"What better gift could today's politician's bequeath tomorrows generation?": A Rhetorical Analysis of Arguments in Support of the International Criminal Court in the United Kingdom House of Commons 1998 – 2001

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Tiivistelmä - Referat - Abstract

This thesis analyses argumentation in support of the International Criminal Court (ICC) in the United Kingdom (UK) House of Commons 1998 – 2001. During that time, the UK Parliament passed the ICC Bill, with which the ICC's Rome Statute was ratified and integrated to UK national law. The issue was heatedly debated in the House of Commons. Attention has often been directed toward the United States, which opposes the Court. Instead, chosen here was a state supports the ICC. In addition, the UK was chosen because of its role as a powerful state in international relations and as a permanent member of the United Nations Security Council. The analysis identifies how the UK Government representatives and other Members of Parliament argue their support for the ICC.

International law, the human rights and atrocities regimes and legalism form the general framework for the analysis. The main theoretical framework of this thesis is constructivism and the so-called logics of action. In addition, the main two international relations theories, realism and liberalism are discussed to provide context for the analysis. Rhetorical analysis is used as a research method. The argumentation in support of the ICC is analysed by using the argumentation techniques of Chaim Perelman and Lucie Olbrechts-Tyteca to identify the different types of arguments used during the debates.

Five main themes of argumentation to support the ICC were identified, such as that the ICC can help in breaking the culture of impunity; that the UK should lead by example by supporting the Court; and that the ICC needs to be seen as a part of the existing body on law. These themes were used to support the ICC and convince the Opposition, the Conservative Party, to back up the ICC Bill. The themes echo the constructivist theoretical points. However, the UK was dissociated from the ICC's jurisdiction and the possibility of a UK national having to face charges in the ICC was dismissed as unconceivable. This draws a more realist picture of the UK's stance towards the ICC and reinforces the principle of sovereignty in international relations.

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International Criminal Court, United Kingdom, rhetorical analysis, argumentation, argumentation strategies

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Tiivistelmä - Referat – Abstract

Tässä tutkielmassa tarkastellaan Kansainvälistä rikostuomioistuinta (KRT) kannattavaa argumentaatiota Ison-Britannian parlamentin alahuoneessa vuosina 1998–2001, jolloin käynnissä oli prosessi KRT:n Rooman perussäännön ratifioimiseksi osaksi Ison-Britannian lakia. Koska aihetta on lähestytty usein KRT:n vastustuksen näkökulmasta, jolloin huomion kohteeksi on noussut pääasiassa Yhdysvallat, valittiin tämän tutkimuksen lähtökohdaksi KRT:ta tukeva valtio. Ison-Britannian valintaan vaikuttivat myös sen rooli yhtenä maailmanpolitiikan keskeisenä valtiona sekä asema Yhdistyneiden kansakuntien turvallisuusneuvoston pysyvänä jäsenenä. Tutkimuksessa selvitetään, miten Ison-Britannian parlamentin jäsenet ovat argumentoineet Kansainvälisen rikostuomioistuimen puolesta.

Aineistoa tarkastellaan kansainvälisen lain, ihmisoikeuksien, rankaisemattomuuden kulttuurin ja kansainvälisten suhteiden legalisoitumisen muodostamassa teoreettisessa kontekstissa. Tutkimuksen pääasiallinen teoreettinen viitekehys on konstruktivismi ja niin kutsutut käyttäytymisen logiikat. Lisäksi tutkimus liitetään kansainvälisten suhteiden teorian kahteen pääsuuntaukseen, realismiin ja liberalismiin. Tutkimuksen metodina käytetään retoriikan analyysiä. Ison-Britannian KRT:ta tukevaa argumentaatiota analysoidaan Perelmanin ja Olbrechts-Tytecan esittelemien argumentaatiostrategioiden avulla. Tutkimuksessa identifioidaan ne strategiat, joita Ison-Britannian hallituksen edustajat käyttivät puhuessaan KRT:n puolesta.

Analyysissa nousee esiin viisi teemaa, joiden kautta KRT:ta pyrittiin keskusteluissa tukemaan, kuten KRT:n ja Ison-Britannian rooli rankaisemattomuuden kulttuurin rikkomisessa ja tukeutuminen olemassa olevaan lainsäädäntöön. Nämä kuvastavat hyvin tutkimuksen konstruktivistista viitekehystä. Toisaalta Iso-Britannia pyrittiin erottamaan KRT:n tuomiovallasta ja ajatusta siitä, että Ison-Britannian kansalaista vastaan nostettaisiin syyte KRT:ssa, pyrittiin vähättelemään. Tämä antaa enemmän realismiin ja kansallisen suvereniteetin käsitteeseen pohjautuvan kuvan Ison-Britannian suhtautumisesta KRT:een.

Avainsanat – Nyckelord - Keywords

Kansainvälinen rikostuomioistuin, Iso-Britannia, retoriikan analyysi, argumentaatio, argumentaatiostrategiat

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List of Abbreviations

ASPA	American Service Member's Protection Act
BIA	Bi-lateral Immunity Agreement
FCO	Foreign and Commonwealth Office
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
ICRC	International Committee of the Red Cross
NGO	Non-Governmental Organization
TAN	Trans-National Advocacy Network

1. Introduction

In the past decade, much has happened in international criminal law. One development has been the establishment of the first, permanent International Criminal Court (ICC). Excitement and interest towards the ICC has been widespread. Research done on the ICC has been diverse, concentrating, amongst others, on the organizational makeup of the Court, its jurisdiction, meaning and significance for the development of international criminal law. Much of the research has also concerned the ICC's effectiveness and its role in international relations and particular conflict situations. Yet, one of the most central questions that have puzzled many is why the ICC was established at all; what stands behind the creation of an international criminal court that, in theory and practice, does and can encroach on matters traditionally taken to be at the core of state sovereignty, the judgement of criminals. Most crucially, the ICC is situated amidst the conflict between the norms of sovereignty and human rights and their protection, where state sovereignty, the guiding principle of international relations, has become increasingly threatened by international criminal law and demands of bringing to justice perpetrators of international crimes.

Quite widely, the ICC has been hailed as a great advancement in international criminal law. Deitelhoff has characterized the Court as "a profound institutional change in world politics". (Deitelhoff 2009, 33) The ICC has been hailed as an important body in the fight against the culture of impunity (Popovski 2000); and by further codifying the idea that individuals are to be held responsible for international crimes, has resulted in the erosion of the concept of sovereignty, which for Gow represents a "revolution" in international affairs. (Gow 2000)

Despite the general enthusiasm, not all view the ICC and international criminal law in a positive light. Criticism has circled, amongst others, around the meaning and effectiveness of the law and the institutions and on the problems posed by the unavoidable relationship to politics and state sovereignty. Goldsmith and Posner question the influence, meaning and effectiveness of international law in general and argue that its importance has been to a large extent overemphasized. (Goldsmith and Posner 2006) Graubart sees that, what he calls global criminal law, has been rendered an instrument of power, used by the great powers and that international tribunals, ICC included, for the most part reinforce this tendency. (Graubart 2010)

These challenges are intensified by the fact that the ICC, though in theory an independent institution, depends to a large extent on its creators, the states. The ICC needs states to function properly and to fulfil its goals. This is why not only powerful opponents are a

problem, but also why supporters are crucial. Therefore, it is no wonder that the hostility of the United States (US) towards the ICC has been of such interest. This interest and the importance of the subject have resulted in a copious amount of research on the US and the ICC. The aim here is not to add to that.

Instead, the focus here is on one of the ICC's supporters, the United Kingdom (UK). The UK, as a powerful actor in international society and as one of five of the United Nations Security Council's (UNSC) permanent members, offers an interesting and meaningful focus. In the aftermath of the Second World War, Prime Minister Winston Churchill saw that the only solution fitting for the highest ranking Nazi war criminals was summary execution (Smith 1981, 45-46); 56 years later, the UK ratified the Rome Treaty of the ICC and since then, the UK has been characterized, and has characterized itself[1], as one of the staunchest supporters of the Court. According to Edlin, *"Britain's support was pivotal to the creation of the ICC"*. (Edlin 2006, 5) In addition, the UK has historically supported international tribunals, being one the main supporters of the International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), regarded as the ICC's precedents.

The statement in the title of this thesis was given by Labour Member of Parliament (MP) Oona King during a 1999 debate in the UK House of Commons and represents well the belief the supporters had in the ICC and its abilities to impact change: "What better gift could today's politicians bequeath tomorrow's generation?" (House of Commons 1999, vol. 336, col. 933) It is the support of the UK that is the focus here. More to the point, it is UK argumentation that forms the focal point. This thesis analyses debates concerning the ICC in the House of Commons 1998-2001. The ICC was widely debated in the UK House of Commons during that time, when the UK adopted the ICC Bill with which it ratified the Rome Statute and adopted its provisions as part of UK national Law. (UK Parliament 2012) How did the UK government representatives and other MPs at the time argue for the ICC? What can the statements reveal, of not only about the argumentation strategies used but views and opinions that inform that argumentation? It is these sorts of questions this thesis sets out to answer.

Before moving on to introducing the research framework, it is important to note what this research is *not* about. First, the purpose is not to answer why states join various international organizations in general. Of course the discussion will touch upon the reasons why the UK

[1] FCO 2012a.

would and did join such an institution, but the aim is not to find those reasons from the sources; the aim, instead, is to identify what sorts of arguments were used. Second, this thesis does not aim to contribute to the wider 'peace versus justice' debate that questions whether justice mechanisms, such as trials, are more of an impediment to peace in on-going and post-conflict situations.[2] Third, as the focus here is on the ICC and thus on criminal trials, other mechanisms for post-conflict justice are not discussed. These include truth commissions, which have been formed in for example South Africa. Furthermore, the emphasis here is on international mechanisms and thus national courts and other national bodies are excluded.[3] Lastly, the purpose is not to analyze the ICC's effectiveness or the extent to which it has managed to fulfil its goals. Such reviews have been advanced lately, as the ICC turns 10 this year in 2012.[4] Although the subject is touched upon as the ICC and the UK's relationship to it are discussed, an in-depth evaluation of the ICC's performance is out of the scope here.

1.1 Research framework

To analyze the UK's ICC argumentation, this thesis advances with the research question of "*How did the United Kingdom's Government representatives and other Members of Parliament argue their support for the International Criminal Court?"* This question directs attention to argumentation and to identifying what kind of arguments can be found in the statements. To answer it, statements in the House Commons during the debates concerning the passing of the ICC Bill are analyzed. This focus contributes to the overall existing body of research done in this area (for example Fehl 2004; Winkelman 2009; and Deitelhoff 2010). Focus is put on the UK's argumentation for the ICC before it came into force. The analysis is conducted from a constructivist point of view of, which offers informative insights to the matter. To analyze the sources, Chaim Perelman's and Lucie Olbrechts-Tyteca's methods of argumentation analysis are used.

The over-arching theoretical framework is formed by the discussion of the legalization of world politics and the development of the so-called human rights and atrocities regimes and the way these structures, once created, influence state actions and behaviour. Thus, the research is grounded most of all in constructivism. It is seen that constructivism offers the best framework for understanding and analyzing the ICC and state support for it, as it directs attention to actors' behaviour, guided and constrained by structure. The surrounding structure

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[2] See: Rodman 2007; Akhavan 2009
[3] See: Teitel 1999; Drumbl 2007
[4] See: Dicker 2012; and Posner 2012

formed by the interest in protecting human rights, which has resulted in increased legalization of the international realm and the creation of institutions such as the ICC, constrains and guides the actions and behaviour of states. Example of this taken here is then the UK's support of the ICC. The UK's support of previous international trials and tribunals lends credence to the perspective that not only has the UK influenced and taken part in creating the structure, the structure has also influenced the policies of the UK; of this, the adherence to the idea of an international criminal court functions as an example. The theoretical framework is further informed by a discussion of different logics of action; logics of consequences, appropriateness and arguing. It is seen that this provides a useful framework within which the statements by the UK MPs can be analysed. Furthermore, this research aims to provide more a methodological endeavour than an in-depth theoretical research. The timeline for analysis is from 1998 to 2001. 1998 forms the natural starting point as the ICC was established that year. Within this period, statements by UK MPs are analyzed. Rhetorical analysis by the argumentation strategies introduced by Perelman and Olbrechts-Tyteca has been chosen, seen to provide a very useful way to analyse the substance of language and arguments.

This thesis proceeds as follows. Chapter 2 takes a closer look at international criminal law and its central institutions in the 20th century. In addition, Chapter 2 introduces the theoretical framework for this research, the legalization and the development of the human rights and atrocities regimes, context in which the ICC is grounded in; and then moves on to discuss the three main international relations theories international law and matters related to it are often viewed through; realism, liberalism and constructivism. Constructivism is then further elaborated as the theoretical foundation for this research. Chapter 3 turns attention to the United Kingdom. The chapter first discusses the UK and human rights and then the UK's foreign policy. Part three includes a discussion of the UK's relationship with international tribunals that preceded the ICC and maps the development of international criminal law through the establishment of institutions from roughly the First World War onwards. This is done to provide a thorough background for the UK's policies concerning international tribunals. Part four discusses the UK's relationship with the ICC. Chapter 4 starts the analysis part. First, rhetorical analysis as a method is introduced, starting with the history and definitions of rhetoric. The second part introduces the tools that are used here; the techniques for analyzing arguments devised by Perelman and Olbrechts-Tyteca. Chapter 5 then moves on to the actual analysis of sources, statements made by the United Kingdom Government representatives and other MPs in support of the ICC during the national debate of the UK's ICC Bill. Chapter 6 will conclude the thesis and point to further avenues of research.

2. Theoretical Framework

This chapter discusses the theoretical framework of this research. At the outset it deems mentioning that the purpose here is not to be a rigorous theoretical endeavor; rather, the emphasis is more on the empirical side of analyzing argumentation. Thus, the aim here is to provide a looser, overall theoretical framework. The chapter advances as follows. First, previous research done surrounding the themes of this research is introduced. Second, international criminal law and its institutions are discussed to provide context. Third, the wider framework formed by legalization and the human rights and atrocities regimes is introduced. This discussion is further elaborated through the debate over the benefits and problems of legalism. The fourth part discusses realist and liberal theories as alternative approaches to constructivism. Constructivism forms the central theme of part 5. The chapter first illustrates different approaches within the field; part two introduces the basic assumptions of constructivism and its relationship to rationalism; thirdly, norm-orientated constructivism is discussed, followed by the different logics of action. The chapter concludes with a discussion of realist, liberal and constructivist approaches to international law and the ICC.

2.1. Previous Research

Before moving on to introducing the theoretical framework, some previous research done concerning the themes of this research is introduced, namely research about international law; international criminal law and its institutions; the ICC in general; and why the ICC was established and why states have joined it.

One object of interest has been why states follow international law. In realist terms, Goldsmith and Posner contend that the meaning and influence of international law today is less than many think and that states follow it to advance their national interest. Thus, international law does not create compliance outside the needs of national interests. (Goldsmith and Posner 2006) Guzman, on the other hand, explains state obedience of international law through a reputational model of compliance. Here, states as rational, self-interested actors follow international law because not doing so would hurt their reputation in the international society and lead to direct sanctions. (Guzman 2002) In an often cited research article, Koh argues for a constructivist understanding of following international law. For Koh, it is a process of interaction, interpretation and lastly, internalization, of international norms, which is crucial to why nations obey international law and not just conform to it when it is convenient. (Koh 1997, 2603) Obedience includes moral, normative and legal reasoning.

For Koh, an "actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system". (Koh 1997, 2659)

Research concerning international criminal law in general and its trials in particular abound[5]. International criminal law, its procedures, principles and development has been the subject of many comprehensive works. (Cassese 2008; Cryer, Friman, Robinson and Wilmshurst 2010) Similarly, both of the earlier *ad hoc* tribunals ICTY and ICTR have received much attention and been at the centre of well-rounded research. Hazan traces the war in Yugoslavia and views critically the process of establishing the ICTY (Hazan 2004); Moghalu's comprehensive work does the same for the Rwandan genocide (Moghalu 2005); and Schabas gives an account of the law in relation to both of the above and the Special Tribunal for Sierra Leone (Schabas 2006). Robertson's *Crimes Against Humanity* tells the detailed story of the development of human rights, international criminal law and the various trials and tribunals that have been established to try perpetrators of international crimes. (Robertson 2006) The ICC, in many ways a unique institution, has attracted wide interest. Various works have been published that discuss the ICC and its Rome Statute and its organization, jurisdiction and procedures in general. (Lee 1999; Broomhall 2004; McGoldrick, Rowe and Donnelly 2004; Politi and Nesi 2004; Schabas 2007; Funk 2010; Jurdi 2011) Deeper theoretical analysis of the ICC is done comprehensively in *Governance, Order and the International Criminal Court*, which compiles articles from US opposition to political evil and cosmopolitanism by leading theorists in the field. (Roach 2009a)

What has attracted wide interest is why the ICC was established in the first place and what could explain why states have joined such an institution and other institutions seen as possibly costly to states. As Moravsick has asked in connection to the establishment of human rights regimes and bodies to enforce them (such as the European Court of Human Rights) why would any state want to join an institution that has the potential to "*to constrain its domestic sovereignty in such an unprecedentedly invasive and overtly nonmajoritarian manner?"* (Moravsick 2000, 219) Quite a few explanations have been offered.

Moravsick himself argues, from a republican liberal, democratic peace theory –grounded viewpoint, that states join when international commitment enforces the particular policy preferences of a particular government. Through this, governments bind themselves, and

[5] For other measures, such as truth commissions see Teitel 2000; Hayner 2011.

future governments, to certain policies. This is done when benefits of committing outweigh sovereignty costs by reducing future political uncertainties. This holds elsewhere than in Europe and can be generalized to the ICC. (Moravsick 2000, 220) Simmons and Danner advance a similar answer and argue that the ICC 'binds' states. Through credible commitment theory, the authors argue that states can rationally use the ICC as a tool to tie their hands. Unaccountable, autocratic states that can credibly foreswear the possibility of resorting to violent tactics are most likely to join the Court. The ICC is seen as being able to advance conflict reduction and peaceful negotiation. (Simmons and Danner 2010, 225-227)

For Meernik and Shairick the ICC "presents all states with a fairly novel opportunity to demonstrate their commitment to international humanitarian law". (Meernik and Shairick 2011, 24) Ratifying the ICC Treaty gives states an opportunity to externalize and export their human rights values they are eager to uphold and to demonstrate attachment to certain moral principles. The authors see that economically powerful states with good human rights records are most likely to support the ICC and to have the normative commitment and foreign policy interest to do so. Meernik and Shairick also emphasize the role *realpolitik* plays in the process as more powerful states can induce the weaker ones to accept the values of international humanitarian law and the ICC. (Meernik and Shairick 2011, 24-26)

Some have explained the matter through relations to other states. London moves on from traditional realist and liberalist accounts and explains joining through a theory of institutional learning: interaction with regional human rights courts has transformed state interests and political attitudes and those states that have joined regional bodies are more likely to accept a supranational institution. The US is skeptic since it has not experienced such interaction and thus also has not been influenced by the norms that human rights bodies entail. (London 2006) Goodliffe et al. argue that support of the ICC depends on dependence networks. All states have their own network which is comprised of states that are partners to the state in question through trade, security and international organization membership. Because of their partnerships, states care about the way the other states in the dependence network react to a state's actions. States also observe the other states and if need be, adjust their own behaviour to fit the behaviour of others. The authors argue that dependence networks of states affect if and when a state will join the ICC. (Goodliffe, Hawkins, Horne and Nielson 2010, 1-3)

Most interesting to this context are the arguments of Hawkins and Deitelhoff. Both move forward from a constructivist perspective and draw on ideas concerning argumentation. Through what he terms as a 'political process model', Hawkins argues that what matters most

to agreements and their support are not state power and interests but the content of arguments. Hawkins emphasizes the influence of arguments that stem from the understandings that are taken for granted in the international arena, which are the value of protection against bodily harm, the role of precedent in decision-making and the importance of cooperation to resolve widespread social problems. During the communication and persuasion processes of arguing state interests can change. (Hawkins 2004, 780) Hawkins takes the 1984 Convention against Torture as the object of analysis and argues that in that case, persuasion played an important role. Arguments which stemmed from the taken-for-granted understandings made the convention against torture subject of enforcement. (Hawkins 2004, 799)

Deitelhoff takes a similar perspective and argues that institutional change, such as the creation of the ICC can be best understood by addressing the process of legalization through constructivism and discourse theory, with the help of the ideas or argumentation and communication. Deitelhoff analyses the negotiation process that led to the establishment of the ICC and sees that it cannot be explained by power and initial state interests but by state interests that changed during the process. (Deitelhoff 2009, 33-35) Persuasion and discourse affected the negotiations in such a way that made the adoption of the Rome Statute possible. (Deitelhoff 2009, 60)

This chapter has introduced some research that has been done in the areas of international law, international institutions and the ICC. The next part starts the discussion of the theoretical framework this research is grounded in.

2.2 Context: International Criminal Law and its Institutions

International criminal law has developed rapidly during the last few decades. This is evident in the establishment of different international tribunals and courts and in the development of the body and scope of the law itself. This chapter introduces this development. As this thesis has a narrower focus, the ICC and the United Kingdom's policies towards it, this introduction is kept on a more general level.

2.2.1 Definitions: a Narrower Understanding of International Criminal Law

As with many concepts, there is no clear-cut and universally agreed-upon definition of international criminal law and it can be taken to include or exclude different things. As Cryer et al. note, "The meaning of the phrase 'international criminal law' depends on its use, but

there is a plethora of definitions, not all of which are consistent". (Cryer, Friman, Robinson and Wilmshurst 2010, 4) Cryer et al. mention different possible understandings arising for example from international criminal law understood as transnational law; through a set of rules protecting international order; or in connection with the involvement of the State. (Cryer, Friman, Robinson and Wilmshurst 2010, 4-9) As this thesis pertains specifically to the ICC, a narrower definition of the concept is adopted. Cryer and Broomhall have both adopted similar understandings of international criminal law where its basis is on individual responsibility. According to Cryer, international criminal law can be understood as "that body of international law that imposes criminal responsibility directly upon the individual, without the necessary interposition of national legal systems". (Cryer 2005, 1) This sort of understanding directs the attention to, as noted by Broomhall, "the 'core crimes', derived from the legacy of Nuremberg". (Broomhall 2004, 9-10) It is this narrower definition, as referring to the core crimes that invoke individual responsibility, which is adopted here.

According to Popovski, development of individual responsibility within international criminal law is "one of the most significant changes in contemporary world politics". (Popovski 2000, 405) Individual responsibility was first acknowledged and codified in the Nuremberg Tribunals' judgement which stated that "crimes against international law are committed by men, not abstract entities". (The Nuremberg Judgement 1946) This liability extends to all; the status of the individual, whether a high official or a common soldier, is of no relevance in international tribunals and courts. Following Nuremberg, this has been further codified in the Statute of the ICTY, ICTR and the ICC. (The ICTY Statute 1993; The ICTR Statute 1994; The Rome Statute 1998)

These so-called 'core crimes' that invoke individual criminal responsibility are crimes of aggression; war crimes; crimes against humanity; and genocide.[6] These are seen as so heinous that they 'shock the conscience of mankind' and are thus regarded as an attack against everyone. (Broomhall 2004, 19-22) Therefore, they have a certain international element which lifts them to the international level and makes them punishable by international courts. (Werle 2009, 55-56; also Fischer 2009) These are the crimes that have been codified (with slight alterations in substance) within international criminal law, in the Statutes of Nuremberg, the ICTY, the ICTR and lastly, the ICC. (The Nuremberg Charter; The ICTY Statute 1993; The ICTR Statute 1994; The Rome Statute 1998)

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[6] An interesting discussion circles around why some acts are regarded as particularly heinous and against 'humanity'. See Luban 2004; Fischer 2009.

To reiterate, the definition of international criminal law that is adopted here concentrates on the narrower understanding of the law; on one that directs attention to the core crimes which invoke individual criminal responsibility internationally.

2.2.2 Development and Institutions

International criminal law is a mixture with parts from several different bodies of laws. In addition to containing elements from public international law, it draws substance from international human rights and national criminal law and, especially, from international humanitarian law (Cassese 2008, 6; also De Than and Shorts 2003; Provost 2002) Important have been the Geneva Conventions (1949) and their Additional Protocols (1977), various other international treaties and the Statutes of the ICTY, ICTR and the ICC. (ICRC 2010) Much of the laws and conventions codified within international humanitarian law are visible in international criminal law. The difference to human rights law, also closely connected to the other bodies of law in the international level, is that both international humanitarian and criminal law apply in times war and conflict, whereas human rights law is also applicable in times of peace. (ICRC 2004)

From the institutional point of view, the development of international criminal law is usually pinpointed to the Nuremberg and Tokyo tribunals, set up in the aftermath of the Second World War. Similar attempts were made after the First World War to establish a tribunal to try the German Kaiser. These failed, however, mainly because the Netherlands refused to extradite the Kaiser. Atrocities of the Second World War, however, reawakened the idea and need for an international tribunal. (Sadat 2002, 23-6) Nuremberg especially is regarded as an important precedent for the prospective international tribunals and left the legacy of, amongst others, of the 'Nuremberg principles', which refer to the core principles of international law codified in the Nuremberg Charter. (Broomhall 2004, 19-23)

As mentioned, the idea of an international criminal court is nothing new. The idea surfaced regularly after Nuremberg and Tokyo, but never successfully made headway. In connection to the 1948 genocide Convention, the UN General Assembly (UNGA) tasked the International Law Commission to study the possibility of an international criminal court. Political and legal questions, as well as the stalemate created by the Cold War, impeded the efforts and kept the establishment of the institution at bay. (Sadat 2002, 32-36) The 1990's heralded in a new era

in international criminal law. Two *ad hoc* courts were established as answers to atrocities in the Former Yugoslavia and Rwanda.[7]

The ICTY was established in 1993 by UNSC Resolution 827 in the aftermath of the dissolution of Yugoslavia. (The UNSC 1993) The purpose of the ICTY has been to deal with the chaos that engulfed the to-be successor states and turned in to violent conflict and war most notably in Bosnia Herzegovina. The ICTY has jurisdiction only over crimes committed in the territory of former Yugoslavia from 1991 onwards. (ICTY 2012) The ICTR was established by the UNSC Resolution 955 a year after the ICTY in 1994 following the Rwandan genocide. (The UNSC 1994a) The ICTR has jurisdiction over the year 1994 and over crimes committed in the Rwandan territory and on the territory of neighboring states by Rwandan nationals. (The ICTR Statute 1994) The importance of the ICTY and ICTR to the overall development of international criminal law and especially to the establishment of the ICC is widely acknowledged. The creation of the tribunals showed that an international criminal institution was both feasible and urgently needed. (Sadat 2002, 40) They are further discussed in connection to the UK. The next part introduces the ICC.

