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Global Goals versus Bilateral Barriers? The International Criminal Court in the Context of US Relations with Germany and Japan

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Abstract

This article deals with the International Criminal Court (ICC) as a point of contention in US relations with Germany and Japan. Both countries rank among America's closest allies, but – quite contrary to the US – they have also been supporting the establishment and operation of the ICC, although each to a different extent. The article analyzes the reasons for the three countries' diverging attitudes and policies towards the establishment and operation of the Court, and contrasts Germany's and Japan's handling of the ICC issue *vis-à-vis* the US. It suggests that Berlin's idealistic position and full ICC support on the one hand, as well as Japan's cautious and pragmatic approach on the other, are both rooted not only in their individual evaluations of the ICC's institutional design, but also the varying degrees of their bi/multilateral orientation and the extent of their 'dependence' on US security commitments.

1. Introduction

Japan and Germany are both members of the International Criminal Court (ICC), which is responsible for the global pursuit of the worst large-scale human rights offenders. Formally established in 2002, the Court represents the first permanent institution with a potentially global reach that aims at putting an end to the so-called 'culture of impunity'. Even though the US initiated the Nuremberg and Tokyo Trials after the Second World War, and also supported the establishment of further *ad-hoc* tribunals in the 1990s (International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda), it has long since been known as the ICC's most outspoken opponent. Under the leadership of George W. Bush, Washington went

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so far as to pressure its allies into signing bilateral non-surrender agreements to protect US nationals from the ICC's reach. In addition, it threatened withdrawal of its troops from missions mandated by the UN (United Nations) unless US troops were exempted from the ICC's jurisdiction. Obviously, this US hostility towards the Court confronts two of its closest allies, Germany and Japan, with a dilemma.

Against this backdrop, this paper concentrates on the ICC in the context of US–German and US–Japanese relations, and examines the differences in Berlin's and Tokyo's handling of Washington's position and policies towards the first global governance institution dealing with international criminal law. The article first contextualizes the ICC in a global governance framework to highlight the Court's most distinct features. It then outlines the three states' basic positions regarding the Rome Statute and the ICC, before concentrating on US ICC counter-policies under the presidencies of Bill Clinton and George W. Bush as well as Germany's and Japan's reactions to them. The last chapter explores similarities and differences in Tokyo's and Berlin's behavior *vis-à-vis* the US and points to Washington's declining influence in shaping global governance institutions.

Evidently, what makes the US important for this study is its status as the only remaining, even if declining, superpower in the international system, and its position as the most influential opponent to the ICC. Moreover, Germany and Japan were selected for the comparison for three reasons. First, both countries traditionally belong to America's most important democratic allies. While Japan and the US have maintained a bilateral security alliance since 1951, Germany has been part of NATO (North Atlantic Treaty Organization) since 1955. Second, particularly due to their economic strength, Germany and Japan are key powers in the international system, and, in fact, both countries also rate among US major democratic trading partners.[1] The economic as well as financial strength of Berlin and Tokyo are reflected in their assessed contribution to the ICC's budget too, as they pay the second largest and the largest contributions respectively. Third, and more distinctively, both countries were targets of US-influenced war crime tribunals after the end of the Second World War. This poses the question of how they position themselves in matters of international criminal justice and *vis-à-vis* US opposition to the ICC today.

This paper holds that the varying degrees of support for the ICC by the three countries are based on their differing assessments of the ICC's institutional design. Whereas the US has been opposed to the highly legalized and autonomous character of the Court, Germany has strongly been committed to establishing exactly such an institution. At the same time, Japan has adopted an 'in between' stance of lukewarm ICC support. Accordingly, the ICC issue emerged as a point of contention in US–German relations much more distinctively than in the US–Japanese context. This

[1] Ellis S. Krauss, Christopher W. Hughes, and Verena Blechinger-Talcott, 'Managing the MedUSA: Comparing the Political Economy of US–Japan, US–German, and US–UK Relations', *The Pacific Review*, 20(3) (2007): pp. 257–71.

paper argues that Tokyo avoided challenging Washington over the ICC due to its strong US orientation and vital security considerations. Germany and the US engaged in more intense confrontation over the ICC, but ultimately neither country was willing to carry matters to an extreme. While Berlin has certainly shown a much more pronounced multilateral orientation and appears less dependent on Washington in terms of security when compared to Japan, security implications were still too important to be completely ignored in the US–German dispute – for both Germany and the US.

2. The ICC as a highly legalized intergovernmental global governance institution

Prior to the establishment of the ICC, mass atrocities and grave abuses of human rights could solely be dealt with in the context of *ad-hoc* tribunals. However, these were only created after the crimes had happened. The Nuremberg Trials and the International Military Tribunal for the Far East (Tokyo War Crimes Tribunal) belong to this *ad-hoc* category, and their establishment is regarded as the greatest landmark in the evolution of international criminal law.[2] The term international criminal law refers to a rather new branch of law, which may be characterized as substantive as well as procedural law. First, it refers to a set of international rules, which define certain acts as international crimes and prohibit them, and which furthermore require states to prosecute and punish at least some of those crimes. Second, it points to a collection of rules governing international proceedings in which the perpetrators of such crimes are prosecuted and brought to trial. It thus also 'governs the action by prosecuting authorities and the various stages of international trials'.[3] The aforementioned *ad-hoc* Nuremberg and Tokyo Trials were rather limited in their authority in three respects: their field of reference, geographic range, and temporal scope. As a result, they ceased to exist after more or less successfully completing their mission to bring the main Nazi-German and ultranationalist Japanese war criminals to justice. The *ad-hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, both set up in the 1990s, will eventually meet the same fate, that is dissolution, once their work is done.

In contrast, the recently established International Criminal Court is to be a lasting court and has a potentially global reach. The preamble of the Rome Statute, its treaty basis, states: the ICC shall be 'an independent permanent ... Court' because 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[4] More specifically, the crimes addressed in the Statute are genocide, crimes against humanity, war crimes, and the crime of aggression.[5] Hence, the Court's

[2] However, the idea and history of war crime tribunals is much older. See Gary J. Bass, *Stay in the Hands of Vengeance: The Politics of War Crime Tribunals* (Princeton, NJ: Princeton University Press, 2000).

[3] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 15.

[4] Rome Statute of the International Criminal Court, Preamble, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 5 November 2008).

[5] Two of these categories of crimes have already been dealt with in past international agreements. This holds true for genocide (Convention on the Prevention and Punishment of the Crime of Genocide,

work is meant to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to [their] prevention'.[6]

In the following, the analysis concentrates on three key characteristics to explain the ICC's significance in more detail: its global governance features, intergovernmental character, and highly legalized structure. In doing so, the basic functioning of the Court is also briefly explicated.

