

REALPOLITIK AND THE INTERNATIONAL CRIMINAL COURT: RESERVATIONS OF COUNTRIES

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ABSTRACT

The paper will focus on the term Realpolitik. An attempt will be made to understand the term and highlight the origins of the term from the time of Rochau to its more modern understanding and its present negative connotation. Furthermore the utilization of Realpolitik as a tool of foreign policy by various actors will be highlighted along with its influence on Anglo – American policies.

Further there will be a focus on the effect that realpolitik has had on weakening the court, specifically the relationship between the ICC and some of the most powerful countries in the world, namely Russia, China, India and USA. The reservations of each country with the Rome Statute will be discussed. These countries continue to remain outside the jurisdiction of the ICC while wielding considerable influence on it.

UNDERSTANDING THE MEANING AND ORIGIN OF REALPOLITIK

Realpolitik is a manner in which the realist and pragmatist approach to politics is practically applied. It is essentially a theory of how a state should conduct itself in the political sphere and takes into account the prevailing economic and socio-cultural realities of the time. It can be best described as an idea of the implementation of practical governance where one's interests reign supreme, often being placed on a higher pedestal than morals or ideals.

The term Realpolitik was first coined by a German writer and politician named Ludwig Van Rochau in his book *Grundsätze der Realpolitik angewendet auf die staatlichen Zustände Deutschlands* (Practical Politics: an Application of its Principles to the Situation of the German States) published in 1853. He tried to study Realpolitik as a force that shapes and governs the political world just as the law of gravity governs the physical world.¹ It is important we understand how Rochau came about developing the concept of Realpolitik. Rochau was exiled in Paris up until the 1848 revolution that spread across European empires of France, Italy, Germany and Austria among others. Following this he became a well-known figure in the National Liberal Party, however the liberal ideology soon fell victim to the forces of nationalism, class and religion. The Age of enlightenment was an intellectual and philosophical movement that dominated the world of ideas in Europe during the 18th century; "The Century of Philosophy".² The Enlightenment age included a range of ideas that centered on reason as the primary source of authority and legitimacy.³ Rochau then attempted to review how a movement that had begun much enthusiasm failed so drastically and did not yield any enduring results. The enlightenment era was dominated by liberal political thought and according to Rochau its greatest achievement was to show that might was not necessarily right.⁴ While this was true in the moralistic sense, however the fact that it is morally true does not mean that it is implemented practically, simply said just because 'might is right' was unjust does not mean that it would not hold true in the practical sense. When it is a matter of trying to bring down

¹ John Bew, *Real Realpolitik: A History* 2014

² Dorinda Outram, *The Age of Enlightenment: A History From Beginning to End*

³ Zafirovski, Milan, *The Enlightenment and Its Effects on Modern Society*, p. 144

⁴ *Supra* 2

the walls of Jericho, the Realpolitik thinks that lacking better tools, the most simple pickaxe is more effective than the sound of the most powerful trumpets.⁵ The political influence of the powerful cannot be overlooked no matter how unethical a principle it is. For Rochau Realpolitik was not a theory but "A mere measuring, and weighing, and calculating, of facts that need to be processed politically."⁶ It was more of a method of working through the various political forces and ideas rather than trying to compete with them for dominance. Realpolitik dealt with the historical product, accepting it as it is, with an eye for its strengths and weaknesses and remained otherwise unconcerned with its origins and the reasons for its particular characteristics.⁷ Thus it can be deduced that Rochau did not aim to derive might is right and power politics from his view of Realpolitik. The concept, was an early attempt at answering the conundrum of how to achieve liberal enlightened goals in a world that does not follow liberal enlightened rules.⁸ He was a critic of utopianism.

It was not that his liberal colleagues were ambitious, optimistic, and idealistic that was the problem, it was that they allowed their critical faculties to atrophy into what he called, formless ideas, impulses, emotional surges, melodic slogans, naively accepted catchwords and habitual self-delusions, and the misguided pride which characterizes the human mind.⁹

This concept of Realpolitik propounded by Rochau soon became associated with the statecraft of leaders like Otto Van Bismarck who many academicians credit with using it to devastating effect in unifying Germany.¹⁰ Realpolitik thus lies in understanding and maneuvering the immediate social context in which the state or individual must operate. It thus can most closely be associated with the political theories of Realism and the statecraft of Machiavelli and the writings of Cardinal Richelieu. It can also be said that some of the concepts of Rochau's Realpolitik were rooted in the writings of scholars and statesmen such as Sun Tzu, Thucydides and Kautilya, while he has been followed by scholars such as Hans Morgenthau.