2.2.3 International Criminal Court

In 1994, the International Law Commission (ILC), at the request of the UNGA, compiled a Draft Statute of an international criminal court. The UNGA then established an Ad Hoc Committee to review the report. The Committee's work was taken on by the Preparatory Committee (the PrepCom), which continued work on the Statute. The process culminated in the Rome Conference held in June – July 1998. (Sadat 2002, 40-2) The negotiations proved difficult. A number of states and the vast amount of NGO's that arrived to Rome to lobby for the establishment of a court wanted an independent institution with robust powers and universal jurisdiction. This was quite far removed from the ILC's Draft Statute, which envisaged, amongst other features, a part-time institution with opt-in jurisdiction. (Deitelhoff 2009, 36-7) The end result fits somewhere between these two positions.

The ICC can be seen to represent the highest advancement in the development of international criminal law. The Rome Statute establishing the ICC was adopted in 1998 and in 2002 the ICC came in to force after the needed 60 states had ratified the Rome Statute. The ICC is a permanent, international court established to punish the perpetrators of the so-called core

[7] The development and work of the tribunals has been well mapped elsewhere and shall not be extensively covered here. See for example: Dallaire 2004; Schabas 2006; Del Ponte 2009.

crimes.[8] The purpose and aim of the ICC is stated in the preamble of the Rome Statute: to *"put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"*. (The Rome Statute 1998, 1)

The ICC has attracted a lot of interest and the institution, its performance and jurisdiction have been the subject of active debates.[9] Thus far, there are 17 cases in 7 situations that have been brought before the ICC. Two of the most notable cases have been those against Omar al-Bashir, the incumbent President of Sudan and the arrest warrant of now deceased Muammar Gaddafi, former President of Libya, notable due to the Head of State status of both al-Bashir and Gaddafi. The Court has gained visibility and stayed in the headlines also in connection to such situations as those in Kenya and the Ivory Coast. (The ICC 2012a; Dicker 2012) The ICC delivered its first judgment on the Congo case in March 2012, convicting Thomas Lubanga for the recruitment child soldiers. (Smith 2012a) In many ways, the ICC has established its place in the arena of international law and relations and has become a highly relevant institution in conflict situations.

To date, 121 states have signed and ratified the Rome Statute. (The ICC 2012b) The number of State Parties is one testimony to the fact that the ICC enjoys wide support amongst states. It is, however, well-known that the ICC also has its staunch opponents, the most prominent one being the US. The US continues to stay outside the Rome Statute despite some signs of leniency shown towards the Court by the current Obama Administration.[10] The Court has also been criticized for being selective and an imperialistic tool for the powerful, further discussed in chapter 3.

The ICC has jurisdiction over crimes committed after July 1st 2002, the date the Court itself came into force. Article 5 of the Rome Statute defines the crimes over which the ICC has jurisdiction, noted above, and article 13 the ways in which ICC's jurisdiction can be invoked: a case can be opened by the ICC Prosecutor; referred to the Court by a State Party; or referred to the Court by the UNSC. Article 12 stipulates the situations in which the ICC can exercise its jurisdiction. ICC has jurisdiction over State Parties and over crimes committed on the territory of or by a national of a State Party. (The Rome Statute 1998, 3-11) One of the most important features of the ICC is the so-called complementarity principle. As stipulated in

[8] As of July 2010 the crime of aggression was added to the crimes over which the ICC can have jurisdiction. However, ICC's jurisdiction over this crime will only come into force 2017 by a separate decision. (CICC 2012)
[9] More on the ICC and issues, see: Rabkin 2005; Schiff 2008; Akhavan 2009.
[10] See, for example Kersten 2011.

Article 17, the ICC's jurisdiction will only be invoked if a State in which crimes are seen to take place is unwilling or unable to prosecute the case itself in its national courts. (The Rome Statute 1998, 12) Therefore, the Court can be regarded as a secondary measure and provides a safety net for situations which a state cannot or will not prosecute itself. The ICC is also intended for prosecutions of perpetrators of the highest status. (Schabas 2007, 211)

The Rome Statute establishes a relationship between the ICC and the UNSC. In addition to its Article 13 referral powers, the UNSC has, as stated in Article 16, the power to defer a case for 12 months at a time. (The Rome Statute 1998, 3-13) The stipulations in articles 13 and 16 establish a relationship between the ICC and the UNSC in general and the Permanent 5 (P-5) members in particular, a relationship that has made many doubt the independence and possible hidden purposes of the ICC.[11]

2.2.4 Problems: Enforcement and Effectiveness

International trials and tribunals have faced many problems. Here, a few of the more general, fundamental problems are introduced shortly. The following includes also a brief overview of US opposition towards the ICC.

First, and perhaps the most often discussed is the lack of enforcement in international law and international criminal law. As Posner notes, there is no enforcement power in the international realm akin to that which exists in domestic societies. The only body with some degree of enforcement powers is the UNSC and even it cannot send an army anywhere, only call on states to send their armies to undertake action sanctioned by the Council. (Posner 2009, 32) The problem of enforcement becomes well visible with the ICC, which, though in theory an independent institution, is heavily reliant on its creators, the states which it needs to investigate cases and arrest individuals. (Posner 2009, 199-200) According to Stephen, the main problem of the ICC is that its ambitions are universal but the participation, cooperation and application of the ICC powers are national. Moreover, the complementarity principle gives primacy to states and national jurisdictions. This has led to situation where the ICC's perpetual problem is the *"schizophrenic role of States as law makers, breakers and enforcers"*. (Stephen 2012, 89) The dependence on states is also why the US's opposition to the ICC has proven to be a much discussed issue. Analysis on the matter abounds and has

[11] See, for example Kirsch and Holmes 1999; UN Security Council 2005

been comprehensively done elsewhere.[12] For this context, an overall picture of US opposition is sufficient.

According to Birdsall, the main oppositions the US has towards the ICC are twofold. Firstly, the US sees potential risks in the Article 12 of the Rome Statute, which stipulates on the jurisdiction of the ICC. Under Article 12, a US national could be accused of committing a crime on the territory of a State Party. This risk of prosecution of its own nationals is something the US is not ready to accept. (Birdsall 2010, 453-454) Secondly, the US is not comfortable with the fact that the ICC is (to a large extent) independent from the UNSC and thus remains outside the full control of the US. The US would have wanted recognition of the US's special role that comes from the frequent use of US military forces in operations around the world. (Birdsall 2010, 454-455) Schabas argues similarly that the US hostility towards the ICC has much to do with the fact that the Rome Statute gave the Court independence from the UNSC and did not leave it as a more of an *ad hoc* institution under UNSC supervision. (Schabas 2004) As is discussed later, these same concerns became visible during the debates in the UK.

This does not mean, however, that the ICC would be a fully independent institution free from the UNSC's power and influence. Not only is the ICC's independence circumscribed by the need of states and their resources, Article 16 gives the UNSC deferral powers (as mentioned above). This establishes a clear relationship between the ICC and the UNSC and can endanger the work of the Court. If the Security Council's actions concerning the ICC are seen as politically motivated, the Courts standing as an independent and legitimate institution becomes tarnished. However, the relationship also has its positive aspects in that the UNSC can refer case to the ICC; this power extends the ICC's reach to events in countries that are not State Parties to the ICC. (Moss 2012) This was the case in relation to the situations in Darfur and Libya.

It is the influence of US opposition to the functioning of the ICC and to peace keeping missions that has made the issue so important. Goldsmith goes one step further and argues that the US opposition does not only mean that the ICC will not be able to reach its goals but that the ICC will actually do harm by discouraging the US from taking part in operations. This means that the ICC is a self-defeating institution and Goldsmith argues for the "futility and perversity" of the ICC's mechanisms. (Goldsmith 2003, 89) Influence of US opposition

[12] See: Wedgewood 1999; Casey 2001; Scheffer 2001-2002.

became visible in the adoption of Security Council Resolution 1422 in 2002. Resolution 1422 excluded UN mission personnel from non- state parties to the Rome Statute from the jurisdiction of the ICC for a period of 12 months. (The UNSC 2002) This was done after the US threatened to veto the continuation of the UN peace keeping mission in Bosnia and Herzegovina if its personnel did not receive immunity from the ICC's jurisdiction. The exclusion was renewed by a similar resolution a year later. (Jain 2005, 240-1)

Birdsall notes, however, that the US position towards the ICC has changed from hostility to careful and pragmatic support. In 2004, the US attempted to again secure continuance to Resolution 1422. Due to fierce opposition towards this attempt, the US dropped the matter. Similarly, the American Service-Member's Protection Act (ASPA) and Article 98 Bi-lateral Immunity Agreements (BIAs) have had their affects. The ASPA (also called the Hague Invasion Act) , which President Bush signed into law, authorizes the US to take all necessary measures to rescue US nationals from the ICC's custody. By signing BIAs with the US, states agree not to arrest and send US nationals to the ICC. US also cut military assistance to countries that refused to sign a BIA. All these measures together proved harmful to US national interests and affected the US's image and its military cooperation and training with several countries. Thus, it was forced to modify its policy towards the ICC and adopt a more pragmatic stance. (Birdsall 2010, 459-462) Under the Obama administration, the US has adopted a more positive policy towards the ICC, which has prompted for example Scheffer to argue that "the days of Washington seeking to undermine the ICC are over". (Scheffer 2012)

In addition to problems of enforcement and the ICC's dependence on states, another issue concerns the Court's effectiveness. The ICC's goal is to fight impunity and to prevent and deter future crimes. Critics point to the inability of the ICC to deliver on its promises. One problem has been the slowness of the trials. In 10 years, the ICC has concluded one case, where it found guilty Thomas Lubanga in connection to the case of Congo. Although a landmark occasion, Lubanga is not a high ranking inductee of the ICC such as Bashir is and the completion of the case against him took close to six years. Compared to about $900 million spent, one conviction seems inadequate. (Smith 2012a; BBC 2012)

The other problem is the deterrence effect of the ICC[13]. Many have started to doubt the ICC's deterrence power as new violent situations and conflicts have occurred and old ones have

[13] The question of deterrence is central in the so-called peace vs. justice debate of whether judicial efforts actually do impede peace. This shall not be discussed in great detail in this context. For more, see: Akhavan 2001; Akhavan 2009; Sriram and Pillay 2010; CIC 2012.

continued even after the ICC indictments. The actions of the ICC have not stopped violence from flaring up in Kenya, Cote d'Ivoire or Syria. Similarly, many note that the indictment of Sudan's Bashir may have had more negative than positive effects and point to the worsening of the situation on ground in Darfur after Bashir expelled international aid organizations following his indictment. (Butler 2009; Flint and de Waal 2009) Based on the ICTY's actions in Bosnia and ICC's in Darfur, Rodman argues that mounting trials and indictments had no apparent effect on violence on ground. The influence was only visible after states took coercive action in both of the situations. (Rodman 2009; also Wippmann 1999) Similarly, Clark notes that there is "growing scepticism" towards the ICC's ability to impact conflict on the practical level. (Ridgwell 2012)

As discussed, the ICC is in many ways dependent on states to be able to function effectively and reach its stated goals. It is clear not only that the ICC is influenced by the lack of support from the powerful players, such as the US, but also that the support of as many states as possible is crucial to the Court. Thus, support for the ICC forms an important aspect in the issues relating to the Court. One state that has supported the ICC since the Rome Conference is the UK and it is the UK's support towards the Court is the focus here. Next, the wider theoretical context is introduced, before moving on to discuss the UK's policies towards international criminal law and its institutions.

2.3 Legalization and the Atrocities Regime as Starting Points

The overall framework of this research is one of legalization and legalism, the so-called atrocities regime and the human rights regime. These frameworks are the result of the overall rise in importance of human rights and the development of international (criminal) law and the institutions to uphold it. This also represents norms and values that have come to challenge the fundamental principle of state sovereignty by emphasizing the need to protect human rights even if it constrains state sovereignty. The first part of this chapter illustrates and defines these frameworks. These are discussed more as illustrations of the spread of law in the international realm rather than as strict, theoretical understandings and explanations. Discussion of legalism, part 2 of this chapter, continues from legalization and ties the analysis in the wider discussion of international relations theory. Important are the two main theoretical frameworks under which international relations and also international law are often defined and discussed, realism and liberalism. The next part also discusses the theoretical framework in light of which this research is conducted, constructivism.

2.3.1 Legalization

Legalization can in general terms be described as a move to law in world politics. In addition to international tribunals, the rise of law has been seen in other issue areas such as environment and arms trade. Despite the increase, practice has not been uniform; for example, compliance with the judgments of international tribunals remains uneven and states break the rules governing the use of force in international law. With legalization, politics and law become entwined. Law is affected by power and political interests as well as politics and political outcomes are influenced by law. Often, this relationship is mediated by institutions. (Goldstein, Kahler, Keohane and Slaughter 2000, 385-387) Legalization has marked a shift in international relations. As Abbott and Snidal have emphasized, "*International legalization in all its forms must be considered one of the most significant institutional features of international relations*". (Abbott and Snidal 2000, 456)

Abbott et al. define legalization as a particular form of institutionalization. Legalization can be analyzed by three sets of characteristics that an institution may have: obligation, precision and delegation. Firstly, obligation means that actors, such as states, are legally bound by rules and/or commitments and that they come under scrutiny in the framework of those rules and/or commitments. Secondly, precision refers to the extent in which a rule defines the required behavior and conduct, the range being from precise and exact to more vague and ambiguous. Thirdly, delegation refers to that actors delegate authority to implement and apply the rules the actors have subjected themselves to. These characteristics are not set but vary in degree and extent. This then results in what can be termed as hard and soft legalization. (Abbott, Keohane, Moravcsik, Slaughter and Snidal 2000, 401-2) Hard law refers to situations where the extent of precision and delegation of authority is high. Benefits include such as the strengthening of the credibility of commitments and the expansion of political strategies available. The price is, however, sometimes significant sovereignty costs in that actors such as states have to accept restrictions on their sovereignty. When the law softens, so to speak, the legal arrangements that govern the certain subject are weakened in one or more ways. The weakening happens to varying extent in one or all of the characteristics of obligation, precision and delegation. Because softer law entails relaxations of the requirements made on actors, arrangements within this framework of law are often easier to achieve. This is often true with states which tend to view sovereignty costs as too much compared to the benefits gained. (Abbott and Snidal 2000, 421-3)

Within international criminal law, the ICC is the latest major development in terms of legalization. According to Deitelhoff, the Court represents "one prominent example of a legalization process that reflects a profound institutional change in world politics". (Deitelhoff 2009, 33) Abbott et al. classify the ICC as a case of near full legalization; in it, the levels of obligation, precision and delegation are all high. In comparison, others in the same category are the European Community and the European Human Rights Convention. (Abbott, Keohane, Moravcsik, Slaughter and Snidal 2000, 406-7) Not all agree that the spread of legalization and legalism in world politics are simply positive developments. This is discussed in part 4 of this chapter.

The root of legalization can be placed in rational-based interests and normative considerations. It seems reasonable to agree with Abbott and Snidal, who argue that legalization in many ways arises from both interests and norms. In addition to being based on norms, legalization gives the opportunity to advance and support certain normative values. This does not, however, preclude the effect of interests. (Abbott and Snidal 2000, 422) The norms that have much affected the legalization of international criminal law are the ones that have been advanced and supported within the framework of the so-called human rights and atrocities regimes. It is to these this chapter turns to.

2.3.2 The Human Rights and Atrocities Regimes

According to Nadelmann, norms that prohibit certain kinds of actions and the processes through which they are enforced are institutionalized in so-called global prohibition regimes. In these, certain actions, such as human trafficking in Nadelmann's list of examples, are prohibited by powerful global norms. Although Nadelmann concedes that economic and political interests, especially those of the powerful states, are often reflected in the regimes, he directs attention to the important part played by moral and emotional factors from humanitarian sentiments to compassion. The case is especially so with prohibition regimes, which often involve criminal law and thus bring to play more moral and emotional factors than some other areas. (Nadelmann 1990, 479-480) Global prohibition regime norms usually entail two main features; they mirror the criminal laws of powerful states in world politics (to date, European nations and the US); and they concern such activities that in some way go beyond national borders of states. In the internationalization process of such norms, it is not only states that seek to promote them but also other actors who lobby for their support. These norms tend to relate to the way individual human beings are treated by states and by each other. (Nadelmann 1990, 524) Nadelmann might have had the ICC-to-be in mind, so well

does his notion seem to correspond with the current situation. Human rights and their promotion are often stipulated as Western-led projects and it is human rights norms that are at the root of the core crimes, which are deemed international in that they go beyond the borders of states and are against humanity overall. International criminal law and its institutions are meant to prohibit actions deemed as crimes and enforce that the law is followed, not by states as entities but by individuals. In this, the ICC represents the latest development.

In Deitelhoff's view, the ICC represents high legalization of the so-called atrocities regime. (Deitelhoff 2009, 40) In turn, the development of an atrocities regime rests on the wish to promote and strengthen the norms of human rights and justice. This wish has been increasingly pronounced within the international community since the the Holocaust. (Rudolph 2001, 657)

The origins of the human rights regime dates back to the Universal Declaration of Human Rights (1948). Posner sees that there are two theoretical frameworks that can both explain the rise of human rights; one based on security and one based on legalism. The security theory of human rights points to the destructive effects of Second World War and the aggressive Nazi Regime and sees a relationship between security and human rights. States that could be forced to respect human rights would not develop in to aggressive ones and could be isolated in the event that they did. Thus, the promotion of human rights worldwide would also mean promotion of security worldwide. (Posner 2009, 183) For the legalistic theory, human rights have value in themselves. Second World War showed that human rights of people in foreign countries matter and should prevail over sovereignty and thus could and should be a concern beyond state borders. In order to protect human rights and prevent atrocities, this concern needed to be institutionalized and made systematic. It is likely that both types of the considerations above have had an effect on the development of the human rights regime. (Posner 2009, 183-4) Explanations for the development of the human rights regime (and others, including international criminal law and its institutions as is discussed later) are often sought from realism and liberalism. These two theories are visible in the explanations above, the security one coalescing with realism and the value-based explanation with liberalism.

The importance of human rights has risen exponentially since the end of the Second World War. Hundreds of human rights treaties have been signed and adopted and regional human rights bodies are in place from Africa to Europe.[14] Within the framework of legalization and

[14] For a more detailed review see Freeman 2011.

international criminal law, the importance of human rights has become epitomized in the so-called atrocities regime.

Abbott defines the atrocities regime as "the norms and institutions governing serious violations of human dignity during internal conflicts". (Abbott 1999, 361) Abbott lists three central features that the atrocities regime entails; the distinction between international and internal conflicts; norms governing certain abuses outside of an armed conflict; and the reliance on criminal responsibility and tribunals. (Abbott 1999, 368) The distinction between international and national conflicts arises from the differences in the extent of rules governing their conduct. The Geneva Conventions, their Additional Protocols and the grave breaches regime[15] govern international conflicts. Thus, in state-state conflicts, in which actors tend to be relatively symmetrical in their capacity to retaliate, actors can more easily anticipate reciprocity in the enforcement of the rules governing conflict and war. Internal conflicts, however, often involve at least one non-state actor which cannot ratify the Geneva conventions; trust in reciprocity decreases and the conflicting parties are less symmetrical. Article 3 of the Geneva Conventions does apply to internal conflicts but has less force. (Abbott 1999, 370) Therefore, the 'old' instruments are not enough to cover abuses during internal conflicts.

The second feature concerns the norms that govern certain abuses of an armed conflict. The question is why some atrocities are classified as crimes also in peacetime. In the Nuremberg Charter, for example, crimes against humanity were tied to armed conflict. The question is, also, why is the criminalization of crimes as inconsistent as it is. Genocide has more standing as an international crime than do crimes against humanity, which are more inconsistently defined throughout the spectrum. Abbott sees reasons for this in history, in the existence of norm entrepreneurs and in the substance of the crimes in question. The Holocaust and other atrocities of the Second World War account for the historical part. Individuals, such as Rafael Lemkin, often named as the father of the term genocide, non-governmental organizations (NGO) and so-called trans-national advocacy networks (TAN) coalesce around certain abuses, frame them and campaign for their prohibition and criminalization. In essence, they work as norm entrepreneurs and are important facilitators for the rise of norms (this is further discussed in part 5). Finally, the issues and abuses that tend to be taken to the fore are those

[15] The grave breaches regime refers to the law established by the Geneva Conventions and their Additional Protocols and its inclusion in the Rome Statute of the ICC. 'Grave breaches' are offences grave enough to constitute war crimes, such as willful killing and torture. For more, see Sandoz 2009; and ICRC 1998.

that are easiest to dramatize and to rally political support for. These usually are the abuses that involve bodily harm, such as torture and sexual atrocities. (Abbott 1999, 371-3)

The final feature relates to the reliance on criminal responsibility and trials. The atrocities regime is all about legalization: legal thinking and action where the actions in question are not only unacceptable but unlawful. Moreover, the criminalization of certain actions is mainly achieved through hard law. In addition to the need to be impartial and professional, Abbott emphasizes that the courts and trials that are established to assign responsibility and support norms that underlie the crimes need to be politically independent. (Abbott 1999, 373,375)

To recap, the atrocities regime entails the establishment of institutions to prosecute the perpetrators of certain actions that are classified and defined as crimes and the norms that underlie them. At the core is the wish and aim to protect and promote human rights and the value attached to them and the idea that sovereignty should not stand in the way of this. However, as Rudolph notes, even though human rights may be the driver behind the atrocities regime, *"differentials in power and the interests of the most powerful states clearly shape the process of institutionalization."* (Rudolph 2001, 638) States, and more to the point, powerful states, are important in the process.

This part has introduced the general framework that surrounds this thesis: the process of legalization and the emergence of the human rights and atrocities regimes. The next part moves on to discuss realism, liberalism and legalism.

2.4 Realism, Liberalism and Legalism

International relations theory and international law been increasingly discussed together. This is no wonder, taken how closely they are connected to each other in many ways. This has been no different when it comes to international criminal law and international criminal courts and tribunals. Realism, liberalism (or more particularly, neoliberal institutionalism) and constructivism are often the theoretical frameworks through which the subject is discussed.[16] This approach is adopted here as well. First, realist and liberalist theories are discussed. This is further supplemented by a discussion of legalism, which also ties the discussion with legalization and the human rights and atrocities regimes. Thirdly, constructivism and the logics of action to frame the analysis are discussed. The last part will introduce approaches to international law of the different theoretical orientations.

[16] See, for example: Abbott 1999; Armstrong, Farrell and Lambert 2007; Schiff 2008; Reus-Smit 2009.

An increasing amount of interdisciplinary research over a variety of issues has been done that bring together international relations theory and international law.[17] Slaughter et al., who in their 1998 article introduced interdisciplinary research done by then and suggested further avenues of research, conclude that many international lawyers and international relations scholars "are speaking the same language". (Slaughter, Tulumello and Wood 1998, 393) Armstrong et al. attest that there is "growing appreciation" among the scholars that they can learn much from each other's discipline but that this has mainly represented the liberalist view, as realism still tends to overlook the possible importance of international law. (Armstrong, Farrell and Lambert 2007, 69) The realist view is discussed next.

2.4.1 Realism

The basic account of realism usually starts with Thucydides and his analysis of the Peloponnesian War, where he emphasized the continuous risk of war. In addition, Hobbes' accounts of life as short and brutish are often cited when realism is discussed. The more modern realist tradition and most cited today dates, however, to the beginning of the 20th century and coincides with the founding of international relations as a discipline. To the fore, amongst others, have risen the works of Carr, Morgenthau and Waltz. (Armstrong, Farrell and Lambert 2007, 72-3)

Donnelly notes that more than a stringent theory *per se*, realism is a "general orientation" and "an approach" to international relations. (Donnelly 2000, 6) Although viewpoints within the realist tradition differ, realists share some common points of thought. For realists, the world is mainly about power and interests. In the end, people are primarily egoistic and are driven by their interests. Because egoism cannot be eliminated, conflict will always remain an inevitable fact. The world and international relations are fundamentally characterized by anarchy; international government, subordination and hierarchical order do not exist in international relations. Together with egoism, power becomes the main issue and goal in international relations. (Donnelly 2000, 10) In this sort of system, sovereign states are the only actors that really matter. States' inherent interest is to survive and since states can truly rely only on self-help, they are driven to competition with other states. In this, material factors and resources are much more important than norms, institutions and international law. (Armstrong, Farrell and Lambert 2007, 73-4) Waltz catches the core of realist thinking well when he notes that "If

[17] The subject will not be discussed in-depth here. For further information, see for example: Roach 2006; Armstrong, Farrell and Lambert 2007; and Biersteker, Spiro, Sriram and Raffo 2007.

might decides, then bloody struggles over right can more easily be avoided". (Waltz 1979, 112) Power is crucial and through power, wars can be avoided.

In the latter part of the 20th century, the approach of neorealism started to gain popularity. Neorealism is most often associated with the theorizing of Kenneth Waltz and his famous *Theory of International Politics* (1979). Also called structural realism, the central argument of Waltz's neorealism is that states behave in a particular way not only because states pursue their self-interests but also because of the structure of the international system. (Leonard and Roach 2009, 57) The way the political situation in international relations is ordered affects the way states behave. In international relations, the ordering principle is anarchy, as mentioned above, and according to Waltz, this leads to balancing rather than bandwagoning, which often is the result in hierarchical structures. Instead of following a stronger actor to increase one's own gains (bandwagoning), states attempt to balance the power of strong actors by allocating sources to national security, allying with others and adopting bi- or multilateral agreements. The structure of the international system constrains the choices of states and pushes them to balancing. (Donnelly 2005, 35-6) It is also the structural condition of anarchy that stands as an obstacle to cooperation between states; in an anarchical situation, a state cannot trust the other to do what it promises to do and fear of the other's intentions drives states to competition and conflict. Another impediment to cooperation is the idea that power is relative; it is not only what sources one has but how those sources compare to those of others. When attempting to cooperate, a state needs to asses not only what it gains itself but also the gains the other can have and whether they outweigh those of the state's own gains. (Donnelly 2005, 37-8)

The realist view in general can aptly be captured with the term *realpolitik*. Bassiouni defines realpolitik as *"the pursuit of political settlements unencumbered by moral and ethical limitations"*. (Bassiouni 2003, 191) A *realpolitik* view put focus on political power and on the need to preserve it. It is close to an amoralistic view; power matters more than ideas. The term is often used as a synonym for political realism. (Roach 2009b, 14) This practice shall be adopted here also and the term *realpolitik* will be used to refer to the general realist-based outlook on international relations, emphasizing the prevalence of power and interests over ideas and norms.