Only a few years before the Rome Statute was adopted in 1998, the so-called 'Commission of Global Governance' emphasized that the rule-of-law exerted a civilizing influence on societies, and thus the non-existence of a permanent international criminal court was assessed as a clear rule-of-law deficit in international relations. Consequently, the establishment of such a court was among the Commission's recommendations for the advancement of global governance.[7] While the term global governance is rather enigmatic and a consensus about its precise meaning does not exist, political scientist Franz Nuscheler highlights four aspects to explain the term.

1. Global governance is distinct from a global or world government, which does not seem desirable nor does its realization seem realistic.
2. Global governance is based on a system of 'international coordination, cooperation and collective decision-making with international organizations taking on these coordinating functions and contributing to the development of global modes of perception'.
3. The need for international cooperation results in certain limitations on state sovereignty.
4. Globalization has been 'accompanied by processes of regionalization'. Hence, global governance structures should be built upon regional units.[8]

In accentuating the second aspect, the ICC can be characterized as a cooperative arrangement – or global governance institution – that deals with the prosecution and punishment of international crimes. It is predicated on international rules as well as on shared norms. Moreover, it is based on a formal structure and operates on fixed processes. As the ICC's prosecutor, Luis Moreno-Ocampo, points out:

> the Rome Statute created a novel system of interaction between states, international organizations, and a permanent international criminal court,

1948), and for war crimes (Geneva Conventions, 1949; First and Second Additional Protocol to the Geneva Conventions, 1977). Besides, while genocide, crimes against humanity, and war crimes were specified in the Rome Statute, the crime of aggression has only recently been defined as a result of the first review conference on the Rome Statute in June 2010. See Claus Kreß and Leonie von Holzendorff, 'The Kampala Compromise on the Crime of Aggression', *Journal of International Criminal Justice*, 8(5) (2010): pp. 1179–217.

[6] Rome Statute, Preamble.

[7] Commission on Global Governance, *Our Global Neighborhood: The Report of the Commission on Global Governance* (Oxford: Oxford University Press, 1995).

[8] Franz Nuscheler, 'Global Governance, Development and Peace', in Paul Kennedy, Dirk Messner, and Franz Nuscheler (eds.), *Global Trends and Global Governance* (London: Pluto Press, 2002), pp. 156–83 (pp. 160–1).

> supported by an emerging global society. States . . . agreed to participate in this novel system of international cooperation . . . The Rome Statute is more than a Court; it created a global criminal justice system.[9]

However, in his writings on the ICC pertaining to the last of the four aspects mentioned by Nuscheler, political scientist Eric Leonard reminds us that globalization and global governance do not exclusively refer to intensifying processes of transnationalization or to increasing levels of interdependence and integration on either the regional or global level, as they have just been described. In his view, the very existence of the ICC reveals that globalization also encompasses tendencies of fragmentation and localization. In fact, deadly conflict and mass atrocities do not necessarily erupt between states, but nowadays more often take place between different groups (religious, ethnic etc.) within one or more states. Against this backdrop, the ICC can eventually be assessed as a global governance institution 'that deals with the fragmentation of nation-states and the localization of international politics'.[10]

What is the role of nation-states in a global governance context, then? As already indicated, nation-states are only one actor within the global governance structure. The term global governance refers to the sum of 'governance by, governance with, and governance without government' or, in other words, governance by the state (national), between states (international), and without the state (transnational).[11] While international organizations and non-governmental organizations (NGOs) certainly play increasingly important roles in the global arena, some scholars still point out the fact that the power and influence of key states are essential in order to make global governance – and therefore its institutions – work.[12] Certainly, the US, Germany, and Japan do rank among those influential actors, and they are embedded in today's global governance architecture as a result of their input and participation during the establishment of international rules and institutions, and due to each nation's willingness to abide by internationally agreed upon (and often also legally codified) rules; but also the occasional rejection thereof, especially by the US.[13]

The ICC has been part of today's global governance system since 2002, when the Rome treaty of 1998 entered into force subsequent to its 60th ratification. While

[9] Luis Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice', *Case Western Reserve Journal of International Law*, 40(1/2) (2008): pp. 215–25 (p. 216).

[10] Eric K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Aldershot: Ashgate, 2005), p. 4.

[11] Bernhard Zangl and Michael Zürn, 'Make Law, Not War: Internationale und transnationale Verrechtlichung als Bausteine für Global Governance', in Bernhard Zangl and Michael Zürn (eds.), *Verrechtlichung – Bausteine für Global Governance?* (Bonn: Dietz, 2004), pp. 12–45.

[12] Hanns W. Maull, Saori N. Katada, and Takashi Inoguchi, 'German and Japanese Foreign Policies and Global Governance', in Saori N. Katada, Hanns W. Maull, and Takashi Inoguchi (eds.), *Global Governance. Germany and Japan in the International System* (Aldershot: Ashgate, 2004), pp. 1–7 (p. 1).

[13] While US delegations usually take an active part in multilateral negotiations pertaining to the establishment of international institutions, Washington in several cases decided not to ratify the documents hammered out. This, for example, holds true for the Kyoto Protocol and the Comprehensive Test Ban Treaty.

the Court would probably not have taken its present shape had there not been the influence of approximately 250 NGOs during the time-consuming bargaining process, the ICC can be classified as a rather traditional international, that is intergovernmental, organization in institutional terms. It is based on a multilateral treaty and is permanently located in its own premises in The Hague, with personnel elected by and recruited from its member states, and it is able to act independently in accordance with the Rome Statute. In developing the concept of legalization, neoliberal institutional theorists depict the ICC as a highly legalized institution. According to Abbott *et al.*, legalization constitutes a particular form of institutionalization and aims at imposing international legal constraints on governments to regulate their behavior (in our example, in the cases of conflict and war). It is characterized by obligation, precision, and delegation. Obligation means that states (and other actors) are actually bound by a set of rules or a commitment. Precision refers to the fact that rules clearly define the conduct they require or prohibit, and delegation indicates that third parties have been granted authority to implement and apply the rules.[14]

While the degree of obligation, precision, and delegation can vary independently from each other, depending on the institution, in regards to the ICC all three levels rank highly and the Court thus constitutes a case of hard law legalization. First, its rules are obligatory in character, and unlike the option offered by many other international treaties on human rights and humanitarian law, the Rome Statute does not allow for any reservations, insisting that state parties must accept all articles of the treaty and comply with them.[15] Second, the Rome Statute is an international treaty creating novel international criminal law and its 128 articles are fairly precise. Third, the ICC holds authority over the interpretation and application of the rules enshrined in the Rome Statute. Hence, if the ICC's prosecutor and the judges of its Pre-trial Chamber come to the conclusion that a member state is not able or willing to pursue, prosecute, and punish those individuals under suspicion of having committed one or more of the so-called core crimes (as defined by the Rome Statute), the Court has the right to take action accordingly and launch its own criminal investigations.