⁵ Hans Morgenthau to Reinhold Niebuhr, 12 May 1970, *Hans J. Morgenthau Papers*, Box 44, Folder 1

⁶ Real Realpolitik: A History SPEAKER: John Bew EVENT DATE: 2014/04/10, Available at https://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=6285

⁷ *ibid*

⁸ *Supra* 2

⁹ *ibid*

¹⁰ See Generally Humphreys, Adam R. C. (2014). "Realpolitik". *The Encyclopedia of Political Thought*. John Wiley & Sons, Ltd. doi:10.1002/9781118474396.wbept0865/abstract.

UNDERSTANDING REALPOLITIK AS A FOREIGN POLICY APPROACH

Rochau essentially applied his understanding of Realpolitik to understand the domestic political scene emerging in various countries of Europe however it can be applied to international relations as well and has been done so very successfully by statesmen such as Henry Kissinger.

It can be said that the first signs of Realpolitik or some sort of derivative emerging in the international arena began with the imperialist British State that believed in colonizing states for its own gains but the nomenclature Realpolitik became common parlance in Anglo-American world in the 19th and 20th century. Realpolitik by then had gained a negative connotation, being associated with the way Germans conducted their politics. Having largely been painted as villains by the thrust of Anglo-American narrative of history, Realpolitik became associated with statescraft that was morally suspect and exhibited uncivilized conduct.

From 1891, it was used in the English press with ever-increasing frequency as the Anglo-German rivalry began to gather pace. Realpolitik was identified as the cause of a sickness in German philosophy and intellectual life. The traditions of Goethe and Kant, which had been so admired in England, had been marginalized by what seemed to be a neo-Machiavellian obsession with power and national destiny. In 1895, *The Times* bemoaned the fact that there were so few survivors of the period when the old-fashioned idealism of the German character had not been superseded by what is now called realpolitik¹¹

There is no doubt a certain hypocrisy in the manner in which the English seemed to denounce this practice since their own foreign policy had up until that time and even long after that showcased methodical and ruthless consistency in working towards achieving their nationalistic goals, often through amoralistic actions and almost always at the interest of other nations.

English columnist, J.A. Hobson suggested that the growing ambitions of all the great powers reflected in colonialism and huge military and naval rearmament programs were all symptoms

¹¹ *Supra* 7

of the same sickness – of Realpolitik.¹² "It was this greedy type of Machiavellianism entitled realpolitik in Germany where it was made which has remodeled the whole art of diplomacy and has erected national aggrandizement without pity or scruple as the conscious motive force of foreign-policy."¹³

"Let us have no more nonsense about the Prussian wealth and the British land, the Prussian Machiavelli, and the English evangelist. As for the Kaiser, the British were his great masters in realpolitik."¹⁴

However in the thrust of the English narrative of history the accuracy of details has been blurred and realpolitik was viewed as a German problem and a blight in the progress of international relations. Realpolitik practices in international relations undoubtedly have their roots in imperialist traditions, championed by the British. The British propounded that the global order had rules, order and semblance that could not be violated, yet in reality it carefully bent and stretched these to its advantage.

The American influence on and adoption of realpolitik undoubtedly has come very late due to its adoption of isolationism as a foreign policy. The British infact often ridiculed the Americans on their understanding of Realpolitik.

