td>83.3 million</td>
<td>32.1 million</td>
<td>99%</td>
<td>7621</td>
</tr>
<tr>
<td>Hungary</td>
<td>$12,000</td>
<td>4.0%</td>
<td>10.1 million</td>
<td>1.2 million</td>
<td>99%</td>
<td>5066</td>
</tr>
<tr>
<td>India</td>
<td>$2,540</td>
<td>4%</td>
<td>1.046 billion</td>
<td>7 million</td>
<td>52%</td>
<td>177</td>
</tr>
<tr>
<td>Japan</td>
<td>$27,200</td>
<td>0%</td>
<td>127 million</td>
<td>56 million</td>
<td>99%</td>
<td>1924</td>
</tr>
<tr>
<td>Mexico</td>
<td>$9,000</td>
<td>0%</td>
<td>104 million</td>
<td>3.5 million</td>
<td>89.6%</td>
<td>1392</td>
</tr>
<tr>
<td>Russia</td>
<td>$8,300</td>
<td>5%</td>
<td>145 million</td>
<td>18 million</td>
<td>98%</td>
<td>2022</td>
</tr>
<tr>
<td>South Africa</td>
<td>$9,400</td>
<td>3%</td>
<td>44 million</td>
<td>3.068 million</td>
<td>85%</td>
<td>5106</td>
</tr>
<tr>
<td>Sudan</td>
<td>$1,360</td>
<td>6%</td>
<td>37.1 million</td>
<td>56,000</td>
<td>46.1%</td>
<td>2141</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>$24,700</td>
<td>2%</td>
<td>60 million</td>
<td>34.3 million</td>
<td>99%</td>
<td>4769</td>
</tr>
<tr>
<td>United States</td>
<td>$36,300</td>
<td>0%</td>
<td>281 million</td>
<td>165.75 million</td>
<td>97%</td>
<td>8517</td>
</tr>
</tbody>
</table>

**Note:** All information, unless otherwise noted was obtained from www.odci.gov, the CIA World Factbook 2002, respective country profiles, updated February 13, 2003.

<table>
<thead>
<tr>
<th>Type of Characteristic</th>
<th>Political Country Characteristic</th>
<th>Legal Country Characteristic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political Unit</td>
<td>Type of Government</td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>Democratic</td>
<td>Based on English Common Law; accepts compulsory ICJ jurisdiction, with reservations</td>
</tr>
<tr>
<td>Brazil</td>
<td>Federative Republic</td>
<td>Based on Roman codes; has not accepted compulsory ICJ jurisdiction</td>
</tr>
<tr>
<td>Canada</td>
<td>Confederation with parliamentary democracy</td>
<td>Based on English common law except in Quebec where it is based on French civil law system; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>China</td>
<td>Communist State</td>
<td>A complex amalgam of custom and Statute, largely criminal law</td>
</tr>
<tr>
<td>France</td>
<td>Republic</td>
<td>Civil law system with indigenous concepts</td>
</tr>
<tr>
<td>Germany</td>
<td>Federal republic</td>
<td>Civil law system with indigenous concepts; has not accepted compulsory ICJ jurisdiction</td>
</tr>
<tr>
<td>Hungary</td>
<td>Parliamentary democracy</td>
<td>Rule of law based on Western model</td>
</tr>
<tr>
<td>India</td>
<td>Federal Republic</td>
<td>Based on English Common law; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>Japan</td>
<td>Constitutional monarchy with a parliamentary government</td>
<td>Modeled after European civil law system with English-American influence; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>Mexico</td>
<td>Federal Republic</td>
<td>Mixture of US constitutional theory and civil law system; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>Russia</td>
<td>Federation</td>
<td>Based on civil law system</td>
</tr>
<tr>
<td>South Africa</td>
<td>Republic</td>
<td>Based on Roman-Dutch law and English Common law, accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>Sudan</td>
<td>Authoritarian Regime</td>
<td>Based on English Common law and Islamic Law; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Constitutional monarchy</td>
<td>Common law tradition with early Roman and modern continental influences; accepts compulsory ICJ jurisdiction, with reservations</td>
</tr>
<tr>
<td>United States</td>
<td>Federal Republic; strong democratic tradition</td>
<td>Based on English Common law; accepts compulsory ICJ jurisdiction, with reservations.</td>
</tr>
</tbody>
</table>

Note: All information, unless otherwise noted was obtained from www.odci.gov, the CIA World Factbook 2002, respective country profiles, updated February 13, 2003.
**Policy History:**

Table 1.3 below outlines international law accord adherence for 15 chosen study countries.

*Table 1.3*—(a) Political Unit adherence to selected International Law accords as of January 1, 2003; and

(b) Demonstration of Political Unit Policy History

<table>
<thead>
<tr>
<th>Political Unit</th>
<th>ICC/mth. &amp; Yr. statute signed</th>
<th>ICJ (*)</th>
<th>IMO/year of entry</th>
<th>UN Convention on the Law of the Sea/mth. &amp; Yr. the convention was signed</th>
<th>UN Declaration on Human Rights</th>
<th>ILO (**)</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>np</td>
<td>p</td>
<td>p—1959</td>
<td>p—June 1995</td>
<td>p</td>
<td>p</td>
</tr>
</tbody>
</table>

*p = party to the accord  
np = non-participant*
### Informational notes:

<table>
<thead>
<tr>
<th>Informational notes</th>
<th>Treaty Acronym</th>
<th>Treaty Name</th>
<th>In-force date</th>
</tr>
</thead>
<tbody>
<tr>
<td>(*) – The ICJ was incorporated into the UN Charter in 1945 - described as the legal institution associated with the UN. As such, all Member States of the UN have in essence signed onto the ICJ. However, under Article 36(2) of the statute of the ICJ, UN Member States can submit to the jurisdiction of the ICJ vis-à-vis any state or states so submitting. A number of states have signed the Article 36(2) clause, but in many cases with reservations. (See Table 1.2) <a href="http://www.icj-cij.org">www.icj-cij.org</a></td>
<td>ICJ</td>
<td>International Court of Justice</td>
<td>1945</td>
</tr>
<tr>
<td><a href="http://www.imo.org/home.asp">www.imo.org/home.asp</a></td>
<td>IMO</td>
<td>International Maritime Organization</td>
<td>March 17, 1948</td>
</tr>
<tr>
<td><a href="http://www.un.org/overview/rights.html">www.un.org/overview/rights.html</a></td>
<td></td>
<td>UN Declaration on Human Rights</td>
<td>December 10, 1948</td>
</tr>
<tr>
<td>(**) – The ILO, originally founded in April 1919 became the first UN Specialized agency in October 1949. <a href="http://www.il.org">www.il.org</a></td>
<td>ILO</td>
<td>International Labor Organization</td>
<td>October 1949</td>
</tr>
</tbody>
</table>

The U.S., to date, has an established track record regarding involvement in and support for the creation and development of statutory provisions included in many important international legal conventions and treaties across a broad range of issue-areas (e.g., International labor standards and regulations; International Maritime rules and regulations; and International Criminal Tribunals (Nuremberg, Tokyo, ICTY and the ICTR).
When considering its general policy history and the demonstration of its support for not only the creation of, but also the continued compliance with international legal accords, one may have expected the U.S. to sign onto and ratify the Rome Statute of the ICC. Although the Clinton administration did authorize David Scheffer to sign on behalf of the U.S., it did so without ever really intending to send the draft treaty to the U.S. Senate for it to fulfill its constitutionally mandated task of providing advice and consent regarding foreign treatises and in essence ratifying such agreements. However, continued U.S. concern, the view that the Statute contained "significant flaws," and because the Clinton administration's imminent departure from power (it was due to leave office within three weeks of its signing of the Rome Statute) overrode any possibility that the treaty would in fact be sent to the U.S. Senate for its consideration.

With regard to the hypotheses posited in Chapter 1 regarding country characteristics and upon examination of the contents of Figure 1.2 and Tables 1.2 and 1.3, the following statements can be made:

(1) "[As] the substantive and procedural duties contained in international legal accords becomes more stringent and comprehensive,"71 the world community must be concerned with signatory states' abilities to implement and comply with the provisions contained in such agreements, particularly smaller (e.g., Hungary) and African countries operating with smaller less vibrant economies and/or economies not necessarily capable of sustained economic output, growth, and development without some level of outside assistance (e.g., World Bank or International Monetary Fund (IMF) loans and grants, or

infusions of Overseas Development Assistance (ODA) and foreign direct investment, etc.).

In order to properly implement international legal accords, states must firstly have the requisite economic resources to adequately attempt such an undertaking, including during the initial implementation phase and even more importantly during the compliance phase of the treaty.

(2) Secondly, states must have some form of a respectable, credible judicial institutional infrastructure in existence, which is operationally viable and able to address the critical aspects of the principle of complementarity. It is more than simply having a system of courts, it is having an adequately functioning judicial system in place, which is deemed to be both willing and able to adequately undertake investigation and prosecution tasks so as to fulfill its obligations under the Rome Statute. Additionally, it can be viewed as the willingness or ability to establish, reconfigure, and appropriately support and finance such a judicial system—both organizationally and operationally speaking. Hence, even more of a reason to have a sound and stable economic environment and infrastructure upon which to draw the necessary resources.

Chayes and Chayes (2000) discussed the temporal dimension associated with treaty compliance:

Regulatory treaties are, characteristically, legal instruments of a regime for managing a major international problem area over time. Significant changes in social or economic systems mandated by regulatory treaties take time to accomplish. Wise treaty drafters recognize at the negotiating stage that there will be
a considerable time lag after the treaty is concluded before some or all of the parties can bring themselves into compliance.72

U.S. concerns existed with regard to the capabilities of many states to in fact be able to comply with the obligations of the ICC, even where they were more than willing to abide by the statutory provisions of the ICC Statute. Its one thing to state that you are going to comply with a treaty, but it is clearly a different thing to be functionally and economically able to do it. The U.S. was concerned that the economic demands that would be thrust upon some states would be overwhelming and unattainable. Not to mention whether the socio-cultural mechanisms of a state would concur with such a reallocation of much needed resources.

(3) Thirdly, for the most part, the countries in this study, who were ICC signatories:
(a) Have large enough GDP per capita and satisfactory economic growth rates to be able to implement and comply with ICC statutory provisions. Those who do not, were likely to seek some form of collective effort to participate in the implementation. For Example, Hungary could look to the European Union (EU) for assistance as it continues to contemplate its entry into the organization.
(b) Generally have the legal systems and associated infrastructure in place so as to appropriately react to situations within its own jurisdiction.

(4) It should be noted that 4 of the countries or political units in the study, who are not parties to the ICC (i.e., China, India, Japan, and the U.S.) all would arguably have the

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necessary economic resources and national legal systems to support the implementation of and compliance with the operational clauses of the ICC.

(5) Given the current state of party and non-party countries to the ICC, it does not appear that a particular type of government or political ideology lend themselves to signing onto the ICC Statute. Democracies, communist states, federal republics, and authoritarian regime types of governments are among both the signatory and non-signatory groups of the ICC.

(6) As mentioned earlier, an issue arose during the ICC negotiations concerning the incorporation of features of several universally accepted types of legal systems without demonstrating any level of unfair reliance on a particular type was important, be they based on English Common Law, constitutional and/or civil law theory, etc.

As such, a states’ particular form of government, political ideology and type of legal system do not seem to rise to the level of an “indicator” of a country’s likelihood of participating in a treaty such as the Rome Statute of the ICC. Nor does a states’ position regarding acceptance of the compulsory aspects of the International Court of Justice’s (ICJ) jurisdiction, with or without reservations, seemed to have influenced many decision-makers.

(7) A states’ type of legal system, adherence to “rule of law” principles, and recent crime rate statistics did not seemingly correspond to its leaders’ decision regarding participation in the ICC. For example, non-party states like China and India had relatively low crime rates per 100,000 inhabitants given the size of their overall populations – each
exceeding 1 billion, while ICC participating countries with significantly smaller populations had much higher crime rates (i.e., Brazil and Canada).

**Information:**

This is an important independent variable as it demonstrates how the ICC proceedings were perceived. For the most part, the average individual, unless a member of an epistemic community interested in international law, human rights, and/or humanitarian issues, generally did not follow or appear overly interested in the creation of or negotiations leading to the drafting of the ICC Statute.

Discussion of this variable is warranted as it relates directly to one of the important roles or aspects NGOs played in the negotiations and proceedings resulting in the ICC Statute(refer to the NGO discussion below).

Benedetti and Washburn (1999) noted the role of the media at the PrepCom as follows:

The PrepCom received the same scant attention in the general media as other comparable UN meetings, although it found extensive coverage in the specialized press, such as journals of political science or international law. PrepCom officers and delegations appeared to be much less concerned than NGOs about the media and public opinion. . . . A sense among participants that the world was watching their proceedings or greater media reaction to PrepCom action on particular issues might have both served to promote agreement and led to more attention in capitals. It was clearly a mistake to close so many of even the most formal PrepCom sessions to the media, especially after they had been opened to NGOs. In the event, however, despite good efforts, especially by NGOs, and despite growing interest at the end, the PrepCom did not prepare the media well for the Rome Diplomatic Conference.²³

Table 1.2 above outlines certain country characteristics, which can be related to the independent variable of information. One would expect that higher levels of literacy and

Internet usage among a nation’s population would lead to a higher level of access to and understanding of information concerning an aspect of a particular issue-area, in this case international law and the creation of the ICC. However, given the fact that the countries analyzed as part of this study all had relatively similar high rates of literacy (excluding the Sudan) seem to suggest otherwise.

**Nongovernmental Organizations (NGOs):**

NGOs were very involved in the preparation of the Rome Statute of the ICC, including providing states with memoranda outlining technical aspects of the statutory provisions, assisting governments draft position papers on issues of importance to them, and ensuring that the Statute was as robust and comprehensive as it could be. As such, this level of “intimate” involvement may have been expected to lead to:

(a). A greater number of States signing the Statute (IV #5);

(b). Result in a greater level of information dissemination regarding the ICC and its targeted activities to states governments, states domestic constituencies and applicable epistemic communities (IV#6).

However, as noted by Benedetti and Washburn, NGOs were not as successful as one might have expected in applying pressure to states’ governments or in influencing the general populous of many nations, including key epistemic communities about the ICC and the need for a permanent international criminal court.

NGOs are likely to play an important ongoing role vis-à-vis monitoring state compliance as well as ICC investigation and prosecution undertakings. They are likely to make every effort in an attempt to see that the ICC becomes an activist organization like
themselves. However, NGOs must be wary of risking their hard earned capital and
credibility by being viewed as trying to turn the ICC into a politically motivated,
manipulative, or frivolous case seeking institution. In a nutshell, NGOs will need to work
with the world community through the sponsorship of the UN so as to help build the
credibility level of the ICC by working closely with the institution, perhaps most
noticeably during the investigation aspects of crimes within the Court’s jurisdictional
purview. However, NGOs role in monitoring states compliance with the comprehensive
obligations is yet to be determined as the Court only began operations on July 1, 2002.

Additionally, NGOs will need to continue their efforts in seeking avenues for further
dissemination of ICC-related information to the general public and in applying pressure
to states’ governments to work with the ICC and not against it. NGO and epistemic
community impact, particularly in the U.S. will be an interesting development to watch
unfold in the future, especially with the unilateral acting mindset of the current U.S.
administration.

“Since epistemic communities are deeply committed to the goals of particular accords
because of their knowledge and professional interests, the greater the size, strength, and
activism of epistemic communities, the greater the probability of implementation and
compliance.” 74 The CICC represents an NGO conglomerate comprised of more than 60
different NGOs, including a number of very well known, highly respected humanitarian
organizations (e.g., Amnesty International). One would have expected that the NGO
extensive involvement, including making the character of the treaty more transparent and,

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therefore, more acceptable to state participants, would have resulted in an even greater number of state signatories.