In sum, the ICC is a highly legalized form of international cooperation and global governance, which sets out to make the most serious macro-criminality of international concern punishable on an individual level. While treaties on humanitarian law, such as the Geneva Conventions, and agreements on human rights, such as the Genocide Convention or the UN Convention against Torture, expatiate on the conduct they require or prohibit, the Rome Statute has above all been established to enforce compliance with the norms and rules enshrined in those 'primary documents'

[14] Kenneth W. Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization', *International Organization*, 54(3) (2000): pp. 401–19.

[15] Rome Statute, Article 120.

already existing. Pertaining to the ICC, international relations scholar Nicole Deitelhoff therefore construes the emergence of a new 'secondary norm', that is the duty of international prosecution of grave breaches of human rights and serious violations of humanitarian law.[16] Thus, according to the view held by neoliberal institutionalism, which is for example reflected by those scholars writing about legalization, the ICC's establishment constitutes the international community's reaction to a collective action problem (occurrence of atrocities). This view could also be complemented by a constructivist's emphasis on shared values (already enshrined in the above-mentioned human rights treaties) and normative understandings (ending the so-called 'culture of impunity'). Correspondingly, Sewall *et al.* note that the ICC 'will breathe new life into the norms that states have long proclaimed'.[17]

How are the responsibilities distributed between the Court and its member states in order to put an end to impunity then? Following the principle of complementarity – the ICC is complementary to national criminal jurisdiction – the Court may only act if its member states do not take charge of criminal proceedings themselves or, according to the judgment of the Court, do not do so sufficiently. In such cases, the ICC has been entrusted the right to step in and bring perpetrators to justice with no further consent by the respective member state needed, and without additional mandates from the UN Security Council (SC).[18] If either the territorial state (where crimes were committed) or the suspect state (nationality of the accused) is a party to the Rome Statute, the ICC commands automatic complementary jurisdiction.[19] Since criminal jurisdiction is commonly reckoned as one of the main attributes of state sovereignty, the ICC's sphere of action may well be assessed as limiting its member states' exercise of sovereignty and autonomy in the field of criminal prosecution. More generally speaking, the ICC brings 'the core constitutive principles of the global system',[20] that is state sovereignty, into question as member states cannot control the Court's action, but can only prevent its direct intervention by domestically abiding to the rules of the Rome Statute. Consequently, some scholars characterize the Court as a supranational authority and others even speculate that the Rome Statute may be a forerunner of a 'world domestic law'.[21]

[16] Nicole Deitelhoff, 'The Discursive Construction of Legal Norms and Institutions: The Interaction of Law and Politics in the Development of the International Criminal Court', *CLPE (Comparative Research in Law and Political Economy) Research Paper* 32/2007, 3(6) (2007): p. 7.

[17] Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, 'The United States and the International Criminal Court: An Overview', in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court. National Security and International Law* (Lanham: Rowman & Littlefield, 2000), pp. 1–27 (p. 2).

[18] Rome Statute, Article 17.

[19] Rome Statute, Article 12, Paragraph 2 and Article 13 (a) and (c).

[20] Leonard, *The Onset of Global Governance*, p. 4.

[21] Philipp Stempel, *Der Internationale Strafgerichtshof – Vorbote eines Weltinnenrechts? Eine Studie zur Reichweite einer rule of law in der internationalen Politik*, INEF-Report No. 78 (Duisburg: INEF, 2005).

3. Actors in the creation process

An international discussion regarding the establishment of a permanent criminal court was already in motion after the completion of the Nuremberg and Tokyo Tribunals. Yet, the creation of the ICC took almost another half a century and ultimately was the result of an intensive bargaining process, which unfolded in the 1990s. After the UN International Law Commission presented a preliminary draft statute for a permanent criminal court in 1994, the UN General Assembly established an *ad-hoc* committee in 1995, and finally summoned several meetings of the so-called Preparatory Committee (PrepCom). PrepCom met with UN member states in 1996 and 1997, and numerous NGOs and international organizations also took part. These efforts finally culminated in a 'Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', which convened in the Italian capital of Rome from 15 June to 17 July.[22] The 'Rome Statute for the International Criminal Court' was adopted after having 120 positive votes, 21 abstentions, and seven votes against it on the final conference day. While Japan and Germany reportedly voted in favor of the Statute, the United States, which is otherwise known as a dedicated advocate of human rights and as a strong supporter of all war crime tribunals established after the Second World War, rejected the Court straightforwardly.[23] In order to explain their diverging views on the ICC, this section analyzes Washington's, Berlin's, and Tokyo's positions regarding three key aspects: the relationship between the ICC and the SC, their views pertaining to the ICC and state sovereignty, and the intensity of their global military engagement.

The US

The US, the only country with the diplomatic position of an 'Ambassador at Large for War Crime Issues', supports the universal values that underpin the ICC. Therefore, it was an active participant during PrepCom consultations prior to the Rome meeting as well as during the Rome conference. Nonetheless, it disagrees with some major aspects of the Rome Statute and therefore opposes the treaty and the Court it helped to establish. While Washington has raised several objections, its main criticism is two-fold. First, it focuses on the existence of a highly independent prosecutor, and, second, it targets the territorial provision pursuant to which even nationals of non-party states may fall under the ICC's jurisdiction. In fact, according to the official US position, these two major 'flaws' ultimately pose severe threats to US sovereignty and are thus to be opposed.[24]

Under the Rome treaty, three entities are permitted to initiate ICC criminal investigations. These are (a) the ICC prosecutor in agreement with the judges of

[22] For a more detailed account of the ICC's coming into being, see e.g. first chapter in William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn. (Cambridge: Cambridge University Press, 2010).

[23] The other six objections were allocated to China, Iraq, Israel, Libya, Qatar, and Yemen.

[24] David J. Scheffer, 'The United States and the International Criminal Court', *The American Journal of International Law*, 39(12) (1999): pp. 12–22.

the Pre-trial Chamber, (b) all state parties to the Rome Statute, which can direct the prosecutor's attention to a certain situation, and (c) the SC when acting under the UN Charter's Chapter VII pertaining to threats to and breaches of peace.[25] However, during the negotiation process, the US was strongly in favor of establishing one sole trigger mechanism that only allowed for referring cases to the ICC by means of a SC resolution. While the SC is in fact the only body that has the right to order the suspension of ICC prosecutions if it deems them a threat to international peace and security,[26] the SC is still far from having the exclusive authority to file cases with the Court, as the US had demanded during the negotiation process.[27] Consequently, Washington is not in the position to control the Court. Due to its status as permanent SC member with veto rights, this would have been possible had the SC been the only body able to trigger ICC prosecutions. The independent ICC prosecutor, whose intentions to launch investigations are only checked by the judges of the Pre-trial Chamber and who cannot be held accountable by any other international body, is thus at the center of US criticism.[28] What Washington fears, more specifically, are politically motivated prosecutions against its own nationals by hostile states and an unchecked ICC.[29]