In 1911 the British Writer, Sydney Brooks, a regular contributor to Harper's Magazine, suggested America's understanding of international politics, was lacking because of her relative security. He wrote, "Americans live in an atmosphere of extraordinary simplicity, spaciousness, and self-absorption," "until from very boredom they are forced to make international mountains out of molehills, a diversion which is itself proof enough of their unique immunity from the serious realities of realpolitik."¹⁵

However, as soon as America gained prominence and asserted its role as an ally, specially in the post World War I era many critics of American foreign policy quickly changed their stance. A fine example of this in hindsight are the almost prophetic words of Walter Lippman with regards to modern American foreign policy. Lippman wrote "If we are to grapple with the issues which distract the world, we have got to enter the theaters of trouble. This I realize, is a terrifying program to most Americans, it terrifies me. If we wish to let the world go hang, we

¹² See generally J.A.Hobson, *Imperialism: A Study*

¹³ *ibid*

¹⁴ George Bernard Shaw, *New York Times*, 1914

¹⁵ *supra* 7

may be able to defend our shores and establish a kind of hermit security for ourselves, but that security will be precarious. Our only choice is between being the passive victim of international disorder or resolving to be the active leader in ending it."¹⁶

Thus the modern world order that actively propogates free trade and freedom of navigation, that fights for the ideals of democracy and human rights is crafted in the image of these powerful nations and is made for maximising their strategic self interest.¹⁷ Shaping their policies in moralistic terms. The Marshall Plan can also to some extent be considered a Realpolitik ploy by USA. It was a nuanced understanding of the prevailing conditions in the international community and how to craft it in the favour of USA, it used not military power and coercion but it created economic dependance and advanced its objectives of asserting soft power. The Americans realized the economic ruins that Europe lay in and asserted their economic might to recraft Europe for their own strategic interests.

This is a world in which there are no permanent friends, just permanent interests. Alliances look more ephemeral than durable, and sometimes those alliances are with some pretty nasty actors.¹⁸

There is no doubt that such a foreign policy provides more room to maneuver and more flexibility in terms of decision making. The practitioners of the art must learn "to put the attainable in the service of the ultimate and accept the element of compromise inherent in the endeavor."¹⁹

A good example of realpolitik in foreign policy activities can briefly be understood in the actions of nations towards the Syrian conflict

- In 2013, the CIA began a covert programme to arm, fund and train rebel groups opposing Assad, but the programme was later shut down, it also supports the Free Syrian Army.²⁰ However, reports claim that America's top military officer has told

¹⁶ Walter Lippmann, *Stakes of Diplomacy*, 1917

¹⁷ see generally A.J.P Taylor, *Trouble Makers: Dissent over foreign policy*

¹⁸ Daniel W. Drezner why no one likes a realpolitik foreign policy

https://www.washingtonpost.com/posteverything/wp/2015/03/26/why-no-one-likes-a-realpolitik-foreign-policy/?utm_term=.25c297c4dfd0

¹⁹ John Bew, *The Kissinger Effect On Realpolitik*

²⁰ Available at <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>

Congress that, while the Pentagon could forcefully intervene in Syria to tip the balance in the civil war, there were no moderate rebel groups ready to fill a power vacuum.²¹ So, essentially without an American friendly replacement USA has no real incentive to enter the war, except for where it feels humanitarian crimes have been committed such as the recent alleged chemical attacks by the Syrian government against its population. However none of these actions are with an aim to bring about the end of the war.

- Recalibrating France's long-held policy of insisting that Syrian leader Bashar al-Assad must step down, President Emmanuel Macron has opted for realpolitik by making the fight against terror the top priority. "The real change I've made on this question is that I haven't said the deposing of Bashar al-Assad is a prerequisite for everything, because no one has introduced me to his legitimate successor." Under Macron's predecessor, Francois Hollande, France was one of the most outspoken advocates of Assad's departure.²²
- With regards to Russia, Syria has become an important element in its anti western narrative and a successful attempt to reassert it self as the main competitor to USA in the game of global power politics. Along with its tactical reasons of maintaining access to its naval facility in Tartus, and gaining from the arms export to Syria, there is another significant realpolitik reason for Russia to back Assad. With Russia being vital to any peace talks in the area and being invited by Syria to help in the conflict, it can reassert its influence in the world by showcasing its ability to stand up to the United States of America. It certainly is winning the perception war. Another maneuver by Russia that hints at Realpolitik is that while on one hand it asserts the independence and sovereignty of the Syrian state in the Security council and has regularly vetoed any resolutions for intervention, on the other it has annexed Crimea and violated the sovereign status of Ukraine.
- Thus it can be derived that almost every major global and regional power is involved in the Syrian conflict through their proxies. Even though various international principles regarding Humanitarian Laws, the Geneva Conventions, treatment of refugees have