With respect to the U.S. policy decision, it would appear that the U.S. had many if not all of the needed country-based characteristics warranted to implement and comply with the adopted provisions of the ICC such as:

(a). It has the economic resources and likely economic growth elements to meet the statutory requirements (IV#2);

(b). It possesses a highly respected and credible judicial system and associated functioning infrastructure in place needed to maintain jurisdictional integrity, including recognized checks, balances, and due process protections, should a case arise (IV#2);

(c). Its involvement in prior international legal accords as well as the drafting of the ICC Statute would generally suggest its likelihood of implementation of and compliance with the accord (IV#3);

(d). The availability of information, relatively easy access to numerous channels of information dissemination coupled with its high literacy level and extremely high number of Internet users would suggest that a greater flow of information concerning the ICC, its jurisdictional mandate, and targeted activities would exist (IV#4);

(e). The permeability of U.S. domestic structures (see Chapter 5 discussion of Risse-Kappen's insights in this area of international relations theory), coupled with:

(i). its strong tradition of adhering to democratic norms concerning political rights, civil rights, and political participation (IV#2); and
(ii). The activist nature of many large NGOs and epistemic communities within the U.S., who coincidentally were very engaged in the negotiation and drafting processes of the Rome Statute of the ICC (IVs #6 and #7).

Based on the above tables and information gathered, it would appear that a distinctive country profile cannot be readily identified as being a precursor. However certain key country-based characteristics would need to exist at a minimum:

(1). Adequate economic resources, both currently (i.e. per capita GNP) and into the foreseeable future (i.e. real growth rate), to implement and comply with statutory provisions and obligations of an international legal accord;

(2). Existing national judicial institutions and infrastructure to fulfill the principle of complementarity requirements;

In summary, the U.S. ICC decision is somewhat clouded when reviewing country characteristics since it can be reasonably argued that the U.S:

(1). Has the economic resources;

(2). Has the national judicial institutions and infrastructure;

(3). Has a high-level of Internet usage and a high literacy rate concerning information dissemination;

(4). Has a government based on a strong democratic tradition and “rule of law”; and

(5). Has consistently participated in previous international law conventions and accords.

In fact the U.S. was instrumental in the founding of the UN, the ICTY and ICTR, and actively participated in the negotiations leading to the development and drafting of the Rome statute of the ICC.
Given the discussion above concerning the ICC and U.S. involvement in it, and the U.S. decision resulting in nonparticipation, it is necessary to address possible international relations theory implications concerning domestic politics, domestic structures, the role of leaders and NGOs as well as foreign policy implications to the United States, ongoing U.S.-U.N. relations, implications concerning the collective security of the world community, and possible other detrimental affects upon U.S. foreign policy influence considering its policy position.
CHAPTER 5 – International Relations Theory Analysis & Implications:

This study chapter was designed as a means of seeking to explain how and to what extent non-state actors such as NGOs can influence issue areas including international law, whether it be as a co-developer of the statutory text, negotiator, disseminator of pertinent information, or policy influencer.

It will also discuss how game theory may be utilized to understand the influential aspect of domestic politics and epistemic communities upon governmental decision-making concerning a state’s foreign policy. This will include:

(a). Exploring the importance of “win-sets” as described by Putnam and how they may have impacted the Bush administration anti-ICC policy;

(b). Discussing the determinants of “win-sets”, political indifference curves as they apply to the present case; and

(c). Discussing how domestic structures and access to such help to determine the effectiveness of epistemic community strategies and efforts.

Lastly, it will also discuss the role leaders play within the inter-relationship between domestic and international politics/relations. How a leader’s particular operational leadership style and associative strategy formulation is impacted by non-state actors, domestic structures, domestic polities, and social psychological factors.

In a similar proposition to that of Putnam, Chayes and Chayes (1993) outlined their perspective on treaties as follows:
Treaties, like other legal arrangements, are artifacts of political choice and social existence. The process by which they are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states. . . . It is at its best a learning process in which not only national positions but also conceptions of national interest evolve. This process goes on both within each state and at the international level.  

Understanding that this process is conducted at both the domestic and international levels and its associated integration and dependency is critical to various state and non-state actors involved in international relations and treaty negotiations. In order to gain a better perspective on this learning process, Thomas Risse-Kappen’s work entitled Bringing Transnational Relations back in: Non-state Actors, Domestic Structures and International Institutions was reviewed. Additionally, because of its close linkage to domestic structures, Robert Putnam’s thoughts concerning the influence of domestic politics, empowered parochial interest groups and public opinion through the application of game theory aspects will also be explored later in the this chapter of the study.

1. **Thomas Risse-Kappen: Non-state actors and Domestic structures:**

Risse-Kappen’s work was examined with a focus on the role of non-state actors and the mediating affect of domestic structures upon this NGO role. This discussion is complementary to that which was outlined earlier concerning NGOs and information dissemination.

a. **Non-state Actors—Nongovernmental organizations (NGOs):**

Benedetti and Washburn (1999) had the following to say about the role of NGOs at the PrepCom:

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Most NGOs at the PrepCom organized their activities through the NGO Coalition for an ICC or the CICC. A few particularly strong international human rights organizations helped to found the coalition and influenced and respected its coordination, but also carefully preserved their separate identities and influence. These organizations and their representatives had long-standing relationships with diplomats, scholars, and the UN Secretariat and had participated in the early work of the International Law Commission on the court.

NGOs engaged in two principal sets of activities in support of the PrepCom outside its sessions. They largely failed in one of them and succeeded brilliantly in the other. Although the coalition tried hard through its communication and contact networks to encourage and coordinate NGOs to influence governments at home, the results were disappointing. (Refer to the earlier NGO discussion concerning information dissemination.)

The coalition assisted delegations in the LMG by preparing thoughtfully researched commentaries on every issue discussed. It made the commentaries available to group members and other delegations prior to the PrepCom sessions. Through regular meetings, the coalition helped the LMG develop guiding principles to serve as the first unified “position” of the group before the Diplomatic conference.76

Considering the number of countries to sign the Rome Statute of the ICC, it would appear that NGOs missed an opportunity to bring pressure upon the U.S. government by citing the high level of international momentum evolving out of the creation of the ICC and during its statute’s negotiations.

Given the role of NGOs, this study will now explore the influence of domestic structures upon the effectiveness of NGOs in fulfilling their intended or stated mission(s).

b. **Domestic structures:**

NGOs effectiveness can be constrained if they cannot gain access to the political system of targeted states and/or if they cannot contribute to or build “winning coalitions” within targeted states to truly influence governments and their respective policy direction.

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on a given issue-area of concern to NGOs. As outlined in Chapter 1, four of the six Risse-Kappen identified domestic structures will be reviewed in order to understand how these structures mediate and/or constrain the efforts of NGOs.

NGOs tend to achieve greater levels of success in Corporatist and society-dominated types of domestic structures such as those found in Japan and the U.S., respectively, as opposed to state-controlled and state-dominated types of domestic structures as exemplified by China and Brazil, respectively.

Given the highly organized and activist nature of the CICC, it is somewhat surprising that they were generally not more effective in either Japan or the U.S. as one would have expected in mobilizing epistemic communities to bring pressure or influence to bear upon the ICC policy positions of the Japanese or U.S. governments.

It should be noted that this lack of CICC effectiveness is more likely than not associated with its inability to overcome the second hurdle of being able to build “winning coalitions.” This is rather surprising since both Japan and the U.S. are characterized as having powerful societal organizations and strong/consensual policy networks. Characteristics that would seem to support NGO efforts in information dissemination and in building the needed “winning coalitions.”

Jacobson and Weiss (1995) noted the following concerning NGOs functionality in democratic states:

There are many features of democratic governments that contribute to improved implementation and compliance. Democratic governments are normally more transparent than authoritarian governments, so interested citizens can more easily monitor what their governments are doing to implement and comply with treaties. In democratic governments, it is possible for citizens to bring pressure to bear for improved implementation and compliance. Also, NGOs generally have more
freedom to operate in countries with democratic governments. The importance of NGOs has already been mentioned. They play a crucial role in treaty implementation and compliance. They mobilize public opinion and set political agendas. They make information about problems available, sometimes information that governments do not have or would prefer to keep confidential. Often the information they make available is essential to monitoring. They bring pressure on governments directly and indirectly. 

NGO ineffectiveness to persuade the governments of certain key global players (i.e., Brazil, China, Japan, and the U.S.) should serve to act as somewhat of a “wake-up call” to NGOs. It is likely that NGOs will need to undertake several internal steps to improve their futures chances of success:

1. Refine their message to reach more people than just selected epistemic community and interest group participants;

2. Refocus their integration with target state policy networks at the grassroots level to build broader, more effective/consensual “winning coalitions,” which are better able to impact policy decision-making. This would include developing operational styles accustomed to building “win sets” as noted within the game theory concepts espoused by Putnam;

3. Must reinvigorate and expand upon their channels of information dissemination. This would include reassessing the current effectiveness level of their policy networks throughout the globe, paying particular attention to those networks operating in key targeted states such as the Brazil, Japan, and the U.S.; and

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(4). Must continue to work towards improving their status as being considered important policy actors to be dealt with because of the constraining affect they can have upon governmental leaders and foreign policy decision-makers particularly in Corporatist and/or society-dominated domestic structure political environments.

Until they are able to complete some of or many of these steps, NGO alliances such as the CICC are likely to find themselves falling short of their goals as may have occurred with the ICC.

Given the ever-changing level of interdependency of states and their respective policy positions, non-state actors now must be more adept and able to operate in an overly integrated and complex global community with new rules. These new rules and changing non-state role have been addressed by various scholars including William Zartman and James Rosneau as briefly described in the following text.

2. William Zartman & James Rosneau:

a. Non-state Actors and New Rules:

In addition to Risse-Kappen’s discussion of non-state actors, William Zartman and J. Lewis Rasmussen, editors of “Peacemaking in International Conflict: Methods and Technologies” (1997) cited James Rosenau’s 1990 work entitled "Turbulence in World Politics: A Theory of Change and Continuity," regarding new actors, new roles and new rules in the twenty-first century as follows:

James Rosenau depicts the shift from the Cold War to the post-Cold War eras as a ‘bifurcation of world politics’ between a sovereignty-bound world and a sovereignty-free world whose dynamics and interactions can be analyzed at three levels. The micro level refers to the cognitive and behavioral skills by which people, regardless of professional or socioeconomic status, ‘link themselves to the macro world of global politics.’ The macro, or structural, level refers to the
'constraints embedded in the distribution of power among and within the collectivities of the global system.' The mixed level 'focuses on the nature of authority relations that prevail between individuals at the micro level and their macro level collectivities.' (Rosenau, 1990, pg. 10).

The bifurcation of world politics has not pushed the state out of the picture. Rather the state is simply forced to share the stage with sovereignty-free actors, whose pluralistic world has its own structures, processes, and decision rules. Competition and cooperation exist among the actors within and across the sovereignty-bound and sovereignty-free worlds. . . . By leaving aside the personality of actors, their behavior, and their interactions, one arrives at a purely positional picture of society. Three propositions follow from this. First, structures may endure while personality, behavior, and interactions vary widely. Structure is sharply distinguished from actions and interactions. . . . Domestic politics is hierarchically ordered. The units—institutions and agencies—stand vis-à-vis each other in relations of super and subordination. . . . Some are entitled to command; others are required to obey. Domestic systems are centralized and hierarchic . . . A domestic political structure is thus defined, first, according to the principle by which it is ordered; second, by specifications of the functions of formally differentiated units; and third, by the distribution of capabilities across those units.  

After consideration of the role of non-state actors in a domestic structural setting, this study will turn to a discussion outlining the application of game theory tenets to the inter-relationship of international and domestic politics as well as the different operational aspects attributable to NGOs.

3. Robert D. Putnam:

a. Game theory and domestic politics:

Putnam's writing regarding domestic politics and the application of game theory to understand the inter-relationship between the domestic and international aspects of states' foreign policy relations was examined as a complement to the previous non-state actor discussion. This was done primarily as a means of gaining a more in-depth perception of

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how non-state actors – be they NGOs or strong domestic epistemic communities – can influence a states’ foreign policy decision-making and policy formulation.

Putnam’s discussion of “win-sets” is important in this context as it relates to Risse-Kappen’s concept of developing “winning coalitions” to impact the policy decisions of targeted states. NGOs’ recognition of the reality and integration of their operations into what Putnam terms the “two-level game” of domestic and international politics and relations is also critical to the success of any future undertakings. Without being able to effectively develop and integrate political and policy-oriented “win-sets” into their strategic agendas, NGOs will find it increasingly difficult to realize the level of influence and success they desire and have become accustomed to achieving.

Additionally, NGOs should seek to create synergistic links between the various negotiating parties in order to reduce what Putnam described as the “political indifference curve differential.” Doing so is likely to result in stronger international legal accords with greater levels of state participation because the parties involved in the negotiations will tend to feel as though their concerns and objectives have been recognized, addressed, and to some extent incorporated into a treaty. In addressing political indifference curve differentials, NGOs will also be called upon to properly identify the affiliation of the other negotiating parties, particularly if they are aligned with or in what Rosenau described as the “bifurcated world of sovereignty-bound versus sovereignty-free actors.” This is important in order to properly focus the efforts of NGOs at the necessary domestic institutions and actors in order to adequately influence policy.
“Treaty making is not purely consensual, of course. Negotiations are heavily affected by the structure of the international system, in which some states are much more powerful than others. . . . On the other hand, a multilateral negotiating forum provides opportunities for weaker states to form coalitions and exploit blocking positions. . . . Like domestic legislation, the international treaty-making process leaves a good deal of room for accommodating divergent interests. In such a setting, not even the strongest state will be able to achieve all of its objectives, and some participants may have to settle for much less. The treaty is necessarily a compromise, "a bargain that [has] been made."  

Here again NGOs need to ably and effectively determine where they are in the various negotiating levels in the overall inter-relationship game model, with which actors (e.g., sovereignty-bound, sovereignty-free, epistemic community, strong domestic constituency, etc.) they should focus their efforts toward building "win-sets" or "winning coalitions," and how to go about disseminating information so as to minimize the mediating affect of the domestic structures and institutions encountered, while maximizing the impact of such efforts.

There is a general influence of domestic politics, constituencies, and public opinion, which needs vigilant consideration by leaders and policymakers. A nation's foreign policy is generally shaped by many domestic-oriented factors including cultural, economic, historical and political tenets, pressure groups and vocal constituencies (e.g., labor unions, environmental organizations, religious fundamentalist groups, etc.). Domestic-based influences can range from partisan and/or bureaucratic politics to

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socioeconomic conditions to the influence of the media to pressurized domestic constituencies.

Robert Putnam noted, "much of the existing literature between domestic and international affairs consists either of ad-hoc lists of countless domestic influences on foreign policy or of generic observations that national and international affairs are somehow linked". 80

Additionally, there are a number of prescient global forces or trends emerging (or increasing their level of emergence) that are leading to further integration among states such as economic interdependence, regionalism, and powerful NGOs and IOs. This increased integration raises the issue of states' collective security. It also raises the possibility of increased NGO and/or domestic constituency involvement. Hence government officials and policymakers will need to not only address the concerns of strong, domestic constituencies, but how to empower these constituencies to support their cause or policy position. The more support that can be garnered in formulating and deciding foreign policy, the less likely leaders and policymakers are to alienate much needed core constituencies. Additionally, gaining supportive public opinion concerning a foreign policy position will assist leaders by strengthening their negotiating position upon the commencement of such activities. Delegations to events such as the Rome Diplomatic Conference are better able to negotiate their states' policy stance and policy proposals.