While President Clinton signed the Rome Statute on one of his last days in office in order to keep the US involved in further negotiation processes (for example pertaining to the 'elements of crimes'), the Bush administration decided to 'unsign' the treaty, refusing to ratify it. However, this move has not alleviated American concerns. The Statute includes a territorial provision, according to which the Court may exercise jurisdiction if the state on the territory of which a presumed crime occurred is an ICC member.[30] In other words, even if the accused is a national of a non-member state, but the crime happened on the territory of a member state, the ICC may still initiate criminal proceedings. Thus, not only does Washington lack the right to veto ICC prosecutions, its approval of ICC criminal proceedings is neither relevant nor necessary with regards to crimes that US nationals might have committed on the terrain of ICC state parties. For the US, which dispatches troops to many foreign countries and often in a multilateral, that is UN or NATO, context, this provision was unacceptable. During the Rome negotiations, Washington had hoped to find its way out of this deadlock by asking that US citizens remain exempt from prosecution,[31] stressing America's special responsibility for international peace and security.[32] While many states certainly view the US as a global security provider, ultimately Washington could not succeed in convincing other delegations that only US soldiers should be

[25] Rome Statute, Article 13.
[26] Rome Statute, Article 16.
[27] Scheffer, 'United States and the International Criminal Court', p. 22.
[28] Ibid. p. 14.
[29] Sewall *et al.*, 'The United States and the International Criminal Court', p. 3.
[30] Rome Statute, Article 12, Paragraph 2a.
[31] Sewall *et al.*, 'The United States and the International Criminal Court', p. 3.
[32] Scheffer, 'United States and the International Criminal Court', p. 18.

Table 1. *Overview on the ratification record of major treaties on humanitarian law and human rights and on troops abroad in UN-mandated missions for the US, Germany, and Japan (in 1998 and 2008)**

	US 1998	US 2008	GER 1998	GER 2008	JAP 1998	JAP 2008
Geneva Convention (GC)	+	+	+	+	+ (not implemented)	+ (implemented)
GC Additional Protocol	–	–	+	+	+	+
Genocide Convention	+	+	+	+	–	–
Torture Convention	+	+	+	+	–	+
UN mandated deployments	approx. 12.370	approx. 22.000	approx. 7000	approx. 6000	45	35

Note: Genocide/Torture Conventions Data: Office of the High Commissioner for Human Rights, http://www2.ohchr. org/english/bodies/ratification/index.htm (accessed 31 October 2008). Geneva Conventions/Additional Protocol Data: ICRC, International Humanitarian Law – Treaties and Documents, http://www.icrc.org/ihl.nsf/ Pays?ReadForm (accessed 31 October 2008). Troop Data: International Institute for Strategic Studies, *The Military Balance 1999* (London: Routledge, 1999). International Institute for Strategic Studies, *The Military Balance 2009* (London: Routledge, 2009).

granted such a preferential treatment. As a matter of fact, such a provision would have heavily undermined the principle of equality under the law, which many states sought to establish.[33] However, the argument that America has a unique role pertaining to the restoration and maintenance of world peace cannot be dismissed easily. In fact, if one considers the total number of US troops taking part in all UN-mandated missions, their involvement is rather high compared to many other nations (see Table 1).

In a nutshell, the US regards the ICC, in its current institutional design, as a risk to its autonomy and democracy. As Marc Weller points out, the US sees the ICC as undemocratic and open to abuse, because it is not subject to a system of checks and balances. It views the Court as a threat to its sovereign decision-making, and it judges the Court in its present form as exposing US nationals to criminal sanctions in relation to crimes which are not committed in the US.[34] In addition, while Washington might have ratified a Rome Statute that only provided for the SC trigger mechanism, its opposition seems to be based on its lack of control over the questions of when and where justice

[33] Christopher Rudolph, 'The Design of International Legal Institutions: Explaining the ICC and the Atrocities Regime', paper presented at the annual meeting of the American Political Science Association, Boston, USA, 28 August 2008, p. 25, www.allacademic.com/meta/p279005_index.html (accessed 4 September 2009)

[34] Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs*, 78(4) (2002): pp. 693–712 (p. 697).

is done.[35] Ultimately, US criticism therefore concentrates on the institutional set-up of the Court, which, from the American point of view, also calls into question its role as super power and most influential force for peace.[36] Even if much of US resentment towards the Court could be explained by pointing to the arguments of liberal theorists, as done by Weller, most authors refer to (neo-)realist assumptions when trying to explain Washington's position. Diane Orentlicher for example writes:

> US policy toward the ICC reflects a peculiar brand of unilateral multilateralism – selective support for multilateral institutions that advance American interests while imposing significant constraints on the action of other states. This form of unilateral multilateralism radiates outward from the United States, disciplining the behavior of other states without significantly constraining US action.[37]

Law expert James Crawford takes a similar line when more generally contemplating the differences between *ad-hoc* tribunals (e.g. Nuremberg and Tokyo Tribunals) and a permanent and universal criminal court:

> *ad hoc* creations were *a priori* controlled, more or less. They amounted to international criminal justice for others, from their inception. But the ICC was – potentially at least – international criminal justice for ourselves, not just for others.'[38]

For (neo-)realists, norms and institutions reflect underlying power relations in the international system. As 'the establishment of the ICC places restrictions on the ability of states to decide for themselves whether or not a particular act qualifies as war crime',[39] the US, as only remaining hegemonic power in the international arena, might have little to no reason to join the ICC based on this argument.

Germany

Contrary to the US, Germany has been fairly enthusiastic about the establishment of the Court, and strongly favored an 'effective, functional, independent and thus credible' ICC.[40] It was among the most vigorous advocates calling for a workable

[35] Jason Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society* (Oxford and New York: Oxford University Press, 2007), p. 119.

[36] Rudolph, 'Design of International Legal Institutions', pp. 25–6.

[37] Diane F. Orentlicher, 'Unilateral Multilateralism: United States Policy Toward the International Criminal Court', *Cornell International Law Journal*, 36(3) (2004): pp. 415–33 (p. 416).

[38] James Crawford, 'The Drafting of the Rome Statute', in Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), pp. 109–56 (p. 134).

[39] Michael Struett, 'The Meaning of the International Criminal Court', *Peace Review: Special Issue on Law and War*, 16(3) (2004): pp. 317–21.

[40] German Federal Foreign Office, 'The International Criminal Court (ICC)', http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/IStGh/hintergrund__ICC.html (accessed 2 December 2008).

international criminal law system.[41] While being generally supportive, not all members of the European Union (EU) exhibited the same degree of advocacy and enthusiasm. Thus, as EU members did not share a common position prior to the Rome conference (although it emerged at a later stage), Berlin essentially negotiated on its own behalf.[42] In addition, it took on a leading role within the group of like-minded states, which championed a strong and autonomous court during the negotiation process.[43] Long before the gathering in Rome, members of Germany's foreign office teamed up with lawyers from the ministries of justice and defense, to cooperate in promoting the ICC project.[44] Many of the German proposals were eventually taken up during the negotiations and are now reflected in the Rome Treaty. Interestingly enough, this specifically holds true for two aspects, which the US has been strictly opposed to: (a) the relatively powerful position of the ICC prosecutor, who is able to initiate investigations independently, and (b) the recognition of the ICC's automatic complementary jurisdiction with regards to the four core crimes.