²¹ A gruesome test of realpolitik in Syria - By DANIEL W. DREZNER - <http://foreignpolicy.com/2013/08/22/a-gruesome-test-of-realpolitik-in-syria/>

²² Available at <http://www.al-monitor.com/pulse/afp/2017/06/syria-conflict-russia-france.html#ixzz5BubQWdku>

been violated in the conflict no state has decided to intervene for peace unless it does not have its own interests served

RESERVATIONS BY RUSSIA, INDIA, CHINA AND USA

The creation of the ICC was an attempt by the international community to create a permanent court in order to prosecute international crimes and end impunity for the perpetrators of these crimes. Since it is a treaty based court, it has jurisdiction over only those states that agree to be bound by it and only in the exceptional circumstances of a UNSC referral does this jurisdiction extend over non-member states. Therefore for the court to be successful in fulfilling its mandate it needs to have universal membership. While it has achieved that to some extent, with 123 states as members, some of the most powerful states continue to remain outside of the jurisdiction of the ICC. States such as Russia, USA, India and China are not members of the court and this greatly impacts the ability of the court to carry out its obligations considering these states are the corridors where the winds of global power politics blow. Each of these states has expressed reservations to both the manner in which the court is constituted and with the provisions of the Rome Statute and therefore have decided not to ratify the statute.

Russia

Russia was originally a signatory to the Rome Statute, it did not ratify the statute and thus it was not binding on it. Recently it has decided to withdraw its signature altogether. Russia's foreign ministry in a statement explained that 'The ICC as the first permanent body of international criminal justice inspired high hopes of the international community in the fight against impunity in the context of common efforts to maintain international peace and security, to settle ongoing conflicts and to prevent new tensions. Unfortunately the Court failed to meet the expectations to become a truly independent, authoritative international tribunal. The work

of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council.’²³

However there is more to the Russian withdrawal than meets the eye. The timing of the exit co-incident with the release of an ICC report stating that investigation had found the conflict in Ukraine to be an armed conflict between Russia and Ukraine. The ICC is also investigating the role of Russian nationals in both Georgia and Russia. Furthermore Russia has also been accused by many human rights organizations of committing war crimes in Syria.

The move is only symbolic in nature as Russia had not ratified the statute and was only a signatory, therefore the court could not exercise jurisdiction over it and the withdrawal will not change much in practice.

Extract from the Report on Preliminary Examination Activities 2016²⁴

The information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation. This international armed conflict began at the latest on 26 February when the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government.

The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Rome Statute relevant to armed conflict of an international character for the relevant period.

Under the application of Russian law throughout the territory, members of the Crimean Tatar population and other Muslims residents in Crimea have also reportedly been subjected to harassment or intimidation, including a variety of measures such as entry bans to the territory, house searches, and restrictions on their freedom of expression, assembly and association.

Russia had also expressed reservations with the definition of crime of aggression as adopted in the Kampala review conference in 2010. The definition adopted by the court is

²³ Statement by the Russian Foreign Ministry http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566

²⁴ Available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

Crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations²⁵

This further creates a problem for Russia whose actions have already been labeled as occupations by the court. Russian foreign policy actions can also be construed to be acts of aggression and therefore making it officials liable for prosecution before the court.

If Russia does ratify the Rome Statute it would contradict various provisions of its Constitution as it currently stands²⁶

- Article 61(1) of the Russian constitution prohibits an exile or extradition of Russian citizens while the Rome Statute requires the surrender of individuals to the jurisdiction of the court.
- Articles 91 and 98 of the Russian constitution provide immunity for the President and the Federal Assembly members however this grant of immunity is in direct violation of the provisions of the Rome Statute that states that the Statute applies “equally to all persons without any distinction based on official capacity.”²⁷

India

India had abstained during the vote on the adoption of the Rome Statute in 1998. India along with countries such as China and Russia has expressed concerns over various issues such as the courts jurisdiction and the powers of the prosecutor.