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concerning areas of concern with other participants at many different levels within the overall international-domestic relations operational model.

b. Empowering Parochial Interests:

Leaders of all kinds, especially those savvy enough to understand the inter-relationship between international and domestic politics and relations recognize the need to listen to and address, where applicable and appropriate, the needs of domestic constituencies who have established themselves as “players or actors in the game.” Jack Snyder’s (1991) work concerning political ambition noted the following regarding parochial interests:

The characteristic advantages of imperial groups – compactness, information monopolies, and ties to the state – are more valuable and easier to achieve in some political contexts than others (e.g., democratic systems). . . . However, the parochial group’s policies might be at odds with the masses. Consequently, persuading the majority of voters to approve a parochial agenda is inherently difficult. In such a political system, the power of parochial imperial groups depends greatly on their information monopolies or on their direct penetration of the state.  

Snyder’s viewpoint exemplifies the role of NGOs in information dissemination and the building of policy-oriented “winning coalitions” with identified policy networks in targeted states. Once again the ability to do so should be “easier” in a state such as the U.S., considering its democratic underpinnings, level of media openness, transparency, availability of information channels, active policy networks as well as NGOs level of penetration within the United States’ society-dominated domestic infrastructure.

Additionally, flexing political muscle by influencing states’ political agendas and, thereby, influencing a states’ foreign policy and decision-maker apparatus should be attainable for those parochial interests who are empowered in such a manner.

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As a means of understanding the impact of domestic politics and influences, this study will turn to a possible deeper explanation within the auspices of game theory tenets.

Robert Putnam referenced Peter Katzenstein’s (1978) work on the importance of domestic factors in foreign economic policy entitled *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States*, noting the following:

The main purpose of all strategies of foreign economic policy is to make domestic policies compatible with the international political economy. He also stressed the crucial point that central decision-makers (“the state”) must be concerned simultaneously with domestic and international pressures... Unlike state-centric theories, the two-level approach recognizes the inevitability of domestic conflict about what the ‘national-interest’ requires... the two-level approach recognizes that central decision-makers strive to reconcile domestic and international imperatives simultaneously.82

The reconciliation of domestic and international imperatives related to humanitarian and international law issues must also be considered simultaneously by leaders and foreign policy decision-makers. A coordinated resolute international community is required to adequately and timely address these areas, which are likely to influence the maintenance of international peace and stability because of the possibility that such events can undermine global collective security.

Putnam recognizes the need to conduct more intensive and thorough research to empirically bolster and deepen the understanding of two-level theory. In fact, Thomas Risse-Kappen notes that the findings in his (1995) work concerning non-state actors, domestic structures and international institutions suggest:

That Putnam’s ‘two-level game’ model linking domestic politics and international negotiations needs to be amended. Putnam’s original framework conceptualized

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state governments as the only actors linking the international with the domestic level.

One could argue that Putnam’s level I of inter-state negotiations is not populated by state governments, but by cross-cutting transnational and transgovernmental alliances and that this is the level where the original bargains are struck. Since international regimes are still inter-state institutions, however, the state does not simply disappear from the framework. Rather, state governments have to sign on to the original agreements which then have to be ratified through the processes of domestic politics (Putnam’s level II).

[Alternatively,] Rissee-Kappen notes that, “structural realists could argue that the distribution of power in the international system accounts by and large for the outcomes] in inter-state relations.”

The role of domestic politics in international negotiations should not be overlooked because of the enormous impact they can have in achieving success in the international/foreign policy arena. Leaders most definitely need to consider their respective domestic constituencies when conducting foreign policy for the following reasons:

(1). Powerful domestic minorities can align themselves with or against an international policy. These minorities can be used to create support for a policy, even defeat a policy or at a minimum seriously influence public opinion;

(2). At the national level, domestic groups pursue their interests by pressuring governments to adopt favorable policies, politicians seek power by constructing coalitions among these groups. Here is a correlation with Rissee-Kappen’s “winning coalitions”, Putnam’s “win-sets”, and Rosenau’s “micro level analysis.” Just as NGOs need to build such coalitions to be effective in their efforts, policy makers and leaders must do the same in order to survive and remain in office. Additionally, their policy

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positions will at times be dictated by these domestic constituencies or coalitions. Hence policymakers and leaders need to operate with consensual policy networks as well, which are more prominent in corporatist or society-dominated domestic structures like Japan and the U.S. as theorized by Risse-Kappen;

(3). At the international level, governments seek to maximize their ability to satisfy domestic pressures, while minimizing the possibility of adverse consequences in foreign developments;

(4). The broader the win-set (as described by Putnam) at the domestic table, the more room there is for international agreement to be attained and implemented because of a greater level of consensus building more than likely exists. Also narrower win-sets could be perceived as strategic weaknesses. Something leaders will avoid at all costs, even if it means a less robust or effective treaty. Political survival is a much stronger instinct to leaders than international consensus. Effective leaders will know where their respective domestic constituencies and national public opinion will stand on an issue and are likely to seek a result that placates the majority while appeasing and thus maintaining their core constituency. They must create broader “win-sets” and winning political coalitions to mobilize their own constituencies to their side of the issue equation;

(5). Domestic politics prevails over foreign policy in that foreign policy is essentially a state affair and a state is defined domestically. Consequentially, if we accept foreign policy is a function of the state, we should always look at domestic policy prior to analyzing the state’s foreign policy. The “real” actor is the state defined by domestic terms. When there is a state policy, it is defined by the nature of state and state interest
both defined by domestic terms. In essence, foreign policy is the extension of domestic policy; and

(6). Foreign policy is a process to analyze what is happening domestically and internationally to come together to formulate a policy. To truly grasp the integration of domestic and international polities, one needs to adequately incorporate behavioral and/or social psychological factors to the extent necessary.

Risse-Kappen may very well have alluded to possible shortcomings associated within Putnam’s game theory tenets concerning the “logic of two level games.” As such, one needs to better understand the imposing complications, which exist in today’s international and domestic relations environments. They are an increasing number of players seeking placement at either level, or in some cases both levels, of Putnam’s model. For example, NGOs, MNCs, influential individuals, and strong parochial or epistemic communities could be classified as such non-state entities.

Relations, negotiations and policy formulation/decision-making are no longer simply conducted between heads of state or their appointed delegations. Policy positions need to be discussed, formulated, and generally agreed upon within a government’s circle of immediate influence (e.g., policy advisers and cabinet members), legislative constituencies such as Congress, domestic constituencies (e.g., unions, human rights groups), and with overall general public opinion. Game players of all strengths and sizes need to be adequately accommodated so as to build “winning coalitions” as described by Risse-Kappen, or “win-sets” as described by Putnam, which could result in a better
answer for all involved in the game. This is by no means an easy task as demonstrated by
the negotiations of the Rome Statute of the ICC.

It now appears that Putnam’s game theory model, while beneficial within the realm of
international relations theory, needs to expand to more than just two levels. For example,
possible sub-levels to each higher echelon level – international or domestic need to be
identified and considered within the development process of a government’s policy
position in a wide variety of issue-areas.

Rosenau’s discussion of relations at various levels (i.e., micro, macro, or mixed)
between sovereignty-bound and sovereignty-free actors is a very adept description of the
present operating environment for today’s players in international relations and
negotiations. The complexities associated with the expansion of Putnam’s game theory
model may even be compared on some level to the aspects associated with another theory
concerning internal state relations, namely Arend Lijphart’s consociational democracy
theory and its four core elements of power-sharing. Lijphart’s theory discussed the need
to be inclusive, contain proportional political representation as well as providing a voice
to those in the minority. NGOs in some respect represent the minority voice and provide
some level of proportionality to a tiered structure of international and domestic relations.

It is becoming increasingly clear that the level of international and domestic inter-
relationship is reaching new heights of complexity and interdependence. Understanding
the role of perceptions, behavior, and rationality in such an integrated inter-relationship
warrants some modicum of exploration in order to properly align the factors and parties
involved in the relations’ arena today.
As such, in order to truly appreciate the complexities involved in negotiating and the conduct of international relations, one must address the humanistic elements, which are an undeniable part of the overall negotiating process. As such, I have chosen to discuss and highlight the role of perceptions and behavior as well as the importance of the concept of rationality, social psychological factors, and tradeoffs and their respective impact upon negotiations within international relations.

4. Alexander George & Robert Jervis:

a. The Role of Perceptions and Behavior:

Several of my literary review readings addressed the role of perceptions and behavior within international relations and negotiations. Alexander George (1993) stated that:

... academic scholars believe policymakers need to develop a better understanding of how their own beliefs and tacit assumptions about the international system, international politics, and other actors in the state system influence their perception of developments, their diagnoses of situations, and their judgments. ... that the foreign policy of a nation addresses itself not to the external world per se but rather to the image of the external world that is in the mind of those who make foreign policy.  

This is clearly the case for the present U.S. head of state as noted and based on the concepts covered by Hermann and Kegley's research (to be discussed later in this study chapter).

Paul Gordon Lauren (1979) provides strong statements concerning behavior and the potential problem of overlooking it:

Historical experience demonstrates time and time again that state policy is determined — as it only can be — by the decisions and the actions of men and women. Formal alliances have no meaning unless the human actors feel bound by

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their obligations. . . . The whole concept of diplomacy itself is significant only insofar as it is understood and put into practice by people. For these several reasons, the human actors in their own particular historical context cannot be folded, stapled, mutilated, or shunted aside when inconvenient for abstract printouts, models, or theories. . . . they neglect the observable patterns of human behavior.\textsuperscript{85}

Alexander George (1993) expressed his proverbial “two-cents” on the issue of behavior, particularly the need to consider and understand an adversary’s behavior and its influence on his/her decision-making processes, by discussing the concept of “an actor-specific model, which would include an understanding of “who the policy influentials are, and what psychological, cultural, and political variables (which may be quite idiosyncratic) that shape and influence that adversary’s goals, perceptions, calculations, and behavior.”\textsuperscript{86}

George W. Bush’s view of the international community is surely premised upon both his innate and learned perceptions of other leaders and perceived threats to the national interest/security of the United States. Bush has been accused of taking a unilateral or an adversarial viewpoint in and approach to his administration’s foreign policy formulation, debate, and decision-making.

Robert Jervis would argue that perception plays an important role and as such must be considered when identifying the possible determinants of state behavior. Additionally, Jervis feels that to:

Argue the international environment determines a state’s behavior is to assert that all states react similarly to the same objective external situation. Changes in the external


situation can alter behavior, even if other variables such as a state's domestic regime, its bureaucratic structure, and the personalities and opinions of its leaders remain constant.87

Jervis contends that the effects of initiatives and threats depend to a large extent on the actors' intentions and perceptions of each other. These perceptions of each other's intentions are a crucial element of policy making. However such perceptions are often incorrect. Further exploration into how states perceive each other is warranted according to Jervis. He notes "because of the importance and difficulty of these tasks, decision-makers do and must employ short-cuts to rationality. But these short cuts often produce important kinds of systemic errors."88

Jervis has made a very strong argument in favor of the role that perception plays in international relations and negotiating. Perception as highlighted by Jervis outlines an additional factor to consider when determining a particular balance of power scenario between and within states. In addition, as realists would contend that power is a tool to realize your self-interest and is used to change the mind of others; Jervis would contend that power and perception, respectively, shapes the identities and interests of state actors operating within the systemic external environment. This balance of power struggle generally becomes more readily apparent when states take varying policy positions during the negotiations of international treatises and conventions as occurred in the present case.


88 Ibid., pg. 115.
Negative perceptions of the U.S. and its ICC position as well as its perceived “arrogant” stance regarding its balance of power position within the global community adversely affected the U.S. delegation’s ability to operate and negotiate effectively during the Rome Diplomatic Conference. Another important aspect to be considered in reviewing the results of the Rome Diplomatic Conference is the contention that the underlying concept of state and actor rationality within international relations theory cannot be underestimated.

b. The Concept of Rationality:

Proponents of realism and balance of power concepts make the assumption that the actors involved in international relations are in fact rational in their thought processes. Alexander George and Graham Allison incorporated rational models in their discussion of decision-making and conceptual modeling, respectively. Given that peoples’ value systems and perceptions are generally learned and socially constructed factors over time, which can vary upon a specific set of circumstances, a blanket assumption of rationality could be interpreted as misleading.

Thomas Schelling explicitly recognizes that strategic theory does assume a model as follows:

The foundation of a theory of strategy is, he asserts: the assumption of rational behavior—not just of intelligent behavior, but of behavior motivated by conscious calculation of advantages, calculation that in turn is based on an explicit and internally consistent value system.\textsuperscript{59}

Alexander George (1980) noted the following concerning rationality:

The assumption that all actors in the arena of world politics can be counted upon to take a rational approach in foreign policy is not without some validity and utility, but it does not offer a sufficient basis for estimating how these actors view events, calculate their options, and make their choices of action. To describe behavior as 'rational' is to say little more than that the actor attempts to choose a course of action that he hopes or expects further his values. But, of course, what the opponent's values are and how they will affect his policymaking and decisions in different kinds of situations remains to be established.90

This concept of rational behavior is at the core of ICC negotiations. The U.S. certainly took steps to calculate advantages or disadvantages to select statutory issue positions (e.g., complementarity, ICC jurisdictional aspects concerning non-party states, and establishing Article 98(2) bilateral arrangements). One can state that the behavior of the U.S. delegation may not have been entirely "rational" given U.S. policy history regarding international law, the establishment of criminal tribunals, and the U.S. traditionally being in the forefront of furthering the rule of law and democratic institutional principles in international settings. Were these "rational" precedents abandoned because of genuine fears of inequalities or "significant flaws" within the Rome Statute of the ICC or because of:

(a). Political and ideological perceptions and beliefs;

(b). The desire to meet the needs of core domestic constituencies; and/or

(c). The U.S. perception that many states, albeit willing, were actually incapable, either economically or via institutional bureaucracies, of fulfilling their obligations as outlined in the Rome Statute of the ICC,

In conjunction with the concept of rationality, perceptions, behavior, images and
beliefs need to be examined, as they will additionally impact a leader's operational style
and strategic orientation development. George Bush's view of the world, potential state
and non-state adversaries, including their potential threat to the U.S. and its national
security, as well as global collective security have in this author's opinion clearly
influenced his decision-making within foreign policy and international relations aspects
affiliated with his role as the U.S. head of state.

Hence Bush's leadership style including its underlying root development facets are
important as he would view the potential infringement of the ICC upon the sovereignty of
the U.S. in total and its potential to infringe upon a U.S. national's constitutionally
mandated due process rights as reasons to forego participation in the newly created
permanent international criminal court.

Jervis asks the question: do decision-makers' perceptions matter? He distinguishes
between "psychological milieu" (the world as the actor sees it) and the "operational
milieu" (the world in which the policy will be carried out). Also, he notes "that it is often
impossible to explain crucial decisions and policies without reference to the decision-
makers' beliefs and their images of others."\(^9\) He looks at how actors behave, rather than
just to use the notions of power, interest, and struggle as noted by Hans Morgenthau's
theory of realism or trying to express realities within the terminology of structure,
hierarchy,archy, and links between elements of the systemic domain in international
relations as hypothesized by Kenneth Waltz.

In the present case of the ICC, leaders’ perceptions, especially those of the U.S. President were a definite factor. Thus, this author agrees with Robert Jervis in that decision-makers’ perceptions do matter! In this case on both the “psychological and operational milieu” levels.

Jervis further contends that the effects of initiatives and threats depend to a large extent on the actors’ intentions and perceptions of each other. These perceptions of each other’s intentions are a crucial element of policy making.

c. Decision-making & Policy Formulation:

Understanding that perceptions can be critical in decision-making processes is vital because foreign policy is a human activity (i.e., subjectivity is involved). Jervis concludes that it does not matter how you perceive reality from the point of view of acting for the existence of foreign policy. Leaders make decisions and act, not the states. State actions and interactions are conducted at the individual level and generally implemented at the state-level. Thus, perceptions of decision-makers are an integral component in the overall decision-making and policy formulation processes.