2.4.2 Liberalism and Idealism

Liberalism provides the traditional opposing view of the world and international relations to realism. The liberalist view of the state of affairs is more optimistic and harmony instead of

war and conflict is the natural state. Liberalism's equivalent to realism's Hobbes, John Locke, saw that humans are born with the natural capacity to reason and cooperate. War was the product of militaristic governments that served the states, not the people. People should have their liberty and the chance to realize their natural harmony of interests; in this, the state's power to interfere should be limited and the states should be held accountable. Although Locke's theorizing concerned more internal politics, the themes he advocated also form the central tenets of liberalist thinking about the international order, where accountable states strive for peaceful order and aim to strengthen their ties through trade and contact across borders. (Armstrong, Farrell and Lambert 2007, 83-4)

Same as realism, liberalism is not one unified theory but rather a broader foundation for particular strands of thinking. The different strands differ and emphasize different aspects[18], but do share some central principles and theoretical starting points, excluding neoliberal institutionalism, which is very close to the realist tradition (discussed below). For liberalism, it matters how a state is organized internally and the extent to which a government is held accountable affects its foreign policies. Domestic politics matters. Externally, states can be and are interdependent through economical and institutional ties. This interdependence in turn affects states' preferences and policies and promotes peace between states. (Armstrong, Farrell and Lambert 2007, 86-7) In all this, liberalism emphasizes methodological individualism and asserts that individuals and private groups are the most important actors in international politics. States matter but their preferences stem from domestic politics, not from assumed interests and power. (Abbott 1999, 366)

According to Bass, if it is accepted that domestic politics affects external behavior and that liberal states hold liberal principles, the "door to idealism in foreign policy" is opened. (Bass 2000, 17) Idealism is usually regarded as a precursor to liberalism and the terms are sometimes used interchangeably and do share the same philosophical tenets. Idealism is often placed to the interwar period, when idealist and realist scholars were debating the 'right' way to view the world. Sometimes also referred to as utopianism, the primary aim of idealism is to prevent war. For idealists in general, war represents an irrational act and is not usually in the interest of most of the people. Idealists belief in progress and that a system can be changed so as to avoid the (re)occurrence of war. This goal could be achieved with the help of international organizations that can provide the organizational structure for cooperation.

[18] One influential approach has been republican liberalism and the so-called democratic peace theory. See for example Barkawi and Laffey 2001.

(Leonard 2005, 66-7) In this, law has a role and as Armstrong et al. note, liberalism is "predisposed" to seeing the importance of law for successful international cooperation as a way to enable governance. (Armstrong, Farrell and Lambert 2007, 83) Liberalism believes that a state's legitimacy depends on whether or not it upholds the rule of law and respects the human rights of its citizens. As individuals should strive to uphold the rights of other individuals, so should states respect the rights of other states. (Burchill 2005, 66)

In Deng's words, the basic idealism can be described as the "Wilsonian worldview, which foresaw progressive perfectability of the social order through increasingly legalized relationships between states". (Deng 2007, 143) It is against this idealism that the realist theorist E.H. Carr, in his famous *Twenty Years' Crisis*, attacked, seeing it as naive and totally neglecting the issue of power. According to Osiander, it is still "textbook wisdom" to see idealism as flawed and having no lasting value. (Osiander 1998, 410)

Neoliberal institutionalism (the shorter term neoliberalism will be used here) is one approach that has been very influential in the past few decades. In many ways, it stands as almost an anomaly in the more traditional thinking of liberalistic idealism. Neoliberalism emerged as an answer to the realities of the 1980's when the tensions of the Cold War flared again and attention turned to military and security issues. The new neoliberalism took on a more realist outlook and viewed the state as the primary actor and put less faith in the capacity of institutions to solve problems in the international arena. Perhaps the main break compared to the more traditional liberalist outlook was that neoliberals abandoned the importance of how a state is organized internally and took on the realist idea of states as rational actors. With these changes in theory, neoliberalism was able to provide a challenge to neorealism. (Armstrong, Farrell and Lambert 2007, 85-6)

Although neoliberalism also accepts the realist notion of the anarchical system, it still views cooperation as a possibility, achieved through institutions, which here refer to looser sets rules that constrain behavior over a given issue (such as rule of the atrocities regime). For neoliberalists, regimes and institutions can bring in predictability and by constraining the actions of states, create the possibility of trust between parties. Moreover, contrary to neorealists, neoliberalists emphasize not relative but absolute gains, seeing that one's own gains on themselves matter. International relations need not be a zero-sum-game; security can be achieved without comparison to the sources and gains of others. Without having to pay attention to relative gains, states can concentrate on cooperation. (Burchill 2005, 64-5)

The ideas and goals behind both idealism and liberalism are at the foundation of legalization and expansion of legalism in international relations. Furthermore, criticism of legalism is often very realist in its outlook. Therefore, realist and idealist and liberalist points of departure are next discussed through legalism

2.4.3 Legalism

Whereas legalization is more a practical, institutional term, legalism can be seen as the ideological component behind the move of law to international relations. Keohane describes it as a "belief" in that progress can happen through law. (Keohane 2012, 132) Shklar defines legalism as "the ethical conduct that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules" and sees it as "a very common social ethos…in Western countries". (Shklar 1986, 1) Accepting Shklar's ideas, West continues by emphasizing that legalism is not "rule fetishism" and that if legalism would only be about commitment to the morality of rule following, it would be inappropriate in the realities of the international arena. (West 2003, 127) If this is what legalism, or what West terms as 'ideological legalism', is only about, it would have a minimal and uninspiring meaning in international politics. Thus, West emphasizes that the wider understanding of ideological legalism not only encompasses a commitment to rules, but also a commitment to peace through law. West bases this on Hobbes' thinking that the state and the law a state produces are positive goods since they are able to produce peace. To West, this better portrays the attitudinal and ideological core of legalism that is actually appealing. (West 2003, 127-131) Furthermore, for West what he calls 'the pinnacle legal moment' in the international arena is not the war crimes trial but the legislative process. If it is accepted that the aim of law is not only to punish but also to deter

future war[19], the crucial issue is not the war crimes trial itself but the attempt by international bodies to prohibit war's reoccurrence. (West 2003, 154-5)

One influential work in bringing together legalism with war crimes tribunals is Gary Bass's *Stay the Hand of Vengeance* where Bass, following Shklar's political theory, represents his case for legalism. In Bass's words, the book is "about idealism in international relations" but also about "its sharp limits". (Bass 2000, 5) For Bass, legalism materializes more as a process,

[19] This is one central aim and justification for international criminal law and its institutions and is mentioned in the preamble of the ICC's Rome Statute (The Rome Statute 1998, 1). For a discussion on deterrence, see also Akhavan 2009.

based on a "principled belief that war criminals must be put on trial" and that those international trials are to be conducted according to good domestic practice. (Bass 2000, 20) Moreover, is not only about rule of law but also about the rights the law is there to protect. Therefore, Bass sees political show trials as the antithesis of legalism; they subvert legal norms completely and disregard with due process, which should be accorded also to those breaking international laws. (Bass 2000, 21-6)

Bass's work on legalism centers on the politics of war crimes tribunals and Bass notes that international trials rely on political will and military force. In this, he concedes a degree of power to realism; very pragmatically, Bass places war crimes policy of liberal states between the contradictions of idealism and selfishness. In acknowledging the influence of politics, Bass asks why liberal states support trials at all and the reason for this he finds in idealism; he sees the main reason behind trials in that "some leaders […] and their countries are in the grip of a principled idea", not necessitated by any structure but based on a belief Bass terms legalism. (Bass 2000, 7-8) In reality, the advancement of this idea is tempered by reality. According to Bass, only liberal states with legalist views establish tribunals. Despite this, they will not do so if it puts their own soldiers at risk; this is the biggest impediment to international trials, according to Bass. Moreover, even liberal states are selfish in their outrage. The more the state's own citizens suffer, the more indignation is guaranteed. In this, domestic opinion and outrage also determines to some extent the level of support given to a war crimes trial. (Bass 2000, 28-9)

In the end, Bass seems to leave himself sitting on the fence. He concludes that in the story of war crimes tribunals, "the selfish impulses have won out" (Bass 2000, 277) but notes in hopeful tones that as legalists have proven on occasion to be serious in their intentions to punish perpetrators of international crimes, "there is at least some idealistic clay to work with here". (Bass 2000, 281) For Bass, legalism represents not the perfect but the best available means to deal with international atrocities. Almost as if yielding to *realpolitik*, Bass concludes: "legalism is all we have now". (Bass 2000, 283) This very pragmatic view is further discussed below.

2.4.3.1 Forgetting Realpolitik? Criticism of Legalism

Especially many in the realist tradition criticize the emphasis given to legalism in international relations. Goldstein et al. summarize aptly the realist view of legalism as a *"comforting and delusional justification for policies that are inconsistent with the realities of interest and power. Those policies are likely to collapse under pressure, often with*

catastrophic consequences." (Goldstein, Kahler, Keohane and Slaughter 2000, 392) Krauthammer spoke of the "curse" of legalism and characterized it as "a naive belief" in the ability of law to function as any sort of a guard over international behavior. (Krauthammer 1989, 44) The idealistic character of legalism attracts criticism and raises doubts of legalism's effectiveness in a world where, in the realist view, power and interests prevail. Following Carr, Goldsmith and Krasner argue that we have been witnessing a renewed commitment to idealism, evidence of which they take to be the rise of universal jurisdiction, increasing demands for humanitarian intervention and the creation of the ICC. In this, they see fundamental flaws; that it is founded on a utopian idea of the possibility of some global consensus on normative principles and their application: that it assumes that norms of behavior can replace material interests; and that international idealism does not heed to political prudence. (Goldsmith and Krasner 2003, 1-2)

Posner makes a comprehensive argument against legalism in his *The Perils of Global Legalism*. What he terms as 'global legalism', he sees as an "excessive faith" in the efficacy of international law where law becomes an end in itself. (Posner 2009, xii) Posner criticizes the legalists he sees are arguing for dispute resolution in legal institutions; for adopting more treaties; for wide-ranging international jurisdiction; for customary international law's application in domestic politics; and that the rise of international law is something inevitable. All this is one alternative adopted to solve collective action problems in international relations. (Posner 2009, 24-25) Posner notes that there are important limits to international law. There is no overriding authority, such as a world government, in the international realm that could issue binding orders in all situations. Furthermore, there is the lack of enforcement; there is no overriding body that has the authority to enforce international law in all situations. The UNSC of course has some power over both binding orders and enforcement, but it is not absolute in the same way as a sovereign state's power over individual citizens. To the day-to-day practicalities of international law, states matter. In the end, international law is created and enforced by states. Posner notes that the proponents of legalism acknowledge this believe that states want to follow and expand international law due to its ability to solve collective action problems. (Posner 2009, 28-34) For Posner, international law *"rests on and confirms existing power imbalances and ugly political realities that exist in most states"*. (Posner 2009, 39)

The ICC in many ways is the legalistic dream and for the legalization of the atrocities regime and for the development of international criminal law the Court represents the most important and positive improvement. In light of the realist critique, the legalistic-inspired enthusiasm over the ICC wavers. For Posner, "the ideal of legalism runs aground on the realities of

power" and to him, the likely fate of the ICC is to be a formally legalistic institution that will be ignored. (Posner 2009, 203) Others with a realist viewpoint share Posner's dim view of the ICC's future and role. For Goldsmith, the ICC is a self-defeating institution that most of all suffers from US animosity; this makes the ICC an unrealistic dream as the US might be inclined to curb its involvement in international operations in the face of fears of malicious prosecutions against its nationals. This perversity dooms the ICC to the same grave where the League of Nations already is. (Goldsmith 2003, 101-104) Rabkin also criticizes the idea of global justice and the institutions that have been established in its name as a dream that deserves nothing more than to be forgotten. (Rabkin 2005, 756)

2.4.3.2 The Lure of Pragmatic Legalism

It is clear that legalism is not a straightforward issue; for some it is the ideal of legalism that drives roughshod over power and interests or the dominance of power and interest that leaves no room for legalism. However, even the proponents of legalism, such as Bass, compromise in that they acknowledge the influence of power on ideas, making legalism not perfect but still valuable. Some have taken notice of this 'middle ground' and criticize it as a too easy solution for the dilemma. Graubart terms the Bass-style, enthusiasm-tempered-by-power over legalism and war crimes tribunals as 'pragmatic legalism'. In essence, he sees that although pragmatic legalism *"may appear to rescue legalism from idealistic irrelevancy, it actually endorses a global legal order crippled by political distortions."* (Graubart 2010, 410) The core idea is that pragmatic legalism is divorced from realism in that it sees value in the liberal-style legal process; at the same time, it acknowledges the necessity of heeding to political concerns and influential actors to make the wanted legal order possible. In the attempt to achieve justice in the international arena, global tribunals have been a hindrance, not a positive development. (Graubart 2010, 410-1)

Graubart is bewildered by the way the proponents of legalism have regarded the trials of Nuremberg and Tokyo that followed the Second World War. Although they were one-sided and despite justifications, represent victor's justice, idealist-inclined legalists see them as positive milestones in the development of international criminal law. The common rationalization of the flaws is that victor's justice is that it was the only thing available at the time and that the trials were at least conducted in a fair manner. Praise is also given to the way the trials advanced accountability after the Second World War and helped to establish a reliable record of the atrocities. Graubart argues that the flaw in all this is that there is no consideration over the possibility that justice meted by great powers might be worse than no

justice at all. Adding insult to injury is the fact all the crimes of the Allies were conveniently forgotten. (Graubart 2010, 411-2)

The use of international criminal law as a tool for the powerful and its legitimation of selective justice continued in the 1990's. Focusing on the ICTR, Graubart sees that the goals of individual accountability and reconciliation have been undermined by political manipulation and one-sidedness for example of the ICTR process from which the developmental path leads to the ICC. For Graubart, the progress is one of relocation of justice to the global periphery, especially Africa, where all the ICC's cases-to-date are. Although this development at first might seem positive, it is premised on the coincidence that the self-interest of the powerful happened to coincide with moral aspirations. Despite the lack of US support, the ICC has operated similarly to the ICTR and followed the interests of local actors in the countries in question and the strategic interests of the US and other Western states. (Graubart 2009, 417-420) Graubart does not see the future of the ICC as wholly hopeless but stresses that change from the previous path is difficult "given the continued resiliency of the structural factors that impede the implementation of a neutral and universal system of global justice." (Graubart 2009, 421)

It seems that the ICC has to tread in rather muddy waters. The point here is not any ambitious attempt of giving an authoritative answer to the problematic relationship between idealism and *realpolitik* but to highlight the many-sided context in the ICC exists. Next, the theoretical framework of constructivism is discussed.

2.5 Constructivism

Constructivism is one of the three main orientations in international relations theory. Constructivism should not be taken as a rigorous theory: as Ruggie notes, constructivism is not a theory as for example the theory of the balance of power is, but "a theoretically informed approach to the study of international relations". (Ruggie 1998, 879-880) Ruggie characterizes constructivism as being "about human consciousness and its role in international life." (Ruggie 1998, 856) For Checkel, constructivism is "concerned with underlying conceptions of how the social and political world works". (Checkel 1998, 325) Reus-Smit notes that *"At the heart of constructivist thought is a concern for 'reasons for action'"* and that these reasons are both a motive and a justificatory claim for action. (Reus-Smit 2009, 22) It is this view that mainly frames this research here.

Constructivism draws its philosophical foundations from sociological theory and has been greatly influenced by the works of Emile Durkheim and Max Weber. Durkheim concentrated on understanding moral phenomena in society and the way in which different social outcomes are influenced by the make-up of social order. Weber was interested in uncovering social meanings and their significance in society through what he called 'understanding'. In general, both Durkheim and Weber saw that what brings individuals together in a society are shared ideational ties. (Ruggie 1998, 857-61) In the latter part of the 20th century, the constructivist approach started to rise as an alternative to neorealism and neoliberalism. Whereas previously neorealists and neoliberals had challenged one another, constructivists now entered the field to dispute the rationalist and positivist standpoints of neorealism and neoliberalism. Thus, a larger debate between constructivists and rationalists emerged.[20] (Reus-Smit 2005, 188) Adler places constructivism in the middle ground, between rationalist approaches, such as realism and liberalism, and interpretive approaches, such as postmodernism and critical theory. (Adler 1997)

2.5.1. The Constructivist Tradition and Different Approaches

Constructivist research can be categorized according to a variety of classifications. Ruggie groups constructivism to three variants. Neo-classical constructivism refers to research which has its roots in the more classical tradition of constructivism. The commitment to social science and the appeal of pragmatic analytical tools of research characterize this strand. Included here are such prominent constructivist as Kratochwil, Adler and Finnemore. To the second variant, postmodernist constructivism, Ruggie includes theorists such as Der Derian and Walker. This variant stresses linguistic construction of subjects in its research and uses the practices of discursive research. The third strand Ruggie calls naturalistic constructivism, which he places somewhere between the two previous ones. The naturalistic stand combines features from the more classical, mainstream theorizing and the belief to scientific realism. The most prominent theorist here is Wendt and his scientific realism. (Ruggie 1998, 881-2)

Reus-Smit has characterized the different approaches within constructivism through what he calls "axis of difference", which can be divided to three larger debates of ontological questions, levels of analysis and methodology. In the ontological debate, Reus-Smit identifies

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[20] Rationalism is more intimately linked to the theme of this thesis and is thus given some emphasis, whereas critical theory is not discussed. Critical theory is often associated with the Frankfurt School. The central tenet of critical theory is the critique of modern social and political life and emancipatory politics. See Devetak 2005.

firstly the approach that proscribes to sociological institutionalism, emphasizing that norms constitute state identities and interests. This perspective emphasis so-called 'logics of appropriateness' (discussed below) and includes Finnemore. The second approach Reus-Smit identifies as emphasizing the 'logics of argument' (also discussed below), where the role of communicative action is stressed; norms do not simply constitute identities and interests but are open to interpretation by multiple actors in situations of discourse. The last variant draws from Foucault and his ideas over knowledge and power, where norms and their meanings are discursively and politically contingent on particular situations. (Reus-Smit 2002, 493-494)

The levels of analysis -debate concerns the appropriate level on which analysis is undertaken. Wendt is the most prominent proponent of a system-level analysis, arguing that analysis can be concentrated only on the social identity of the states without having to pay attention to the domestic realm. Those proposing a unit-level analysis disagree, arguing for the importance of the relationship between the domestic realm and the states. Holistic constructivists, on the other hand, see the benefit of combining the two perspectives and treating the internal and external as different aspects of the same coin. (Reus-Smit 2002, 494-495) Lastly, debates have concerned the right methodology for doing constructivist research. Some have argued that only interpretative methods provide the appropriate way of analyzing the role of norms and ideas, seeing that only in this way can the embedded meanings actors attach to their actions be understood. The more conventionalist theorists argue against this and see that no particular interpretative method is needed, moving their research away from theoretical debating to the empirical realm of research. Lastly is the positivist, scientific realism-approach most purported by Wendt, supporting positivist social science. (Reus-Smit 2002, 495-496)

Burch makes the division depending on what he terms the 'ontological foci' of the constructivist strand in question and divides between structure-, norm- and rule-oriented constructivism. Burch illustrates these divisions by a clear graph classifying the different approaches. (Burch 2002, 65) Firstly, structure-oriented constructivism concentrates on the way norms construct actors and interests. States are the most central actors and the aim is to identify state interests and see how they are influenced by norms. Burch puts Wendt in this category. The second focus is norm-oriented constructivism, which can also be referred to as sociological institutionalism (the term used above in Ruggie's categorization) of which Finnemore and Ruggie's works are the most prominent examples. Here, norms come first and then influence interests and ideas. The central aim is to analyze the social construction of a norm and see how that norm affects social action. Lastly, Burch identifies rule-oriented

constructivism, where social are rules are at the centre of analysis. In essence, actors come in to contact with fixed social relations that embody a mix of rules. Social rules play an important role in, for example, international law. The most prominent theorists in this category are Onuf and Kratochwil. (Burch 2002, 65-68) Importantly, rules are significant because "they link the material and ideational aspects of social structures." (Burch 2002, 69) Next, a few of the most influential constructivist theorists are introduced following Burch's categorization. This is not to say that there are not others that have made significant contributions to the field but that these works are central to the constructivist approach and to the context here.

One of the most influential theorists in constructivism has been Alexander Wendt. Wendt's *Social Theory of International Politics* is widely considered to be the most important constructivist work in international relations theory. Wendt's work functions as an answer to Waltz's neorealist account of the international realm. (Armstrong, Farrell and Lambert 2007, 98) As mentioned, Wendt takes a scientific approach to social inquiry and identifies himself as moderate who concedes points to realist and materialist perspectives. (Wendt 1999, 1) Perhaps most famous is Wendt's notion that "anarchy is what states make of it", an argument put forward already in his 1992 article. According to Wendt, there is no 'logic' of anarchy and the realist notions of self-help and power do not logically follow from anarchy. Rather, if the world is indeed a self-help one, it is so because practices create a particular structure of identities and interest. Self-help and power are institutions, not any essential features that flow from anarchy. Anarchy is what it is made to be. (Wendt 1992, 394-5)

Central in the field of rule-oriented constructivism is Friedrich Kratochwil's work and especially his 1989 work *Rules, Norms and Decisions*. According to Kratochwil, rules and norms guide human action. He takes on an interdisciplinary approach and places his research in the intersection of international relations, legal theory, jurisprudence and political thought. Kratochwil moves on from three assumptions; that the study of norms is useful in the realm of public choice where self-interested actors have to make choices; that human action in general is governed by rules, where behaviour becomes understandable against the norms embodied in rules and conventions; and that rules and norms influence choices through a reasoning process and the deliberation and interpretation inherent in this process need more attention. (Kratochwil 1989, 1-11) Kratochwil's research stems from the framework of law and he focuses on the structure of legal arguments and examines legal reasoning used and conclusions reached by lawyers and courts. (Kratochwil 1989, 19)

If in Burch's categorization Wendt represents the structure-oriented constructivism and Kratochwil the rule-oriented approach, Finnemore is perhaps the most central and often cited theorist of norm-oriented constructivism. In *National Interests in International Society*, Finnemore sets out to analyze how states know what they want. Finnemore's aim is to understand state interests and behaviour by investigating an international structure of social value and meaning. She argues that what states want cannot be understood without knowing the social structure which they are a part of. The social structure and network of social relationships socializes states to want certain things. Finnemore demonstrates the influence norms have on state behaviour through case studies of the activities of three international organizations; United Nations Educational, Scientific and Cultural Organization UNESCO, The International Committee of the Red Cross ICRC and the World Bank WB. (Finnemore 1996, 2-5) More of Finnemore's work is introduced below.

A whole thesis could be written on the debates within constructivism and the above classifications and theorists only provide a short glance on the different approaches. Comprehensive analyses over constructivist debates have been advanced elsewhere.[21] This research is mainly grounded in the first category of Reus-Smit's classification, sociological institutionalism, or in the language of Burch's categorization, norm-oriented constructivism. This encompasses best the central theme of this is research as it usually includes the logic of appropriateness and the debate between the different logics, discussed below. Next the core perspectives of constructivism are introduced.

2.5.2. Basic perspectives and Relationship to Rationalism

Despite different strands, Reus-Smit points to three foundational ontological propositions about social life that constructivists share and see to explain world politics. Firstly, constructivism purports that the structures that influence actors and their behavior are not only material but also normative and ideational structures. Systems formed by shared ideas, values and beliefs have structural characteristics and these have an effect on actors themselves and the actions they take and policies they adopt. Secondly, constructivism sees that these non-material structures have an influential effect on identities: the structures shape identities and identities influence interests and actions. Following this, constructivists argue that it is important to understand not only what interests actors hold but also how those interests have formed in the first place. This helps in explaining and understanding political events and

[21] See, for example Fierke and Jorgensen 2001; Zehfuss 2002; Guzzini and Leander 2006

phenomena. Lastly, constructivists see that structures and actors, or agents, are mutually constituted. This means that even though structures influence the identities and interests of actors, those structures would not have formed without the actors themselves. (Reus-Smit 2005, 196-7; See also Hopf 1998; Adler 2002) In this context, then, this constructivist premise is accepted; that actors, including the UK, have created a structure which encompasses the legalized international society, the atrocities regime and the ICC; and in turn, those structures influence the way states can and should behave. Thus, the UK's push for the ICC was guided by the structure surrounding the issue; the appropriateness of and value placed in human rights and their protection, individual criminal responsibility and international trials.

In their theoretical underpinnings, constructivist make a break from the rationalist viewpoints of (neo)realism and (neo)liberalism. The main arguments of constructivism go against the rationalist-based argumentation in international relations theory. Reus-Smit identifies three main assumptions that underlie rationalist theory and are common to neorealists and neoliberals. Actors are firstly assumed to be unitary, self-interested and rational. Rational here refers to the capability of realizing the best, that being most effective, way of achieving ones goals. Moreover, actors' interests are thought of as pre-existing, meaning that actors' interests are already formed when they come to have relations to other actors. Finally, actors meet each other in a strategic realm, meaning that actors come in with the aim of pursuing their goals, defined by interests. (Reus-Smit 2005, 192)

Contrasted to these main assumptions of rationalist theory, the basic thinking can be summarized as follows: rather than being unitary and egoistic, actors are social; rather than having ready-formed interests, actors' interests form through social interaction; and rather than functioning in a strategic realm, actors come together in a constitutive realm, which influences actors and their actions. (Reus-Smit 2005, 199)

This is not to say that constructivism and rationalist theory would be or are treated only as opposites and mutually exclusive. Hurd notes that constructivists too see actors, for example states, as pursuing their interests and are similarly concerned with interests and power as realists and liberalists are. The difference is in the source and content of those interests; where they come from and what they are made up from. (Hurd 2008, 310) Quite a few theorists have sought to bring together rationalist and constructivist theories. One research in this vein has been by Fehl, who explains the establishment of the ICC and its institutional design by converging rationalist and constructivist explanations. According to Fehl, two rationalist

arguments explain why the Court was established; the ICC solves the problem of states' unwillingness to prosecute perpetrators of international crimes in their national courts (the so-called public good problem); and it lowers the transaction costs that are included in the establishment of *ad hoc* tribunals. However, these are not enough and the explanations can be deepened by a constructivist perspective. Constructivism helps to explain how such a public good problem came to be in the first place; why is it viewed as a common problem whether or not perpetrators of international crimes are prosecuted? Here, explanatory power is derived from the constitutive effects of human rights norms, which have influenced the demand for prosecutions. Secondly, a constructivist approach gives another explanation for the transactions costs; more than the expectation of lesser costs, the ICC was believed to be more legitimate than the previous *ad hoc* tribunals. As for the institutional design, rationalism is in trouble trying to explain why the supporters of the ICC were not willing to concede to the demands of the more powerful states, such as the US, support of which is essential to the Court's functioning. Constructivism can help rationalism by pointing to the lobbying activities of various NGOs in Rome that functioned as norm entrepreneurs and had vast influence on the structure of the Rome Statute. (Fehl 2004, 382-383) Fehl concludes by noting that the result of what she calls a 'practice test' of combining rationalist and constructivist explanations "is positive for both […] approaches". (Fehl 2004, 383)

Rationalist theory and constructivism do not need to be treated as automatically excluding each other: explanations and understandings derived from both can complement to each other and be used to build fuller arguments. However, a basic division between the two viewpoints can function as starting point for analysis. This is further visited below. Before that, one central aspect of constructivist research, norms, is discussed.