The principal objections of India to the Rome Statute have been the following²⁸

- The ICC has been made subordinate to the UNSC through the powers of referral and deferral and thus liable to political interference

²⁵ Article 8 *bis* Rome Statute, 1998

²⁶ Available at <http://www.constitution.ru/en/10003000-03.htm>

²⁷ Article 27 Rome Statute 1998

²⁸ Dilip Lahiri, Should India continue to stay out of ICC? Available at <http://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/>

- There has been an extraordinary power granted to the ICC to extend its jurisdiction over non member states as well. This is in direct violation of the Vienna Convention on the Law of Treaties that no state can be forced to be bound by a treaty that it has not accepted.²⁹
- To power of the prosecutor to initiate investigations are too broad and liable to misuse
- The use of nuclear weapons and terrorism were not included as crimes within the scope of the ICC
- There was no opt out or opt in provision in the statute

These objections can be understood through the statement of the Indian Delegation at the conference.

Mr. President, it is not realistic to conceive of inherent jurisdiction for the ICC in the face of the wide divergences that still continue to exist on the specific elements of certain crimes, the proposed inclusion of elements from multilateral instruments to which several states are not party, and the absence of consensus on the current status of customary international law with respect to several of these crimes. We accordingly favor the approach of the optional jurisdiction of ICC adopted by the International Law Commission in its draft Statute. We do not favor any inherent or compulsory jurisdiction for ICC which dispenses with such an essential sovereign attribute.

We can understand the need for the ICC to step in when confronted by situations such as in former Yugoslavia or Rwanda, where national judicial structures had completely broken down. But the correct response to such exceptional situations is not that all nations must constantly prove the viability of their judicial structures or find these overridden by the ICC.

Any role for the Security Council before the ICC would necessarily entail legal and political implications. Legally, the ICC is meant to have only a criminal justice function, i.e. to prosecute and punish serious international crimes. Maintenance of international peace and security is not its responsibility. There is no legal basis for the Security Council to either refer the matters of peace and security to the ICC or to veto the cases from coming before the ICC.

²⁹ Article 34 of the Vienna Convention on the Law of Treaties

The scourge of externally inspired terrorism represents a gross violation of human rights of innocent civilians - men, women and children -, and is also a direct threat to the territorial integrity and political independence of States, and a breach of international peace and security. My delegation, along with other delegations committed to combat terrorism, strongly supports the proposal made by Algeria in the PREPCOM for its inclusion in the jurisdiction of the international criminal court.³⁰

Another major concern for India is that the definition of war crimes involves non-international armed conflict within its purview. This raises serious concerns for India, specially with context to the situation in Jammu and Kashmir, Naxal insurgency and its AFSPA act along with recent episodes of Gujarat and Punjab. The State apparatus has repeatedly been accused of committing excesses in these situations. Ratifying the Rome Statute could lead to the apprehension that Indian nationals may be prosecuted for their conduct in these situations since the ICC would then exercise inherent jurisdiction. The problem of Kashmir has often been politicized by Pakistan on the international stage and it may further be misused to that effect by India's political foes.

The AFSPA act grants the power to certain officials to use force, fire upon any person who they are of the opinion is acting contrary to the law prohibiting certain acts. These officials may even cause the death of the person. It gives wide powers of arrest. Additionally no legal proceeding may be instituted against them without the sanction of the central government.³¹

India's objections to the misuse of the discretionary powers given to the prosecutor however are unfounded. As explained earlier the prosecutor cannot initiate a formal investigation on his own accord. He must obtain the prior permission of the Pre Trial Chamber. There is an inherent checks and balance system provided in the statute and it cannot be misused. Furthermore the credibility and legitimacy of the court itself would be called into question if such a blatant misuse of these powers were to occur. Such an accusation would undoubtedly be more damaging to the court than it would to India

³⁰ Statement by Mr. Dilip Lahiri, Head of the Indian Delegation, At the United Nations diplomatic conference of Plenipotentiaries on the establishment of an international criminal court, available at https://www.legal-tools.org/uploads/tx_ltpdb/doc27815.pdf

³¹ Article 4,7 AFSPA Act, 1958

Another concern; there is not opt out or opt in position would also be detrimental to the main objectives of the court. If state consent were to be required before the court could initiate action it would further strengthen impunity and immunity and for leaders and officials. States that were complicit in the commission of crimes would just opt out of the jurisdiction of the court and thus avoid prosecution. Furthermore the court only acts as a last resort, when the domestic judiciary is unable or unwilling to prosecute. In this regard membership of the court does not weaken national jurisdiction but instead acts towards reinforcing and strengthening national judiciaries to deal with these crimes effectively and punish those who are guilty.