In international relations and foreign policy decision-making, we are always seeking to measure the available means to apply towards our goals and as such we will generally produce a particular action. While doing so the psychological /cognitive element becomes an integral part of the process. Decision-making is a human activity, and we must be cognizant of the limited human perception as well as possible biases and fundamental belief systems. Perceptions of one’s means, goals, and of the reality you want to change are extremely vital in the decision-making process.
Additionally, ideologies play a large role in constructing the said perceptions, biases, and belief systems. In the present case, the Bush administration contained many policy advisers with distinct ideologies and thoughts concerning the ICC. You have those members of the administration very much opposed to the core tenets of the ICC and the perceived constraints it could render upon U.S. foreign policy (e.g., Donald Rumsfeld and Paul Wolfowitz from the defense establishment at the Pentagon). In the meantime, you had the likes of Colin Powell, Secretary of State, and Condoleezza Rice, National Security Adviser, who were both seemingly greater proponents of cooperation with and within the UN family of institutions as well as seemingly more willing to further negotiate possible consensual points with traditional and non-traditional allies so as to not further damage relations with the Europeans or hinder improving relations with Arab states and with the developing countries of Africa and Latin America in the hopes of fostering a more robust anti-terrorism coalition within the world community.

This is then the first test of a government leader’s leadership ability in building an acceptable policy position within his/her own small circle of advisers before proceeding to the next level of the game model. A leader needs to reach and be able to maintain a consensus position from which he/she can more adequately negotiate with other constituencies, non-state actors, and other state leaders at different levels within the overall model, whereby the best overall policy position can be achieved for the parties involved.

Jervis would also argue that perception plays an important role and as such must be considered when identifying the possible determinants of state behavior and/or
leader/policymaker decision-making processes. Jervis notes, “the policy advocate should try to reach the more modest goal of developing policies that have high payoffs if the assumptions about the adversary are correct, yet have tolerable costs if these premises are wrong.” Although not explicitly evident, this approach may have been invoked in formulating the Bush administration’s ICC policy. Jervis asks if there is a particular event in the levels of reality that is “triggering” the decision-making?

Foreign policy and international relations issues are addressed at the decision-making level. In fact, it is the bureaucratic and individual levels associated with international relations theory that analyze, discuss, and formulate policy options resulting in ultimate decision-making taking place at this level. Consequently, the implementation of the policy options decided upon by the decision-makers takes place at the state and/or systems-level of international relations theory.

In addition to perception and rationality, policymakers and decision-makers need to address and appropriately incorporate other potential socially constructed or psychologically based factors into the framework within which governmental policy is formulated and decided. Hence, the following text will address some additional aspects of this important perspective within the overall international relations puzzle.

d. Social Psychological Factors:

These types of factors have generally not received enough attention in international relations theory. However, Alexander George delved into the psychological factors of

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decision-making in his work. As such, he highlighted and explained a number of potential impediments to information processing at the individual and bureaucratic levels.

As noted earlier in the study, this is an area where NGOs and epistemic communities can play an important role in disseminating pertinent information about international organization or institutionally targeted activities in states with permeable bureaucratic domestic structures.

George also noted that the issues of uncertainty and stress play paramount roles in the decision-making process as it tends to result in the decision-makers attempting to apply certain cognitive processes or tactics such as Procrastination, perception, application of fundamental beliefs concerning international politics, which can adversely impact the overall decision-making process.

Keck and Sikkink discussed actor characteristics within advocacy networks as follows:

"Networks operate best when they are dense, with many actors, strong connections among groups in the network, and reliable information flows. . . . Target actors must be vulnerable either to incentives or to sanctions from outside actors or they must be sensitive to pressure because of gaps between stated commitments and practice."  

See Table 1.4 below for additional commentary and cites regarding social psychological factors. These additional cites are included as a means of demonstrating that several of the literary pieces reviewed have discussed the importance of social psychological factors associated with international relations schools of thought. As such, these factors need to be considered and their effects understood upon decision-making and policy-making processes. They are also considered an important factor in

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determining the answer to this study's research question as posited in Chapter 1 of this study.
### Table 1.4 – Social Psychological Commentary and Cites:

<table>
<thead>
<tr>
<th>Author/cite</th>
<th>Quotation</th>
</tr>
</thead>
</table>
| Stein, J. G. 1996, *Image, Identity, and Conflict Resolution*, United States Institute of Peace Press, Washington, D.C., pgs 93-96. | Stein’s 1996 article focused on the impact that images and identity have upon conflict resolution. Included in this discussion was text of the creation of images, strategies to utilize in situations where images and identities permeate the negotiations:  
1. Once formed, enemy images tend to become deeply rooted and resistant to change. . . . The images themselves then perpetrate and intensify the conflict.  
2. Images of an enemy can form as a response to the persistently aggressive actions of another state or group.  
A. Identity and the creation of enemy images:  
i. Enemy images can be the product of the need for identity and the dynamics of group behavior.  
ii. One important component of identity is social identity, . . . together with the value attached to that membership.  
iii. Social identity and differentiation do not, however, inevitably lead to violent conflict.  
B. Cognition and Enemy Images:  
i. Common cognitive bias can also contribute to the creation of enemy images. |
In attempting to decide on the kind of bargaining stance to adopt, each party must acquire information about the other’s true preferences, intentions, and social perceptions: ‘what he wants,’ ‘what he will settle for,’ and ‘what he thinks of me.’ |
| Young, P., editor (1974). *Negotiation Analysis*, The University of Michigan Press: Ann Arbor, MI., pg. 21. | H. Peyton Young noted the following regarding social psychology and cognition: |
Social-psychological factors such as personality and psychoanalytical motivations, and individual cognitive biases such as interpersonal and cultural styles all influenced international negotiations as well and needed to be considered as part of the overall process of when conducting negotiations in the international arena, whether it is bilaterally or in some form of multilateral coalition.

Given the potential impact of social psychological factors upon information processing, perception and belief development, and ultimately decision-making itself, one must also understand the intricacies or use of tradeoffs as part of an overall negotiating strategy.

**e. Tradeoffs:**

When including individuals in the realm of international relations theories and negotiating processes such as those encountered during the negotiations of the Rome Statute of the ICC, a number of potential tradeoffs need to be considered prior to undertaking such a task. One must consider the following:

1. Will incorporation of an individual-level of analysis make the theory overly complex and parsimonious in nature? Alexander George noted that doing so could result in information impediments as well as complexities in preparing and delivering advice.

2. How will Advisors perceptions, biases, and value systems influence their cognitive thought processes and in turn their advice. Noting that this could result in sub optimal advice being given, and consequently leading to less than prudent decisions and crises outcomes.
(3). Mark Zacher noted and discussed the tradeoff between autonomy vs. sovereignty as well as the fact that changes in “patterns of governance in international systems and modal patterns of state interactions are substantially responsible for the transformation of the overall international system. State sovereignty still reigns supreme in the minds of many people and theorists. So it has become a socially constructed lexicon, which is likely to be impacted by individual perceptions, images, etc.”

One of the hypotheses in connection with the independent variable of domestic politics concerned the involvement of a country’s domestic officials in the preparation, implementation and oversight of the accord, the greater the probability of implementation and compliance. Representatives of the Clinton administration were certainly involved in the establishment of the ICC, including Secretary of State Madeleine Albright, David Scheffer, and many other administration officials. As such, a review of the role and typology of leaders is desirable as part of this overall study.

5. Margaret Hermann & Charles Kegley:

a. Leaders:

As noted earlier, James Rosneau believed that the micro level of interaction considers the cognitive and behavioral skills by which people link themselves to the macro world of global politics. So such, and quite corollary in nature, another area to be considered is the leadership style and decision-making practices of a state’s leader. Hermann and Kegley (1995) discussed this topic:

Political psychology focuses on the degree to which leaders are responsive to the constraints in their political environments and the impact such responsiveness may have on their leadership style... how constrained they are likely to perceive themselves to be by domestic political factors, and, as a result of such perceptions, the strategies that they are likely to choose in dealing with [decision-making].

See Table 1.5 below outlining leader typology and political system strategies as developed by Hermann and Kegley in their 1995 work entitled, Rethinking Democracy and International Peace: Perspectives from Political Psychology.

Leaders and their respective leadership style is an important variable to consider in the present case because "... people make a difference. The more committed a country’s leader is to the goals of an accord, the greater the probability of implementation and compliance. ... It matters who is the head of state." Leaders whose profiles exude strength, power, and charisma or are perceived as such (e.g., Churchill, Reagan, FDR, etc.) can have an underlying impact upon the balance of power status in international relations (e.g., Ronald Reagan v. Mikhail Gorbachev near the end of the Cold War, Reykjavik, Iceland Summit in particular).

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Table 1.5 – Leader Typology and Political System Strategies:

<table>
<thead>
<tr>
<th>Type of Leader</th>
<th>Type of Democratic</th>
<th>Political System</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Responsive:</strong></td>
<td><strong>Democracy</strong></td>
<td><strong>Autocracy</strong></td>
</tr>
<tr>
<td>Perception of Constraint</td>
<td>Perceives behavior to be constrained; checks preferences of a range of constituencies interested in current issue before acting.</td>
<td>Perceives leadership is constrained by preferences of elites who can affect continuation in office.</td>
</tr>
<tr>
<td>Strategy for dealing with Conflict</td>
<td>Responds to positions of relevant constituencies.</td>
<td>Engages in external conflict only when important elites support decision.</td>
</tr>
<tr>
<td>Orientation</td>
<td>Moderate</td>
<td>Pragmatist</td>
</tr>
<tr>
<td><strong>Ideologically Driven:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Perception of Constraint</td>
<td>Perceives constraint is something to be overcome; frustrated by limitations on power.</td>
<td>Perceives others share view of the world and current issues as well as support what leader wants to do.</td>
</tr>
<tr>
<td>Strategy for dealing with Conflict</td>
<td>Approves increased use of secrecy/covert activity and of diversionary actions.</td>
<td>Engages in both highly conflictual and cooperative actions depending on leader’s perception of the nature of target and his/her view of the world.</td>
</tr>
<tr>
<td>Orientation</td>
<td>Militant</td>
<td>Radical</td>
</tr>
</tbody>
</table>


Upon further cursory examination and application of the Hermann and Kegley leader-political system model, I would conclude, based on behavior and actions taken to date, that the President of the United States, George W. Bush, could be classified as an “ideologically driven leader [who believes] constraints are things to be overcome, not accepted; they are obstacles in the way but not insurmountable.”

Additionally, with regard to the leaders strategy orientation as “assessed by making judgments concerning leaders’ beliefs about the severity of foreign threats and the appropriate strategies for responding to them [and based upon their leadership typology, I

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would categorize President Bush as more of a radical orientation than moderate, pragmatist or militant], noting that for leaders with this orientation, international politics is centered around a set of adversaries that are viewed as “evil” and intent on spreading their ideology or extending their power at the expense of others[(i.e., “the axis of evil”)]. Such leaders perceive that they have a moral imperative to confront these adversaries [(i.e., Iraq’s Saddam Hussein and North Korea’s Kim Jung Il)] As a result, they are likely to exhibit a foreign policy that takes the offensive and is highly aggressive and assertive.'98

Although the U.S. President is not necessarily a “fan” of the ICC, he is most certainly committed to seeing that the perpetrators of unspeakable human right violations and other crimes within the jurisdiction of the ICC are dealt with forcefully and in a timely manner. The Bush doctrine of preemptive action has come under fire from many different camps—be they politically oriented, or an epistemic community or humanitarian/human rights driven NGO. Bush has clearly set the tone for the foreign policy attitude and direction of his administration. “He knows what he wants and is intent on using both the domestic and international settings to further his aims.”99

By synthesizing a head of state’s leadership style, political system and foreign policy strategy orientation, one is able to develop a better understanding of how these forces integrate within Putnam’s two-level game theory model. This helps to form an indication

98 Ibid., pg. 527.
99 Ibid., pg. 527.
of how a leader will act in and react to international negotiations as well as their support for the implementation and compliance with international accords.

Application of this synthesis process might provide insights into Bush administration decision-making regarding U.S. participation, or lack thereof, in accords or treaties such as the Rome Statute of the ICC, the ABM Treaty, and the Kyoto Protocol.

Several inter-related questions must be asked:

(a). How does international relations theory explain the actions taken by states and/or the individual leaders of states?

(b). How do decisions at the decision-making and/or individual level of analysis impact overall state behavior?

(c). How do an individual’s perceptions affect their decision-making processes?

(d). How do an individual’s perceptions impact their view of state interactions, including the advice they may be called upon to provide to state and/or governmental leaders?

As noted in the earlier text, these are all important aspects needing consideration in not only the present case of the ICC, but in overall foreign policy positions of a state’s government. As such, reasonable answers should be sought.

Robert Jervis’ discussion of perceptions and behavioral aspects associated with and within international relations is corollary to a number of other theories examined including the intersubjective social construction concept put forth by Alexander Wendt.
“Treating the identities and interests of agents as exogenously given and focusing on how the behavior of agents generates outcomes.”\textsuperscript{100}

Additionally, Robert Putnam’s explanations are explicit about the interactions among the various actors at both levels of his game theory model. In fact, Jervis proposes a two-step model of his own built around the concept of decision-makers’ beliefs and images of others. “That is to say, these cognitions are part of the proximate cause of the relevant behavior and other levels of analysis cannot immediately tell us what they will be.”\textsuperscript{101}

As part of the examination of and determination of its impact upon negotiations, leaders style and strategic orientation, the concept of rationality and its underlying assumption most definitely must be considered in the overall puzzle and thesis hypothesis explanation.

The concept of social psychological behavior should be used to complement/supplement currently accepted perspectives/theories of analyzing international relations as this perspective introduces an important dimension which needs to be considered in a comprehensive multidimensional approach to international relations analysis. Theorists should seek to identify and propose a more comprehensive approach to the study of international relations. One that has a multi-tiered foundation incorporating the essential features of game theory (Putnam). A comprehensive theory based on a sound structural framework coupled with the agreed upon organizational processes utilizing standard operating procedures and agreed upon societal norms


(Allison, Risse-Kappen), accepting the existence and importance of human characteristics (e.g., perceptions, images, behavior, etc.) (Jervis, Wendt, and George) that are part and parcel of the innate and learned make-up of decision-makers — by they governmental, corporate, social, cultural, financial organization executives, or NGO and IO Secretary Generals, etc. — need to be incorporated as well.

Jervis' theory and concepts are at the individual level of analysis, many other theories including realism, balance of power, two-level game theory are all at higher level or more structurally oriented levels of analysis. Perceptions, images, etc. play an important role in the actions of states based upon the decisions made by policy-makers, governmental officials, and leaders. Assumptions of rationality and self-interest can be construed to be fundamental weaknesses of some international relations theories because of the tendency to overlook the underlying causes behind an individual actor's behavior and decision-making processes.

Several authors have concluded that international relations and foreign policy decision-makers sit at the bureaucratic-level. Small group theory supports this notion and in fact, it is generally the domain of the individual, who is responsible for deciding the balance of power issues within the international/global community. It takes individuals within states to determine the role the nation will play in foreign policy scenarios.

Systems and states in and of themselves do not have the capacity to adequately address such issues. It takes involvement at the bureaucratic and/or individual level, to adequately address foreign policy plans of states. Of course this opens a whole host of other factors
(e.g., perceptions/biases, beliefs and images, cooperative behavior, psychological, etc.) that need to be considered because of the fallibility of individuals.

Systems-level and state-level analyses generally don’t incorporate the impact of individual-level analyses such as biases, perceptions, images, etc. in their respective theories. As such, an attempt at melding the different levels of analysis within international relations theory is probably warranted. At a minimum, theorists need to explicitly note when they have not made such an attempt within their conceptual analyses. However, incorporation of perceptive, image-oriented concepts could make systems and state-level analyses overly parsimonious at the sacrifice of accuracy and application. A suitable and agreed upon medium needs to be sought and openly discussed among international relations theorists.