Two reasons appear to have been the driving force behind Germany's position against restricting case referrals to the ICC via the SC and for the appointment of an ICC prosecutor with *motu proprio* authority. First, an ICC, which would have tightly incorporated the SC into its legal structure, thus giving it specific powers, would have received the same critique the SC itself has been facing ever since its creation.[45] Second, unlike Washington, Berlin does not fear the prosecutor's autonomy, as he[46] is to be elected from a group of distinguished, highly ethical law experts by all ICC member states.[47] Furthermore, his plans to initiate investigations also have to be approved by the judges of the Pre-trial Chamber. Hence, from the German point of view, checks do exist and the abuse of power, that is the launching of politically motivated investigations, seems highly unlikely. Moreover, the ICC is not considered a risk to sovereignty because

[41] David Turns, 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States', in Dominic McGoldrick, Peter Rowe, and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford and Portland: Hart Publishing, 2004), pp. 337–87 (p. 378).

[42] Martijn Groenleer and David Rijks, 'The European Union and the International Criminal Court: The Politics of International Criminal Justice', in Knud Erik Jørgensen (ed.), *The European Union and International Organizations* (London and New York: Routledge, 2009), pp. 167–87.

[43] Spyros Economides, 'The International Criminal Court: Reforming the Politics of International Justice', *Government and Opposition: An International Journal of Comparative Politics*, 38(1) (2003): pp. 29–51 (p. 45).

[44] Hans-Peter Kaul, 'Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues', in Roy S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Ardsley, NY: Transnational Publishers, 2005), pp. 65–81 (p. 69).

[45] Dominic McGoldrick, 'The Legal and Political Significance of a Permanent International Criminal Court', in McGoldrick, Rowe, and Donnelly (eds.), *The Permanent International Criminal Court*, pp. 453–78 (p. 461). (McGoldrick does not refer to Germany in his argument, though).

[46] Luis Moreno-Ocampo has occupied this position since 2002, hence the personal pronoun 'he'.

[47] Hans-Peter Kaul, 'Durchbruch in Rom: Der Vertrag über den Internationalen Strafgerichtshof', *Vereinte Nationen*, 4 (1998): pp. 125–30 (p. 126).

there is free choice to join (or not join) the Court, as well as the principle that each state bears the primary responsibility for the criminal prosecution of the four core crimes. This is firmly established within the complementarity context. Pertaining to this last aspect, as Hans-Peter Kaul, who headed the German ICC-negotiation team for six years and is now a judge at the ICC in The Hague, points out:

> It is almost impossible to overstate the importance of the complementarity principle from the German perspective. German support for the ICC had as indispensable requisite the complementarity principle. To illustrate this point further, had there been proposed a parallel jurisdiction or primacy of ICC jurisdiction over German national criminal jurisdiction, the German side, in all likelihood, would have opposed it.[48]

Consequently, the German government does not deem the Court to be a threat to its sovereignty, because it is the nation-state and not the ICC that commands primary responsibility for the prosecution of genocide, war crimes, the crime against humanity as well as the crime of aggression. Also, in Kaul's opinion as a legal expert, the ICC does not even constitute a supranational institution, because the complementarity principle guarantees that national criminal proceedings take priority over those of the Court.[49] Nevertheless, Berlin proposed and strongly supported automatic ICC jurisdiction over the core crimes, as it believes that perpetrators of gross human rights offenses should never go unpunished. If an ICC member state does not prosecute such crimes, the ICC should be obliged to act automatically and not solely by the backing of a SC mandate. Washington, however, was only willing to accept such automatic jurisdiction over the crime of genocide, and required an SC referral with regards to the other crime categories.[50]

While Germany certainly belongs to the group of states that hopes that the rule of law will gradually replace the rule of force in international affairs, it still sends increasingly high numbers of troops abroad to UN-mandated missions. In fact, about 7,000 German soldiers took part in UN- or NATO-led operations in 2008, mostly assuming non-combat duties. Nonetheless, based on its reflections about the Nazi's brutal reign of terror, Germany has been seriously committed to the idea of preventing further large-scale human atrocities. This, among other things, is illustrated by Germany's ratification record of major treaties on humanitarian law and human rights (see Table 1), and by its dedication to establishing a 'domestic mechanism and . . . an effective international penal machinery' for the repression of international crimes.[51]

In sum, Germany is devoted to actively promoting the duty of international prosecution of massive human rights violations, and seeks to implement this by means of a highly independent hard law global governance institution. Germany's positive experiences with the strongly legalized EU-integration processes might have added to

[48] Kaul, 'Germany: Methods and Techniques', p. 70.
[49] Kaul, 'Germany: Methods and Techniques', p. 71.
[50] Scheffer, 'United States and the International Criminal Court', p. 18.
[51] Turns, 'Aspects of National Implementation of the Rome Statute', p. 378.

its preference for a highly legalized ICC. Hence, Berlin signed the Rome Statute on 12 December 1998, ratified the treaty on 11 December 2000 (24th ratification), and implemented four pieces of related national legislation on 26 June 2002, which also included a new 'Code of Crimes against International Law'.[52] This was only a few days prior to the Rome Statute going into effect on 1 July 2002.

Japan

While the US has been fervently rejecting the ICC in its present shape, and Germany has been seriously endorsing it, the Japanese position can best be described as an 'in between' stance. In 1996, when the PrepCom process started, NGOs pointed out the lack of Japanese enthusiasm for a permanent international criminal court and commented that the Japanese government was not yet convinced of its need.[53] Some observers furthermore suggested that Japan belonged to a group of states which aimed to stir up disagreement at the PrepCom meetings, and which lobbied for a court with only few powers.[54] As Japanese delegates were often sent to the meetings with detailed instructions to observe, they also lacked the degree of negotiation flexibility enjoyed by many of those delegations strongly committed to the idea of establishing an international criminal court.[55] Tokyo sent a fairly large negotiation team to Rome, and, as in Germany's example, Japan had set up a study group prior to the conference. Discussions, however, seem to have centered on the legislative[56] as well as financial[57] consequences of becoming a member state of a future international criminal court. Chief negotiator was Japan's ambassador to the UN, Hisashi Owada, who is an experienced diplomat and well-known legal scholar.[58] In Rome, he also served as a member of the 'Bureau of the Committee of the Whole', which was responsible for managing the overall negotiation process.[59]

It seems that the Japanese government had reviewed its somewhat dismissive attitude towards the establishment of a permanent international criminal court between the final PrepCom session and the beginning of the Rome conference. In fact,

[52] For the text of the 'Code of Crimes against International Law', see http://www.dw-world.de/popups/popup_pdf/0,,1109851,00.pdf (accessed 25 March 2010).