China

China had decided to vote against the adoption of the Rome Statute and shares much of the same concerns as India does.

One of the major concerns of China regarding the statute was the adoption of what it considered was universal jurisdiction by the court. China asserted that the principle of sovereignty would be violated by the fact that even countries that were not member states could be subject to the court's jurisdiction. It violated the Vienna convention (similar to the view taken by India)

It also raised a concern regarding the inclusion of Non International armed conflict within the scope of war crimes. Primarily this concern arose because of the situation in Tibet and how it is widely viewed as an occupation by China, along with its continuing commission of atrocities in the region. China could be prosecuted by the court if it accedes to the statute. China argues that the definition has gone beyond customary international law, however it is worth pointing out that common article 3 of the Geneva Conventions, 1949 mention the inclusion of non international armed conflict and the application of humanitarian law in those conflicts as well. Since these conventions have gained the force of customary international law, it is difficult to see how the China's argument that the present definition has gone beyond customary international law holds weight.

With regards to the addition of the crime of aggression as a crime within the purview of the state, China has raised concerns. Though these too are to some extent guided by realpolitik. The Chinese position on the issue is that since acts of aggression are acts of

the state and directly relate to the violation of international peace and security, a determination should first be made by the UNSC to that regard. The court should not prosecute in these cases if the UNSC does not think that an act of aggression has occurred. Article 39 of the Charter of the United Nations provides that, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Therefore in the first instance it is the UNSC that holds jurisdiction over the issue and not the court.

“What was regrettable was that because some articles of the text of the statute agreed by Rome Conference could not satisfy some reasonable concern of the Chinese Government, the participating Chinese Delegation had to vote against the statute when it was adopted. This was also the reason why China could not sign the Rome Statute. It is subject to influence of many factors whether the International Criminal Court can operate effectively in the time ahead. In order to establish the authority of the International Criminal Court, build up the trust and confidence of all countries in the Court and the realize the real universality of the court statute, the Chinese Government is of the view that the operation of the Court should strictly follow relevant principles based on which the Court was established, firstly of all, the principle of complementarity. The most important role of the International Criminal Court is expressed in that it promotes all countries to improve their domestic judicial systems and guarantees that all countries exercise jurisdiction over perpetrators of grave crimes according to their domestic judicial systems. Secondly, the crimes under the jurisdiction of the Court should only be limited to the gravest international crimes as provided for in the Statute. Thirdly, the activities of the Court should not run counter to the provisions of the Charter of the United Nations, especially should be in keeping with the provisions of the Charter of the United Nations on the question of crimes of aggression. Fourthly, The Court should execute its duties objectively and impartially, make best efforts to avoid political bias and prevent the Court from becoming a place for political misuse of litigation.”³²

³² China and the International Criminal Court, Ministry of Foreign Affairs, the People's Republic of China, Available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml

“The exclusive power of the Security Council to determine the existence of the act of aggression is a cornerstone of the collective security system, and shall not be diminished except with an amendment to the UN Charter. The Amendment on the Crime of Aggression, which allows the Prosecutor to investigate crimes of aggression without a determination by the Security Council on the existence of the act of aggression, will practically undermine the integrity and authority of the UN Charter as the basis of international legal order.

The Court and the Security Council share responsibilities and complement each other in preventing and punishing grave crimes, which threaten international peace and security. We look forward to forging a partnership featuring win-win cooperation between the Court and the Security Council based on mutual respect, which is in the interest of both sides.”³³

It is important to note in terms of Realpolitik that while Russia, India and China have raised some common concerns, they differ with regard to the role of the UNSC and ICC. While Russia and China are both permanent members, they have never raised objections that the court may become a political tool in the hands of the UNSC due to its powers of deferral and referral. India on the other hand is not a permanent member and raises this concern.