Finally, “the more the respective issue-area is regulated by international norms of cooperation, the more permeable should state boundaries become for transnational [or non-state actor] activities. Highly regulated and cooperative structures of international governance tend to legitimize transnational [or non-state actor] activities and to increase their access to the national polities as well as their ability to form “winning coalitions” for policy change. Transnational [or non-state actor] relations acting in a highly institutionalized environment are, therefore, likely to overcome hurdles otherwise posed by state-dominated domestic structures more easily.”

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The previous international relations theory implications were provided to demonstrate the close inter-relationship between various schools of thought. After discussing several

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potentially influential international relations theory implications associated with the present case, this study will now embark upon a more in-depth analysis of the game theory tenets cited previously, particularly those concerning “win-sets.”

Initially, this analysis will attempt to assign parties to the different levels within Putnam’s game theory model. As Putnam (1988) noted, “It is convenient analytically to decompose the process into two stages:

1. Bargaining between negotiators, leading to a tentative agreement; call that Level I. [This would be exemplified in this study’s case by the Rome Diplomatic Conference, negotiations between states party delegations, NGOs including the CICC alliance, and UN Secretariat personnel.]

2. Separate discussions within each group of constituents about whether to ratify the agreement; call that Level II.”¹⁰³ [For example, Bush Administration foreign policy and defense policy advisers, Congressional leaders, powerful epistemic human rights communities, and public opinion.]

It is quite clear in the present case that the Bush administration engaged in the development of win-sets”. Evaluation of these “win-sets” will show an ability to successful create a cohesive and broad win-set at the domestic level, while efforts at the international level were not accomplished as effectively.

Domestically, the Bush administration assessed its ICC policy position by receiving feedback from various core constituencies:

(1). First by ensuring it had a consistent policy message within and among the administration’s key policy personnel, especially among the leadership of the State and Defense Departments as well as the National Security Council. For example, in a May 2002 Pentagon news release, U.S. Defense Secretary Donald Rumsfeld stated:

The U.S. has a number of serious objections to the ICC – among them, the lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of the UN Security Council’s authority over international criminal prosecutions; and the lack of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials. These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is a risk that the ICC could attempt to assert jurisdiction over U.S. servicemembers, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow.104

Paul Wolfowitz, U.S. Deputy Defense Secretary, noted, “Our objection to this whole treaty is that there are not adequate safeguards included within the treaty text when it was negotiated.”105

U.S. Secretary of State Colin Powell declared the following in an interview on ABC television (2002):

The U.S. has the highest standards of accountability of any nation on the face of the earth. But the ICC, where prosecutors and a court beholden to no higher authority, not beholden to the Security Council, not beholden to anyone else, and which would have the authority to second-guess the United States after we tried somebody and take it before the ICC, we found that this was not a situation that we believe was appropriate for our men and women in the armed forces or our diplomats and political leaders. And it is for that reason that the United States does not intend to ratify the ICC.106


Finally, in an interview with Radio Netherlands (2002), Vice President Richard Cheney stated:

The U.S. government regards the ICC as a violation of its sovereign rights. We are afraid the ICC has different standards of justice, and that our peacekeepers will be vulnerable to be convicted by the ICC. As a superpower, we have military intervention in many parts of the world and do not want our citizens to be a victim of this court.\(^\text{107}\)

(2). Secondly, by understanding and analyzing the U.S. Senate’s general disdain for the proposed treaty. Particularly the strong anti-ICC thoughts of several influential and key Republican Senate Committee chairmen including:

(a). Sen. Jesse Helms (R-NC) retired, former chairman of the Senate Foreign relations Committee, who was quoted as follows, “The United States must fight this treaty and we must be aggressively opposed to this Court.”\(^\text{108}\)

(3). Thirdly, although powerful NGO organizations such as Human Rights Watch and Amnesty International made statements deploiling Bush’s decision to “un-sign” the Rome Statute of the ICC. The Bush administration did not believe that disillusionment among these types of groups warranted concern regarding their Level I negotiating strategy. The Bush Administration believed it could minimize any potential NGO discontent by touting the U.S. policy history regarding human rights and the establishment of ad-hoc international criminal tribunals.

The American delegation to the Rome Diplomatic Conference and the various PrepCom sessions “are likely to have had prior consultations and bargaining at Level II to hammer out [negotiating] positions for the Level I negotiations.”\(^\text{109}\)


Noting that the U.S. Senate was controlled by the Republican Party, whose members generally did not support the Rome Statute of the ICC, made the likelihood of ratification of the treaty, in its form at the time, highly doubtful. Also, it should be noted that candidate and then President Bush was not a proponent of the ICC primarily because of the aforementioned areas of concern as discussed in Chapter 4. Additionally, Bush's leadership orientation, which could be considered radical, as denoted in the Hermann and Kegley leader typology work cited earlier.

The Bush administration had orchestrated a clear pathway in addressing the ICC. First the President built an internal and "intimate" coalition within the inner circle of his administration. This was bolstered by building a winning coalition with Congressional leadership, particularly in the U.S. Senate, and included some levels of public opinion as emanating from traditional republican-based constituencies such as conservatives, anti-UN and isolationist groups, and rank and file military personnel and their families. All of these combined to form a large and committed domestic win-set for Bush.

Although one can make the claim that the Bush administration and the President himself did an admirable job in building a strong domestic coalition such that the majority of the relevant parties at the domestic political level were in agreement in their condemnation of the ICC treaty and the inability of the U.S. to participate because of "significant flaws. On the other hand, the international level of the model was a much tougher venue for developing a reliable and supportive win-set for the Bush administration and its designees. As such, the experience at this table was less successful

than at the domestic table. First, as discussed in Chapter 3, the U.S., albeit involved in the negotiations leading to the creation of the ICC, was not able to build a winning coalition, even among its traditional allies, on many of its statutory proposals.

Secondly, its adversarial approach alienated many other participants such that the U.S. found itself unable to join the very influential LMG at the Rome Diplomatic Conference.

Thirdly, its pursuit of Article 98(2) immunity agreements did not endear the U.S. with the powerful NGO coalition – the CICC, whose influence and organizational capital were readily apparent during the negotiation proceedings.

Putnam (1988) noted, “The unusual complexity of this two-level game is that moves that are rational for a player at one board may be impolitic for that same player at the other board.” Here again, the concept of actor rationality is present. This rationality is generally present in a negotiating party’s overall negotiation strategy, issue positions, choices to be made, trade-offs and concessions to be considered in order to reach a more mutually acceptable result not only on a single issue, but on an entire accord. Rationality plays a role in the Level I negotiations in order to provide a greater possibility of ratification at Level II. However, in the present case, the U.S. delegation was waging a multi-front campaign. It needed to negotiate very untenable issue positions with other conference participants while at the same time attempting to maintain the integrity of its positions so as to provide even a shred of hope that Level II ratification could be achieved despite setbacks at the Level I negotiating table.

\[110\] Ibid., pg. 434.
"Central executives have a special role in mediating domestic and international pressures precisely because they are exposed to both spheres, not because they are united on all issues nor because they are insulated from domestic pressures." President Bush realized that his ICC position would not build any realistically viable win-set at the international level. It was likely that a strong stance against the ICC, while clearly delineating its shortfalls and the reasoning behind his policy position would strengthen Bush's domestic win-set. This strong domestic win-set, may partially help to explain why the activities of the CICC were not as effective as one might have expected. In spite of the permeability of the U.S. society-dominated domestic structures including the U.S. Congress vis-à-vis lobbying efforts, the broad-based win-set Bush established and maintained effectively mediated possible domestic pressures. This mediation on the domestic level allowed the Bush administration to address the mediation of international pressures through Article 98(2) bilateral agreements, re-examination of status of forces arrangements with many other states as well as continuing economic and military aid packages with those states not willing to make some level of concession to U.S. interests.

Putnam (1988) went on to note the following regarding reneging and treaty cheating:

The prospects for international cooperation in an anarchic, "self-help" world are often poor because unfortunately, policy makers generally have an incentive to cheat. However, ...the temptation to defect can be dramatically reduced among players who expect to meet again. [Cheating and reneging can result in] high political and diplomatic costs.\(^{12}\)

\(^{11}\) Ibid., pp. 432-433.

\(^{12}\) Ibid., pg. 438.
Given the increasing interdependency of global activities, particularly in the economic and trade realms make it a strong certainty that heads of state will meet again and be expected to negotiate other serious matters on any number of fronts including collective security, global health and development issues.

Putnam's (1988) article discussed that:

It is important to understand what circumstances affect the win-set size. Three sets of factors are especially important:

(1). Level II preferences and coalitions;
(2) Level II Institutions; and
(3) Level I negotiators' strategies.113

Each of these will be briefly examined as they relate to the present case.

(1). **Level II preferences and coalitions**:

The Bush administration Level II players could certainly be classified as having similar preferences, which allowed the development of a strong domestic coalition to take place. These preferences or perceptions as discussed earlier are important factors in the development of policy positions and negotiation strategies. In this case, these preferences were not only ideological in nature, but also encompassed incumbency concerns for elected officials who most definitely felt the need to address the concerns of key constituency groups such as military personnel and their extended families by attempting to ensure that these voters, not to mention themselves as civilian leaders, would not be subject to misguided ICC jurisdiction.

(2). **Level II Institutions**:

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113 Ibid., pp. 441-442.
Establishing a cohesive and consistent message among the primary Level II parties within the Executive and Legislative branches of the U.S. government, the President was afforded the opportunity to strengthen his domestic win-set.

(3). *Level I negotiators' strategies:*

Creation of a strong domestic win-set at both the Level II, the third determinant of negotiator strategies at Level I was clearly influenced. The U.S. delegation and foreign policy advisers recognized the tremendous uphill struggle awaiting it in PrepCom and Rome because of U.S. governmental concerns in both the Clinton and George W. Bush administrations. The U.S. negotiating position and U.S. areas of concern as previously discussed were clearly formulated by both the individual and bureaucratic actors at Level II.

The size of the Bush administration domestic win-set, coupled with the unlikely ratification of the ICC treaty by the U.S. Senate, U.S. attempts to create Article 98(2) bilateral agreements all created a somewhat hostile negotiating environment for the U.S. delegation at the Rome Diplomatic Conference. These circumstances made it difficult for U.S. representatives to effectively build coalitions with other states' participants, the LMG on very important issues and such as complementarity, non-party ICC jurisdiction, and usurping of UN Security Council authority, and/or U.S.-sponsored statutory change proposals.

The U.S. attempts to use trade-offs to gain support for their positions were for the most part somewhat unfulfilled because of its inability to develop any viable Level I win-set. Some Conference participants, both state and non-state actors, viewed the U.S. strategy
of strong-arming some states into Article 98(2) bilateral agreements or suffer reduced U.S. economic and/or military aid as more of a "threat" than some form of consensual trade-off.

The manner in which Bush built his domestic win-set somewhat ensured that multi-issue negotiations would not necessarily result in political indifference curves that could not be reduced or mitigated to some extent. For example, the U.S. Dept. of Defense felt strongly about protecting U.S. military personnel from misguided ICC prosecution.

The U.S. State Dept. was more concerned with maintaining its ability to effectively coordinate U.S. foreign policy initiatives and foster international cooperation while preserving human rights.

These two views were not independent of each other. They most certainly would be deemed extraordinarily interdependent as they relate to the ability of the U.S. to effectively participate in future international law and other geopolitical and collective security issues. The synergistic link between these two domestic table concerns, and their corresponding interdependency reduces the extent of any insurmountable political indifference curve at the domestic level. Conversely, U.S. policy and issue-area positions, Article 98(2) bilateral agreement efforts, U.S. leader perceptions of states' willingness and ability to effectively implement and comply with ICC provisions most likely resulted in a political indifference curve at the international level, which would be difficult to assuage.
The next and final chapter of this study will suggest several proposed conclusions designed to address the overall thesis hypothesis and research question, while seeking to highlight those independent variables that best support the study conclusions.
CHAPTER 6 — Conclusion:

Before discussing my concluding remarks concerning possible factors that led to the Bush administration nullification of the Clinton administration ICC Statute signature, it is important to once again understand the context in which the newly elected U.S. President George W. Bush found himself regarding the ICC. During the 2000 presidential election campaign cycle, candidate George Bush was quite clear in his opposition to the ICC. Given the Clinton administration’s less than genuine support for the court’s statute, it was surprising that Clinton would allow the signature of a U.S. representative to be affixed to the treaty.

However, Lee Casey, et. al. (2002) noted the rather surreptitious circumstances by which the Clinton administration proceeded:

The United States objected to the design of the proposed ICC at the Rome Conference and in the negotiations leading up to it, and voted against adoption of the final Statute at the Rome Conference. Thus, it was somewhat of a surprise that on December 31, 2000, the last day on which signature of the Statute was permitted pursuant to Article 125 of the Statute (and only three weeks before the inauguration of President George W. Bush); President Clinton authorized the United States’ signature of the Rome Statute. President Clinton’s authorization was even more puzzling in light of the fact that it was accompanied by a statement expressing concerns about “significant flaws” of the Statute and, notwithstanding Article 120, which prohibits reservations to the Rome Statute, with the qualification that “I will
not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until fundamental concerns are satisfied.\textsuperscript{114}

It would appear that the Clinton administration decision was one designed to preserve President Clinton’s personal integrity regarding the ICC, saddling a successor administration with a political “hot potato” at the outset of the new administration, and an obvious attempt at protecting his personal legacy. One could argue that Clinton’s motivations were disingenuous and that he put himself before the well being of U.S. foreign policy interests. But that argument is for another day and another paper.

My research and analysis thus far has provided support for the primary hypothesis in addressing the study dependent variable as outlined in the introductory chapter. As such, I will posit the following six concluding propositions. It is clear that the U.S. is uncomfortable with the whole idea of the ICC and its jurisdictional authority. Of course this American stance will not promote its prestige within the UN. The U.S.’s stature and position in the UN is just recovering from the fallout associated with prior administrations’ refusal to pay the UN dues assessments for both the regular and peacekeeping budgets. The U.S. has made great strides in repairing its image and how other nations view the U.S. and its foreign policy only to potentially hinder its place in the world community by taking an anti-ICC policy position.

\textbf{Proposition #1 — treaty character and negotiations:}

The overall character of the Rome Statute of the ICC, its language ambiguities, potentially harmful carve-outs regarding the principle of complementarity, poorly defined

jurisdictional caveats concerning non-parties to the ICC, and wide prosecutorial latitude coupled with a lack of institutional checks and balances should all be deemed factors which influenced the Bush administration decision. The manner in which the treaty was negotiated and the resultant statutory draft were for the most part unacceptable to the U.S. and in essence rendered the treaty “dead on arrival” in Washington D.C.

U.S. arrogance together with the U.S. delegation’s perception that it was “an us versus them” undertaking at the Rome Diplomatic Conference, hindered the U.S.’s ability to have its proposals for changes to the treaty acted upon. Pertinent anti-ICC viewpoints within the U.S. government included displeasure with:

(1). The manner (e.g. processes and procedures utilized) in which some sections of the treaty were negotiated;

(2). The overreaching committee and working group chairperson authority and decision-making;

(3). Haphazardly created solutions to important issue-areas within the statutory provisions of the treaty solely to bolster the perception that progress was being made to the detriment of possible participant consensus and agreement.

Despite traditional U.S. support for international criminal tribunals such as the ICTY and ICTR as well as participation in numerous UN-sponsored international law accords and conventions, U.S. dissatisfaction with the draft ICC treaty could not be overcome through the negotiation process and thus played a role in the Bush nullification decision.
Proposition #2– Country characteristics and Profile Indicators:

Based on the information gathered for and discussed within this study, it would appear that a standardized country-characteristic profile cannot be readily identified as being an indicator of a states’ likelihood to become a party to an international law treaty or convention.