2.5.3. Norms: Definitions and Meaning

Much about constructivist research centers on norms. Finnemore has defined norms as "shared expectations about appropriate behavior held by a community of actors". (Finnemore 1996, 22) Several notions emerge. First, norms are intersubjective, in that they are social and shared by actors. Second, norms by default concern behaviour: a norm can be violated or obeyed by acting in a certain way that is accepted by the actors. Here the term often used is internalization; some norms can be so deeply internalized that behaviour according to the norm is taken for granted. Norms can create patterns of behaviour and they are often used in discourse between actors. Actors can use norms to either justify some of their own actions or they can invoke norms and normative arguments to persuade others. (Finnemore 1996, 22-23)

A variety of different norms have been advanced and taken hold in the international real. One such category and relevant to this context are human rights norms, already discussed in part 2 of this chapter.[22] Finnemore and Sikkink also point to the laws of war as norms that have managed to influence the traditional security field and the way wars are waged. (Finnemore and Sikkink 1998, 894)

Katzenstein defines norms as "collective expectations about proper behaviour for a given identity". (Katzenstein 1996, 5; also Finnemore and Sikkink 1998, 891) Referring to identity here means that norms sometimes function as rules that constitute identity. Norms can also regulate behaviour, for example that a person identified as a university professor is expected to act in a certain way. (Katzenstein 1996, 5) Indeed, norms can be defined as constitutive and regulative, as is often done across disciplines; in short, constitutive norms create or constitute new actors, interest or categories of action and regulative norms order and constrain behaviour. Finnemore and Sikkink also point to a category of evaluative or prescriptive norms and are puzzled by the lack of attention they have received in research as it is "the prescriptive quality of oughtness" that divides norms from other rules. Norms imply an appropriate way of behaving and this appropriateness can only be identified through the way in which a community or a society judges behaviour. (Finnemore and Sikkink 1998, 891-892)

One area of interest has been the way in which norms come to be. Used here is the influential work of Martha Finnemore and Kathryn Sikkink on the emergence of international norms. International norms point to appropriate behaviour of states but often have their foundation in domestic norms: many norms have started as domestic ones and have then become international through the efforts of various persons and groups. (Finnemore and Sikkink 1998, 893)

According to Finnemore and Sikkink, norms come to affect the behaviour of actors through a three-stage process. First is norm emergence, when norm entrepreneurs attempt to promote the acceptance and embracing of certain norms. Norms are not ready made but built by actors who wish to see certain behaviour as appropriate in a given society or community. For this, norm entrepreneurs are important: they point to and promote issues by naming, interpreting and dramatizing them. In this process, so-called organizational platforms are crucial as norm entrepreneurs need a platform from which to promote the norm. (Finnemore and Sikkink 1998, 896-899) Moreover, international organizations come to function as the structure that can

[22] See also research conducted by Risse, Ropp and Sikkink 1999.

constitute actors in the mutually constitutive agent-structure relationship. According to Finnemore, international organizations can teach the normative views it has adopted to the agents, in this case states. (Finnemore 1996, 24-25) In the language of constructivism, the states that created the ICC are influenced by the institution they themselves created.

Secondly, norms become cascaded. If the norm entrepreneurs are successful in promoting the norm, a tipping point is reached when a 'critical mass' of states have adopted the norm. A critical mass refers to the amount of states that have accepted the norm and to which states have done so: states are not equal and the acceptance of some states is more important than the acceptance of others. When the tipping point is reached, more and more states will adopt the norm without significant domestic pressure and the process of socialization will begin with the aim of turning all to followers of the certain norms. (Finnemore and Sikkink 1998, 901-902) According to Finnemore and Sikkink, socialization works because when enough states, and critical states, adopt a norm, the substance of what is perceived to be appropriate behaviour becomes redefined. States comply with norms because their behaviour is linked to their identity as a member of international society and they want to retain this identity. (Finnemore and Sikkink 1998, 902)

In the last stage, norms become internalized: a norm is taken for granted and norm-following is automatic. Following this, the norm can be very powerful in that it is not questioned and it is hard to identify because whether or not to follow the norm is not really widely discussed. Problematizing an internalized norm can create a very heated debate, as has happened with the current discussion concerning the norm of sovereignty. (Finnemore and Sikkink 1998, 904)

Finnemore and Sikkink also point to the distinction made between rationalist theory and constructivism and argue that the fault line between the two is untenable. Norms are a concern also to realists and liberals. Rationality and strategic interaction between actors plays a big role in the politicized social construction of norms. Social construction and strategic behaviour are intertwined and rationality comes to play when norms are researched. The issues of contention are thus not about rationality versus norms but about the way in which rationality and norm-based behaviour are linked. One issue revolves around materialism and whether behaviour and adherence to norms is explained by material interests. Utilitarianism is another issue: whether actors behave according to a norm because they see that it will help them get what they want or because they see the behaviour as good and appropriate. (Finnemore and Sikkink 1998, 909-912; also Ruggie 1998, Hurd 2008, 310) This issue is further discussed next through the logics of consequences and appropriateness.

2.5.4 The Different Logics of Action

It is also in the framework of a debate between different logics of action where rationalism and constructivism, and realism, liberalism and constructivism can be discussed. The issue between the logics of appropriateness and of consequences has been quite widely discussed.

One influential work has been that of March and Olsen concerning the logic of appropriateness and the relationship between the two logics (March and Olsen 1989; 1998). Finnemore and Sikkink touch upon the issue in their article of norms, already discussed above (Finnemore and Sikkink 1998). Risse adds to the debate by introducing his case for logic of argumentation, where the process of argumentation forms a distinct mode of social interaction. (Risse 2001) Shannon the two logics in an interactionist perspective and argues from political psychology that choices made stem from agents pursuing their goals whilst heeding to what is considered to be acceptable in a given social structure. (Shannon 2000) Müller discusses the two logics and bargaining in international negotiations (Müller 2004). Snyder's and Vinjamuri's research on international trials and tribunals as the strategy to prevent and deter mass crimes argues for policies based on the logic of consequences as the most suitably way to prevent future crimes. (Snyder and Vinjamuri 2003)

The logic of expected consequences is "The idea that action by individuals, organizations, or states is driven by calculation of its consequences as measured against prior preferences". (March and Olsen 1998, 950) Within the logic of consequences, political order arises from negotiations between rational actors that pursue their interests if coordinated action is seen to provide an opportunity of gaining something. As a frame, this is the most conventional one when interpreting international political life. (March and Olsen 1998, 950-951) In relations to others, the actors' aim is to achieve their objectives by using the full range of material, institutional and persuasive resources they have. Actors' will follow rules and standards of behaviour defined by norms only if the norms are seen to be effective for achieving the goals the actors are interested in achieving. (Snyder and Vinjamuri 2003, 13) Shannon notes that this logic is inherently individualist: it is rational, cost-benefit calculations that help actors to reach their goals. If compliance with a norm happens to coincide with the achieving of goals, the norm can be followed. (Shannon 2000, 295) Graubart's argument, discussed above, that the ICTR was established because it happened to coincide with the interests of the powerful states at the time can be taken as an illustration of this.

As Finnemore and Sikkink note, the logic of consequences is inherently a utilitarian and instrumental approach that is driven by agents. It corresponds best with rationalist and

methodological individualist –orientated thinking and thus traditionally coincides with realism and liberalism, or neoliberal institutionalism. (Finnemore and Sikkink 1998, 912-913) Realists concede only minimal importance to norms. Norms will be followed if it is compatible with interests and as long as they do not go against *raison d'état*. National interests trump norms. Neoliberal institutionalists do argue that norms have power and that they can constrain actors' behaviour and facilitate commitment and cooperation. However, following norms is a result of similar cost-benefit calculations as within realism. Compliance with norms is seen to help with attaining long-term goals and benefits based on self-interested calculations. Norms have power in certain situations and institutions, not in an overarching way *per se*. Rationalist, self-interest –based calculations underlie neoliberal institutionalism. Following Shannon, despite their differences, realist and neoliberalist approaches are grouped under the same heading of the logic of consequences for the purposes here. (Shannon 2000, 295-297)

Where the logic of consequences is associated with realist and liberalist approaches, constructivism underlies the logic of appropriateness. As Checkel notes, "implicit in many constructivist accounts is a model of human and state behavior where rule-governed action and logics of appropriateness prevail." (Checkel 1998, 326)

According to March and Olsen, within this logic actions are rule-based and "human actors are imagined to follow rules that associate particular identities to particular situations." (March and Olsen 1998, 951) Where the logic of consequences is agent-driven, logic of appropriateness is driven by social structure. Social structures formed and defined by norms and rules inform the sort of actions that are available to and taken by actors. Moreover, norms and rules point to actor's responsibilities and to who will act. (Finnemore 1996, 29) The choices available are constrained by the surrounding structure, or as Shannon has eloquently put it, *"states take cues from the social environment to determine how to behave and what interests and identity to claim"*. (Shannon 2000, 297)

Therefore, where the logic of consequences points to rational and self-interested cost-benefit calculations, the logic of appropriateness points to the power of norms. It is components of social structure, norms and social institutions, and the values, roles and rule they represent which guide behaviour. Under this logic, behaviour is directed by considerations of what is good, desirable and appropriate. (Finnemore and Sikkink 1998, 912-3) To sum up, as March and Olsen have put it, from the viewpoint of the logic of consequences, it is "an international system of interacting autonomous, egoistic, self-interested maximizers"; from the point of

view of the logic of appropriateness, it is "political actors as acting in accordance with rules and practices that are socially constructed, publicly known, anticipated, and accepted". (March and Olsen 1998, 952)

It is important to remember that the two should not be strictly separated from each other but come entangled in many ways. As Finnemore notes, following the logic of appropriateness does not mean irrationality. Careful thinking underlies decisions to follow rules and norms. (Finnemore 1996, 29) Furthermore, drawing a division between the two is not to say that adhering to one logic will exclude the other. Finnemore notes that "Ultimately, like structures and agents, the two logics are intimately connected". (Finnemore 1996, 30) March and Olsen agree and note that a particular action taken will most likely involve parts from both logics and that action cannot be explained by exclusively drawing from only one approach. (March and Olsen 1998, 952; also Shannon 2000, 298) Others contend that the logics of consequences and appropriateness are not enough or that their substance is ambiguous. Snyder and Vinjamuri discuss a logic of emotions as a way to deal with past atrocities, where attention is directed to achieving an emotional catharsis and to reconciliation as a way to reduce post-conflict tensions. (Snyder and Vinjamuri 2003, 15-17) Sending argues that the logic of appropriateness is untenable as a theory of individual action (Sending 2002) and Goldmann discusses in length the divisions drawn between the two logics. (Goldmann 2005) Most interesting for the context here, however, is the logic of argumentation and it is introduced as the third logic surrounding the theme of the research.

Perhaps on of the most well-rounded case for the logic of argumentation has been made by Thomas Risse (see also Hawkins 2004; and Deitelhoff 2010). In his 2001 article *Let's Argue!* Risse contends that constructivism encompasses not only the logic of appropriateness but also what could be termed as a logic of truth seeking or arguing; the question is not what the right thing to do is but how actors decide which norm applies. Through a process of collective communication, actors seek to find out either if their assumptions about the world are correct (theoretical discourses) or whether norms of appropriate behaviour can be justified and what norms apply in which situations. By arguing over an issue, actors challenge the validity claims inherent in statements; and seek a communicative consensus both about their understanding of a situation and about the justifications for the norms that are guiding the actors' behaviour. Arguing is also goal-oriented but the goal is more about reaching a reasoned consensus than about fixed preferences. Central to argumentative rationality is also that those participating in the discourse are open to being persuaded by the argument of the other and thus ready to change their views and interests. (Risse 2000, 6-7)

Risse bases his conceptualization of the logic of argumentation on Jürgen Habermaas' critical theory of communicative action. (Risse 2000, 2) Habermaas based his theory on the idea of rational individuals who through speaking to each other moved towards agreement and action; this is the foundation for a rational society. To achieve it, communication was central. Argumentative dialogue in turn, is at the heart of rationality; it offers the possibility of testing propositions and through that, reaching intersubjective agreements. Disagreement over the truth or appropriateness of statements is what results in argumentation. (Herrick 2005, 236-9)

As Habermaas defined, "We use the term argumentation for that type of speech in which participants thematize contested validity claims and attempt to vindicate or criticize them through argumentation." (Habermaas 1984, 18) According to Habermaas, the strength of a particular argument can be measured through the soundness of the argument's reasoning. One way to perceive this is the extent to which it can motivate others to accept the reasonings within and the validity of the claims made. (Habermaas 1984, 18)

By drawing on Habermaas' theory of communicative action, Risse develops his notion of truth-seeking arguing, the third form of communication in addition to bargaining and rhetorical action. The success of rhetoric is based on the logic of argumentative rationality, oriented towards reaching a common understanding. Thus, rhetorical statements and exchanges tend to move more towards the logic of argumentation as actors engaged in the discourse need to come up with increasingly well-rounded justifications to convince their audience of their opinion. (Risse 2000, 8-9)

Argumentative rationality needs to be preceded by what Risse in Habermasian terms calls a common lifeworld. The term refers to "a supply of collective interpretations of the world" and consists of "a shared culture, a common system of norms and rules perceived as legitimate"; in essence, the common lifeworld provides actors "a repertoire of collective understandings" to which actors can refer to when making claims. (Risse 2000, 10-11) Security communities that share values and norms to a high extent can constitute a common lifeworld (the European Union and the so-called transatlantic community for example); and, following the ideas of democratic peace theory, the collective identity shared by democratic states can form a common lifeworld. Moreover, Risse argues, some issue areas can be institutionalized to such a high extent as to constitute a common lifeworld, the issue of human rights being one such possibility. Here, international institutions create a normative framework which structures interaction in a particular issue area. A common lifeworld does not, however, imply common knowledge, lack of which then leads to arguing. (Risse 2000, 15)

Risse also points to certain features present in discussions in the public sphere as opposed to diplomatic negotiations between two or more parties. First, the public sphere is open to other actors than states (nonstate actors and advocacy groups). Second, public debates often concern identity-related issues, which also concern normative debates linked to the social identities of actors. Of such issues Risse mentions the debates over humanitarian intervention and human rights questions. Third, debates in the public sphere tend to have a civilizing effect on actors. Actors become forced to justify their actions based on shared values and notion of 'good'. Fourth, lack of material power does not preclude the possibility of influencing the discourse. The authority and knowledge of many NGO's is proof of this. (Risse 2000, 22)

Despite the divisions drawn, Risse notes that "we rarely observe pure argumentative rationality prevailing in world politics" but instead see various combinations of all three. (Risse, 2000, 24) Strategic behaviour, norm-guided behaviour and argumentative behaviour are ideal types and often become intertwined. Risse notes that we often seek to argue to somebody that our opinions are justified and in this process we follow norms that enable the communication (language rules). Thus, the question is not about the way in which actors behave but the mode of behaviour that best captures action in a give situation. (Risse 2000, 18) Adding the logic of argumentation to the debate allows for a deeper understanding of the issues between rational choice and constructivism. It challenges the rationalist notion of fixed interest and breaks some of the structural bias of the logic of appropriateness. (Risse 2000, 34) As Reus-Smit notes, when constructivism centers on reasons for action, the focus is not just on the logic of appropriateness but also on the logic of argumentation, on the "*way in which norms provide the communicative framework in which actors debate issues of legitimate agency, purpose and strategy*". (Reus-Smit 2009, 23)

So far, the parts in this chapter have introduced the theoretical framework that surrounds this research. The legalization that the international realm has undergone in many aspects and the human rights and atrocities regimes that have developed provide the wider context for the discussion. This context is further elaborated by arguments for and against legalism. Realism, liberalism and constructivism provide alternative theoretically-orientated approaches to international relations and state behaviour within it. The discussion of the three logics of action is intended to provide a more in-depth framework. A discussion of realist, liberalist and constructivist approaches to international law concludes this chapter.

2.5.5 International Law through the Theoretical Approaches

A different picture of international law and its institutions materializes when it is approached through the different theoretical starting points. For realists, the picture is rather bleak. Surrounded by conditions of anarchy, possibilities for cooperation are dim and this does not bode well for agreements in international law. Realists do not deny the existence of international law altogether but disparage its meaning. Even Morgenthau, the staunch critic of international law, conceded that “"to deny that international law exists as a system of binding legal rules flies in the face of all the evidence”. (Morgenthau 1965, 277) States will cooperate within international law and institutions but only if it is in their interests to do so. The commitments states are willing to make are based on their perceived political realities and cooperation is guided by the interests of the most powerful states in the system. (Abbott 1999, 365)

In the realist view, international trials and tribunals are established winners of the conflict and inflicted on the losers; it is about punishment and revenge but nothing more. It is also often feared that trials will stand in the way of maintaining or re-establishing international order and should thus be avoided. (Bass 2000, 10-11) For realists, the creation of the ICC represents an anomaly. Why should states cooperate in such a way? The most powerful states, US in the forefront and also Russia and China, do not support the Court. Moreover, a myriad of other countries, including many of the US’s allies and NATO members, support the Court despite US opposition. This leads to the conclusion that realism cannot really account for the establishment of the ICC. (London 2006, 9-11; Schiff 2008; 5-6; Wippman 2009, 152)

To sum up, in the realist view, states do not and should not have any desire to concede to an institution that could potentially curb their choices in securing survival. Much of the criticism towards the ICC and legalism can be seen to be realist-inspired.

Neoliberalism, with its belief in the ability of cooperation trough institutions, takes a more positive view of international law. The neoliberalist position of strategic action through which actors seek the best way to achieve their goals and interests opens up the possibility for international law. Working together through institutions can do away with the traditional obstacles of cooperation, such as cheating and transaction costs. The arguments for legalization, already discussed above, quite well coincide with the neoliberalist understanding of the capabilities of international law. (Reus-Smit 2009, 18-19) Reus-Smit, however, points to limitations in neoliberalist understanding of international law. First, neoliberalism does not account for the historical uniqueness of the modern institution of international law. If

institutions would only simply be functional solutions, recurring cooperation problems should also generate recurring institutional practices. This however has not been the case and different solutions have been developed throughout history. Second, neoliberalism does not account for the ways in which international law can function as a focal point for discursive struggles. The creation of the laws of war was not just the establishment of a set of rules but enacted and asserted a definition of legitimate statehood and appropriate action. Third, neoliberalism cannot fully account for the obligatory force of international law and why some rules are considered to be binding in and of themselves. The argument that states obey the law because they have consented to it fails when confronted with customary international law, which binds states without their formal consent. Fourth, neoliberalism has problems accounting for the way international law has come to be increasingly enmeshed in the rights of individuals and groups. The neoliberalist approach with states in the centre becomes questioned when normative impulses and nonstate actors capture more authority. (Reus-Smit 2009, 19-21)

In their answer to the legalization discussion, Finnemore and Toope call for a fuller understanding of law and criticize the neoliberalist approach to legalization as too narrow. Finnemore and Toope point to three features of international law neglected by neoliberalism. First is the already briefly mentioned failure to account for customary international law, which influences state behaviour through norms in areas such as the legitimate use of force and human rights. Second, they question obligation, precision and delegation as the defining characteristics of law. In many well-established areas of international law, norms are rather imprecise and much of international law functions outside a system of extensive delegation of decision-making authority (excluding the EU, human rights law affects states quite largely without compulsory adjudication). Obligation is seen as the most problematic and the authors call for a discussion of how obligation becomes generated. Finnemore and Toope point to legitimacy as a source of obligation. Third, law should be treated as a process, not as an artifact that has a strict form. (Finnemore and Toope 2001, 743-750)

As an approach that gives space to institutions, neoliberalism can to some extent account for the establishment of the ICC. As Schiff notes, states will support the ICC if they see that the support will help in achieving their goals. If the Court supports the interests of the states, it will gain more legitimacy. Some aspects of the ICC's form, survival and growth can be explained through neoliberalism. (Schiff 2008, 7) Wippman agrees and notes that to some extent the creation of the ICC is motivated by the states' wish to reduce the problems and costs of creating international tribunals on an *ad hoc* basis. When the issue is taken further,

problems arise. Behind the ICC were also wishes, shared by many, to develop and stabilize the norms that inform what legitimate behaviour by states and nonstate actors is. Neoliberalism cannot account that well for normative impulses. (Wippman 2009, 152-3) Schiff notes that neoliberalism "doesn't explain why the anti-impunity norm and international criminal law grew in the first place." (Schiff 2008, 7)

Constructivism offers a different view of international law. Finnemore and Toope characterize law as "a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies." (Finnemore and Toope, 2001, 743) Brunnee and Toope argue for an interactional view of international law where "law is constructed through rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors." (Brunnee and Toope 2000, 65) Armstrong et al. argue that constructivism has made four central contributions to understanding international law. First, constructivists emphasize norms and seek to recover the meanings those norms have for those who practice and adhere to them. Second is constructivism's adherence to structure, of which the already mentioned customary international law provides a ready example. (Armstrong, Farrell and Lambert 2007, 102-3) When discussing structure, Armstrong et al. draw on Reus-Smit's conceptions of so-called fundamental institutions, which are deep institutional practices that structure international society. Fundamental institutions are generic in nature and differ from society to society. As the institutions of modern international society Reus-Smit mentions multilateralism and international law and sees them as grounded in the normative foundations of international society. (Reus-Smit 1997, 555-6)

Thirdly, Armstrong et al. point to the concept of agency. Constructivists have highlighted the way in which states achieve their powers through the norm of sovereignty, which legitimates many state activities. Moreover, constructivism highlights the role of nonstate actors. Fourthly, constructivists point to the constitutive effect of international law. Politics and international law affect each other in many different ways; the construction of norms involves politics and norms, such as state sovereignty, are defined and validated by international law. (Armstrong, Farrell and Lambert 2007, 102-5) Thus, in the language of Finnemore and Toope a constructivist view of international law can provide a fuller picture of that law. They point to the way the spread of law and legalization encompass features and effects of legitimacy. Attention is directed to how law is purposively constructed and how taking part in that construction contributes to the ideas of legitimacy and obligation. A fuller understanding also points to the procedures, institutions and process that generate legitimacy. Moreover, law not

only constitutes relationships; it also defines what is deemed acceptable behaviour in the international arena. (Finnemore and Toope 2001, 744-5)

Reus-Smit highlights international law as a central feature in the framework that rules and norms form and within which international politics also takes place. Social and legal norms both play a role and constitute actor's identities, interests and actions. The international society viewed through constructivism is a constitutive one in which legitimacy, purposes and appropriate strategies are debated. Lately, politics has given international law form and content and in turn, international law has influenced politics. (Reus-Smit 2009, 3-5) In relation to institutions, Reus-Smit notes: *"states create institutions not only as functional solutions to co-operation problems, but also as expressions of prevailing conceptions of legitimate agency and action that serve, in turn, as structuring frameworks for the communicative politics of legitimation."* (Reus-Smit 2009, 5)

Constructivists too have sought to explain the creation of the ICC. As with realism and neoliberalism, this discussion remains short as the subject here is not the creation of the ICC. As introduced above (p. 43), Fehl finds answers in constructivism for why the ICC was established, and for its institutional design. Ralph combines English School (Bull) and constructivist (Wendt) approaches and argues that the ICC was created as an answer to the demands of holding individuals responsible for atrocities and to the instability in international relations created by the ability of the great powers to decide whether or not international trials will be compiled. (Ralph 2009, 135)

Wippman considers the reasons for action in relation to the creation of the ICC through analyzing arguments by the US and other states during the Rome negotiations over the key issues of the Rome Statute. Wippman notes that in many ways, in Rome law was inseparable from politics and vice versa. He separates legal and political arguments and sees that both were used in Rome, the negotiations as a whole being encompassed by the larger context of existing international law and its institutions. Whereas the legal arguments of actors concerned what international law does or should require as a legal system, political arguments were claims about what would advance the interests of actors. (Wippman 2009, 153-154) Wippman asserts that the views expressed in the Rome negotiations were founded on material, identity-based and normative concerns. The different emphasis on these concerns led to different views as to the role of international law and its institutions in international relations with supporters emphasizing law's ability to constrain and advance human rights –orientated views of the international society. (Wippman 2009, 155-6)

This Chapter has discussed the theoretical framework of this thesis. The ICC is a result of the increasing importance and value put on human rights and their protections especially since the Second World War. This has lead to the establishment of international institutions and trials to bring perpetrators of heinous international crimes to justice and to the creation of the so-called atrocities regime. This has come into conflict with the principle of state sovereignty and challenged the more realist-inspired views of international relations.

Before moving on to discuss the United Kingdom, a short step back is in order. As Finnemore and Toope have noted law should be treated as a process. Reus-Smit agrees[23] and argues that even though actors assume the existence of social rules, they argue as to the forms of those rules, what new rules should be established, what the rules proscribe and what is their reach. Through this, international relations and law remains a dynamic and changing framework under constant change and debate. The reasonings actors give in the debate are rhetorical in nature. (Reus-Smit 2009, 41) Thus, rhetorical analysis as a research method is useful here, as the aim is to uncover the ways in which actors in the international arena argue and reason. The method in turn is complemented by a constructivist framework, which points towards the idea that reasons and motivations behind actions are not simply based on self-interested calculations, but are constructed through interaction between actors and the structure that forms the framework within which the actors act and argue. It is these arguments and reasonings that are discussed in Chapters 5 and 6.

[23] For a lengthier discussion on the matter see Wheeler's discussion on international law and NATO's Kosovo bombings in 1999. (Wheeler 2009)

3. The United Kingdom: Foreign Policy and International Trials

This thesis circles around the UK's foreign policy towards the ICC. In order to offer a comprehensive analysis, it is important to put the subject in context. Therefore, this chapter offers a more in-depth discussion of the UK's foreign policy and its policies and viewpoints towards international criminal law and its institutions. In addition, this gives a practical illustration of the theoretical framework. Viewed through the theoretical points, the UK's support for the international tribunals can be seen to be influenced by the overall legalization of international relations and by a belief in legalism as a way to solve problems, such as how to deal with post-conflict calls for justice. The influence of the atrocities and human rights regimes can be seen in the Blair government's formulation of an ethical foreign policy. Viewed through a constructivist lens, these structures are seen to have an influence on the way the UK has acted in relation to these issues.