These states however have raised pertinent questions regarding the issue of sovereignty. Sovereignty of states is an important pillar on which international law is based. There is an inherent flaw in compelling sovereign states to be bound by norms and rules, which they have specifically rejected. In this case the rule would be the provisions of the Rome Statute. It is a clear contravention of the principles of sovereignty and international law.

USA

The United States of America took an active role in the drafting of the Rome Statute and its provisions leading up to the vote on the adoption of the statute, however it finally voted against the adoption of the statute expressing reservations against various provisions.

³³ Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, Available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf

Prime amongst these fears was that the court could become a tool for politicized and arbitrary prosecutions of Americans.

President Clinton did in the final years of his presidency sign the Statute despite much domestic criticism, however he did not forward it to the American Senate for ratification. Following this President Bush repealed the signature and notified the United Nations of America's intention of not becoming a party to the Rome Statute.

There was since its inception strong criticism of such a treaty domestically in USA.

“Now, while I am relieved that the administration voted against the treaty of Rome, I am convinced that it is not in itself sufficient to safeguard our nation's interests. The United States must aggressively oppose this court each step of the way because the treaty establishing an International Criminal Court is not just bad, but I believe it is also dangerous.”³⁴ - Senator Rod Grams

“I share the concerns which ultimately led United States to determine that it could not support the draft statute that emerged from Rome. None of us would like to see a court that frivolously prosecutes Americans or which acts with politics, not justice, as its motivating force.” – Senator Dianne Feinstein³⁵

USA views the court as an inherently flawed institution, and perceives it to be counterproductive to its interests. It has actively tried to subvert the court and its authority. In 2002 it passed the American Service members Protection Act.

The act ³⁶

³⁴ Is A U.N. International Criminal Court In The U.S. National Interest? Hearing Before The Subcommittee On International Operations Of The Committee On Foreign Relations United States Senate One Hundred Fifth Congress, Second Session, July 23, 1998, Available at <https://www.gpo.gov/fdsys/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf> - The document provides the views of various senators who the ICC with much skepticism and their discussions

³⁵ *ibid*

³⁶ see generally American Service members Protection Act, Available at <https://legcounsel.house.gov/Comps/aspa02.pdf>

- Prohibits any United States court, agency, or entity to cooperate with the International Criminal Court in response of a request for cooperation submitted by the International Criminal Court.
- Prohibits any United States court, agency, or entity to extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.
- It prohibits the appropriation of funds for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court.
- It directs the President to use the voice and vote of the United States in the United Nations Security Council to ensure that any member of the US armed forces taking part in a peacekeeping operation be exempt from criminal prosecution jurisdiction of the ICC
- It authorizes the President to use all means necessary to bring about the release of certain specified persons, who are being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

Further the United States of America has utilized Article 98 of the statute to enter into Bilateral Immunity agreements with various countries. These agreements prohibit the countries from handing over US nationals to the jurisdiction of the court, should they be indicted in any matter relating to the criminal jurisdiction of the court. Countries have often been strong armed into entering these agreements in lieu of American military aid and financial funding.

Other concerns that the country has with the Rome Statute are³⁷

- Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the

³⁷ American Foreign Policy and the International Criminal Court, Marc Grossman, Under Secretary for Political Affairs Remarks to the Center for Strategic and International Studies, Available at <https://2001-2009.state.gov/p/us/rm/9949.htm>

hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.

- The treaty creates an as-yet-to-be defined crime of “aggression,” and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression. Yet the ICC, free of any oversight from the Security Council, could make this judgment. (the crime of aggression has now been ratified and will soon be operational, the concerns with regard to the power of the prosecutor remain the same)
- The Court, as constituted today, claims the authority to detain and try American citizens, even though our democratically-elected representatives have not agreed to be bound by the treaty. (this stand reeks of double-standards on behalf of USA as they had no problem referring the situation in Libya to the ICC, who also is not a member of the ICC. USA abstained from voting in the Darfur referral.)
- The United States has a unique role and responsibility to help preserve international peace and security. Politicized prosecutions of US personell will greatly hinder their operations.