However certain key country-based characteristics would need to exist at a minimum in order for a state to be able to effectively comply with the obligations affiliated with the statutory provisions of international legal accords including:

(1). Possessing adequate economic resources, both currently (i.e. per capita GNP) and into the foreseeable future (i.e. real growth rate), to implement and comply with statutory provisions of an international legal accord;

(2). Existing national judicial institutions and operational infrastructure to fulfill the principle of complementarity requirements;

(3). Political leadership whose beliefs are based soundly within the principles of the rule of law and protection of individual human rights;

(4). Possessing domestic structures and effective policy networks, which can be effectively permeated by epistemic communities and NGOs such that important information concerning the operational aspects and targeted activities of an international organization can be easily disseminated to interested parties; and

(5). Possessing an acceptable level of cultural and social standards, whereby the reallocation of scarce resources toward the creation of the required national/domestic
institutional infrastructure is seen as being progressive in nature as opposed to constraining.

As noted within the study text, a state must be in a position to give more than "lip service" to an agreement. It must be both willing and able to implement and comply with treaty obligations upon ratification and into the foreseeable future. The aspect of state capability to fulfill treaty obligations had its place as a determinant or factor within the overall Bush ICC decision framework.

**Proposition #3—UN Legal Undertakings, Success and Precedence:**

Previous UN-sponsored legal endeavors have achieved certain levels of recognizable success and have clearly provided the ICC with both organizational and operational precedents upon which a credible, resolute, efficient, and effective multilateral judicial institution can be premised, established, and integrated into the world community. This apparent level of success and the U.S. role in assisting in the achievement of it clearly could not overcome the potential shortfalls associated with the drafted and adopted statutory text of the ICC.

**Proposition #4—International Relations Theory Implications:**

Given the present make-up of the world, the creation of NGOs and international regimes, the emergence of powerful non-state actors such as transgovernmental and multinational corporate entities, prominent socially active environmental and health-related organizations; it becomes clear that Putnam’s two-level game theory will need to be retooled in order to appropriately account for the new actors with new roles and differing priorities.
Putnam’s game theory model, particularly the concepts of “win-sets” and “win-set
determinants as well as political indifference curves represent an explanatory variable in
answering the study hypothesis. The application of game theory to the present case in and
of itself does not fully explain the dependent variable outcome. As Putnam (1988) noted,
“At each stage, cleavage patterns, issue linkages, ratification procedures, side-payments,
negotiator strategies, and so on would need to be considered.”

It is readily apparent that the existence of interrelationships between international
relations and domestic influences, non-state actors, behavioral and social psychological
aspects of the diplomatic and/or foreign policy advisers and decision-makers is generally
undeniable. Because of the inherent complexities and the volume of information needed,
not to mention the number of theorists from a many different disciplines, the
development of an overarching theory would constitute a tremendous academic
undertaking. However, there are a number of possible patterns of intersection in the
current literature. For example, I would contend that game theory scenarios, rationality
models, organizational processes, and the acceptance of socially constructed determinants
demonstrate that similar thought processes have been explored by and within the various
schools of international relations theories and art of negotiation thought. It appears that
they have not been pursued to their potentially mutual fruition in attempting to develop
an acceptable theory with consistent and broader application abilities. This is more than
likely due to the level of complexity and loss of accuracy, which could result in such an
undertaking.

However, the lessons learned from the creation and negotiation of the ICC as well as the following trends (not an exhaustive list by any means), dictate a reexamination of the current crop of international relations theories in order to develop a broader more applicable theory:

- Globalization;
- Increasing economic interdependence;
- Regionalization;
- Modernization;
- Technological and communications innovations;
- Increase of terrorist activities premised upon fundamental religious beliefs and their effect upon the collective security of the world community;
- Increased global health threats, increased levels of poverty and economic disparities; and
- Changing political landscapes resulting in the emergence of post Cold War multipolarity versus bipolar configurations and loyalties.

Incorporation of these trends as well as ICC lessons learned will require international relations theorists, political and social science professionals to reexamine the applicability of the current schools of international relations theories.

Given the complexity of today’s world and the increasing threat of terrorism, increased economic interdependence, international negotiations framework and practices require a theory that has a multi-tiered foundation incorporating the essential features of game theory, bargaining, negotiating, and concession-making as well as tradeoffs. I believe that
a comprehensive theory based upon the incorporation of the following is needed at a minimum in order to provide a more adequate, consistent and applicable philosophy within overall international relations theory and analysis:

(1). A sound structural framework premised upon tenets of game theory with differing levels of participation and authority, with an expanding list of players or actors;

(2). Use of agreed upon organizational processes utilizing standard operating procedures and agreed upon societal norms;

(3). Acceptance of the existence and importance of human characteristics (e.g., perceptions, images, behavior, etc.) that are part and parcel of the innate and learned make-up of decision-makers should be incorporated as well; and

(4). Additionally, theorists should consider advocating the inclusion of an approach that is similar to and builds upon that of Zartman and Rasmussen (1997):

A broader, more comprehensive approach is needed to guide peaceful change in the international realm. Traditional concepts such as state, power, national interest, and diplomacy appear in much wider frame. The capabilities and foreign policy decisions of individual states must broaden to cover more extensive relationships among bodies politic the world over. This step entails seeing relations between nations as a political process of continuous interaction between significant elements of whole societies.

This approach challenges us to develop conceptual framework that integrates rather than fragments understandings of the relationships among a variety of international actors, including states, regional organizations, public and private organizations, and individuals. Although the authors were referring to conflict resolution and negotiation I would suggest a corollary concerning foreign policy negotiating and decision-making can be and should be developed. "Social and political change occurs through many levels of interaction rather than mainly through a linear series of governmental actions and responses."

It is readily apparent that there are numerous factors involved within the art of negotiation and international relations. Accounting for potential possibilities is nearly impossible. A case such as the creation of the Rome Statute of the ICC and the Court itself highlights many of the explicit and implicit underpinnings needed to achieve a mutually beneficial and accepted result. This case also demonstrated that there is no standard operating negotiation procedure in existence. No current concept of international relations has been developed to the standardized or consistent extent needed to successfully operate in a multilateral, multicultural negotiation which will have varied economic and political impacts to the parties involved, especially when the various negotiating parties' political and economic systems are in some cases so diametrically opposed to each other.

Proposition #5 – NGOs:

The importance of NGOs and their various roles and functions are well documented and well founded. Their participation in the formulation of and influence upon domestic policy and international treatises in a number of significant issue-areas requires theorists to include them and other non-state actors in the inter-relationship between domestic and international polities.

NGOs and other non-state actors are likely to become even more important as they monitor states' compliance with treaty obligations, continue their efforts to attract attention to cases and occurrences of violations of human rights, and continue their efforts to disseminate information concerning issues of concern and to educate the general populous, while influencing foreign policy decision-making.
Proposition #6 – Perceptions:

In his 1994 work, Roger Fisher discussed the need to explore partisan perceptions as follows:

We all face a complex world. To make sense of it, we develop perceptions that work as a kind of shorthand; a template that we impose on what would otherwise be a welter of chaotic data. . . . Based on our perspective, we also selectively view additional information. We tend to collect evidence that supports our prior views to dismiss or ignore nonconforming data. This screening process has at least three levels: We selectively remember what we want to; we selectively recall what we remember; and we revise our memories to fit our preferences. 117

This is probably true of the present U.S. president and is a piece of the policy puzzle that needs to be included when determining reasons behind his decision to nullify the previous president's ICC signature.

In conclusion, although most of the IVs cited in the introductory chapter played some role in the eventual nullification decision, each one did not rise to the level of being a discreet integral factor or variable as may have been initially anticipated. Some of the variables clearly played a more significant role in influencing the ultimate decision and should be viewed as being both conditionally sufficient and necessary with regard to the final ICC decision. These variables would be:

IV#1 – The character of the accord itself: processes, procedures, negotiations;

IV#5. – the role and influence of NGOs and epistemic communities;

IV#4. – Availability and dissemination of ICC-related information;

IVs #6 and 7. – Domestic politics and structures; and

IV #8. – Leaders, leadership styles; and social psychological factors;

Other variables are likely to have represented factors to be considered in the overall decision-making process, but are not necessarily likely to have been instrumental in the final puzzle. These variables would be:

IV #2 – Economic, political, social, and legal country characteristics. Although the U.S. perception that some states were economically and/or bureaucratically incapable of fulfilling treaty obligations was a concern;

IV #3. – States’ previous policy history; and

IV #9. – Criminal tribunal precedence and success. However, one could argue that the U.S. policy decision regarding the ICC was a reversal of its previous position supporting tribunals. However, the ICC is a case where the perceived disadvantages outweighed the perceived advantages in the minds of U.S. foreign policymakers.

Lastly, further investigation into possible additional independent variables may be warranted to more stridently support this study’s dependent variable and thesis hypothesis. However, further study is probably not prudent until such time as the effect of the nullification decision upon U.S. foreign policy and the effectiveness of the ICC can be measured by mutually acceptable benchmarks.

The final study chapter will focus upon implications to U.S. foreign policy, possible detrimental impact upon the U.S. role within the UN, and global collective security implications.
CHAPTER 7 - Possible U.S. Foreign Policy Implications:

This chapter will seek to determine to what extent potential adverse U.S. foreign policy consequences could have impacted the U.S. decision on the ICC. These could include, but are not limited to:

(i). Collective security issues;


"The ICC is thus another issue that demonstrates the tensions between policy enhancement and prerogative encroachment in the U.S. relationship with the U.N. and in its own substantive terms remains a major foreign policy controversy."\(^\text{118}\)

However, Benedetti and Washburn (1999) stated "the United States had elements within its government that strongly favored an international criminal court and regarded it as a logical extension of the U.S. initiative to create ad hoc tribunals for Yugoslavia and Rwanda."\(^\text{119}\)


Ongoing U.S. relations with the U.N. is a very important consideration for a number of reasons:

(a). Continued U.S. financial support of the organization, its activities, and funds and programs. Currently, the U.S. funds approximately 22% of the UN’s biennial regular budget and upwards of 30% of its annual peacekeeping operations costs. The impact of a lack of or reduction in this funding was apparent during the 1980s and 1990s when U.S. arrears regarding their dues was a prescient issue in the bilateral relations between the U.S. government, the UN Secretariat, and other UN Member State delegations;

(b). The U.S. role as a permanent member of the UN Security Council with veto power. This role and its responsibilities are likely to be tested regarding ICC referrals as well as negotiations concerning extensions of current UN PKOs, further funding of the ICTY and ICTR tribunals as well as the establishment of tribunals concerning crimes committed in Cambodia and Sierra Leone;

(c). U.S. participation in newly established UN-sponsored PKOs and/or humanitarian relief initiatives. For example, a possible PKO in Liberia, Africa or continued global health undertakings designed to address epidemic crises in Africa and Southeast Asia. The impact of a reduction in U.S. participation may be felt on a number of important fronts including; financial, technological, and logistical support for PKOs;

(d). The U.S. need and desire to have continued international support for the ongoing “war on terrorism,” This is an area of extreme importance to the U.S. and its close allies;

(e). The collective security of the world community and the continued maintenance of international peace and stability; and
(f). The timely and effective response to human rights violations, international humanitarian crises, and breaches of international and/or humanitarian law.

1. Ongoing U.S. - U.N. relations:

Ongoing relations between the U.S., UN Member States and the UN organization itself have survived numerous occasions when relations were very strained. The UN needs the U.S. and the U.S. definitely needs the UN. Both need to be supportive of the other in order to address major global issues in many different areas – be they health, international peace, and/or humanitarian in nature.

Robert Holloway reporting for the Global Policy Forum Organization noted the following concerning a visit by U.S. Secretary of State to the UN in February 2001:

Brushing aside fears that the United States might be distancing itself from the United Nations, Secretary of State Colin Powell declared strong support for the world body. . . . Some diplomats had forecast the United States would be less involved with the organization under President George W. Bush than it was under his predecessor, Bill Clinton. Powell said that in an hour-long meeting with Secretary-General Kofi Annan, he had taken “the opportunity to express the president’s strong support for the work of the UN.” Standing beside him, Annan said: “We had a very good discussion going over a whole range of issues and trouble-spots around the world and UN reform, as well as the US-UN relationship, which we believe is on very good footing.

Asked for his views on the International Criminal Court – the bugbear of Republican members of Congress – Powell said, “The Bush Administration does not support the International Criminal Court. President Clinton signed the treaty, but we have no plans to send it forward to the Senate for ratification.”

a. U.S. Role within the Security Council:

The ongoing U.S. role in the UN Security Council is important when considering the U.S. influence in directing Security Council action on several vital fronts including:

(i). Peacekeeping Operations;
(ii). Decisions concerning unilateral or multilateral use of force in enforcing Security Council resolutions;
(iii). Ongoing efforts of the ICTY and ICTR in developing international law precedence; and
(iv). ICC referrals and the ongoing relationship between the Security Council and the ICC.

Jentleson (2000) noted the initial U.S. position regarding the ICC as follows:

Originally, the Clinton administration had supported the idea of the ICC, in large part because a permanent international criminal court would potentially enhance U.S. foreign policy in cases against aggressors, gross violators of human rights, and rogue states. But the treaty that was proposed at the 1998 Rome Conference was seen as encroaching upon U.S. prerogatives. One issue was the relationship between the ICC and the Security Council. The United States wanted the UNSC to have authority over the ICC, so with its veto the United States could block ICC actions it opposed. Another was the concern that U.S. soldiers might be subjected arbitrarily, unfairly, and in politically explosive ways to the ICC’s jurisdiction. The United States argued that subjecting Americans to an international trial would violate the U.S. Constitution and that, as one opponent of the ICC put it, “we’re the ones who respond when the world dials 911 and if you want us to keep responding you should accommodate our views.” Most other nations found the U.S. positions unjustified, and the votes on these and other issues went overwhelmingly against the U.S. [However,] the conference concluded with a treaty to create the ICC, but the United States has refused to sign.\textsuperscript{121}

The ICC crisis in the Security Council has wider significance than the jurisdiction of the ICC alone. “It may prove a defining moment in the relations between the superpower and the rest of the international community. Even if the U.S. ‘wins,’ and imposes its will, it will have created hostility and counter-alliances to challenge the domination of the U.S. hegemon.”\textsuperscript{122}


John Washburn noted that he believed “the ICC does not usurp the authority of the UN Security Council.” However, Lionel Yee (1999) discussed the ICC and the UN Security Council with regard to two specific Statute articles: Article 13(b) – Exercise of jurisdiction; and Article 16 – Deferral of investigation or prosecution as follows:

Some delegations were, however, opposed to giving the Council any power to initiate proceedings. The grounds for objection included the argument that this would subject the functioning of the Court to decisions of a political body and therefore undermine the Court’s independence and credibility. Some felt that such a provision was inequitable in that this specific “trigger” would only be used against States other than the permanent members of the Council since the latter could use their power of veto to prevent referrals, which impinged on their interests. The assumption of these delegations was presumably that because of the veto powers, the permanent members of the Security Council are unlikely to agree to refer to the Court a situation involving themselves. . . . [However,] at the Rome Conference, a clear majority of delegations supported the power of the Security Council to initiate proceedings of the Court. Article 13(b) of the Statute thereby acknowledges the enforcement powers of the Council acting under Chapter VII of the Charter of the United Nations, to refer a situation to the Prosecutor in which one or more of crimes falling within the jurisdiction of the Court appears to have been committed. These enforcement powers of the Security Council bind all Members of the United Nations.124

Many U.S. governmental personnel refute and, in some cases, out right reject the notion that the U.S. is unilateralist in international affairs. They contend that the U.S. is exercising its leadership role and cite the following in support of this contention:

(1). The role of the U.S. military power regarding collective security issues;

(2). U.S. policy toward Iraq (i.e., seeking UN approval for Security Council resolution enforcement action); and


(3). Prosecuting the war on terrorism with allies, while attempting to deal with the Palestinian-Israeli conflict vis-à-vis the much touted “roadmap for peace” initiative sponsored by the Bush administration.