The main developments in international criminal law have taken place in the 20th century. Owing to that and to the subject of the thesis, the discussion concentrates on UK policies concerning institutions of international criminal law and themes closely related to it, such as human rights from the 20th century onwards. This chapter advances as follows. First, the UK's current foreign policy is discussed. The main focus is from the latter part of the 1990's onwards and corresponds to the time frame of the analysis. Secondly, focus is put on the UK's policies towards international criminal law and its institutions before the establishment of the ICC. The UK's relationship with the ICC is discussed next. The concluding part deals with the main criticisms of the ICC and the UK's relationship with it.

3.1 The UK and Human Rights

The UK's human rights policies need to be viewed in the larger context of the human rights regime, discussed in Chapter 2. Traditionally, the UK has been viewed as a strong proponent of human rights. The UK is a signatory to the central human rights treaties and covenants, including but not limited to (the year represents the time of UK ratification/accession to the treaty): The Universal Declaration of Human Rights UDHR (1948); The Convention of the Rights of the Child (1991); Convention for the Protection of Human Rights and Fundamental Freedoms (1951); The Genocide Convention (1970); International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (1976); Convention Relating to the Statues of Refugees (1954); Convention of the Abolition of Slavery (1957); and the Convention against Torture (1988). (FCO 2012b)

Successive UK governments have sought to bring human rights in to foreign policy. This was not only so in the case of the Blair government from 1997 onwards (further discussed below) but also previous governments under Callaghan and Hurd attempted to bring human rights in the diplomatic agenda. (Wheeler and Dunne 1998, 852) When the Blair Government came to power, human rights were emphasized as a central theme in UK foreign policy. The support of international criminal law and its institutions has been one way in which this has been done in practice. The next section analyzes the UK's foreign policy overall, before moving to discuss international trials.

3.2 The UK Foreign Policy

The 20th century saw the decline of the British Empire.[24] Starting roughly from the end of the Second World War, the UK's foreign policy has revolved around the so-called US-UK 'special relationship'. In addition, the UK has balanced with its relationship to the EU. When the Blair Labour Government took power 1997, the UK's foreign policy was characterized by interventionism and promises of an 'ethical foreign policy'.

Since the start of the Cold War, much of the UK's foreign policy was characterized by UK's relationship to the US. Both economic and national security issues have been at the root of the US-UK special relationship. From the establishment of the North Atlantic Treaty Organization to the many nuclear power related debacles of the Cold War, this relationship of shared economic and national security issues continued well into to the 21st century. (Gamble and Kearns 2007, 117-119; Dumbrell 2001) According to Gamble and Kearns, "Support for the US has been the default setting of UK foreign policy". (Gamble and Kearns 2007, 119) The early 1990's saw one major upheaval after the other: the First Gulf War was quickly followed by the disastrous dissolution of Yugoslavia and the genocide in Rwanda.[25] According to Gamble and Kearns, the 1990's also saw both the "climax as well as a breaking point" in US-UK relations, which under the Blair leadership became very tight. (Gamble and Kearns 2007, 120)

Blair's New Labour took power in the 1997 elections. UK foreign policy under the first Blair Government (1997-2001) can in general terms be characterized with three main themes: continued close relationship with the US; placing the UK in the center of the EU; and interventionism, central to which was the idea that intervening in grave humanitarian

[24] See Brendon 2007.
[25] This subject is further discussed in second part of this chapter.

situations was a moral obligation. The interventionist policy was epitomized in 1999 with the Kosovo intervention and continued with the UK's role in bringing an end to the conflict in Sierra Leone. (Lunn, Miller and Smith 2008, 9-10)

Central to the Blair era was the advancement of a "Third Way" in politics. As a political strategy and in economic terms, the aim was to go beyond the divisions between the old left and the new right and balance the free market and public ownership. In foreign policy terms, references were made to the need to bring human rights in foreign policy. (Wheeler and Dunne 1998, 847-8) This was to be done by building a framework of an 'ethical foreign policy'. The idea was put forward by Blair's Foreign Secretary Robin Cook, who proclaimed that Labour's foreign policy "must have an ethical dimension". This new 'ethical foreign policy' as it became to be called had in its centre the promise that "the Labour Government will put human rights at the heart of our foreign policy". (The Guardian 1997) The wish was to bring ethics and idealism into the world of foreign policy, traditionally ruled by realism. In essence, the aim was *"mapping out a third way which tames the element of brute power"* and look to *"the reconciliation of order and justice in world politics."* (Wheeler and Dunne 1998, 856) From this, followed the policy of 'liberal interventionism', the foundation of which was the idea of bringing ethics to the foreign policy arena. Overall, it can be seen that the UK's foreign policy at the time echoes the structure formed by the human rights and atrocities regimes.

The main tenets of the ethical foreign policy can be pinned to the ideas of humanitarian intervention and of an 'international community'. In humanitarian intervention, the main impetus is human suffering, the prevention and stopping of which provides the moral right to intervene. The international community referred to the shared rights and responsibilities of those belonging to the community. As a member of the community, a state should live up to its responsibilities, of which the most stressed in the beginning was the protection of core human rights. Should a state not respect its responsibilities, intervention became a possibility. (Bulley 2010, 445-447)[26] Chandler points to the benefits of framing the issue of intervention with ethics. When an intervention is conducted under ethical motivations, the final policy outcome of the intervention diminishes in importance; often, it can be emphasized as being at least better than doing nothing. A positive framework for Western intervention is created and the framework of ethical foreign policy becomes 'rhetoric without responsibility'. (Chandler

[26] Similar ideas are now coined in the responsibility to protect –doctrine, illustrated in the 2001 Report "Responsibility to protect" by The International Commission on Intervention and State Sovereignty (ICISS). (ICISS 2001)

2003, 305-9) Blair's interventionism was tested in the late 1990's and early 21st century. According to Bulley, the UK took part in "an unprecedented number of military interventions" from 1997 to 2003. Included are the bombing of Iraq in 1998, Kosovo 1999, Sierra Leone 2000, Afghanistan 2001 and Iraq in 2003 and smaller actions in East Timor 1999 and the Republic of Congo. (Bulley 2010, 447)[27]

In addition to the above, the other important context for the UK's policies is the EU. The UK-EU relations have throughout history been strenuous. Although pre-Labour Conservative governments have kept the slogan of putting the UK 'in the heart of Europe', a promise of Blair's too as he assumed office, this has been more about placing the UK in a position where it could slow down attempts of closer integration than about making the EU the UK's main priority. With France and Germany historically being the forerunner's of tighter EU integration, the UK has preferred cooperation on the intergovernmental level. The UK's stance towards the EU has been one of 'a la carte' picking and choosing, the UK for example opting out of the Social Chapter of the EU, the Schengen Agreement and the Euro (Lunn, Miller and Smith 2008, 28-30) This remained so even though Blair's policies towards the EU have been regarded as more constructive than the marginalization of the UK practiced by the predecessor Conservative governments. (Grant 2007, 132)

The UK's role in the development of the EU's common security and defence policy has been more constructive. What started with the UK-France St Malo declaration in 1998 has resulted in a European Security and Defence Policy and the creation of European Rapid Reaction Forces. The UK under Blair was also more involved in the Common Foreign and Security Policy of the Union. (Lunn, Miller and Smith 2008, 32-33) Under the framework, British troops have been deployed as part of EU operations in for example DRC and Macedonia. (White 2009, 133)[28]

The UK has in many ways had to balance with its aims of keeping the 'special relationship' with the US and maintaining a role in the European Union. The UK government's need to heed to its US-relationship has affected its policies towards the EU and the 'pro-Atlanticist' stance has been maintained through the development of the EU. One result has been the UK's policy of acting as 'bridge' between the US and EU. Here, however, Iraq has proved to be a point of contention, which made the 'bridging' increasingly difficult. The development of a

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[27] For more on UK military actions, see White 2009.
[28] EU operations and development will not be further discussed here. For more detailed information, see Howorth 2007.

European defence policy and foreign policy also stained UK allegiance to NATO and through that, the US. (Lunn, Miller and Smith 2008, 20-38) Next, the discussion is moved to the context of international law.

3.3 The UK and International Criminal Law

This part discusses the UK's relationship with international law since the turn of the 20th century. UK has been involved in the establishment of all international tribunals and trials sine the First World War. The purpose of this part is to provide a historical context for the UK's support of the ICC. First, the international trials envisaged and established in connection to the World Wars are introduced. Second, the UK's involvement in the tribunals for the Former Yugoslavia and Rwanda are analyzed.

3.3.1 Germany on Trial: From Leipzig to Nuremberg

The first attempts to form an international trial were made following the First World War. Already in the early stages of the war, trials became one of Britain's war aims. Prime Minister Lloyd George demanded punishment for war criminals and this was echoed strongly by the British public and after fierce debates, also by the Cabinet. (Bass 2000, 60-61; 73) This was however to no avail: the German Kaiser had sought and been granted asylum in Holland, which refused to extradite him despite calls from the Allies to do so. (Cryer 2005, 34) There are many similarities between the situations of the late 1910's and the early 1940's. Britain had suffered in the hands of Nazi Germany and the British public wanted to see the war criminals of Germany punished. According to a poll in 1944, 97 % of Britons thought that the top Nazi leaders should be punished. (Bass 2000, 182-183) The difference between the situations was the British insistence of summary executions for the main Nazi war criminals. Whereas Lloyd George called for trials, Prime Minister Winston Churchill supported executions. (Smith 1981, 45-46) In the end, the Americans changed the UK's mind, President Truman being a fervent believer in the justice system. (Smith 1981, 195) After negotiations in London in 1945 Britain yielded to the American and Soviet Union positions and the London Agreement establishing the Nuremberg International Military Tribunal was signed by the four Allies. (Cryer 2010, 111)

The British were not initially supporters of a trial following the events of the Second World War. According to Bass, the British were aware of "the risks of legalism" (Bass 2000, 181) and consequently sided with idea of summary executions. Bass concedes that although liberal

states are usually legalist, they are not always so and in the case of Britain and Nuremberg, the initial non-legalist position was, fortunately, "only a partial lapse". (Bass 2000, 181-2)

3.3.2 The International Criminal Tribunal for the Former Yugoslavia

The 1990's presented as a new opportunity for international criminal law and trials. The Cold War era hiatus ended and the crises in both Yugoslavia and Rwanda[29] demanded the attention of the world and became to be the test cases for post-Nuremberg trials. They also show well the tensions that exist between realpolitik and idealism that underlies international criminal law.

In the UNSC meeting when the ICTY was established, UK representative David Hannay attested UK's strong support for the resolution and warned the parties of the conflict that *"they must stop immediately violations of international humanitarian law or face the consequences"*. (Bethlehem and Weller 1997, 278) Although it supported the Tribunal in principle, in reality, the UK's belief in the Tribunal and support for it was and has been somewhat ambiguous.

The UK, together with France, was the leading troop contributor country to the United Nations Protection Force, a UN peacekeeping mission on ground in Bosnia tasked primarily to secure the delivery of humanitarian assistance. In order to keep the troops safe, the UK had in its interest to settle the Bosnia conflict as quickly as possible; a war crimes trial would in all likelihood indict key Serb leaders, which might result in reprisals against British troops on ground.[30] (Bass 2000, 216) The UK was also concerned judicial proceedings would impede diplomatic efforts to end the fighting and make it more difficult to find a solution. (Forsythe 1994, 403) Both the UK and France became *"prisoners of their own contradictions"* in wanting to at the same time achieve peace as soon as possible and create a court they saw might be an obstacle to that achievement. (Hazan 2004, 24) The early years of the ICTY proved difficult in many ways. The Commission of Experts tasked to document and investigate the crimes was under-resourced, not having enough founds or staff. (Hazan 2004, 26-29) Electing the judges was difficult, as was the protracted selection of a Prosecutor. (Bass 2000, 217-219) The nascent Tribunal also had to deal with technical problems. There were no

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[29] For detailed information on events, see Silber and Little 1996; Power 2002; Moghalu 2005.

[30] The mission itself has been widely criticized for having an ineffective mandate and failing to protect civilians on ground. Moreover, the British and French fears were not unfounded; the Serbs did take UN personnel hostage to stop Western assaults. See White 2009, 140-142; Silber and Little 1996, 328-9.

offices, proper equipment or money. The creators of the ICTY were not eager to financially support the Tribunals work; the UK gave $30, 500 and one staffer. (Bass 2000, 222) The UK was also criticized for lacking enthusiasm to gather witness statements and testimonials. (Block and Castle 1993) To Hazan, all this was evidence of particularly Britain's *"shameful realpolitik"* and *"pragmatic, realist raison d'etat that carries them ever farther away from democratic ideals"*. (Hazan 2004, 45) This continued as the Tribunal got underway in its work. Especially difficult was the arresting of war criminals, a task which the IFOR, NATO's International Protection Force on ground in Bosnia, did not want to undertake. (Bass 2000, 239-249)

The Blair Government, however, changed the UK's policy towards the ICTY which was marked in foreign policy by "major innovations" which amounted to "a very significant change" among other things in UK commitments in the Balkans and Kosovo. (Hill 2001, 331) The new line was epitomized in the new ethical foreign policy, discussed above. As Robertson notes, the election of the Blair Government was *"an important event in the transformation of the Tribunal's fortune"*. (Robertson 2006, 406) This change became evident for example by the support the UK gave to the NATO's bombing campaign in Kosovo in 1999. (Wheeler 2000, 257-265)

3.3.3 The International Criminal Tribunal for Rwanda

Rwanda is remembered as an uncomfortable failure for the international community as a whole and for the UN in particular. During the 100 -day killing spree that started in April 1994, the UNSC managed a few half-hearted resolutions and actually reduced the size of the UN mission already deployed in Rwanda. (The UNSC 1994b; Melvern 2000, 172) France received the main criticism and has been accused of having knowledge of the impending genocide and of supplying arms to Rwanda both before and during the atrocities. The US has been similarly criticized (Dallaire, Manocha, Degnarain 2005, 863-866; Power 2002, 335-348)

The UK, although less so that the US and France, has gotten its share of criticism. According to Melvern, the Foreign and Commonwealth Office (the FCO) attempted to underplay the events in Rwanda and claimed that it did not know what was going on. Rwanda was low on the list of British interests and attention was directed to Bosnia. Furthermore, UK's UN representative Hannay was convinced that there really was nothing the UN could have done to stop the genocide. Rwanda was also not high on the list of debates in the House of Commons. (Melvern 2000, 230-232) In addition to France, UK has been found to have supplied arms to Rwanda as a UK company brokered an arms deal to Rwanda before and during the genocide.

(McNulty 2000, 120) As a whole, the Rwandan genocide stands as an embarrassing failure for the international community and for the UNSC. There were no strategic or national interests in Rwanda; as Bass has illustrated the issue with both Rwanda and Bosnia, "It was the great misfortune of Rwandans and Bosnians to be able to make appeals to the West only in moral terms". (Bass 2000, 278)

Although the UNSC failed to intervene in Rwanda to prevent or stop the genocide[31], it did set up the ICTR, establishment of which followed closely the path of the ICTY. On July 1st 1994, the UNSC established a Commission of experts to investigate the grave violations of humanitarian law. (The UNSC 1994c) In connection to this (Resolution 935), the UK's UN representative Hannay expressed the UK government's strong support for the establishment of the Commission and emphasized the international community's duty to ensure that perpetrators are brought to justice. (Hannay 1994a)

Cooper argues that the international community rather established an international tribunal to persecute a few for the massacre of close to a million than take a look in the mirror. (Cooper 2009, 83) This sort of fig-leaf criticism – that a tribunal is established to mask the fact that there is no willingness to do anything more robust[32] – speaks volumes of the way humanitarian motives and calls for international justice are often tempered by *realpolitik*. The UK was ready to support a tribunal for Rwanda, but it rings hollow in the light of what was not done. This is not to say that the benefits of the ICTR would be eliminated because of the reasons it was established, but to emphasize the influence of power and interests.

The aim was to illustrate the UK's relationship with earlier international tribunals to provide context for its policies regarding the ICC. It is clear that support for international criminal law has heeded to national interests and realpolitik. Next, UK's policies towards the ICC are discussed.

3.4 The UK and the International Criminal Court

The last part concentrated on the UK's relationship with international criminal law and some of its central institutions. This part focuses of the ICC. First, the reasons for joining an institution such as the ICC are discussed briefly. As this is not the main focus here, the matter

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[31] A UN Report found that "The failure of the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole". (UN 1999, 3;Barnett 1997, 559)

[32] Rabkin 2005, 261-263

is introduced only on a general level. Secondly, the UK's relationship with the ICC is discussed. Endorsing the ICC corresponds well with the UK's foreign policy at the time, which in turn reflects the interests in human rights and international trials.

3.4.1 Joining the ICC

By signing and ratifying the Rome Statute of the ICC, a state becomes a party and accepts the jurisdiction of the Court. The potential risks involved have deterred some states from joining the Court, most notably the US, China and Russia. (The ICC 2012b) The question is why so many states have joined an institution that can (in principle) interfere in matters traditionally taken to belong to the internal matters of a sovereign state (the punishment of nationals). States accept the possibility of incurring so-called sovereignty costs when they ratify a statute such as that of the ICC's. As Abbott and Snidal point out, the acceptance of binding legal obligations and delegating authority to a supranational body is possibly costly to states. The costs may be lower, such as loss of decision-making power but also higher, such as the punishment of one's own nationals. (Abbott and Snidal 2000, 436) Legalization makes trade-offs a necessity. Especially with hard legalization, which the ICC represents in many ways as discussed in Chapter 2, states need to balance between the benefits it brings and the sovereignty costs it entails. (Abbot and Snidal 2000, 455)

Practice has shown that the UK has not been particularly concerned about the ICC's sovereignty costs. For one, the complementarity principle stands as a barrier for the prosecution of UK nationals in the ICC. It seems likely that should a UK national be accused of crimes that fall under the ICC's jurisdiction, the UK would deal with the matter itself. As Foreign Secretary Cook has noted, it "remains inconceivable that British service personnel could ever end up in The Hague" due to the UK's readiness to initiate prosecutions in its own legal system. (Cook 2005) The UK has, in fact, initiated a prosecution under its 2001 ICC Act in the case of Corporal Payne and others, who were accused of ill-treatment of prisoners during the Iraq war in 2003. Payne became the first British soldier convicted of a war crime under international law. However, the case would in all likelihood be very different should the alleged criminal be a high ranking British official or statesman. In many ways, as the importance of the person increases, the likelihood of prosecution decreases. (Rasiah 2009) Moreover, the UK's possible sovereignty costs in this vein are also lowered by its status as a permanent member of the UNSC, which can defer ICC cases as discussed previously. It is highly unlikely that a British national will ever stand accused in the ICC, and not only due to

the complementarity principle. As will be seen, this matter became one central theme in the ICC debates in the House of Commons.

Secondly, the acceptance of the ICC corresponds well with the ethical foreign policy of the Blair government and it is cited as one of the achievements of a policy more concentrated on human rights. (Lunn, Miller and Smith 2008, 9) Williams agrees and states that the ICC was a *"key part of the British Government ethical foreign policy."* (Williams 2005, 18) The Blair Government took a more supportive stance towards international trials than the previous Major Government. As Betti argues, the rise of the New Labour and the support it received created the favourable conditions for the adoption of the Rome Statute and its integration to the UK's domestic law. With the parliamentary system in the UK and the large victory secured by the Labour in 1997, the Blair government could rely on a large majority ideologically favourable to the ICC. Betti points especially to Foreign Secretary Cook, who framed the adoption of the Rome Statute as a necessary step in the attempt to spread respect for human rights. The conditions at the time rendered the UK supportive for the prosecution of international crimes. (Betti 2001, 33)

The UK's staunch support of the ICC is also interesting in the light of the so-called US-UK 'special relationship', discussed above. With the ICC, the UK made a clear break from the US position. As stated, the domestic situation in the UK, with the Labour party and the ICC-enthusiast Cook in power, was conducive to the ICC's endorsement. As Edlin notes, it is more surprising that the US did not support the ICC than that the UK did. The US position stands as an anomaly compared to its traditional Western allies. From the UNSC permanent members France and UK support the Court, as do all NATO countries, Turkey excluded. (Edlin 2006, 6) When it comes to the ICC, Edlin sees the differences of opinion as rising from the different experiences of the US and UK with the UN and the EU, respectively. The UK is used to relinquishing some of its sovereignty to the EU but the US tends to be more wary of possible UN effects on US actions. The US, not being used to sovereignty costs, views the ICC and its possible effects as more of a threat than the UK does. (Edlin 2006, 18-19) Moreover, the EU-framework has been conducive to UK support to the ICC. EU-states have collectively proclaimed their support for human rights and the rule of law and that the principles of the Rome Statute coincide with those of the EU itself. (Aoun 2012, 22) This can in part explain the UK's support for the ICC.

On the whole, the UK's support for the ICC corresponds with the UK's convictions to uphold and advance human rights as part of the Blair Government's ethical foreign policy. Given the

overall human rights framework, the EU's influence and the context at the time, created by the Blair Government, the UK's support of the ICC does not strike very surprising.

3.4.2 The UK: Adopting the Rome Statute and After

Pre-1997, the Conservative Party remained cautiously supportive of the ICC. In the spirit of the announced ethical foreign policy, discussed above, the Labour Party took a more positive stance and made the ICC part of their election campaign, promising to work for its creation. Prime Minister Blair and then Chancellor Gordon Brown echoed Cook's views for a moral component in foreign policy. (Busby 2010, 241-242) Cook emphasized that the Government fully supports the ICTY and ICTR and continued by expressing the Government's support for an international criminal court since *"it is also our position that a prosecution for a war crime or genocide should not depend on an ad hoc resolution of the Security Council"*. (House of Commons 1997, Vol. 301, col. 769)

Cook's statement became to characterize a definite shift in UK policy towards the ICC. In December 1997 during the fifth PrepCom session the UK opposed a provision demanding that ICC proceedings should always depend on prior UNSC approval. This change of opinion altered the course of the negotiations and proved a definite break from the US-position. This paved the way for UK joining the so-called Like-Minded group which advocated for a strong and independent Court. It continued in the Like-Minded Group until and through the Rome Conference. (Edlin 2006, 5) Wippman argues that the shift was an attempt to give effect to the ethical foreign policy and responded to pressure from EU states to adhere to a common EU foreign and security policy point of view. In Rome, the UK's human rights image and the pull of Europe trumped the UNSC and its ties with the US. (Wippman 2009, 167-8)

UK's support of the ICC started in practice in November 1998[33] when the UK signed the Rome Statute and ratified it in October 2001. Upon ratification, Foreign Secretary Jack Straw[34] characterized the ICC as one of the boldest steps in achieving humanitarian justice and emphasized the UK as "an enthusiastic supporter" of the Court. (Government News 2001) Betti analyses that the UK invoked the norm of international criminal responsibility when it adopted the Rome Statute to its national legislation and sees reasons for invoking the norm in

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[33] Another example of support was the case General Pinochet, Chile's former military leader. The UK House of Lords ruled that Pinochet could not claim immunity from the jurisdiction of UK. The Pinochet case has become a landmark case. (Sands 2003)

[34] Jack Straw succeeded Robin Cook as the Foreign Secretary at the start of the Blair Government's second term in the summer of 2001. (BBC 2001)

British party politics at the time. (Betti 2001, 3) However, during the past decade the UK's conviction to the ICC has been suspected. One reason has to do with the already discussed US-UK 'special' relationship and so-called Article 98 Agreements. In 2002, the UK, together with Italy and Spain secured a deal that allowed EU member states to enter in to Article 98 Agreements with the US[35]. (McGoldrick, Rowe and Donnelly 2004, 424-429) Amnesty International accused the UK of betraying its commitment to the ICC. Human Rights Watch similarly named the deal as a "betrayal by the Blair Government of its earlier support" and as "ill-considered and damagingly effective". (Black 2002) The UK justified its actions with *realpolitik* practicalities: the failure of reaching agreements with the US could endanger the UN's peacekeeping operations, as the US could veto them in the Security Council if it saw that its soldiers were put in risk. (Black 2002)

The UK has also been criticized due to financial reasons. The ICC's proposed budget increase of over 13 percent for 2012 was met with reluctance by the largest donor countries, UK included. The Court is in need for more funds to take on the cases of Libya and Cote d'Ivoire. CICC's William Pace accused the UK of political hypocrisy, since it supported ICC's involvement in Libya but then was reluctant to increase the Court's budget so that it could actually do its work. (Corey-Boulet 2011) In 2006, an official who took part in the 1998 Rome negotiations described the UK position as one that has moved from support to "somewhere between neutral and buyer's remorse". (Waugaman 2006, 4) One reason for this might in the changes in government: whereas Cook was personally an enthusiastic supporter of the ICC, Straw and others who followed have expressed less zeal towards the Court. (Waugaman 2006, 4)

Other reasons for criticism stem from the general problems associated with international criminal law, its institutions and states. With the ICC, a substantive amount of money has been spent but it does not show in the results. The ICC's credibility as a strong enforcement institution has suffered as Sudan's President al-Bashir continues to travel despite an ICC indictment. (The Economist 2011; McCormick 2012) The most crucial criticisms for this context, however, are the intertwined accusations of imperialism and selectivity. Although they do not strictly pertain to the focus of this thesis, they provide for a more thorough understanding of the issues surrounding the debates in the House of Commons.