[53] William Pace, 'Serious Progress Achieved at April ICC "PrepCom"', *The International Criminal Court Monitor*, 1 (1996): p. 1.

[54] Fanny Benedetti and John L. Washburn, 'Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', *Global Governance*, 5(1) (1999): pp. 1–37 (online issue).

[55] Ibid.

[56] Jens Meierhenrich and Keiko Ko, 'How do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan', *Journal of International Criminal Justice*, 7(2) (2009): pp. 1–24 (p. 4).

[57] Interview with Japanese delegation member, Yokosuka, 29 August 2008.

[58] Owada now fills a position as judge on the International Court of Justice, which is also located in The Hague.

[59] Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiation Process', *The American Journal of International Law*, 39(12) (1999): pp. 2–12 (p. 3).

Owada emphasized Tokyo's full support in favor of establishing such a court right at the beginning of the conference. However, Japan's ideas relating to this institution essentially differed not only from those expressed by the US but also from the German position. Tokyo, for example, argued neither for one (like the US) nor for three mechanisms (like Germany) to set off ICC investigations. Instead, it suggested two trigger mechanisms by assigning the right for case referrals to either state parties, or alternatively to the SC, but not to the ICC's prosecutor. Furthermore, it favored the inclusion of the crime of aggression within the scope of the ICC's jurisdiction, but envisioned allocating the authority to diagnose such a crime exclusively to the SC.[60] In Japan's view, automatic ICC jurisdiction should only have been granted for three of the four crimes, that is genocide, crimes against humanity, and war crimes. Nevertheless, reaching an agreement on universal jurisdiction – even for those three crimes – turned out to be rather complicated. The Japanese team thus reconsidered its position and initiated a negotiation effort to find a compromise. While international observers rated this initiative as 'low-key'[61] (if they mentioned it at all), Japanese commentators repeatedly highlighted their country's role as 'honest broker' in Rome.[62] In the end, Tokyo's foray led to a seven-year 'opting out mechanism', which is now enshrined in Article 124 of the Rome Treaty. It states that an ICC state party may reject the jurisdiction of the Court with respect to the category of war crimes for a period of seven years after joining the ICC. This provision was meant to accommodate those skeptics who questioned the political independence and integrity of the Court.[63] For the US, this was not enough of a concession, though. Needless to say, Japan appears to have struggled to bridge the gap between the groups of like-minded states on the one hand and of doubtful states on the other. This can be illustrated further by the fact that the Japanese delegation had considered joining the group of like-minded states, which favored a strong and autonomous court, but eventually decided against such a move in order to maintain a stance of independence during the Rome conference. In fact, Japan also cooperated with skeptical states like the US, even though each country's skepticism was based on different reasons.[64] It thereby might have rightfully declared itself as mediator, which it has long since claimed to be in terms of international diplomacy.

In terms of sovereignty, Japan assumed a position similar to that of the German one in Rome, as its delegation stressed the importance it attached to the complementarity principle.[65] Still, Owada points out that the ICC's political inclinations regarding

[60] Hisashi Owada, 'Statement made by H.E. Hisashi Owada, Head of the Delegation of Japan', 15 June 1998, http://www.un.org/icc/speeches/615jpn.htm (accessed 8 September 2009).

[61] Kirsch and Holmes, 'The Rome Conference', p. 9.

[62] See e.g. Hisashi Owada and Kuniji Shibahara, 'Rôma kaigi wo furikaete [Looking back at the Rome Conference]', *Jurisuto*, No. 1146 (1999), pp. 4–28.

[63] Neither Germany nor Japan utilized this article when joining the Court. Of the two permanent SC members that joined the ICC, GB and France, only the latter did.

[64] Interview with Hisashi Owada (The Hague, 12 December 2007).

[65] Owada, Statement.

sovereignty were not as important for Japan as for the permanent SC members, for example.[66] This might stem from the fact that Tokyo sends comparatively low numbers of self-defense forces on UN-mandated missions (see Table 1), and, in addition, the ones it actually dispatches are severely restricted in their range of duties to non-combat back-up support tasks. Also, based on Japan's peace constitution and the country's general pacifist sentiment, Japanese bureaucrats and politicians alike emphasize that they cannot imagine a scenario where the ICC would deal with a Japanese case,[67] thus infringing on its state sovereignty. In addition, lawmakers in Tokyo tried to assure that Japan would be able to indict most – but not all – offences related to the four core crimes itself,[68] before becoming the 105th member state of the ICC on 1 October 2007. As opposed to the German example, Tokyo does not seem to feel any distinct morally driven, or historical, responsibility for supporting the Court. Instead, discussions in Japan tend to indicate a focus on the advantages of being an ICC member.[69]

4. The ICC as a contested issue in the context of US relations with Germany and Japan

Due to its categorical disapproval of the ICC, the US began to launch an aggressive diplomatic anti-ICC campaign in 2002, when the Rome Statute entered into force. First and foremost, Washington's program of action aimed at ensuring that its military personnel would stay out of the ICC's reach, despite the territorial principle. By and large, its strategy consisted of two core elements. The first being that the US threatened to veto all UN peacekeeping operations (PKOs) proposed in the SC if it did not receive the assurance of an exemption from ICC jurisdiction for its troops involved in UN-mandated deployments. Second, Washington sought to reach bilateral non-surrender agreements with as many states as possible, and threatened to cut military aid to nations unwilling to comply.[70] In fact, these provisions, which are part of the 'American Service-Members' Protection Act' (ASPA), in combination with various other measures were

[66] Interview with Owada, The Hague, 12 December 2007.

[67] Yasushi Masaki, 'Kokusai keiji saibanjo he no nihon no kamei to kokunaihô seibi [Japan's accession to the International Criminal Court and the adjustment of its domestic law]', *Kokusai Mondai*, No. 569 (4/2007): pp. 26–34 (p. 31). Explanation by Foreign Minister Tarô Aso, 166th Diet, Plenary Session, House of Representatives, Record of Proceedings, 22 March 2007.

[68] For more detailed information, see e.g. Kanako Takayma, 'Participation in the ICC and the National Criminal Law of Japan', *Japanese Yearbook of International Law*, 51 (2008): pp. 384–408. See also e.g. Meierhenrich and Ko, 'How do States Join'.

[69] Ministry of Foreign Affairs official Okazaki, for example, stresses that Japan can send personnel to the ICC, once it becomes a member state. This would increase Japan's visibility at international organizations and help to have Japanese values reflected there. It would provide Tokyo with a better access to information and thus possibly with more influence. See Yasuyuki Okazaki, 'Kokusai keiji sainbanjo (ICC) kitei e no kamei to kongo ni mukete [Towards the membership in the Rome Statute of the International Criminal Court (ICC) and the future]', *Hôritsu no Hiroba*, 60(9) (2007): pp. 8–53 (p. 50).