2. Potential detrimental ramifications to U.S. foreign policy:

   The question of unilateral use of force versus multilateral coalitions becomes an issue when needing to address ethnic-based and/or other international conflict situations. However, the divergent U.S. and U.N. opinions of policy enhancement versus national prerogative are raised in these situations as well. Additionally, this is most definitely an area where domestic political opinion as influenced by NGOs, pressure group, or other non-state actors are relevant to the formulation of foreign policy and national-level decision-making.

   Bruce W. Jentleson (2000) noted the following regarding unilateral versus multilateral intervention:

   The question of when and where the United States should intervene militarily is especially difficult when the horrors of ethnic cleansing and genocide seem to urge action in the name of American principles, but involve areas that... are not a critical piece of real estate for anyone in the post-Cold War world.125

   Here is where American governmental concerns regarding politically motivated ICC trials or ICC prosecutorial manipulation become of paramount concern. Frankly U.S. officials can find themselves between the proverbial rock and a hard place because if no action is taken to halt crimes of genocide or ethnic cleansing pressure will be brought to bear on political leaders. However, if action is taken and Americans are considered for

ICC prosecution, than political leaders could pay a price for this occurrence. However, generally doing nothing at all is perceived to be a foreign policy weakness (e.g., U.S. action in Somalia and initial U.S. hesitancy regarding Kosovo in the 1990s). Acting forcefully can be viewed as overbearing or even downright aggressive (e.g., U.S. support for Nicaraguan contra rebels in the 1980s and more recently, U.S. military action in Iraq during 2003's Operation Iraqi Freedom). The role of the media, pressure groups, and political opinion in these cases must be accounted for in any related foreign policy decision as noted by Jentleson (2000):

The basic pattern of what the public is and is not inclined to support does have an underlying logic based on conceptions of legitimacy and calculations of efficacy. On the first point, using force to restrain aggression has a much stronger normative claim than does trying to remake governments... Other factors may also come into play in any particular case. Multilateral support and burden sharing is one; the public often wants to know that other countries are also bearing some of the risks and costs. The reactions of congressional leaders, newspaper editorialists, television pundits, and other elites are also a factor.126

After consideration of the ongoing state of U.S. and UN relations, the U.S. must consider the potential harm to its "war on terrorism" initiative because of the anti-ICC policy decision. The specter of terrorism since September 11, 2001, has raised the need for U.S. leaders to steadily work on repairing the overall image of the U.S. in foreign policy circumstances as well as the need to build "winning coalitions" and consensually agreed upon international legal accords particularly with the UN and its Member States.

a. **Impact on the "War on Terrorism"**

Kenneth Roth discussed the sentiment of the US regarding terrorism in an article for Harvard International Review (2002) as follows:

The U.S. Government’s overriding goal since September 11, 2001 has been to defeat terrorism. If conceived broadly, as it should be, the fight against terrorism must be understood as a campaign for human rights because the Geneva Conventions and international human rights law, with their limits on permissible conduct in war establish that terrorism is not a legitimate act of war or politics. Yet the urgency of the effort to defeat particular terrorists has tempted governments to compromise on human rights. The fight against terrorism is only partly a matter of security; it is also a matter of values. Building a stronger human rights culture – one in which any disregard for human life is condemned rather than condoned – is essential for defeating terrorism in the long run.\(^{127}\)

The Program on International Policy Attitudes has conducted many opinion polls post September 11, 2001 with the results showing that:

A majority favors the US dealing with terrorism by utilizing multilateral approaches. Many believe that the U.S. should work with our allies by seeking UN Security Council approval for military action. Additionally, many believe in empowering the UN in the War on terrorism.\(^{128}\)

In spite of recent events, “terrorism, [in general,] does not actually threaten that many Americans, but its randomness and the sense of injustice it evokes, as well as the drama that it entails and the media’s klieglight attention, ensure that it will continue to be a major security issue”\(^{129}\), [not only for the U.S., but for the collective security of the world community.]


It is clear that the United States will need the assistance of many other nations regarding terrorism – be it through sharing of intelligence data, restrictions upon financial flows to terrorist organizations, possible extradition of captured terrorist personnel, etc. However, will the U.S. be hesitant to tackle the issue vis-à-vis the use of force, when deemed necessary, for fear of misguided ICC prosecution? This is a difficult question to answer until such time as the U.S. acts unilaterally in a way that some would construe as requiring the application of the ICC’s jurisdictional mandate. As a side note, both the perpetrators of the September 11, 2001 terrorist attacks on the U.S. and the subsequent U.S. military action in Afghanistan as a response to the terror attacks occurred prior to the ICC’s in force date of July 1, 2002 and thus would not be subject to the purview of the ICC. Additionally, because the Rome Statute of the ICC does not currently contain definitions for the terms “aggression” or for “acts of terrorism”, it would be unlikely that American service personnel who participated in and governmental personnel who planned and/or coordinated Operation Iraqi Freedom have much to fear from the ICC.

Extremist Islamic fundamentalist groups (e.g., Al Qaeda, Islamic Jihad, Hamas, etc.) claiming responsibility for recent “terrorist-type” attacks in Saudi Arabia (May 2003), Morocco (May 2003), and Israel (ongoing since July 1, 2002) are unlikely to be effectively brought before the ICC in any capacity. The world community will need to rely upon the application of the principle of complementarity and hope that national courts with the requisite jurisdictional mandate and capacity will take effective steps to investigate, indict, try, convict, and punish those accountable for such acts. These terrorist attacks demonstrate the fragility of global security, thereby, providing the world
community with the catalyst to ensure that resolute collective security exists and will invoke a timely ICC response or, if need be, such overwhelming force upon terrorist perpetrators that abhorrent acts of “homicide bombings”, attacks upon states’ civilian, military, or governmental property and personnel will not be tolerated or go unpunished.

b. **Collective Security:**

The strong U.S. interest in seeing that the perpetrators of serious humanitarian crimes are held accountable is generally undeniable as exemplified by the U.S. support for the ICTY and ICTR. Additionally, U.S. participation in and continued support for the North Atlantic Treaty Organization (NATO) including its contemplated expansion and role in the new global infrastructure or world order, all demonstrate the resolve of the U.S. to ensure that international peace, stability, and collective security are maintained.

Casey, et. al. (2002) went on to discuss the U.S. concern of adverse consequences to governmental and military personnel under the ICC, especially considering the U.S. role in ensuring international peace, and its impact upon the world community’s collective security:

The real issue [facing the U.S.] is how best to accomplish this goal [of promoting and supporting the ICC] without sacrificing vital American interests. The matter is complicated by the fact that, as events of the past decade have proven, the United States occupies the dominant position in promoting international peace and security in today’s world. Fulfilling our unique role often requires the use of military force. Given the importance of the U.S. in promoting world security and keeping in mind our national security interests, the U.S. has been and should continue to be concerned with the adverse effects that the ICC, as currently proposed, might have on our foreign policy decisions and the threat of ICC prosecution facing everyone in our military chain of command, from the President as Commander-in-Chief to
our soldiers, sailors, airmen and marines who carry out American military operations.\textsuperscript{130}

Ziring, et. al (2000) discussed the prospects of achieving international security through collective security and defined such as follows:

Safeguarding international peace and security was the primary reason for the establishment of the United Nations in 1945. . . . The great frequency of armed conflict since 1945 testifies that the UN security system has not worked as intended. Security is still the central concern of all states, but the UN has been less central to the security of its members than the charter might indicate. States rely primarily on their own might and that of their allies to deter aggression against themselves and, should peace fail, to vindicate their interests by force of arms. Lack of centrality does not mean irrelevance, however, and the UN has in many situations affected the way states pursue their security interests. . . . The UN war-prevention role has often been called “collective security,” although in practice, the UN has been largely an adjunct to the operation of local and global balances of power. In its more specialized and correct meaning, collective security is an arrangement among states by which all are committed to aid any country threatened with armed attack by any other country. The object is to deter aggression by confronting a potential aggressor with the power of an overwhelming coalition and, should war nonetheless occur, to bring the aggressor quickly to heel. A collective security system is synonymous with a balance of power system, but modifies the traditional conception of alliances.\textsuperscript{131}

This raises the question as to whether the advent of the ICC will complement the underlying premise of collective security. And if it is seen as such, why would the U.S. maintain its policy position of nonparticipation in the ICC in spite of being a strong supporter of the principles of collective security and member of two of the premier international organizations dedicated to collective security, namely the United Nations and NATO.

Ziring, et. al. (2000), went on to explain the components behind collective security:

\textsuperscript{130} Casey, Lee A., et al. (2002).“The U.S. and the ICC: Concerns and Possible Courses of Action,” The Federalist Society, February 8, 2002, pg. 3.

The essential elements of an effective collective security system are consensus, commitment, and organization. At the minimum level, states must agree that peace is indivisible and that threats to peace anywhere are the concern of all. But more is required. There must be a commitment to act in accordance with the collective security principle. The commitment has both a positive and self-denying aspect. States are bound affirmatively to combine their force to meet any threat to the security of the world community. They are also committed to refrain from unilateral force to achieve purely national objectives. Ideally, the commitments should be so binding and so widely embraced that attempts to change the status quo by violence are considered unlawful and subjected to overwhelming force. Without this commitment consensus remains a meaningless abstraction. But commitment, too, may fail in time of crisis if there is no organization to make it effective. Every such commitment is necessarily a generalized commitment until a specific crisis arises. If each state is then free to decide how and when its commitment will be honored, enforcement may be highly selective. An effective collective security system requires a central decision-making organ that is empowered to say how and when collective force is to be used, with adequate military forces available on call to carry out that decision.

On paper the UN Charter seemed a reasonable approach to collective security, subject to the limitation of the veto. The Charter registered broad consensus that peace is indivisible and that any threat to international peace and security is the concern of all. Members were legally committed to accept and carry out Security Council decisions, and the Council could make binding decisions (not just recommendations) to impose both military and nonmilitary sanctions. Here then was consensus, commitment, and a central decision-making machinery merged in a coherent collective security system.\(^{132}\)

Although the addition of the ICC to the UN arsenal addressing international peace and security would seem to challenge the U.S. unilateral foreign policy position, it is the potential ICC usurpation of Security Council functions and its purview as the UN central decision-making organ concerning international peace and stability that worries the United States.

However, increased state intolerance of war crimes, crimes against humanity, genocide, and perpetrator impunity are likely to result in states’ seeking more integrated and higher levels of global collective security. Consequently this could produce increased

\(^{132}\) Ibid., pp. 146-149.
compliance with ICC statutory provisions and possibly even reduced need for the use of force to enforce UN Security Council resolutions or to timely and effectively address a humanitarian crisis.

Given U.S.-UN relations and the need to further the aims of collective security through enhanced international legal accord development, state support and cooperation of judicial institutions such as the ICC, ICTY and ICTR. It is worthwhile to examine other potential pitfalls awaiting U.S. foreign policy.

c. Other Possible U.S. foreign policy Implications:

U.S. foreign policy has on many occasions tied its foreign policy decisions such as most favored nation trading status to a state’s human rights record; most notably the People’s Republic of China. However, it appears that this criteria has taken a “backseat” to economic criteria associated with trade agreements. Additionally, utilizing a states’ human rights record as part of the criteria checklist may be more difficult in the future given that the U.S. has decided not to participate it what many consider to be an important step forward in the fight to protect human rights.

American foreign policy analysts concede that UN peacekeeping efforts, particularly in the Middle East, the Balkans, and Kashmir, parallel those of U.S. national interests. Although there is a perception that the UN is ineffective, many Americans believe the U.S. should continue to consult with the international body.

Perspectives differ on the impact of the ICC on U.S. interests, as it begins to operate. “Some see the ICC as a fundamental threat to the U.S. armed forces, civilian policy
makers, and U.S. defense and foreign policy. Others see it as a valuable foreign policy tool for defining and deterring crimes against humanity. 133

Some Americans have expressed concern regarding the issue of UN imposition upon U.S. sovereignty. Since the UN is but an organization and not a sovereign entity, it does not pose any real threat to the sovereignty of the United States. Additionally, the U.S. is in no way forced to go along with UN decisions it is at odds with or does not support; including those of the General Assembly, which are generally non-binding on Member States. Only decisions made by the Security Council to maintain or restore international peace and security are binding on Member States. However, the U.S. enjoys veto power as a permanent member of the Security Council, which it can use to block any proposed action that would be counter to U.S. interests.

Bruce Jentleson (2000) discussed U.S. foreign policy on a geopolitical scale as follows:

Post-Cold War geopolitics is more complex in a multipolarity model versus the bipolar model of the U.S. versus the U.S.S.R. As such, four sets of power-related issues present themselves for U.S. foreign policy today:

(a). The geopolitics of the post-Cold War era. Russia and China are no longer U.S. enemies, but to what extent are they new friends, and to what extent great-power rivals?
(b). The second involves the need for rethinking defense strategy – what adjustments are needed in the basic strategies of deterrence to meet the threats and challenges of this new era?
(c). U.S. policy toward the ethnic and other deadly conflicts that have been so pervasive in this post-Cold war era.
(d).Addressing security threats from non-state actors (e.g., terrorists, drug lords, and global crime rings). 134


See Table 1.6 below for what Jentleson refers to as the core elements of U.S. foreign policy.

Table 1.6—Core Goals of American Foreign Policy (The 4Ps Framework):

<table>
<thead>
<tr>
<th>National interest Goal</th>
<th>Corresponding International Relations Theory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power</td>
<td>Realism</td>
</tr>
<tr>
<td>Peace</td>
<td>Liberal Internationalism</td>
</tr>
<tr>
<td>Prosperity</td>
<td>International Political Economy</td>
</tr>
<tr>
<td>Principles</td>
<td>Democratic Idealism</td>
</tr>
</tbody>
</table>


Hermann and Kegley noted the following regarding U.S. presidents and foreign policy:

The tendency for some American presidents is to bring more and more of the executive bureaucracies’ foreign policy tasks into the White House as they move through their term in office. They believe that, as a consequence of this process, they will know more about what is happening in foreign policy and can exercise greater control over it.\(^{135}\)

The current Bush administration has repeatedly attempted to consolidate and control its foreign policy tasks within the White House by integrating State Dept., Defense Dept., and National Security Council/Agency initiatives into working groups operating out of the West Wing. Additionally, the administration is very aware of the constituencies they need to work with to reach policy consensus and policy support versus disagreement and constraint. Refer to Appendix G (on page 169) – Typology of Foreign Policy Interest Groups, which outlines several different types of non-state actors needing consideration when formulating and deciding upon foreign policy positions.

Lastly, with regard to my inquiry—Do you see any negative foreign policy implications because of the Bush policy on the ICC?, John Washburn noted two key points as follows:

(1). The Bush position has resulted in straining relations with Europeans and others since the repudiation of the ICC was seen as an addendum to the Bush Administration's position on the Kyoto Protocol and the ABM treaty; and

(2). The ICC could be utilized to bring frivolous and unfounded case claims against U. S. citizens in order to demonstrate displeasure with the current administration.

Additionally, the U.S. may encounter some trouble or a more difficult negotiation environment at the UN when appearing to pursue its own interests on any number of fronts. This resistance could come from traditional allies, groups of smaller Member States seeking to work together to block U.S. proposals, or larger more prominent Member States seeking to undermine the U.S. in order to disrupt its hegemonic influence to some extent. U.S. concerns regarding possible politically motivated or frivolous prosecutions are likely to affect its participation in UN-sponsored PKOs and humanitarian missions. Also, a decrease in the amount of U.S. participation in UN-sponsored International law accords is likely to negatively impact:

(a). The implementation of its foreign policy initiative;

(b). Its ability to build coalitions and alliances at the UN, particularly in the Security Council and ECOSOC; and

(c). It’s negotiating position within the realm of the Security Council and its status within the world organization, in general.
In general, a key factor regarding nonparticipation in the ICC is likely to have been the U.S. not wanting to sacrifice its ability to utilize unilateral action and force when deemed necessary and in the national security interests of the United States.