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[35] A US-UK Bilateral Immunity Agreement is under consideration. The UK has signed a "Side Letter" in which it confirms that it will not extradite US citizens to the ICC. (CICC 2009)

Fundamentally, these problems arise from the influence of politics on international law. Christie notes that since Nuremberg, political influence and the issue of victor's justice that flows from that poses one of the greatest threats to international criminal trials and institutions. (Christie 2010-2011, 382) Both the ICC and the exercise of universal jurisdiction need to be viewed in the context of an international society where states belong to different classes and vary in power and influence. Such a divide cannot simply be solved by creating an international criminal court. (Stephen 2012, 57) Griffiths (the chief defence counsel for Charles Taylor[36]) illustrates this point well: *"The requirement of international justice is not the raison d' etre of the International Criminal Court at all. Instead, the court acts as a vehicle for its primarily European funders, of which the UK is one of the largest, to exert their power and influence, particularly in Africa"*. (Griffiths 2012a)

This aptly captures one of the chief dilemmas of the ICC. Despite having 121 State Parties to date, 33 being African nations, the ICC has suffered legitimacy problems and has been viewed as anything but universal. The ICC's legitimacy and standing in the eyes of African nations has declined especially after the indictment of President al-Bashir in 2009. (Mills 2012, 423-5) Monbiot, one of the starkest critics of the West's record with international law, states bluntly: *"International law remains an imperial project, in which only the crimes committed by vassal states are punished"*. (Monbiot 2012) When it comes to international trials, the ICC and the Western states are often accused of being selective. Stephen notes that the ICC too needs to be assessed not only by the cases it handles, but also by the cases that it does not. The ICC remains pervaded by partiality and selectivity. (Stephen 2012, 88-9) The selectivity criticism looks even more somber in light of a statement by Foreign Secretary Cook in BBC's Newsnight in 2000: *"If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States"*. (Griffiths 2012b)

The dissatisfaction in the ICC becomes evident for example by the demands of bringing to justice Prime Minister Blair and President Bush for the 2003 war in Iraq. Responsible for the most recent and well publicized reproach is Desmond Tutu, who demanded that Blair and Bush should face the consequences of their actions in The Hague. (Tutu 2012; see also The Herald 2011; Grundy 2012; Arrest Blair 2012; Bush to the Hague 2012) Furthermore, the fact that the crime of aggression is missing from the ICC's jurisdiction has caused skepticism. As Griffiths points out, the awkward truth is that this crime, that is now supposedly difficult to

[36]Charles Taylor was convicted by the Special Court for Sierra Leone for crimes against humanity and other violations of international humanitarian law for his involvement in Sierra Leone's civil war. See SCSL 2012.

define, is the one that provided the foundation for the Nuremberg trials. More to the point, it certainly has not been Africans who have benefited from the inability to find a definition for the crime of aggression. (Griffiths 2012b) In light of Afghanistan and Iraq, it does not surprise that aggression as a crime was missing from the ICC's jurisdiction.

Proponents of the ICC point to the Court's achievements and ideals. Fatou Bensouda, the ICC's Chief Prosecutor since 2012, has criticized the focus on the words of the few powerful, when the real emphasis should be on the millions of victims in Africa. Bensouda has stressed the Court as a shield for the powerless, not a club for the powerful. (Smith 2012b) Sands, (in quite a pragmatic legalist way at that), commends the ICC and international courts for doing a good job in difficult circumstances. Although not able to eradicate crime altogether, they make a difference. More time should be given for further development: the hope is that the current difficulties will prove to be only "teething problems". (Sands 2012)

Selectivity and accusations of imperialism of the ICC stand as obstacles to the Court's success now and in the future. The impartiality and fairness of international criminal law is the goal that is often trumped by the realities of power and politics. As Megret argues, there is more to the reluctance of proceeding with international trials; in the background there are "deeper misgivings" over the concept of international criminal justice and the potential risks seeking justice can have on fragile situations and peace processes. (Megret 2002, 1272)

This part has provided a deeper understanding of the context in which the ICC exists and which surrounds the UK's relationship with it. The UK's actions concerning international trials can be seen to reflect the values of the human rights and atrocities regimes and legalism that have taken hold in international relations. The UK's aim to promote human rights through an ethical foreign policy and its support for the international trials point to an influence the structure that surrounds policy- and decision-making has had on the UK's actions and behaviour. The turn is now made to the analysis of the UK's statements to identify and illustrate arguments and argumentation strategies.

4. Rhetorical Analysis

As stated in the end of chapter 2, rhetorical analysis is useful when the aim is to uncover the reasoning behind actions. By adopting a constructivist view, it is accepted that actor's actions and behaviour are influenced by the structures that surround them. At the foundation of actions and particular behaviour are reasons for acting in that certain way. The analysis of arguments and their substance can help to identify the reasons that underlie actions.

Rhetorical analysis is a qualitative method of research. According to Foss, it is "designed for the systematic investigation and explanation of symbolic acts and artifacts for the purpose of understanding rhetorical processes". (Foss 2004, 6) Rhetorical analysis does not form one, coherent method for analysis. Charland notes that rhetoric is "not a discipline"; instead, it ""hangs together" as a domain of knowledge even though it does not cohere conceptually". (Charland 2003, 116) Thus, definitions of what rhetoric is also abound, as is discussed below. Rhetorical analysis can help to uncover how actors argue; in this case, what kind of arguments the UK has put forward in the ICC's support. The purpose of this chapter is to introduce rhetorical analysis as a research method. The first part concentrates on introducing rhetoric and its definitions; its historical origins; and the last part is devoted to the review of some previous research. A discussion of argumentation analysis by Perelman and Olbrechts-Tyteca follows this.

4.1 Rhetoric: Definitions, History and Approaches

There is no one, agreed upon definition of rhetoric and definitions can include or exclude different things. Since there is no acceptance on the concept, there is also no one accepted definition of rhetorical analysis. (Selzer 2004, 279-280) Consequently, there are various ways of conducting rhetorical analysis depending on one's views on rhetoric, its meaning, its use and the purpose and the focus of the research itself. This part introduces some understandings of rhetoric and its analysis.

4.1.1 Definitions of Rhetoric

Language has traditionally taken to be at the heart of rhetoric and rhetorical analysis. Whereas the focus used to be more on how to speak or write effectively and persuasively, recently

rhetoric has been used as a means to interpret objects. Therefore, it can be both the study of language and the study of how language is used. (Selzer 2004, 280)[37]

The word rhetoric has its origins in the Greek word *rhētoricē,* which means the *"art of oratory"*. (Oxford English Dictionary 2010) Rhetoric is often thought of as an art in the way of using and deploying language. Plato[38] referred to rhetoric as *"the art of winning the soul by discourse"*. (Stanford University 2011) According to Aristotle's well-known definition, rhetoric refers to *"the faculty of observing in any given case the available means of persuasion"*. (Aristotle 1992, 2155) In Aristotle's view, everyone needs rhetoric when dealing with a public audience especially as the topics that are usually discussed in the public forum are not matters of precise knowledge, but ones that are uncertain. The ability to have an effect on somebody is not so much a matter of knowledge as it is of persuasiveness. (Rapp 2010)

Thus, the purpose of using rhetoric is usually taken to be the persuasion of one's listeners. Many definitions of rhetoric emphasize both the role of language and the aim of influencing on someone in some way. For Herrick, rhetoric has been seen as a way *"for gaining compliance"*. (Herrick 2005, 3) Selzer speaks of the use of rhetoric when *"people within specific social situations attempt to influence others through language"*. (Selzer 2004 281) One of the grand rhetorical theorists, Kenneth Burke, sees persuasion and language as integral parts of rhetoric when he defines it as *"the use of language as a symbolic means of inducing cooperation"*. (Burke 1950, 43)

Perhaps in some part due to its inherent aim to persuade, for some rhetoric entails negative connotations. People often refer to something being "just" rhetoric and many see that when someone uses rhetoric, nothing concrete or truthful is really said at all.[39] John Locke has expressed a rather explicit distaste towards rhetoric:"[…] *all the artificial and figurative application of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment; and so indeed are perfect cheats...*". (Locke 1690, Book 3, Chapter X, paragraph 34)

For Locke, the widespread use of rhetoric, the expansion of professors who teach it and its reputation were testaments to the fact that men *"love to deceive and be deceived"*. (Locke

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[37] This is not to say that other objects than texts cannot be used as sources. For rhetorical analysis of for example videos, movies and songs, see Foss 1994; Herrick 2005, 6-7.
[38] Plato was rather critical towards rhetoric; see for example Griswold 2009.
[39] Politicians are often seen as using rhetoric in a negative way. See for example Barnett 2009.

1690, Book 3, Chapter X, paragraph 34) Locke's perceptions on rhetoric and the negative attributes he saw it to entail are still visible in the way rhetoric is commonly viewed nowadays.

To recap, behind rhetoric is the attempt to persuade the other(s) of the rightness of one's own arguments. Herrick distinguishes between four resources with which persuasion can be sought; arrangement (the planned ordering of a message); aesthetics (elements that add form and beauty to expression); and arguments and appeals. (Herrick 2005, 13-14) The emphasis here is on arguments. An argument takes place when a conclusion is supported by reasons and can be defined as "reasoning made public with the goal of influencing an audience". (Herrick 2005, 13) Rhetorical analysis thus is a useful tool to analyse argumentation, in this case that in the UK House of Commons. Next, history of rhetoric is shortly introduced.

4.1.2 Historical Origins

The interest in the study of rhetoric dates back to ancient Greece and Rome. When rhetoric developed in Greece around 450 B.C it was used as a practical art in the civic discussions of Athens. The origins were similar in Rome but by the first century B.C rhetoric became the dominant discipline in the Roman educational system. According to Vickers, rhetoric gained success in Rome and Greece because of its power over human minds and its ability to affect one's beliefs. (Vickers 1993, 101-102) The classical thinkers took great interest in the study of rhetoric. Aristotle's *Rhetoric* is still regarded as one of the most influential works done on rhetoric and the "Aristotelian doctrine" had its effect on teachers of rhetoric such as Cicero and Quintilian. (Rapp 2010) The teachers of rhetoric became known as the Sophists and offered the Greeks education in the *"arts of verbal discourse"*. (Herrick 2005, 33) The Sophists as a group consisted of teachers, speechwriters and professional speakers, whose principal aim was the teaching of persuasive discourse. The idea was that by mastering persuasion, one can rise above others. This was mainly seen to be achieved through teaching dialectic, where one was able to argue for either side of the case. (Herrick 2005, 34-39)

Fascination towards rhetoric continued through the eras of Christian Europe, the Renaissance and Enlightment. (Herrick 2005, 122-197) After that interest in subject, however, started to wane. Luciates and Condit note that the study of rhetoric by no means disappeared altogether in the post-Enlightment and modernist eras but that its ""significance was related to the margins" in Western intellectual thought and it was often termed as the "Harlot of the Arts". (Luciates and Condit 1999, 6) Towards the end of the 19th century the status of rhetoric as an interesting and worthy object of study continued its steady deterioration and by the 20th century interest in the topic had reached an all-time low. (Herrick 2005, 198) At that time, it

was the scientific methods of research that gained premise as the most suitable and valued ways to conduct research. Attention soon turned, however, towards the rising need to understand and investigate human motivation, or how people or politicians rise to power, for which science and scientific standards did not provide tools. It was acknowledged that science itself had in many ways something to do with rhetoric; the dominant theory was usually the one presented in the most persuasive way. (Herrick 2005, 198-199) From approximately the 1950's onwards many works now regarded as classics were published and rhetoric gained back some of its lost popularity. Hauser started his 1986 book on rhetorical theory by noting that *"The study of rhetoric is currently enjoying a renaissance"*. (Hauser 1986, ix) The next part gives an overview of some of the central approaches to the study of rhetoric.

4.1.3 Approaches to Rhetoric

Rhetorical analysis is not a strict method but comprises of various different ways with which to conduct analysis. It thus offers a rich array from which to choose the tools for analysis. (Foss 2004; Luciates, Condit and Caudill 1999) For example, Ritter's and Medhurst's edited volume analyses the rhetoric of political speeches of US presidents. (Ritter and Medhurst 2003) Schimmelfennig explains and analyses EU enlargement through rhetoric action, the strategic use of arguments to persuade others. (Schimmelfennig 2003) In a more particular treatment, Krebs and Jackson problematize the concept of persuasion. The authors contend that mechanisms of persuasion rest on a strong specification of the subjective motivations of individuals and this makes persuasion mechanisms difficult to trace methodologically. As an alternative, Krebs and Jackson propose a model of rhetorical coercion. When arguing, actors have to attempt to argue in a way that leaves no rhetorical material for their opponents to use, needed for an effective counterargument. If an actor succeeds in this, rhetorical coercion has taken place. The model is tested on one case, the efforts of Druze Arabs in Israel to gain greater citizenship rights. (Krebs and Jackson 2007, 37)

Herrick notes Kenneth Burke as one of the most influential rhetorical theorists in the 20th century and points to his rhetorical work in philosophy, religion, political science and literature as being crucially influential and fundamental. (Herrick 2005, 223) Burke's methodology can in general be termed as dramatism and he studies all symbolic action as a play, even if the discourse in question has no explicit narratives of fictionalities; the metaphor of drama roots Burkean study. (Brummet 1999, 480) Burke is famous for his treatment of identification. Burke saw that one of the central problems in society is alienation and separation of people, to which rhetoric could provide the answer. The aim was to bring people

together with symbolic means. For example, a politician could claim to be a farm boy him or herself when talking to farmers. Another central contribution of Burke's is his dramatistic pentad, which refers to rhetorical situations according to five elements. (Herrick 2005, 223-8) Herrick notes that the "use of strategic language" was for Burke the very essence of human social existence and in this, rhetoric formed the "a kind of verbal magic that created meaning and reality out of the immateriality of the world". (Herrick 2005, 230)

Another influential work has been that of Lloyd Bitzer. In his 1986 article The Rhetorical Situation, Bitzer argued that rhetorical discourse becomes rhetorical through the context it is in. For Bitzer it is clear that rhetoric is situational; rhetorical discourse *"does obtain its character-as-rhetorical from the situation which generates it."* (Bitzer 1968, 3) Three elements define a rhetorical situation. The exigence is an "imperfection marked by urgency"; an obstacle and something that needs to be modified and modified through discourse. (Bitzer 1968, 6) Audience is the second element and Bitzer emphasized that not all persons are part of the audience of a rhetorical situation. To be part of the audience, the ability to persuade the person listening needs to be present. Lastly, there are in constraints rhetorical situations; persons, events, objects and relations that have the ability to constrain the actions that are taken to modify the exigence. (Bitzer 1968, 8) Herrick notes that Bitzer's theorizing proved a very useful tool for assessing different rhetorical events and has been widely used and cited since[40]. (Herrick 2005, 232)

Other influential works were conducted concerning argumentation. Herrick notes that "One of the important accomplishments of the twentieth-century rhetorical studies has been to examine and provide a means of discussing the structure of everyday argumentations". (Herrick 2005, 1999) In addition to the work of Perelman and Olbrechts-Tyteca, Stephen Toulmin's work has been influential in this area.

Toulmin's still much used *The Uses of Argument* was first published in 1958. Although Toulmin notes that not all arguments are made in defence, it is such arguments that the most interesting: justificatory arguments that are brought forward to support assertions. The structures of these arguments, the merits they claim and also the ways arguments are graded, assesses and criticized could then be analyzed. This, Toulmin argued, is the primary function of arguments. (Toulmin 2003, 12) For analysis, Toulmin introduced the concept of argument fields and saw that arguments belong to the same field when they can be compared and

[40] Not all agree. Vatz for example has criticized Bitzer's understanding of the rhetorical situation. See Vatz 1973; Vatz 2009.

judged by similar criteria. To this, Toulmin added modal qualifiers, referring to words that indicate confidence in a conclusion (such as must). These were brought together in Toulmin's famous argumentation model; an argumentation consists of a claim or conclusion, data (evidence), a warrant (generalization), backing for the warrant, rebuttals (potential conditions) and modal qualifiers. (Herrick 2005, 205-207; Toulmin 2003, 97) Toulmin's model has attracted such wide interests because it allowed the analysis of everyday arguments and their components and the model made it possible to evaluate the rationality of everyday arguments. (Herrick 2005, 207)

Rhetoric is an interesting and versatile object of study. Theorists have identified different things one is to look for when conducting a rhetorical analysis. Depending on one's views, focus and goals, a rhetorical analysis can concentrate on finding and identifying different themes. The review offered here has represented only a small glance in to the ways in which rhetoric has been treated.[41] The next part introduces the mechanism used here.

4.2 Argumentation and Arguments: Perelman and Olbrechts-Tyteca

Finlayson points to a puzzling lack of interest towards rhetoric within political science and its use in analyses of government. (Finlayson 2004; Finlayson 2009) Krebs and Jackson note the same and wonder why rhetoric has not been at the centre of international relations studies. (Krebs and Jackson 2007, 36) Finlayson makes the case for the centrality of arguments; according to him, focus *"ought to be not ideas but arguments: their formation, effects and fate in the activity known as persuading."* (Finlayson 2007, 552) Indeed, speeches and statements made in politics make an ideal case for the study of rhetoric. As Perelman notes, in political debates "orators defend opposing theses and seek, by their speech, to win the support of the audience to which they address themselves". (Perelman 1984, 129-130) Next, the argumentation techniques put forth by Perelman and Olbrechts-Tyteca are introduced.

4.2.1. The Foundations of New Rhetoric

Frank has characterized Perelman's and Olbrechts-Tyteca's new rhetoric as "perhaps the most influential system of rhetoric of the twentieth century". (Frank 2003, 253) The new rhetoric project, which includes articles, books and conferences, culminated in the 1958 publishing of *The New Rhetoric: Treatise in Argumentation*. Behind the project was the authors' wish to in a way heal the wounds that the horrors of the Second World War left on Europe. Through

[41] For more, see Herrick 2004; Johnstone and Eisenhart 2008.

fostering ‘contact of minds’, they hoped to reconstruct civil society and show the utility of reasoning over violence to settle disagreements. (Frank 2004, 267)

The founding assumption of Perelman’s and Olbrechts-Tyteca’s is that no claim is self-evidently true, meaning that resorting to absolutes such as God will not be enough to sustain arguments about important issues. Propositions of value could only be tested and established as reasonable or lacking merit through a process of public argumentation. Thus, they concentrate on categorizing the different types of arguments that can be found in everyday discourse and how those arguments achieve their effects. (Herrick 2005, 200)

Perelman and Olbrechts-Tyteca place great emphasis on the audience. According to them, all argumentation in essence “aims at gaining the adherence of minds” and thus in turn means that argumentation also assumes that there exists an “intellectual contact”. (Perelman and Olbrechts-Tyteca 1969, 14) This they link to the wish of the ‘contact of minds’ and note that “It is not enough for a man to speak or write; he must also be listened to or read”. (Perelman and Olbrechts-Tyteca 1969, 17) Thus, argumentation needs the audience as an object. They distinguish between two types of audiences; universal and particular. The universal audience is comprised of the whole mankind, or at least of all ‘normal’ adults. Of particular audiences, Perelman and Olbrechts-Tyteca mention two different types. The second audience consists of one person, an interlocutor, who takes part in the given dialogue. The third audience is the speaker himself, when he deliberates and explains for himself the reasons for his actions. (Perelman and Olbrechts-Tyteca 1969, 30) The particular audience is particular in that its composition is known to the speaker and thus, appeals can be made to its particular interests. The point of dividing between universal and particular audiences is to differentiate between logic-based argumentation and argumentation which appeals to emotions. To persuade a particular audience, the speaker argues by appealing to the audience’s interests and tendencies. (Herrick 2005, 201)

The universal audience is defined by an individual himself. Perelman and Olbrechts-Tyteca state: “Everyone constitutes the universal audience from what he knows of his fellow men, in such a way as to transcend the few oppositions he is aware of”. (Perelman and Olbrechts-Tyteca 1969, 33) In order to compose sound arguments, a speaker should look beyond persuading only the immediate audience and instead consider how a wider, imagined audience of rational individuals would respond to the argument. The imagined, universal audience is also not subject to the limitations and biases particular audiences are limited to. A rational speaker will seek to conform to principles of action that are acceptable to everyone, thus

seeking to find common basis that transcends differences. Reasoning to a universal audience should be rationally compelling, self-evident and timeless. (Herrick 2005, 202)

For a successful argument, the speaker and the audience need to share some common understandings (similar to this is Habermaas' 'common lifeworld, discussed in Chapter 2) Perelman and Olbrechts-Tyteca term these as the starting points of arguments, which are points of agreement shared by the speaker and the audience. There are two points; those that concern the real (facts, truths and presumptions); and those that concern the preferable (values, hierarchies and arguments relating to the preferable). (Perelman and Olbrechts-Tyteca 1969, 65-67) Perelman notes that the aim of argumentation is "to transfer to the conclusion the adherence accorded to the premises", which can be accomplished through "the establishment of a bond between the premises and the theses whose acceptance the speaker wants to achieve". (Perelman 1984, 21) If the conclusion runs, he continues, totally counter to the audience's convictions and ideas the audience will in all likelihood reject the speaker's argument. (Perelman 1984, 21)

Winkelman uses Perelman's and Olbrecht-Tyteca's concept of the universal audience to study US opposition to the ICC through speeches and statements made in the US Congress in 2000 and argues that international justice presents a collective value. Winkelman argues that international justice was much used in the Congressional debates and continues by asserting that international justice is a value collectively held by a universal audience. Moreover, debates that are embedded in human rights rhetoric acknowledge the concept of international justice and thus create the momentum for institutions such as the ICC. (Winkelman 2009, 18-26) Embedding arguments in such a context is important, since *"In order for specific courts to be legitimized collectively […] they must adhere to transnational metanarratives that communicate universal norms, value systems and international justice"*. (Winkelman 2009, 25) The ICC has "rhetorical precedent" in the ICTY, ICTR and other international trials, which provide references the collective of people can consider and apply and create an imagined community that transcends the differences between states and their publics. (Winkelman 2009, 27) Concerning the ICC, the starting point for the argumentation could be seen to be international justice and within it, the hope of breaking the culture of impunity; the increasing number of the trials and tribunals established to reach such an end can be seen as testament to this aim. Whether the ICC is the most suitable for advancing this is then contested.

Overall, Perelman's and Olbrecht-Tyteca's *New Rhetoric* introduces techniques which one making an argument can use to argue his or her point. Of this, Summa notes that the authors emphasize the availability of different techniques. Whereas logic- based argumentation concentrates on identifying the premises, conclusions and the reasoning between the two, Perelman and Olbrechts-Tyteca point to myriad of ways with which an argument can be made, ranging from metaphors and analogies to examples. Thus, the assertiveness and force of an argument depends not on the logical structure of the argument, but on the extent to which the techniques used by the speaker seem compelling to the audience. (Summa 1998, 71)[42] These techniques are discussed next.

4.2.2 Argumentation Techniques by Perelman and Olbrechts-Tyteca

Perelman's and Olbrechts-Tyteca's argument can be divided first to two main groups; associative and dissociative arguments. Associative arguments can then be further divided to three main categories; quasi-logical arguments; arguments based on the structure of reality; and arguments establishing the structure of reality. Furthermore, within these categories different techniques of arguing can then be identified[43]. (Perelman and Olbrechts-Tyteca 1969, 185-459)

Quasi-logical arguments are such that "claim to be similar to the formal reasoning of logics or mathematics" and they are characterized by their "nonformal character and the effort of thought which is required to formalize" them. (Perelman and Olbrechts-Tyteca 1969, 193) Arguments are quasi-logical when they seem to partake in formal or mathematical reasoning; and they are quasi-logical in that they are nonformal reasonings of everyday affairs. Arguments of formal reasoning point to formal relationships between pieces of information and that makes them compelling. These can be based on contradictions; identity or difference; reciprocity; or transitivity. (Hauser 1986, 182-3) Arguments of mathematical reasoning are based on mathematical relations and include arguments that are based on inclusion of the part in the whole; division of the whole into its parts; comparison; sacrifice; and probabilities. (Hauser 1986, 183)

Of the second category, arguments based on the structure of reality, Perelman notes: "As soon as elements of reality are associated with each other in a recognized liaison, it is possible to use this liaison as the basis for an argumentation which allows us to pass from what is

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[42] Free translation from Finnish by author.
[43] The discussion here is informed by the illustrative tables by Hauser. (Hauser 1986, 183-185)

accepted to what we wish to have accepted." (Perelman 1984, 81) These arguments use what people take to be real to build a bridge to a new assertion one wants to support. (Hauser 1986, 185) The central characteristic here is thus that they have such a firm basis in reality that it is not challenged. These can be divided to two categories; those basing on sequential relations and those basing on relations of coexistence. Their difference is on the level; in sequential relations the terms that are brought together are "on the same phenomenal plane", whereas those of coexistence bring together two realities not on the same level, "one of them being more basic and more explanatory than the other". (Perelman and Olbrechts-Tyteca 1969, 293) Arguments of sequential relations can be based on causal links; pragmatic arguments; waste; direction; or unlimited development. Here, attention is directed to the order of events. Arguments of coexistence can be a relationship of a person and act; group and its members; act and essence; symbolic relation; or degree and order. (Hauser 1986, 185-6)

The third category of arguments establishes the structure of reality. These arguments are often used in situations where there is a disagreement over the rules that describe the world. The effectiveness of these arguments is based on the premise that persons engaged in an argument are willing to solve their differences. Arguments of this kind can be examples; illustrations; models; or analogies. (Hauser 1986, 185-6) These are used to make generalizations or already established generalizations are highlighted by particular cases. As Perelman and Olbrechts-Tyteca describe, a particular case "as an example, it makes generalization possible; as an illustration, it provides support for an already established regularity; as a model, it encourages imitation". (Perelman and Olbrechts-Tyteca 1969, 350) Analogies, on the other hand, draw relationships between two separate things, most commonly characterized as A is to B as C is to D. Analogies bring in a fifth technique: the metaphor. According to Perelman and Olbrechts-Tyteca, metaphors are condensed analogies, which take a word or a phrase from its original meaning to describe something else. (Perelman and Olbrechts-Tyteca 1969, 372- 398)

Lastly, there are dissociative arguments. Dissociation aims at "separating elements which language or a recognized tradition have previously tied together". (Perelman 1984, 47) Whereas in associative arguments links are forged and elements are made interdependent, dissociative arguments oppose such interdependence and this opposition will be made by refusing to recognize that a link considered to have been accepted or one that was hoped for exists between elements. (Perelman and Olbrechts-Tyteca 1969, 411) The prototype of such a dissociation, Perelman and Olbrechts-Tyteca argue, is the pairing appearance (term I) – reality (term II). Term I corresponds to what occurs in the first instance and to what is actual, immediate and known directly. Term II can then be understood through comparing it to term I;

it is both normative and explanatory. Because these are central in the field of philosophy, they are termed “philosophical pairs”. These pairings can also be distinguished, amongst others, between relative – absolute; theory – practice; or particular – general. (Perelman and Olbrechts-Tyteca 1969, 415-420)

Rhetorical analysis is a useful tool for studying language (and other objects as well). As there is no one, agreed upon way to conduct a rhetorical analysis, one can choose from a variety of tools method. One such a way is identified by Chaim Perelman and Lucie Olbrechts-Tyteca in their New Rhetoric. They identified four categories of argumentation that can be used to argue one’s point and within these, various techniques with which an argument can be made. These argumentation techniques are used to analyze the sources here, debates concerning the ICC in the UK House of Commons.

5. Sources and Analysis

In this chapter, debates in the UK House of Commons are analysed to answer the research question set in Chapter 1: "How did the United Kingdom's Government representatives and other Members of Parliament argue their support for the International Criminal Court?" Analyzed are the debates in the House of Commons 1998 – 2001 concerning the UK's ICC Bill and arguments made in support of the ICC. The division of stand points during the debates is quite clear; the Labour, Labour Co-operative and Liberal Democrats being in favor of the ICC and the Conservative members forming the Opposition. The focus is on the UK's arguments in support of the ICC before it was actually established. The arguments are considered within the theoretical framework of legalization, the atrocities and human rights regimes and constructivism and the different logics of action. To identify different argumentation strategies and to analyze how the ICC was supported, Perelman's and Olbrechts-Tyteca's methods for analyzing arguments are used.