[70] US Department of State, 'American Service-Members Protection Act', 30 July 2003, http://www.state.gov/t/pm/ rls/othr/misc/23425.htm (accessed 30 March 2007).

geared towards obstructing the effective operation of the Court and at undermining its authority.

UN peacekeeping and article 16

This US campaign, which was perceived as a severe unilateral assault on the ICC by a large number of states, evoked condemnation and even resistance.[71] However, when the US appeared to deliver on its threat to veto UN peacekeeping deployments, by announcing its intent to block the extension of the UN mission to Bosnia and Herzegovina in 2002, ICC advocates within the SC found themselves under pressure to consider concessions. Finally, the Council unanimously agreed on a compromise formula, providing for a one-year immunity guarantee for those PKO-participating states that had not yet joined the ICC. In addition, the agreement held out the prospect of further one-year extensions.[72] SC members deemed such a compromise possible, because Article 16 of the Rome Statute acknowledges the SC's authority to suspend ICC investigations under Chapter VII of the UN Charter. It is remained unclear, however, what exactly posed a threat to peace and security in the given context.

While neither Germany nor Japan belonged to the SC at that point in time, and could therefore not directly influence the decision-making process, their reactions were rather different. Germany was among the most critical observers,[73] and claimed that the resolution was at variance with Article 16, which was designed to deal with specific threats to international peace and security rather than a general preventive measure.[74] In contrast, Japan welcomed the 'realistic solution' that had been reached.[75] Thus, while Germany stuck to the principle of upholding the integrity of the ICC, Japan's assessment was grounded in pragmatism. For Tokyo, it was essential to keep the US engaged in worldwide peacekeeping, despite an already operating ICC. If this was not possible, the depletion of UN peacekeeping missions and the alternate generation of non-UN-mandated missions (to ICC non-member states only) would have caused both Germany and Japan major difficulties. As a general rule, both countries' military deployments have to be backed by UN mandates. Hence, when Germany occupied one of the non-permanent seats on the SC in 2003, Berlin abstained from voting for the renewal of the compromise formula, but did not vote against it.[76] With 12 positive votes, the formula was extended for a final one-year period.

[71] Weller, 'Undoing the Global Constitution', p. 694.

[72] SC resolution, S/RES/1422, July 22, 2002.

[73] William A. Schabas, 'United States Hostility to the International Criminal Court: It's all about the Security Council', *European Journal of International Law*, 15(4) (2004): pp. 701–20 (p. 719).

[74] McGoldrick, 'Legal and Political Significance', p. 421.

[75] Ministry of Foreign Affairs Japan, Press Conference 16 July 2002, http://www.mofa.go.jp/announce/press/2002/ 7/0716.html#1 (accessed 8 September 2009).

[76] McGoldrick, 'Legal and Political Significance', p. 420.

Non-surrender agreements and article 98

In addition, in 2002 Washington tried to negotiate 'bilateral immunity agreements', which were essentially non-extradition treaties, with all governments worldwide. To reinforce this approach, the US simultaneously threatened to suspend military funds (and later on even economic aid) to those countries that refused to sign such an agreement. These were not idle threats, and the US followed through by actually cutting aid to 35 countries in 2003.[77] In fact, Washington declared non-surrender agreements in line with the Rome Statute. This was made possible by Paragraph 2 of Article 98, which states that 'a request for surrender [to the ICC should not] require the requested State to act inconsistently with its obligations under [further] international agreements'. Originally, this article was included in the Statute to preserve so-called Status of Forces Agreements (SOFAs), which ensure that those troops stationed abroad and who commit offences as part of their official duties are not subject to foreign jurisdiction.[78] However, the provision turned out to be a loophole, which the US obviously wanted to exploit. Interestingly enough, Germany and Japan were both excluded from the ASPA provision pertaining to the prohibition of military assistance to deniers of non-surrender agreements. This was due to exceptions granted to major US allies, NATO, and non-NATO respectively.[79]

We have to keep in mind, however, that Germany had already ratified the Rome Statute in 2002, while Japan did not join the Court before 2007. Thus, at that point of time, Japan was under no commitment to cooperate with the ICC (and, in the given scenario, to extradite US suspects to the Court), whereas Germany could have been required to do so, theoretically. Even so, both countries operated and continue to operate under SOFAs with the US. This would invariably prevent them from transferring US military personnel to the ICC.

Did their reaction to Washington's demand for bilateral non-surrender agreements differ, then? On the one hand, Germany once more emerged as a strong critic of Washington's attempt to thwart the Court, and refused to ever sign the agreement the US was asking for. As a German official put it: 'To give in to the US "would make us lose our credibility" as a staunch supporter of the Court.'[80] Ultimately, members of the EU, which had finally adopted a common position on the ICC in 2001, opposed the signing of non-surrender agreements unanimously.[81] On the other hand, Japan's reaction to US claims revealed more caution. At first, Tokyo declined to sign such an

[77] The American Non-Governmental Organization Coalition for the International Criminal Court, 'Chronology of US Opposition Related to the International Criminal Court', http://www.amicc.org/docs/US%20Chronology.pdf (accessed 18 March 2011).

[78] Ralph, *Defending the Society of States*, pp. 156–7.

[79] US Department of State 2003, ASPA, sec. 2007.

[80] Philip Shishkin, 'Despite EU Deal, Germany Won't Exempt US From International Criminal Court', *Wall Street Journal*, 1 October 2002.

[81] Ralph, *Defending the Society of States*, p. 155 and p. 159.

agreement and reasoned that it was not yet a member of the ICC,[82] thereby leaving it open to interpretation, whether it would consider signing a bilateral non-surrender agreement after acceding to the Court. Thus, Japan again avoided expressing a clear opinion of its own interpretation of the Rome Statute and on the proper functioning of ICC. However, when Japan joined the ICC in 2007, it eventually rejected a bilateral non-surrender agreement,[83] just as most states that are not affected by the ASPA provisions had done before. Moreover, the above-mentioned EU's common position on the ICC is said to have served as crucial 'moral and political guidance' for Tokyo and other ICC members, leading them to eventually reject US demands.[84] In this sense, the EU appears to have laid important ground for hesitant ICC members such as Japan.

5. Convergence and divergence in Germany's and Japan's management of the US relationship

Berlin has been a dedicated supporter of the ICC ever since its conception and was willing to endure confrontation with the US on matters of the Court. In contrast, Tokyo had apparently adopted a 'wait and see' position *vis-à-vis* the ICC, and arguably *vis-à-vis* the US stance on the Court as well, before it finally became a member state in 2007. While Japanese lawmakers and bureaucrats involved in the accession process do of course not attribute Japan's late accession to the ICC to the softening US opposition to the Court, Tokyo's decision to join quite obviously coincides with Washington's weakening anti-ICC stance. The first indication of such a change in attitude could be seen in spring 2005. When the SC voted on a draft resolution referring atrocities in Darfur to the ICC for an investigation, the US refrained from imposing a veto. Moreover, Washington started to revoke its policy of canceling military aid to those ICC member states that refused to conclude non-surrender agreements in 2006.[85] In sum, by the end of 2006, US efforts to obstruct the Court had largely weakened for numerous reasons.