Under the Obama administration, the ICC-USA relationship had improved. America provided in kind assistance to the court and even helped in turning over Bosco Ntaganda³⁸ and Dominic Ongwen³⁹ to the court so that they may stand trial before the ICC. The relation has hit somewhat of a sour note under the Presidency of Donald Trump. President Trump has time and again made clear his intention to significantly reduce funding for international organizations. Now while the United States does not fund the ICC, it does provide logistics and intelligence support, while it also runs a rewards programme wherein it would provide a financial reward for any

³⁸ ICC Prosecutor welcomes news of Ntaganda’s transfer to the Court, Available at <https://www.icc-cpi.int/Pages/item.aspx?name=rstatement-22-03-2013&ln=en>

³⁹ LRA rebel Dominic Ongwen surrenders to US forces in CAR, Available at <http://www.bbc.com/news/world-africa-30705649>

information that leads to the arrest of individuals like Joseph Kony, Okot Odhiambo amongst others.⁴⁰

These actions are more likely than not to provide a set back to US-ICC relations. The support of the ICC from the United States is imperative for the court to become a strong judicial tribunal in its attempt to enforce international criminal justice and end impunity. The US must work towards, if not ratifying, then at least actively working with the court and supporting its endeavors, specially by wielding its influence in helping the court secure arrests and ensuring cooperation by states. It remains to be seen how the relationship will further develop in the wake of reports citing that the Prosecutor of the court had “a reasonable basis to believe” that war crimes and crimes against humanity had been committed by U.S. armed forces in Afghanistan in its request for authorization of an investigation

Excerpt from Public redacted version of “Request for authorisation of an investigation pursuant to article 15”,

“Finally, the information available provides a reasonable basis to believe that members of United States of America (“US”) armed forces and members of the Central Intelligence Agency (“CIA”) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.”⁴¹

If viewed objectively, the history of the development of international criminal law has been dictated by Realpolitik. Almost all international tribunals that have been established, and which through their decisions have contributed to the jurisprudence of international criminal law, have some element of victors justice and political compromise attached to them.

The law then is in many ways part of the political process; law is made and agreements are given meaning by the total political process—when governments act and other governments

⁴⁰ Trump Admin. on UN Cuts: We're Spending Less Overseas, More at Home By B.D Lea, Available at <https://www.foxbusiness.com/politics/trump-admin-on-un-cuts-were-spending-less-overseas-more-at-home>

⁴¹ Available at https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF

react, when courts (national or international) decide cases, when political bodies debate and pass resolutions and nations act in their light.⁴²

The ICC is a treaty-based organization; it is based on the consent of the states. It can only be as strong an organization as these states will allow it to be. Its effectiveness depends on the willingness of the states to participate and cooperate. The problem is that a strong ICC may not be in the best interests of every member state. It cannot be denied that every state is seeking to safeguard and advance its interests.

Operating and finding solutions, while effectively enforcing justice in such a political environment is no easy task. It brings us back to reconsider Louis Henkin's famous dictum, "first, law is politics"⁴³

One conclusion that we can definitely draw from this is that realpolitik will always continue to shape and influence how the court operates, and also how successful of an institution it can become.

It is my view that the sustainability of the Court is contingent on the actions that all of us – the Court, states and civil society – will take to address the challenges ahead. It will depend, first, on the cooperation that the international community is willing to provide to ensure effective investigations and prosecutions wherever they are undertaken and, second, on the quality of justice that the Court is able to dispense. Both aspects - cooperation and performance - are interrelated and interdependent. Without cooperation the Court cannot investigate and prosecute effectively. At the same time, if our supporters lose confidence in the ability of the Court to deliver high quality justice, the willingness to cooperate will diminish.⁴⁴

The court is a globally recognized institution, a commitment to the ideals of human rights, equality before law and of accountability. It will be successful, no matter to what extent realpolitik and its considerations affect the court, if the international community continues to value and uphold these ideals.

⁴² War Crimes and Realpolitik: International Justice from World War I to the 21st Century, Jackson Nyamuya Maogoto

⁴³ Louis Henkin, *International Law: Politics and Values*

⁴⁴ Judge Silvia Fernández de Gurmendi - President of the International Criminal Court, Remarks to the 25th Diplomatic Briefing, Available at <https://www.icc-cpi.int/iccdocs/db/25DB-Pres-Eng.pdf>