Finlayson and Martin note that "British political leaders spend much of their time doing something else: talking." (Finlayson and Martin 2008, 445) They make the argument for wider use of the study of speech and rhetoric in UK politics. To highlight the possibilities such an analysis can offer, the authors take on a speech by Tony Blair and point to the usefulness of analyzing political rhetoric. (Finlayson and Martin 2008, 445-446) In a similar vein, Smith and Smith argue for the use of rhetorical strategies to analyze the manifestos of UK Conservative, Labour and Liberal Democrat Parties. The authors emphasize that the manifestos should be analyzed as rhetorical texts, so reliant the parties are on manifestos. Through analyzing the texts' iconic structure and narratives the authors found that all parties focused on economical and historical issues. (Smith and Smith, 2000, 457-459) Thus, it seems that debates in the British parliament can offer a suitable and rich source for analysis.

This Chapter proceeds as follows. First, the sources are introduced. The second part identifies the Opposition's main arguments. Part 3 discusses five main themes of argumentation in the ICC's support identified from the debates. Part 4 concludes this Chapter by discussing the argumentation in light of the theoretical framework.

5.1. Overview on Sources

The ICC Bill was passed in the UK in 2001 and incorporated the Rome Statute's provision to UK national law. The matter was debated in both the House of Commons and Lords. Legislation was needed so that the UK could ratify the Rome Statute and its provisions could

become part of UK national law. A Draft ICC Bill was issued by the Blair government in August 2000. It was introduced to the Parliament in December 2000 and then debated in the spring of 2001. The Bill was passed by the House of Commons on April 3rd and came into force in September 2001. (Betti 2001, 4; The National Archives 2012)

The arguments analyzed here are those made during the debates in the House of Commons between July 1998 and May 2001. The issue was mainly discussed in spring 2001 and thus this period provides the most sources for analysis. Considered here are the debates in the House of Commons and Standing Committee sittings (hereinafter Committee), a Public Bill Committee comprised of representatives of the main parties, which was set to debate the ICC Bill in detail. This Committee held its last sitting on May 10th 2001. Including only House of Commons debates was done to form a coherent group of sources and limit the amount of material. Statements made in support of the ICC, by Labour, Liberal Democrat and Labour Co-operative MPs are analyzed by using the techniques of Perelman and Olbrechts-Tyteca. Opposing arguments by the Conservative Party are provided to identify the other side of the argumentation process and to give a fuller understanding of the debate but do not form the data for the actual analysis. Only debates where the ICC Bill was the main issue under consideration and thus debated in length are included: where the ICC Bill is mentioned in written statements or only shortly referred to when discussing other matters are not considered in this analysis.[44]

Through these criteria, five points of debates are identified. First is the instance when Foreign Secretary Robin Cook announced to the House the results of the Rome Conference of on July 20th 1998. Second, the Bill was under debate in October 1999, in connection to a debate concerning the Government's foreign policy. Third, the ICC Bill was debated in length on April 3rd 2001 when it was read for the second time in the House of Commons[45]. After that, the Bill was debated in detail by the Committee which held 10 sitting on five day between April 10th and May 10th. The fifth debate was held in the House of Commons when the debate in and results of the Committee was introduced to the whole House. A list of the sources is presented in Appendix 1.[46]

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[44] A list of instances where the ICC Bill was mentioned can be found in: UK Parliament 2012a.
[45] When passing a Bill, it is first introduced (1st reading); then put to debate (2nd reading); debated in Committee; and then the amended version is introduced and reported (3rd reading). See UK Parliament 2012b.
[46] All sources are freely available from the UK Parliament's website and have been obtained from http://www.parliament.uk/business/publications/hansard/commons/

During the first three sittings of the whole of the House of Commons in 1998, 1999 and 2001 the ICC and the UK's ICC Bill were discussed in general terms and MPs expressed, on the main, their support for the ICC.[47] The Committee sittings concentrated more on detailed scrutiny of the Bill and its provisions.[48] The Committee dealt with both more substantial parts of the Bill and also smaller procedural matters, such as whether arrest warrants can be transmitted through e-mail (Standing Committee 2001e, 2.45 pm) and the proper language used when informing a person of his or her rights. (Standing Committee 2001g) During the last debate, which were held in the whole of the House of Commons in May 2001, the Bill was read for the Third time, the work done in the Committee was reported and some amendments the Opposition wanted to bring before the whole House were discussed and voted on.[49]

The ICC Bill was extensively debated in the House of Commons, both during sittings of the whole House and during sittings of the Committee. The debates in the House were more general in nature, whereas discussions in the Committee concentrated on particular parts of the proposed Bill. There can, however, be identified a number of overall, central themes that rise from all the debates. Two of those themes pertained more to the procedural traditions of the Parliament and its role in the legislative process than the ICC itself. Especially during the Committee sittings, Conservative MP's expressed frustration of not being able to affect the Rome treaty itself and called for a wider role for the Parliament. (Standing Committee 2001d) Furthermore, the Conservative MPs criticized the hurried process with which the Bill was being pushed through the Parliament and accused the Government for wanting to pass the Bill before the general election which was to be held in May 2001. (Standing Committee 2001a, 9.55-10.15 am) During the Report stage, Conservative MP Cheryl Gillan pointed to the long period of time between the Rome Treaty's adoption and the ICC Bill's introduction and argued that the Government should have given the Parliament more time to debate the Bill; now, the Government's disregard to the legislation process was only reprehensible. (House of Common 2001b, vol. 368, col. 307-310)

As these two themes do not pertain to the ICC per se but to the legislative process and traditions of the UK parliamentary system, they are not further discussed here. From the

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[47] House of Commons 1998; House of Commons 1999; and House of Commons 2001a
[48] Standing Committee 2001a; Standing Committee 2001b; Standing Committee 2001c; Standing Committee 2001d; Standing Committee 2001e; Standing Committee 2001f; Standing Committee 2001g; Standing Committee 2001h; Standing Committee 2001i; Standing Committee 2001j.
[49] House of Commons 2001b.

debates, 5 central themes of supportive arguments for the ICC and for ratifying the ICC Bill can be identified: 1) breaking the culture of impunity; 2) that the UK should be among the first 60 states to ratify the Rome Statute; 3) that the UK should lead by example; 4) that the ICC and the ICC Bill are a continuance to existing law: and 5) and that the ICC does not limit the UK's sovereignty. These themes and argumentation techniques are each identified and analyzed in turn. First, however, the main arguments of the Opposition are introduced.

5.2. Common Ground and Opposition's Main Arguments

As stated by Perelman and Olbrechts-Tyteca, the achievement of a 'contact of minds' requires both a speaker and a listener. In order to fully understand and follow the arguments put forward in support of the ICC, it is important to know what those arguments are an answer to. In addition, the parties also need to share some common understanding, starting points from which the arguments can be advanced. This part identifies the parties to the debate, their shared understandings and introduces the main arguments of the Opposition.

5.2.1 Parties to the Debate and Common Ground

The parties of to the debate can be divided to two: the supporters of the ICC Bill, which in general included Government representatives, Labour MPs, Labour Co-operative MPs and Liberal Democrats; and the Opposition, which consisted of the Conservative MPs. Although the supporters of the ICC Bill and the Opposition disagreed on many issues, a common understanding as a starting point can be identified. As Perelman and Olbrechts-Tyteca termed it, a starting point can concern either that what is real or that which is preferable. In the case of the ICC, the common understanding was the preferable: that the ICC and the ICC Bill are 'good things' *in principle*. It was the practical issues that were disputed. This common understanding can be also characterized as what Risse referred to as a 'common lifeworld', which is a pre-requisite for argumentative rationality; that the parties to the debate have a shared culture, norms and rules that provide them with collective understandings, discussed in Chapter 2. The Opposition shared with the Government the premise that the ICC in itself is something that is good and preferred. This point was emphasized by the Opposition all through the debate. The central focus was that the ICC is a 'good thing' because its aim is to ensure that perpetrators of heinous crimes do not go unpunished. This comes across well in Conservative MP Gillan's statement during the 1998 debate: *"By creating an International Criminal Court, we hope that we can move towards a more humane and peaceful world in which there is no sanctuary for the despot, the dictator or the depraved."* (House of

Commons 1998, vol. 316, col. 806) In the debate on April 3rd 2001, the Shadow Foreign Secretary Francis Maude stated the premise as an imperative, as something that is and should be a shared by all: *"We support the Bill in principle […] We welcome, as everybody must, measures that will allow those who have committed crimes against humanity to be brought to book. That is clearly common ground."* (House of Commons 2001a, vol. 366, col. 224)

Thus, the debate moved onwards from the shared premise that the ICC, in principle, is a good thing. It was in the practical effects the ICC Bill the Opposition saw problems. These are identified next.

5.2.2. "Do not trust the horse, Trojans": Opposition's Main Arguments

All the oppositions main concerns relate to the possible ways in which the ICC and adopting the ICC Bill could affect the UK's sovereignty and its actions on the international arena. To a large extent, these correspond to the concerns the US has over the ICC. Overall, the Opposition viewed the ICC with suspicion. Telling of this is the reference to the ICC as the Trojan horse, above, which was quoted by Conservative MP Edward Garnier. (Standing Committee 2001g, 6.30 pm) In general, the Opposition saw dangers in ratifying the ICC's Rome Statute and thus subjecting the UK to its jurisdiction. The core of the fear is in the sovereignty costs joining the ICC entails, referred to in previous chapters: by joining the ICC and other international institutions, states run the risk and often the reality of curbing their sovereignty over certain matters. MP Garnier put it bluntly when the Rome Statute's complementarity principle was discussed in Committee "The statute and the Bill amount to a complete denial of our national sovereignty". (Standing Committee 2001g, 10.45 am)

This underlies all of the three main lines of argument, closely connected but slightly different in emphasis: 1) lack of control over the ICC; 2) UK personnel and operations abroad are negatively affected; and 3) the UK should shield its personnel from the ICC's jurisdiction over war crimes.

First, The Opposition viewed the ICC with suspicion because the way in which the ICC will function and behave in the future is unknown; and should the ICC behave in way not expected by the UK, the UK does not have enough control over the Court. This became clear from the Opposition's arguments all through the debates about the ICC in general and in the more particular arguments concerning one, the ICC's prosecutor, and second, the other state parties to the ICC.

Conservative MP Nicholas Lyell expressed his serious concerns in the House of Commons in 2001 over the fact that the ICC Bill "hands international jurisdiction to the world at large" and results in the UK's loss of control. (House of Commons 2001a, vol. 366, col. 250) Conservative MP Crispin Blunt warned of the ICC: "We cannot just have blind faith that it will work in the way that we hope […] e must bear the burden of responsibility to the citizens of the United Kingdom if the institution goes wrong". (Standing Committee 2001d, 4.30 pm) In a later sitting, MP Blunt expressed concern that the ICC could go "sour very quickly". (Standing Committee 2001h, 5.30 pm)

The Opposition's central point was that since the ICC does not yet exists, the UK cannot know how the ICC will behave once it starts its work. Closely connected to this was the ICC's structure. The Opposition was concerned about the ICC's procedural matters and about the prosecutor and the judges of the Court, seen as a possible threat to the UK. Central was the danger of a misbehaving prosecutor who would target the UK over actions it itself deems justified. Blunt envisaged a scenario of a "prosecutor who had, in effect, gone bad and was bringing prosecutions against countries which should not be brought." (House of Commons 2001a, vol. 366, col. 320)

Overall, the Opposition saw it as unacceptable that the UK as a major power in international relations would not have overriding control of the ICC and its personnel. Conservative MPs referred to the fact that the ICC prosecutor and judges will be elected by secret ballot from various countries and with the principle of one country, one vote. Similarly, the smaller countries could drive through amendments that everybody would then have to adopt. (Standing Committee 2001b, 11.15 am; Standing Committee 2001c, 11.30 am) Moreover, the fear was that the judges chosen in this way and outside the UK's control could be pressured to bring politically motivated cases against the UK. (Standing Committee 2001b, 4.30 pm) To emphasize its arguments, the Opposition relied on numbers and pointed to the voting system, through which the smaller countries could influence the actions and behaviour of the larger states. The most popular reference here was San Marino, at the time the smallest state signatory to the ICC with a population of less than 30 000. (Standing Committee 2001c, 11.30 am; Standing Committee 2001a, 11.15 am) So much was San Marino used as an example by the Opposition that when MP Blunt talked in general about the majority being outvoted by the minority, Minister of State John Battle interrupted by asking sarcastically "San Marino?". (Standing Committee 2001i, 10.30 am)

In essence, the fear was that the ICC would act contrary to what the UK views as justified and reasonable and that through the Court, the minority could dictate what the majority can do. These fears were closely connected to the second theme of the Opposition's arguments: that the ICC could affect negatively the UK's operations and its personnel abroad. The main concern was that the ICC would view a certain action by the UK as a crime under the ICC's jurisdiction. Main examples used to advance this argumentation were the Belgrade television station bombing by American forces during the 1999 Kosovo war and actions in Iraq in the 1990's. (Standing Committee 2001e, 10.30 am; 12.15 pm) Thus, the Opposition saw the ICC as a possible impediment to UK operations abroad and was bothered by the idea of an international court second-guessing UK decisions. (House of Commons 2001a, vol. 366, col. 247; col. 260) Again, in a rather realist fashion, the Opposition pointed that the UK might well be faced with a situation where it had to defend itself and in situations of war, "all manner of nasty things happen" and in such instances, the UK should not have to worry about the ICC. (Standing Committee 2001h, 4.30 pm; Standing Committee 2001b, 2.45 pm) It was both the higher levels of government and the army personnel on ground the Opposition was worried about. The danger of the ICC impeding UK military actions and exposing the UK's government and personnel to the ICC's jurisdiction is well visible in MP Gerald Howarth's statement:

"If the Bill is enacted, might not a sword hang over a future British Prime Minister? Might not that Prime Minister hesitate before deploying weapons that could protect British troops' lives? Surely the first responsibility of Members of Parliament is to protect our troops, whom we send into battle on our behalf. (House of Commons 2001a, vol. 366, col. 248)

The Opposition argued vehemently that the UK should take steps to protect its personnel abroad. MP Gillan argued that the Government should take steps to ease the worries of the armed forces about the possible effects of the ICC. By appealing to emotion, she stated that "Their minds must be set at rest, not least the minds of those who put their lives on the line every day for this country and its interests". (Standing Committee 2001h, 12.15 pm) Most clearly the case for protecting the army was made within the third theme of arguments, that the UK should shield its personnel from the ICC jurisdiction over war crimes.

Under Article 124 of the Rome Statute, a state party could choose to opt out from the ICC's jurisdiction concerning war crimes for the next 7 years, starting from the point in time when the ICC became active. (The Rome Statute 1998) The Opposition argued strongly that the UK should adopt such an opt-out and give as much protection to its armed forces as possible. The

fears of losing control, of a sword hanging over the Prime Minister, of unaccountable judges and of a prosecutor who might "go bad" and second-guess actions of the UK are all connected to the UK's military actions abroad and the way they might be affected by the ICC. The seven year opt-out would give the UK, the Opposition argued, a chance to see how the ICC develops and whether it will work as the UK would like it to work. The danger was, as Conservative MP Julian Lewis characterized it: "whether normal military action or honest mistakes made during normal military action could end up being defined as war crimes […] the definition of a war crime could be stretched too far". (House of Commons 2001a, vol. 366, col. 265)

The implicit premise in the Opposition's arguments concerning the armed forces (and the supporters' too, discussed below) is that should the UK's military action lead to an incident during war or should a case arise when the UK had to, to attain its military objectives, use substantive power, it would be an unfortunate mistake or a necessity, not really a crime in the sense crimes are defined in the Rome Statute. The danger was that such an incident could be judged very differently by the UK and by the ICC. Howarth pondered on the situation during the last Committee sitting through the examples of the Allied area bombing of Dresden and the use of atom bombs in Hiroshima and Nagasaki during the Second World War. Howarth contended that "as human beings they [the armed forces] could, if faced with a difficult situation, be guilty of some atrocity" but that an action such as Hiroshima, although horrible, "was necessary to destroy a great evil": the question then is whether adopting the Rome Statute inhibits the ability to prevent greater evil. (Standing Committee 2001j, 3-3.15 pm)

To prevent the impediment of UK military actions and to shield its armed forces from the ICC, the Opposition argued that the UK should opt out from the ICC's jurisdiction over war crimes. To argue their point, the Opposition relied on comparisons to France, which did take the opt-out. The issue was mainly debated in the Standing Committee sitting on May 1st 2001. (Standing Committee 2001g; Standing Committee 2001h) MP Gillan thought it peculiar that the UK would let one of its closest European allies, France, to take the opt-out and not do so itself. (Standing Committee 2001h, 12.15 pm) Reference was also made to the US. MP Howarth wondered why would the Government, especially when the UK's closest ally US had reservations over the ICC, "want to rush headlong into ratifying the statute, failing to take advantage of the breathing space afforded by article 124?" (House of Commons 2001b, vol. 368, col. 344) None put it more clearly, however, than Shadow Foreign Secretary Maude during the Report stage in the House of Commons on May 10th 2001. He first expressed amazement as to why "members of the British armed services should be subject to a lesser

degree of protection than members of the French armed services" (House of Commons 2001b, vol. 368, col. 328) and when pushed on the matter, declared that "I believe that the British armed forces should be exempt" because "In the absence of genuine immunity, the armed forces will find their military efficiency, morale and ability to be operationally effective seriously inhibited." (House of Commons 2001b, Vol. 368, col. 333)

Thus, the Opposition supported the ICC and the ICC Bill in principle, but had serious reservations about how it would work in practice. The Conservative MPs thought problematic that the UK could not control the ICC and its personnel and that the ICC would impede the UK's military operations and expose its armed forces to ICC prosecution in cases the UK might not view as crimes. The Government should have used its opportunity to opt out from the ICC's jurisdiction over war crimes, the Opposition contended, and through that protect UK forces and allow time to see how the ICC develops.

It is to these arguments the Government and other MPs supporting the ICC had to answer and the five supportive themes identified in the supporters argumentation reflect, naturally, the concerns raised by the Opposition. The supporter' arguments are analyzed next.

5.3 "A weapon against wickedness": In Defence of the ICC

The last part introduced the main themes of the Oppositions argumentation in the debates concerning the ICC and the ICC Bill. In this part, the arguments of the supporters of ICC are analyzed. As mentioned in the beginning of the last chapter, five main themes of supportive arguments can be identified from the debates: 1) breaking the culture of impunity; 2) that the UK should be among the first 60 states to ratify the Rome Statute; 3) that the ICC does not limit the UK's sovereignty; 4) that the ICC and the ICC Bill are a continuance of existing law: and 5) that the UK should lead by example. These themes and the argumentation techniques used to argue them as characterized by Perelman and Olbrechts-Tyteca are each introduced and discussed in turn.

5.3.1 Breaking the Culture of Impunity: The Need for an ICC

Within the first theme, arguments concentrate on supporting the ICC and the idea of it in general. The ICC was generally regarded as a very important achievement by supporters of the Court. As quoted in the headline of this part, the ICC was characterized for example as "a weapon against wickedness". (House of Commons 2001a, vol. 366, col. 239) The main positive impact the ICC was envisaged to have was bringing perpetrators of international

crimes to responsibility and thus help to break the culture of impunity. Foreign Minister Cook pointed to the culture of impunity right after the Rome Conference in 1998: "It has been a paradox of our century that those who murder one person are more likely to be brought to justice than those who plot genocide against millions" and saw the ICC as an answer to this problem. (House of Commons 1998, vol. 316, col. 803) In the general debate in October 1999, various MPs referred to the ICC's role in tackling the culture of impunity. (House of Commons 1999, Vol. 336, col. 931; 940; 941) Labour MP Oona King perhaps put it most eloquently, charactering the ICC as *"another hurdle in the path of criminals who have all too often felt that they can act with impunity despite—and sometimes because of—the magnitude of their crimes."* (House of Commons 1999, vol. 336, col. 931) In the May 2001 debate, Labour MP Jeremy Corbyn reminded that behind the ICC and the UK's ICC Bill is "the revulsion of many people around the world at abuses of human rights and the unbridled power of dictatorships. They see the need to bring such dictators to heel". (House of Commons 2001b, vol. 368, col. 345) It is evident that the MPs saw in the ICC the possibility of, if not ending, at least eroding the culture of impunity.

MPs pointed often to the positive consequences the ICC will have in the future. Foreign Secretary Cook argued that the ICC will put an end to the *ad hocery* of international criminal law: "Until now…we have had to invent an entirely new tribunal with its own procedures and institutions. Now, we will have the advantage that the International Criminal Court will be ready to act". (House of Commons 1998, vol. 316, col. 811) Labour MP Desmond Browne saw benefits in the ICC and international trials in general for conflict resolution: "Without justice, many countries have no hope of lasting peace". (House of Commons 1999, vol. 336, col. 940) Cook pointed out that the ICC Bill, by incorporating the crimes identified in the Rome Statute to the UK's domestic law, "removes any concern that the absence of such a provision could leave Britain a safe haven for war criminals". (House of Commons 2001a, vol. 366, col. 220)

The above arguments illustrate arguments that are based on the structure of reality, the second category of arguments in Perelman's and Olbrecht-Tyteca's classification. These rely on what people accept as real and use that reality as a basis from which to form bridges to the point one wants to make. Within these, pragmatic arguments evaluate an act or an event through the favourable or unfavourable consequences it might have. (Hauser 1986, 186) Here, MPs pointed to the favourable consequences establishing the ICC will have, such as ending the *ad hocery* of international law, and to the negative costs that would be incurred should it not.

Labour MP Tony Worthington argument for the ICC was straightforward: "If we do not embrace the Bill, we will not get an ICC". (House of Commons 2001a, vol. 366, col. 238) Labour MP Andrew MacKinlay argued that "we must have the international court as a safety net in case of failure so that despots and people who fail to recognize wrongdoing can be arraigned before the international community". (House of Commons 2001a, vol. 366, col. 246)

Here, MPs MacKinlay and Worthington use two other arguments based on the structure of reality. MacKinlay draws a direct causal link, argument which points to a causal connection that is seen to exist between events, process, objects etc (Hauser 1986, 184), between the ICC and the UK's actions: if there is no Bill, there is no court. Worthington's argument is an example of direction, seeking to criticize events and things by pointing to something which causes alarm in listeners (Hauser 1986, 1984); here, that is the idea of a "despot" escaping justice what is hoped to persuade the listeners to support the ICC.

Concerning the UK and the ICC, MPs pointed to what the UK was able to accomplish during the negotiations to highlight the UK as a positive and important actor in the process. When reporting back to the House of Commons right after the Rome Conference, Foreign Secretary Cook not only highlighted the ICC as a way to end impunity (above) but also the UK's role in bringing that about: "I am pleased to report to the House that […] Britain was part of the overwhelming majority" that agreed to set up and international criminal court. (House of Commons 1998, vol. 316, col. 803) In the 1999 debate in the House of Commons Minister of State Keith Vaz declared that "We are proud of our achievements during the Rome negotiations.The United Kingdom took the lead in introducing important elements" ranging from the inclusion of internal conflicts to the question of the appropriate selection of judges. (House of Commons 1999, vol. 336, col. 946) In 2001, Cook emphasized similarly that in Rome, the UK "delegation played an important role" and was able to "secure a number of improvements to the Rome Statute" by, for example, widening the remit of the court and getting crimes of sexual violence included in the crimes. (House of Commons, vol. 366, col. 217) These sorts of statements point to the importance of the UK during the negotiating process and seek to emphasize the UK as proponent of international law in general and the ICC in particular. This was likely very important to the Government, when and if it wanted to promote its idea of an ethical foreign policy. This is discussed in more detail later.

In the above, reality structure –arguments of person and act were used to highlight the UK's role. This technique evaluates a person (or in this case, the UK) through the person's acts and thus characterizes that person through his deeds. (Hauser 1986, 185) This sort of emphasizing

of the UK's positive role in making the ICC a reality was done in parallel to emphasizing the positive influence of the ICC.

The importance of breaking the culture of impunity was emphasized by references to individuals and past events. Individuals used as examples were persons from history that are widely familiar and in general regarded as dictators and perpetrators of international crimes. In the ICC debate, most often used were Idi Amin, Pol Pot and Saddam Hussein. The cases of Pinochet and Milosevic were also popular references. Concerning events, the Second World War, Sierra Leone, Bosnia and Rwanda were often used to highlight the need of an ICC.

Familiar individuals were often used either as particular examples or more in an abstract sense to refer to the perpetrators of heinous crimes in general. Foreign Secretary Cook used Pol Pot and Saddam Hussein to construct an idea of an abstract group of future criminals, catching of which will be helped by an ICC: "The International Criminal Court will put on notice the Pol Pots and Saddam Husseins of the future". (House of Commons 1998, vol. 316, col. 803) The Conservatives used the technique too and for example during the same 1998 debate, Conservative MP Michael Fabricant referred to "the court's practical work in deterring the Pol Pots and Saddam Husseins of this world". (House of Commons 1998, vol. 316, col. 811) During the 2001 House of Commons debate Liberal Democrat MP Robert Adam Ross MacLennan and Minister of State John Battle made similar references, respectively: "…to bring to justice the Pol Pots, the Idi Amins, the Saddam Husseins and the others whose names will reverberate throughout history for the monstrosities that they have been guilty of perpetrating" (House of Commons 2001a, vol. 366, col. 215) and "Hitherto, there has been nowhere to bring to justice the Idi Amins, Pol Pots and Saddam Husseins". (House of Commons 2001a, vol. 366, col. 279)

Pinochet and Milosevic were used more as particular examples than as examples aiming to construct the idea of an abstract group. As it happened, Milosevic was arrested just before the April 2001 House of Commons debate and Foreign Secretary Cook made use of it, and also the ICTY and the ICTR, when he opened the debate. Cook referred to Milosevic's crimes and highlighted the fact that the case of Milosevic in unusual because there is a tribunal to charge him, thus indirectly referring to the need of a permanent solution:

"There could be no clearer case for the need to achieve international justice than that of Milosevic. What makes the case of Milosevic unusual is the fact that there is an international tribunal to pursue justice throughout the former Yugoslavia. Apart from Rwanda, no other

part of the globe has an international mechanism to call dictators to account." (House of Commons 2001a, vol. 366, col. 214-215)

Pinochet was used by MP King as a positive example of an individual caught despite his standing (House of Commons 1999, vol. 336, col. 930); and MP Worthington argued that an ICC would have helped with "the problems that General Pinochet posed" (House of Commons 2001a, vol. 366, col. 240). MP Corbyn reminded that "thousands of people died in Chile at the hands of Pinochet" and although Pinochet could not de tried in the ICC, others can be. (House of Commons 2001b, vol. 368, col. 345)

In addition to these, references were made to the Holocaust, Sierra Leone and East Timor, the genocide in Cambodia and Rwanda and to crimes in Kosovo to highlight the need for a court. (House of Commons 2001a, vol. 366, col. 239; 254; 258-259) Liberal Democrat MP Jenny Tonge emphasized her argument in support of a court by referring to "the blood-curdling and heart-rending stories from Rwanda, southern Sudan and Kosovo". (House of Commons 1999, vol. 316, col. 941)

Quite commonly, the ICC was characterized as "a step". Contrasting the ICC in such a way highlights it as a move forward and as a change to the current situation characterized by impunity. This was especially done during the 2001 House of Commons debate, where the ICC and its establishment were characterized as "a historic step"; "an important step"; a "great step forward that has been denied to other generations"; "a major step forward for humanity"; and as a "giant step forward for universal human rights and the rule of international law". (House of Commons 2001a, vol. 366, col. 214; 238; 250; 256; 276) In this process the UK was characterized as "an architect of legal innovations". (House of Commons 2001a, vol. 366, col. 217)

The above arguments rely on the techniques of establishing the structure of reality, where particular cases are used as examples to make generalizations, to illustrate regularities and to draw analogies. (Hauser 1986, 186) In addition, as stated in chapter 4, metaphors represent condensed analogies that use a word or a phrase taken from its original meaning to describe something else. The most prominent metaphor used was of the ICC as a step, as illustrated above. By drawing as examples on individuals and past events, the case and need for the ICC was further emphasized. The arguments draw persuasion from the likely assumption that the individuals are regarded as criminals and despots and the events as horrendous by the audience; they therefore awaken the thought that something needs to be done to stop such people from creating such horrendous events in the future. The aim is to then generalize the

idea that what is needed to prevent the occurrence of such events and bring to justice such criminals is the ICC.