Against this backdrop, it is interesting at least that Japan's intention to become an ICC member state was only unveiled in the summer of 2006. The government had repeatedly pointed out the complex and time-consuming domestic legal adjustment process in order to justify delays in its participation in the ICC prior to 2007.[86] Despite the fact that this process was necessary to meet the requirements of the Rome Statute,

[82] *Japan Policy and Politics*, 'Japan "not Considering" US demands on Criminal Court Waiver', 26 August 2002, http://findarticles.com/p/articles/mi_moXPQ/is_/ai_90916869 (accessed 13 June 2006).

[83] Coalition for the International Criminal Court, 'Regional and Country Info, Asia and Pacific, Asia, Japan', 30 April 2007, http://www.iccnow.org/?mod=country&iduct=86 (accessed 13 July 2007).

[84] Groenleer and Rijks, 'The European Union and the International Criminal Court', p. 177.

[85] *The Economist*, 'Let the Children Live', 27 January 2007, vol. 382(8513) (online issue).

[86] For example, explanations by Justice Minister, Chieko Kôno, and Parliamentary Vice Minister for Foreign Affairs, Itsunori Onodera. 163rd Diet, Justice Committee, House of Representatives, Record of Proceedings, 28 October 2005.

the ministries involved did not start to seriously work on such legislation before 2006.[87] This was also after Japan closely observed Mexico's joining of the ICC in late 2005, in order to ascertain whether any punitive or negative US reaction followed.[88] Even though it remains difficult to prove, Tokyo appears to have deliberately delayed decision-making regarding its ICC membership, in order to circumvent confrontation with the US, until Washington finally scaled back hostilities towards the Court. This cautious Japanese stance seems to be based on security considerations. As is known, Washington is Tokyo's only alliance partner, providing Japan with far-reaching security guarantees. Given China's military rise, as well as North Korea's nuclear brinkmanship, Japan did obviously not want to risk its pivotal alliance relations over the contested ICC issue. Hence, it took up a lukewarm stance on the ICC and a non-confrontational position *vis-à-vis* the US.

On the contrary, Germany did not leave any doubt whatsoever about its ardent support of the Court. Already during the Rome conference, US officials reportedly warned Germany that the adoption of the Statute would require the US to reconsider security arrangements in Europe.[89] That, however, left Berlin unimpressed, as it probably already presumed that the US would not 'shoot itself in the foot'[90] by damaging essential security relations over the ICC dispute. In fact, the ASPA provision on the special treatment of NATO and major non-NATO allies makes rather clear that Washington did not intend to jeopardize crucial military alliances resulting out of the ICC issue. Similarly, Germany's efforts to uphold the integrity of the Court did not go so far as to let Berlin vote against the compromise formula on peacekeeping operations in 2003. Even though Germany certainly took a more principled and unyielding stance on questions of international criminal justice when compared to Japan, this voting behavior within the SC indicates that it was not willing to carry matters to an extreme *vis-à-vis* the US.

Owing to their experiences with the Nuremberg and Tokyo Tribunals, Germany and Japan both advocate the universality of the law enshrined in the Rome Statute, because it does not differentiate between those crimes committed by the defeated and the victorious parties to a conflict. Whereas Germany's reflections on Nazi atrocities and the Nuremberg Trials led to its assertive support of a highly legalized and universal ICC, Japan's contemplations did not deliver the same degree of enthusiasm. This might not only derive from its much more negatively perceived experience with the Tokyo Trial and from its stronger leaning towards its bilateral relationship with the US, but also from its

[87] Interview with a bureaucrat from Japan's Ministry of Foreign Affairs who was involved in the accession process, 8 September 2008, Tokyo

[88] Interview with the same bureaucrat.

[89] Bartam S. Brown, 'Unilateralism, Multilateralism, and the International Criminal Court', in Steward Patrick and Shepard Forman (eds.), *Multilateralism and US Foreign Policy* (Boulder, CO and London: Lynne Rienner, 2002), pp. 323–44 (p. 330).

[90] This term was used by Bush's Secretary of State, Condoleezza Rice. Cf. *Economist*, 'Let the Children Live'.

preference for more informal multilateral institutions, that is less heavily legalized. As opposed to Germany, which could already gain substantial practice regarding shaping and coping with such highly legalized multilateral institutions through EU-integration processes, Japan evidently lacks such regional experience and appears less keen in its support for a strong and independent Court.

Closely related to the ICC's institutional design is the debate about the role of state sovereignty. While the 'ICC example' supports the argument that ceding a certain degree of sovereignty to regional or global institutions is part of Germany's foreign policy culture,[91] this does not hold true for Japan to the same degree, and even less so for the US. This explains why Washington's reaction to an ICC with global jurisdiction was initially obstructive, and then circumspect at best. However, US policies towards the ICC have become more cooperative under President Barack Obama, even if reluctantly so. This was demonstrated by American support for a recent SC resolution that referred the military escalation in Libya in early 2011 to the ICC's prosecutor for an investigation. As the resolution also includes provisions on the protection of non-members from the ICC's jurisdiction,[92] fundamental US concerns clearly remain. For the US, the ICC is perceived as a threat to its interests and as a first move towards a world government that in the long run could render the idea of national sovereignty meaningless. Still, Washington's objection to – or now rather skepticism towards – the ICC shall not and will not obscure the fact that the protection of human rights and the quest for an end to the 'culture of impunity' are important elements of its foreign policy. Consequently, the argument about the ICC does not center on the aims of the Court, but focuses instead on its institutional characteristics and the scope of its authority.

In this context, the 'ICC case' also illustrates Washington's declining impact on molding global governance institutions. During the Rome conference, the US delegation was unable to achieve acceptance for an institutional design according to its own preferences. Besides, even fierce US opposition to the Rome Statute could not prevent the ICC from entering into operation swiftly. In part, this loss of US influence is due to increasingly self-confident alliance partners like Germany and, even if much less so, Japan. With the end of the Cold War, we have seen a growing unwillingness in both countries to support US interests in multilateral contexts, if they conflict with their own political aims and agendas. This gradual emancipation, which is certainly more advanced in the case of Germany, has already been demonstrated during international negotiations on a variety of issues, such as climate change, landmines, and nuclear testing, to name but a few. So far, this shift in behavior has not shown a lasting negative impact on US–German and US–Japanese relations. It remains to be seen if this will change someday, though. Moreover, additional studies are needed to explore further

[91] Maull *et al.*, 'German and Japanese Foreign Policies', p. 5.

[92] Cf. S/RES/1970 (2011), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement (accessed 18 March).

implications of Washington's shrinking global influence on shaping the international order.

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