Although the U.S. is certainly a nation, which boasts a strong rule of law heritage, its hesitancy regarding the ICC is likely to have unsettling affects upon U.S. foreign policy.

Despite concessions from the European Union and other countries concerning blanket immunity for U.S. personnel and other UN concessions, the existence of the ICC will likely result in a decrease in the amount of U.S. participation in UN peacekeeping operations and possibly UN-sponsored humanitarian efforts because of the wide net thrown by the ICC’s jurisdictional mandate, ambiguous language, and prosecutorial latitude.

At the one end of a broad spectrum of options, the U.S. could simply decide to discontinue military assistance and/or troop deployments to countries that do not renegotiate Status of Forces Agreements (SOFAs) with the U.S. or consider adopting article 98(2) bilateral agreements with the U.S. However, this approach would likely be viewed as a “bullying tactic by the U.S. and could damage U.S. foreign policy efforts.

Jentleson (2000) noted the potential foreign policy impact as follows:

To the extent that the United States and other international actors can be expected to act (such as through military intervention or other measures such as economic sanctions and tough diplomacy) in ways could raise the costs and risks for ethnic leaders who would turn to mass violence, a moderating effect on these domestic actors’ calculations is possible. If there is no such expectation, the calculation is left without a major constraint against turning to war and mass violence. Thus even
‘staying out’ has an impact, especially when you are the most powerful country in the world. \\textsuperscript{136}

However, could U.S. concerns regarding the ICC effectively remove the U.S. from being an international actor fearful of politicized ICC prosecutions?

The bigger issue to consider for examination and resolution is not only whether the U.S. should sign the Rome Statute of the ICC, but whether the U.S. should sign onto and ratify an international law-based treaty containing obligations and compliance procedures that conflict both directly and/or indirectly with the doctrine of the U.S. Constitution.

United States – United Nations (U.S.-U.N.) Relations –

The International Criminal Court (ICC)

APPENDICES

These appendices are incorporated into this study in order to provide information to support the author’s claims that selected IVs can be viewed as being key components in the ICC decision-making process. The appendices can be integrated into the study as follows:

1. Appendix A – UN basis and language regarding international peace and security including the UN Security Council role in the maintenance of such.
2. Appendix B – Demonstrates the comprehensive nature of the Rome Statute of the ICC.
3. Appendices C through F – Aspects of ICTY and ICTR, which serve as precedence for the ICC concerning: (a) key definitions of crimes; (b) role and jurisdictional aspects; (c) achievements; and (d) relevance for international peace and demonstration of the world community’s resolve to address violations of human rights.
4. Appendix G – Examples of non-state foreign policy interest groups/actors.

Although this informational is supplemental in nature, it provides important information, which can be used to help address the thesis hypothesis and the study research problem.
APPENDIX A: Relevant UN Charter and Article Citings:

| Article 1 of the United Nations Charter outlines the four primary purposes or principles of the UN summarized as follows: | 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen the universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.  

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**Chapter V entitled – The Security Council.**

This chapter of the charter outlines the composition, functions and powers, and procedure of the Security Council. The Security Council’s two main functions under the Charter are to settle disputes peacefully (Chapter VI) and to meet threats to peace with the concerted action of the organization (Chapter VII). Whenever possible the Council has handled situations under Chapter VI of the Charter as simple disputes rather than considering collective action under Chapter VII, even when both

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sides to the dispute have been engaged in extensive military actions. The Korean War (1950-53) and the Persian Gulf hostilities (1990-91) were two exceptions to this general UN rule of trying to avoid military action.\textsuperscript{138}

### Chapter VI entitled—Pacific Settlement of Disputes

This chapter of the charter outlines measures disputants should seek to undertake — mediation, negotiation, arbitration, etc. — in order to resolve the dispute rather than the use of force. The Security Council’s decisions under this chapter are generally not binding upon the Member States.\textsuperscript{139}

### Chapter VII entitled—Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

This chapter of the charter outlines measures, which can be initiated in the Security Council including recommendations for the use of force, establishment of a peacekeeping operation, and Member States contributions to maintain international peace and security. Unlike Chapter VI, Security Council decisions under Chapter VII are generally binding upon the Member States.\textsuperscript{140}

\textsuperscript{138} Ibid., pg. 50.

\textsuperscript{139} Ibid., pp. 506-507.

\textsuperscript{140} Ibid., pp. 507-510.
# APPENDIX B: Components of the Rome Statute of the ICC:

<table>
<thead>
<tr>
<th>Component Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preamble</td>
</tr>
<tr>
<td>Part 1</td>
</tr>
<tr>
<td>Part 2</td>
</tr>
<tr>
<td>Part 3</td>
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<td>Part 4</td>
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<td>Part 5</td>
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<td>Part 6</td>
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<td>Part 7</td>
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<td>Part 8</td>
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<td>Part 9</td>
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<td>Part 10</td>
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<tr>
<td>Part 11</td>
</tr>
<tr>
<td>Part 12</td>
</tr>
</tbody>
</table>

APPENDIX C: International Criminal Tribunal for the Former Yugoslavia (ICTY): selected facts, role & jurisdiction, and achievements:

<table>
<thead>
<tr>
<th>Selected Facts about the ICTY:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Tribunal was created as a result of SCR 827 and is located in the Hague, The Netherlands.</td>
</tr>
<tr>
<td>As of May 2002, the tribunal was comprised of 1,248 staff members from 82 countries. The 2002-2003 budget is expected to be U.S. $223,169,800.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Role &amp; Jurisdiction of the ICTY:</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;<strong>The ICTY's mission is fourfold:</strong></td>
</tr>
<tr>
<td>• To bring to justice persons allegedly responsible for violations of international humanitarian law;</td>
</tr>
<tr>
<td>• To render justice to the victims;</td>
</tr>
<tr>
<td>• To deter further crimes;</td>
</tr>
<tr>
<td>• To contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subject Matter:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The tribunal's authority is to prosecute and try four clusters of offences:</td>
</tr>
<tr>
<td>• Grave breaches of the 1949 Geneva Conventions;</td>
</tr>
<tr>
<td>• Violations of the laws or customs of war;</td>
</tr>
<tr>
<td>• Genocide;</td>
</tr>
<tr>
<td>• Crimes against humanity.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Geographic and Temporal:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any of the crimes listed above, committed on the territory of the former Yugoslavia since 1991.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACHIEVEMENTS OF THE ICTY:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishment of voluntary contribution fund in accordance with SCR 235 (1993) -- as of May 2001, the fund received approximately U.S. $32.9 million in contributions to the tribunal's activities. Additionally non-monetary contributions of equipment, counseling and protection services have been received.</td>
</tr>
<tr>
<td>Have handed down 30 indictments covering 69 Indictees including Slobodan Milosevic, President of Serbia and who is considered to be the face of the Yugoslav genocide.</td>
</tr>
<tr>
<td>Have successfully carried out important exhumations of mass graves in Croatia, Bosnia and Herzegovina, and Kosovo in order to proceed with the gathering of forensic evidence to be utilized to bring further indictments and to prosecute the leaders who are currently indicted and incarcerated in the detention center in the Hague.</td>
</tr>
<tr>
<td>Have coordinated the overall administration of the divisional units within the tribunal including human resource management, communications management, and electronic support, security services.</td>
</tr>
<tr>
<td>Effectively incorporated judicially oriented reforms into the tribunal infrastructure vis-à-vis trial judges, prosecutorial authority, internal processes and procedures to achieve investigatory and trial efficiencies.</td>
</tr>
</tbody>
</table>

APPENDIX D: International Criminal Tribunal of Rwanda (ICTR) — Selected Facts, role & jurisdiction, and achievements:

<table>
<thead>
<tr>
<th><strong>Selected Facts about the ICTR:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Budget and staff — for 2002-2003, the General Assembly of the UN decided to appropriate to the ICTR a total budget of U.S. $177,739,400 and 872 posts. More than 80 nationalities are represented at the tribunal.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Role &amp; Jurisdiction of the ICTR:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The international Criminal Tribunal of Rwanda (ICTR) was established by the Security Council of the United Nations to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also prosecute Rwandan citizens charged with such crimes committed in the territory of neighboring states during the same period.</td>
</tr>
<tr>
<td>The purpose of this measure was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region, replacing an existing culture of impunity with one of accountability. Only with the commitment to justice of the international community can the architects of the Rwandan genocide, who have fled to countries around the world, be held legally accountable for their actions. Through the creation of the ICTR, the international community demonstrates that it will not tolerate crimes of genocide.</td>
</tr>
<tr>
<td>Genocide, crimes against humanity, violations of Article 3 common to the Geneva Convention and of Additional Protocol I shall be punishable.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>ACHIEVEMENTS OF THE ICTR:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Since Starting Work in 1995, the ICTR has:</td>
</tr>
<tr>
<td>Obtained the co-operation of the international community in the arrest of suspects, the travel of witnesses to Arusha, United Republic of Tanzania, the detention of convicted persons and in general, and in support of its aims and activities.</td>
</tr>
<tr>
<td>Secured the arrest of over 50 individuals accused of involvement in the 1994 genocide in Rwanda.</td>
</tr>
<tr>
<td>Completed trials of several of those arrested, including Jean Kambanda, the former Prime Minister, Jean-Paul Akayesu, and other political and military leaders. Kambanda, the first Head of Government to be convicted for such crimes, has been sentenced to life imprisonment. The Akayesu judgment and the Kambanda sentencing were the first-ever by an international court for the crime of genocide.</td>
</tr>
<tr>
<td>Laid down principles of law, which will serve as precedents for other International Criminal Tribunals and for courts all over the world. Decisions on some 500 motions and various points of law have been given.</td>
</tr>
</tbody>
</table>
APPENDIX D: International Criminal Tribunal of Rwanda (ICTR) – Selected Facts, role & jurisdiction, and achievements (Continued):

<table>
<thead>
<tr>
<th>Pioneered advocacy for victim-oriented, restitutive justice in international criminal tribunals – a concept now included in the Statute of the International Criminal Court. At the ICTR this includes legal guidance, psychological counseling and medical care.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Since November 1995 the tribunal has made steady progress towards fulfillment of its mandate and has made a notable contribution to the development of international criminal justice. To date, over seventy suspects have been indicted of whom more than sixty have been arrested and transferred to the tribunal’s custody. Of those so far apprehended the trials of nine have been completed resulting in eight convictions and one acquittal. Eight trials are currently in progress involving 21 defendants. As a result, the total of completed cases and trials in progress involve nearly half of the total number of persons arrested.</td>
</tr>
</tbody>
</table>

(Sources:
**APPENDIX E: International Criminal Tribunal of Rwanda (ICTR) — Relevance for Peace and Justice:**

<table>
<thead>
<tr>
<th><strong>Relevance for Peace and Justice:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lessons Learned:</strong> African countries must absorb the lessons of the Rwanda genocide in order to avoid a repetition of the “ultimate crime” on the continent. Weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships that will do anything to cling to power.</td>
</tr>
<tr>
<td><strong>Evolution of Political and Legal Accountability:</strong> The tribunal’s work sends a strong message to Africa’s leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is providing an example to be followed in other parts of the world where these kinds of crimes have been committed.</td>
</tr>
<tr>
<td><strong>Cooperation of African Countries:</strong> There appears to have been a realization in these countries that they cannot allow fugitives from international justice in their domain.</td>
</tr>
<tr>
<td><strong>Enforcement of Prison Sentences:</strong> The tribunal prefers to the extent possible, enforcement of its sentences in Africa, for socio-cultural reasons. This will also have a greater deterrent effect in the continent. By providing jails for the tribunal’s genocide convicts, African Countries would be demonstrating a serious commitment to the rule of law.</td>
</tr>
<tr>
<td><strong>Political, Moral and Material Support</strong> by African countries for the court are essential. Much depends upon the ultimate success or failure of the ICTR because it is dealing with crimes committed in Africa, with more than 500,000 victims. The tribunal’s work is providing important precedents for the future ICC and various national jurisdictions.</td>
</tr>
</tbody>
</table>

# APPENDIX F: Key Definitions:

<table>
<thead>
<tr>
<th>Crime/SCR/Article/ ICC Stat. Article</th>
<th>Definition (^{141})</th>
<th>Acts Punishable (^{142})</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Genocide:</strong></td>
<td>Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily harm or mental harm to members of the group; (c) Deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.</td>
<td>• Genocide; • Conspiracy to commit genocide; • Direct and public incitement to commit genocide; • Attempt to commit genocide; • Complicity in genocide.</td>
</tr>
<tr>
<td>o SCR 955/3;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o SCR 827/4;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o ICC art.6.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Crimes Against Humanity:</strong></td>
<td>Crimes when committed as part of a widespread systematic attack against any civilian population on national, ethnic, racial or religious grounds, with knowledge of the attack.</td>
<td>• &quot;Murder; • Extermination; • Enslavement; • Deportation; • Imprisonment; • Torture; • Rape; • Persecutions on political, racial and/or religious grounds; • Other inhumane acts.</td>
</tr>
<tr>
<td>o SCR 955/3;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o SCR 827/5;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o ICC art.7.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Violations of Article 3 Common to the Geneva Convention:</strong></td>
<td>Serious violations of Article 3 common to the Geneva Convention of August 12, 1949 for the Protection of War Victims, and of Additional Protocol thereto of 8 June 1977.</td>
<td>• &quot;Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; • Collective punishments.</td>
</tr>
<tr>
<td>o SCR 955/3;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o SCR 827/2;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o ICC art.8</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


\(^{142}\) Ibid., SCR 955, pp. 3-5, SCR 827, pp.2-4.
| Individual Criminal responsibility: | 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.  
2. The official position of any accused person, whether as Head of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.  
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know |
| o SCR 955/6; | Acts of terrorism; Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;  
Pillage;  
The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples;  
Threats to commit any of the foregoing acts;  
Grave breaches of the Geneva Conventions of 12 August 1949. | o SCR 827/7;  
| o ICC art. 25. |
that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that the accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the ICTR determines that justice so requires.

(Sources:
### APPENDIX G: A Typology of Foreign Policy Interest Groups:

<table>
<thead>
<tr>
<th>Type</th>
<th>General Examples</th>
<th>General Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Economic Groups</strong></td>
<td>o AFL-CIO&lt;br&gt;o Consumer Federation of America&lt;br&gt;o Major multinational Corporations (MNCs)</td>
<td>Lobbying is motivated principally by how foreign policy affects the economic interests of their members.</td>
</tr>
<tr>
<td><strong>2. Identity Groups</strong></td>
<td>o Jewish Americans&lt;br&gt;o Cuban Americans&lt;br&gt;o Greek Americans&lt;br&gt;o African Americans</td>
<td>Ethnic identity groups have sought top influence U.S. relations with the country or region to which they trace their ancestry or heritage.</td>
</tr>
<tr>
<td><strong>3. Political Issue Groups</strong></td>
<td>o Amnesty International&lt;br&gt;o World Wildlife Fund&lt;br&gt;o Refugees International&lt;br&gt;o [Coalition for the ICC]</td>
<td>Groups that are organized around support for opposition to a political issue that is not principally a matter of their economic interests or group identity.</td>
</tr>
<tr>
<td><strong>4. State and Local Governments</strong></td>
<td>o Local Elected Officials for Social Responsibility&lt;br&gt;o California World Trade Commission</td>
<td>Seek to influence foreign policy as it affects their interests. For example, cities with large defense industries have pressured the federal government not to cut defense spending.</td>
</tr>
<tr>
<td><strong>5. Foreign Governments</strong></td>
<td>o Washington Law Firms, lobbyists, public-relations companies (hired to promote interests of foreign governments in Washington)</td>
<td>It is of course normal diplomacy for governments to have embassies in each other’s capitals. However, many governments have lobbyists on their payrolls seeking to influence Congress and/or the Executive branch.</td>
</tr>
</tbody>
</table>

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The International Criminal Court (ICC)

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