All these arguments rely on the suggestion that the ICC, once established, will either have a positive influence on ending the culture of impunity or will prevent an alarming consequence that would reinforce impunity. In addition, references were made to the UK's positive role and to what it had accomplished during the Rome negotiations. Arguments in this vein are easily acceptable by both parties, as the Opposition too supported the ICC in principle and regarded it as valuable in bringing perpetrators of heinous crimes to justice. Thus, they were ready to accept the idea of the ICC's positive influence. Next, the second theme of arguments is discussed.

5.3.2 Among the First 60: Importance of Passing the Bill

The UK Government eagerly wished to be one of the first 60 states to ratify the ICC. All through the debates it was underlined that the UK should ratify the Rome Statute as quickly as possible. The point behind this was that if the UK ratifies as one of the first 60 states, it can influence the ICC's structure and procedures. It was also stressed that the Statute in general should be ratified quickly. This was highlighted by MP Browne when he argued that if the Rome Statute is not ratified quickly, interest in the matter could wane: "We must build on the enthusiasm and momentum generated in Rome before it is dissipated. To do that, it is essential that countries in favour of the court, such as the United Kingdom, proceed with ratifications immediately". (House of Commons 1999, vol. 336, col. 940) In the final debate on the matter in May 10th 2001, Labour Co-operative MP Mike Gapes reminded that if the Bill is not passed now, all the previous efforts to pass it would be lost: "If the Bill falls, it will not be easy to reintroduce it quickly. It would again have to go through all its stages in both Houses of Parliament". (House of Commons 2001b, vol. 368, col. 315) Similar strategy was used by Minister of State Battle. Through pointing out what had been accomplished so far Battle indirectly hinted at what might be lost when he reminded others in the first Committee sitting that "There is urgency also because we have been heavily engaged in the formative stages of the court and in negotiating the details to get it established. We want to be one of the early signatories – among the first 60". (Standing Committee 2001a, 9.55 am)

The main point was that the UK should be one of the first 60 to ratify so that it would be able to influence how the ICC and its procedures are developed. In the April 2001 debate in the House of Commons Foreign Secretary Cook put it in very practical terms when he stated that by passing the Bill, the UK will be among the first 60 and that it is important

"not just because we will have helped to bring the court into existence, but because those that have ratified are the only countries with a say in setting up its procedure and appointments […] Britain could nominate candidates, vote in the elections of the prosecutor and judges and have a say in the adoption of the procedural rules." (House of Commons 2001a, vol. 366, col. 216-217)

Minister of Battle appealed to the MPs in a similar vein and reminded all that the point of the debate and discussion on the Bill in Committee "is that we are seeking to be one of the first 60 signatories to help to shape the court […] we must be at the table." (House of Commons 2001a, vol. 366, col. 278) Later in Committee, Battle struck on the Opposition's fears of not being able to control the ICC by stating that "The Government believe that the best way to exercise control over the ICC's future development is to be part of it.[…] If we are engaged we will be best placed to solve any problems that may emerge." (Standing Committee 2001d, 4.30 pm)

It was hoped that the Opposition members would alarmed by the prospect of negative consequence delaying could result in, and alarmed enough to support the Bill. Battle warned that "If we are not one of the 60, we will not have a say at all". (House of Commons 2001a, vol. 366, col. 278) Similarly, during the last debate in May MP MacLennan answered Conservative MP Gillan's criticism over the lack of time to debate the Bill by asking "Would she regard it as the right time for us to do so [adopt the Bill] when 60 other countries have already set the processes in concrete?" and MP Gapes reminded that should the Bill fall now, "We would not be one of the most influential countries in the International Criminal Court". (House of Commons 2001b, vol. 368, col. 313; 315)

Arguments here were most often based on the structure of reality and more specifically, arguments of waste, pragmatic arguments and arguments of direction. Arguments of waste seek to argue that something which has been achieved is lost if a particular activity is stopped. (Hauser 1986, 184) By pointing to the possibility of losing all achieved thus far concerning the ICC should the Bill fall now, the aim was to persuade the Opposition to back up the Bill so that progress gained would not be lost. Pragmatic arguments within this theme either pointed to the positive consequences of ratifying quickly or to the negative ones that delay in the matter would incur, illustrated above for example in the statements referring to the ability to influence the ICC's procedures, seen as a favourable consequence. In a similar vein, arguments of direction were used to alarm that should the Parliament delay the matter, the UK could lose all its influence.

It was clearly important for the UK government at the time to be amongst the first 60 states to ratify the ICC's Rome Statute. However, it was not only the pragmatic matter that the Government wanted to be at the ICC table deciding on procedures and electing personnel but also that when it came to the ICC, it strongly wanted to be seen as a positive example. Such arguments are analyzed next.

5.3.3 Leading by Example: Why Not Ratifying Is a Bad Thing

The third theme of argumentation that was clearly identifiable from the debates was that the supporters of the ICC wanted the UK to set an example to other states and the international community. Foreign Secretary Cook put it in straightforward terms: "The most powerful argument is always by example" (House of Commons 2001a, vol. 366, col. 223); and Minister of State Battle maintained that it is important to "demonstrate leadership and stand up for the rule of law around the world". (House of Commons 2001b, vol. 368, col. 347) Central here was the idea that if the UK endorses the ICC, others will be persuaded to follow and thus the UK needs to lead by example. It was maintained that if the UK would opt-out and thus show suspicion towards the Court, it would hurt both the UK's image and affect negatively support for the ICC. These sorts of arguments were often used to answer the Opposition's demands that the UK should opt-out from the ICC's jurisdiction over war crimes. The supporters argued that if the ICC's jurisdiction is going to apply to others it should also be accepted that it will apply to the UK. Should the UK opt-out, others could too and those others could include such the sort of states and people the ICC is set up for.

Supporters of the Court argued vehemently that if the ICC is going to have jurisdiction over other states, it also should have jurisdiction over the UK. By distancing the UK from other states as an actor who would not stoop so low as to perpetrate ICC crimes, the Opposition (and the Government as well: this is discussed later) created a picture where the UK and other states were presented as counterparts to each other. The supporters of the ICC argued that similar treatment should be given to both if the ICC was to be seen as a worthwhile and legitimate institution. This is well visible in MP Gapes' statement, made during the last debate on May 10th, when he stated that if the ICC can act against "the armed forces of countries that perhaps do not maintain the scrupulous standards and have the generally exemplary record of our own armed forces", why should it not be suitable for the UK army? (House of Commons 2001b, vol. 368, col. 335) MP Corbyn drew the logical conclusion that opting out could well lead to unwanted results. For him, asking for an exemption for UK forces was "ridiculous" since "If we ask for that exemption, who are we to oppose anyone else's exemption?" (House

of Commons 2001b vol. 368, col. 346) MP Browne put the issue in the following way: *"Why should we in the UK have the arrogance to say that the court should practise on other countries' nationals while we watch to see whether the standard of justice is good enough for ours? What sort of message is that for a civilised country to send?"* (House of Commons 2001b, vol. 368, col. 338)

These arguments aptly show the two parallel lines of argument in this theme: that equal treatment should be given both to other states and the UK; and what the UK does concerning the ICC is important for its image. Opting out would be counterproductive to the UK's image as a civilized country and send the wrong message to others. The supporters argued strongly that in order for the ICC to gain as much support as possible and be effective, the major actors need to show a good example. Thus, MP MacKinlay noted that if countries such as the UK and France are not ready to put themselves under the ICC's jurisdiction, "how on earth can we expect the baddies of this world to do so?" (House of Commons 2001a, vol. 366, col. 249)

MP Corbyn used East Timor to give his argument force and pointed that an opt-out by, for example Indonesia, "would be a joke", for "many of us have seen what they [Indonesian armed forces] are capable of in East Timor and other places". (House of Commons 2001b, vol. 14, col. 346) In relation to an amendment put forward by the Opposition to give UK leaders discretion over the ICC, MP Worthington used the same technique when he pointed out that what powers the UK wants for itself, it has to give to "the Government of Rwanda, to Milosevic, to Saddam Hussein and so on". (Standing Committee 2001c, 10.45 am) By invoking the image of generally regarded-as-such-perpetrators of international crimes, the aim is give force to the argument that opting out would lead to unwanted consequences.

During a debate over an Opposition amendment to give the UK Secretary of State more discretion over situations where the ICC was able to claim jurisdiction over UK nationals, Minister of State Battle defended the ICC and pointed to the negative consequences when he stated that such discretion "would undermine the ICC even before it is established. That would send completely the wrong signal from the outset, when we are trying to build support". (Standing Committee 2001c, 12.30 pm) He furthermore contended in the House of Commons that opting out would send "the most appalling signal" and hurt the efforts to encourage others to support the ICC. (House of Commons 2001b, vol. 368, col. 348) Foreign Secretary Cook emphasized his argument by pointing to a possible positive consequence of leading by example and contended that the best way to persuade the US to support the Court is "to show

our own confidence in the court by taking part in it". (House of Commons 2001a, vol. 366, col. 223)

Arguments within this theme were made with a variety of techniques. First were quasi-logical arguments which seek to persuade through establishing logical and mathematical relations in the argument. Of these, mostly used here were arguments based on reciprocity, maintaining that two elements that are counterparts need to be given equal treatment. (Hauser 1986, 183) This is illustrated by the arguments that contend that equal treatment should be given to the UK and other states. Second, the points made were further emphasized by using events and individuals as examples (arguments establishing the structure of reality) to point to the negative consequences there could be if the UK would opt-out from the ICC's jurisdiction. In this, reference made for example to East Timor and Indonesia. Third, in addition to these two techniques, pragmatic arguments (arguments based on the structure of reality) were used to show that if the UK wants the ICC to succeed, it needs to endorse it fully and accept the ICC's jurisdiction over its own nationals.

Overall, these sorts of arguments show that the UK believed in the power of example. All through the debate process it was maintained that to persuade others to support the court, the UK needs to set a positive example and show that it believes in the ICC. Not only would this prove to be beneficial in getting support for the ICC but it would also reinforce the image of the UK as a supporter of the rule of law. How one behaves can influence the behaviour of others and establish or reinforce a structure where support for an international court is a positive thing. The fourth theme of argumentation drew force from the existing structure of international law and the context surrounds the ICC itself. These arguments are discussed next.

5.3.4 Existing Law: The ICC as a Part of the Context

The Opposition was worried that the ICC would affect negatively the military operations and armed forces of the UK. Mainly as an answer to this, the supporters contended that in practice, the ICC does not really change anything or bring in new law that would not already exist through some other measure. MPs pointed to existing law and conventions UK personnel are already subjected to and maintained that since there has not been problems previously, there will not be problems with the ICC.

Overall, this theme of argumentation is premised on the structure of reality: the arguments drew their force from the structure that existing law forms and many are familiar with and accept as a well-established fact. By pointing out that the ICC does not bring in anything that

would be radically different from the rules that are already in place, the supporters aimed at persuading the Opposition to accept the ICC and its jurisdiction by connecting it to the already existing law. As Minister of State Battle contended about war crimes, "The crimes set out in that article are already crimes in international law. That message has not gone home." (House of Commons 2001b, vol. 368, col. 347) During the last the stage of the debate in May 2001, he made the connections and stated forcefully that: *"Similarly, what we are doing is not new and is not a newly minted principle. We are continuing the proud and honourable role that the United Kingdom has played in the development and enforcement of international humanitarian law."* (House of Commons 2001b, vol. 368, col. 349)

The most popular point of comparison for the ICC was the ICTY, which was used to highlight that UK personnel in Bosnia and elsewhere are subjected to the ICTY's jurisdiction and this has not proved problematic. Minister of State Battle highlighted this in the House of Commons by pointing to subjecting the UK armed forces to the jurisdiction of the ICTY: "If that were right in the case of former Yugoslavia and the British personnel on active service in difficult circumstances there, it is equally valid in respect of the Bill and the International Criminal Court." (House of Commons 2001a, vol. 366, col. 223) In the May 10th debate, Foreign Secretary Cook asked whether the Shadow Foreign Secretary Maude could "cite a single case where the operational effectiveness of British personnel in the former Yugoslavia was impeded by the existence of that tribunal?" (House of Commons 2001b, vol. 368, col. 333) The aim was to persuade the Opposition to agree that the ICC would not change the situation and thus there is no good reason the UK to stay outside its jurisdiction.

The Geneva Conventions were similarly used as a point of comparison. In the same way as he referred to the ICTY, Minister of State Battle referred to the Geneva Conventions. (House of Commons 2001b, vol. 368, col. 347) MP MacLennan pointed out that through the Geneva Conventions, other states already have jurisdiction over UK nationals and if that is acceptable, why would jurisdiction by an international court not be. (Standing Committee 2001j, 3.15 pm) To Conservative MP Howarth's fear of a sword hanging over the heads of future UK Prime Ministers should the ICC Bill be enacted (above p. 89), MP MacKinlay answered by noting pointedly that the logical conclusion of opposing the ICC would be that "we would not agree to existing Geneva conventions and codes of war. We are, after all, merely building on an arrangement that already exists." (House of Commons 2001a, vol. 366, col. 248) So too did MP Gapes when he contradicted Conservative MP Lyell's argument about ICC's negative effects on UK personnel by suggesting that Lyell's arguments "may be leading to the

conclusion that we should tear up our obligations under the Geneva conventions". (House of Commons 2011a, vol. 366, col. 253)

These comparisons were further emphasized by pointing out that the ICC in fact offers more protection to UK soldiers than do the ICTY and the Geneva Conventions. This is because, it was argued, the ICC's jurisdiction is premised on complementarity, which gives the UK primary power to prosecute its own nationals should they have committed ICC crimes. The ICTY's jurisdiction, however, supersedes that of the UK. This point was emphasized throughout the debate. MP Browne made this point in the House of Commons and Committee (House of Commons 2001a, vol. 366, col. 233; Standing Committee 2001c, 11.15 am). So too did Foreign Secretary Cook when he pointed to the complementarity principle and criticised the Conservatives in connection to the ICTY by arguing "Why is it wrong for us to act on the same principles on which they acted, when we have a cover that they did not provide for British troops". (House of Commons 2001a, vol. 366, col. 234)

The supporter's aimed to contradict the Opposition position by arguing that since the previous Conservative Governments have supported the ICTY and the Geneva Conventions, opposing the ICC now is inconsistent. Labour Co-operative MP Louise Ellman criticized Conservative MP Garnier for opposing "in a tortuous manner, something that he and his party supported previously. I cannot but wonder what is the reason behind that." (Standing Committee 2001b, 4.15 pm) Minister of State Battle referred to the whole structure created by international law when he pointedly asked MP Garnier:

"The treaty [The Rome Statute] is built on internationally agreed legislation to which the previous Conservative Government signed up because they thought it was a good thing. Why does the hon. and learned Gentleman wish to debate it again now, if he has already agreed to it?" (Standing Committee 2001b, 4.00 pm)

Foreign Secretary Cook reminded the Conservative Shadow Foreign Secretary Maude that it was the Conservative Government that set up the ICTY (House of Commons 2001b, vol. 368, col. 333); and Labour MP, Solicitor-General Ross Cranston did the same with a reference to the Geneva Conventions. (Standing Committee 2001j, 3.30 pm) Perhaps the most suitable example of this line of combined argumentation is a statement by Cook during the April 2001 debate. It is thus useful to quote Cook in some length:

"Provisions […] in the Bill closely parallel the provisions in the statute setting up the war crimes tribunal for former Yugoslavia. The previous Government acceded to the war crimes

tribunal for former Yugoslavia in the full knowledge that there were several thousand British service men in the area. […] Nor does the creation of an international criminal court change the law under which our armed forces operate. The definitions of war crimes in the statute are already part of the well-established law of armed conflict. They are already binding on our armed forces and form part of the basic training of every British officer. Indeed, most of the wording on the crimes committed during combat is wording drawn from the Geneva Convention Acts 1957 and 1995, both of which were brought to Parliament by a Conservative Government." (House of Commons 2001a, vol. 366, col. 222-223)

This statement combines well the central emphasis of this theme of argumentation. By drawing on existing law and law adopted by the Opposition's party, the supporters aimed towards the conclusion that the ICC is in fact continuance in the existing structure , formed by the laws of war and international tribunals, which influences states by directing them towards what is considered to be appropriate behaviour. The argument is further emphasized by pointing to the inconsistencies in the Conservative's position, created by the contradiction between their previous support and current resistance.

The above arguments illustrate the type of argumentation mainly used within this theme. Argumentation was mainly quasi-logical and the most often used argument was a three-pronged approach that combined comparisons to the situation created by the ICTY; comparisons between the ICC and the Geneva Conventions; and pointed to contradictions in the Opposition's position by reminding that they themselves had adopted the ICTY and the Geneva Conventions; taken that the ICC will not bring in a radical change, supporting them but opposing the ICC is inconsistent. Arguments of comparison compare objects to each other in order to evaluate them; and arguments by contradiction aim to indicate inconsistencies in the other's position and through that dismiss the validity of the other's argument. (Hauser 1986, 183)

In relation to the ICTY, the Conservative's in turn argued that the ICTY and the ICC are not comparable since the ICTY is premised on a jurisdiction limited in time and space. (House of Commons 2001a, vol. 366, col. 227) Thus, to further allay the Conservative's fears about the ICC, the supporters relied on one more line of argumentation.

5.3.5 The Difference between Us and Others: Dissociation of the UK and the ICC

The fifth and last theme of argumentation that clearly arises from the debates is the distance the supporters attempted to create between the UK and the ICC. The point all through the

debates was that although the idea of a UK national committing heinous crimes is unthinkable, should such a case arise through unfortunate circumstances, that person would never have to face the ICC because the case would be handled nationally. This point was emphasized fervently and came up very often, as it is connected to all the Opposition's main concerns. Dissociation between the UK and the ICC can be seen as perhaps the main argument with which the supporter's sought to persuade the Opposition to back the ICC and the ICC Bill.

In the ICC debates, distance was created between the UK and the ICC concerning the issue that UK personnel could end up before the ICC. The separation of the two was often emphasized by taking as example some past event, the Second World War or the Former Yugoslavia. Dissociated was done to emphasize that the ICC would not impede the UK's military operations or endanger its personnel. The supporters worked very hard to obscure the image of an UK soldier who, first, was guilty of ICC crimes and second, indicted by the Court. This was done to persuade the Opposition that the ICC could not 'hurt' the UK or its leaders and to allay the Opposition's fears and minimize the power of their argumentation.

As mentioned, the idea of UK nationals perpetrating ICC crimes was thought absurd. The viewpoint was that should the UK be guilty of acts that could be regarded as criminal in the eyes of the ICC, these would be the result of unfortunate and human mistakes. Thus, the first point of dissociation was separating the UK's and its personnel from acts that could be considered to be international crimes. This was not done only by supporters but by the Opposition as well. In Committee, Conservative MP Garnier made a distinction between the UK and those who could commit crimes of aggression (article 5 crimes) when he stated that "It is highly unlikely that the present Government or a successor Conservative Government would be an aggressor in the sense that I envisage that term being defined under article 5. It is the totalitarian regimes who will be guilty […]. (Standing Committee 2001b, 2.30 pm) Shadow Foreign Secretary Maude made a similar point when he characterized a scenario "of events in war in which dutiful, decent officers and men obeyed orders that unintentionally led to the loss of civilian life" and should such a situation arise, as some have argued it did with the Kosovo bombing campaign, it "does not mean that it would be right to accuse the Foreign Secretary and the Prime Minister of being war criminals […] Nor, of course, does it mean that Lady Thatcher was a war criminal when she ordered the retaking of the Falklands". Maude further painted the picture of UK personnel who could be "subjected to politically motivated prosecutions or threats of prosecution for carrying out their duties in distant foreign lands." (House of Commons 2001a, vol. 366, col. 230) These well describe the idea that UK soldiers

carry out their necessary duties in service of their country, a duty which can in some instances lead to unfortunate but not intentional consequences.

Similar dissociation was done by the supporters of the ICC. MP MacKinlay used the Dresden bombing during the Second World War and contemplated that

"I do not believe that the head of Bomber Command or Winston Churchill could or would have been brought before the international court, because it was obviously a grey area. We are talking about despots, who will use weapons of mass destruction—or genocide—without regard to what represents at least some semblance of justification in terms of the war objective." (House of Commons 2001a, vol. 366, col. 248)

The distinction is clearly made between the justifiable actions of the UK that are "in the grey area" and the actions of others belonging to a different plain. So far removed did the idea of a UK leader being prosecuted by an international court seem to MP Gapes that when Conservative MP Blunt contemplated the idea of something 'going wrong' between the UK and the ICC, he reproached: *"Is he saying that there is a certainty or a great likelihood of this country being so out of line with the higher tenets of international behaviour that the rest of the world would gang up against us to put our Prime Minister on trial for an alleged war crime? […] What he says is simply absurd."* (Standing Committee 2001c, 10.30 am)

A statement by Solicitor-General Cranston also portrays well the distinction that was made between UK acts and acts by others. In Committee, Cranston separated between "The unfortunate and avoidable mistakes that may occur in wartime" and people who "systematically shelled and blew up virtually every building in Vukovar, during the war in Croatia. The action was not for legitimate military reasons, but to allow people to vent their ethnic hatred". (Standing Committee 2001j, 3.30 pm) This is not to say that the UK has or would intentionally commit international crimes or that the shelling in Vukovar could not be regarded as a crime. The point is that the actions of the UK, past and future, were dissociated from the concept of a crime by classifying them as 'mistakes' and then juxtaposing such mistakes with for example the bombing in Vukovar, which was emphasized not being about legitimate military objectives. This distances the UK from the ICC's sphere of influence and works to construct an idea of a distinction between 'us and legitimate actions' and 'them and criminal actions'.

This line of argumentation was continued by dissociating the UK from the ICC's jurisdiction. It was maintained that should a situation arise where the UK could be seen as being guilty of

an ICC crime, and it could, given the messiness of war, the matter would never go to the ICC because the UK would handle the prosecution in its national courts. Thus, in addition to the distinction between the UK and international crimes, it was necessary to dissociate the UK from the ICC's jurisdiction. This was mainly done by distancing the UK and the ICC from each other and by pointing to the complementarity principle and maintaining that the UK would without a doubt prosecute its nationals in its own courts should they commit international crimes and that is why a UK national will never go to the ICC.

MPs attempted to disregard as nonsensical the idea that the ICC would someday try to indict and prosecute UK nationals. MP MacKinlay emphasized that if the UK courts martial system follows appropriate rules, The ICC "will not come banging on the door of the Foreign Secretary or the Secretary of State for Defence, saying, "We want this officer."" (House of Commons 2001a, vol. 366, col. 247) MP King argued similarly when she stressed that the ICC is meant for states that won't prosecute, not for states like the UK. By comparing to a police force, she argued that *"The ICC will not be rifling through the files of the Ministry of Defence or demanding the indictment of Cabinet Ministers and senior officers. It is not an international FBI."* (House of Commons 1999, vol. 336, col. 931) In April 2001 she further maintained that the army "*will be protected because their behaviour, on the whole, reaches the highest standards in the world.* On the whole, our armed forces do not go around perpetrating crimes against humanity." (House of Commons 2001a, vol. 366, col. 261)

To further distance from the minds of Conservative MP's an image of an UK national in the ICC's dock, the issue of complementarity was brought up abundantly during the debates. The complementarity principle and other measures were characterized as safeguards that will shield the UK from malicious and politically motivated prosecutions. It was argued that the complementarity would shield UK nationals because the UK would prosecute if one of its nationals would commit an ICC crime and thus, the Oppositions arguments were without merit.

In April 2001, Foreign Secretary Cook characterized complementarity as "a fundamental principle of the Rome statute" which characterizes the belief that "the best place to try any crime is at the national level" and means that the ICC "has no authority to initiate an investigation where the allegations have already been examined by the appropriate national authorities". (House of Commons 2001a, vol. 366, col. 222) Minister of State Vaz expressed his belief that the "Rome statute contains sufficient safeguards to protect service men, the most important of which is the complementarity principle". (House of Commons 1999, vol.

336, col. 977) Solicitor-General Cranston made the point in Committee when he underlined that the language of Article 17 (the complementarity principle) is mandatory and thus provides an important protection. He further emphasized in strong terms that

"Our courts can deal with relevant cases and if we prosecute, or decide not to, in accordance with the law, the ICC will not be able to trump our decisions. If we decide not to prosecute, our decision will not be trumped […] the ICC will not be in a position to trump us". (Standing Committee 2001d, 6.19-6.30 pm)

The supporters also emphasized additional safeguards that were put in place in the Rome Statute. Foreign Secretary Cook contended that the pre-trial screening stage of the ICC "will provide a safeguard against accusations brought in bad faith" (House of Commons 1998, vol. 316, col. 804) and MP King reminded the House of the powers of the UNSC to impede a case's progress to the ICC. (House of Commons 2001a, vol. 366, col. 266) In Committee, Minister of State Battle pointed out that the prosecutor has to make a solemn case to open an investigation in the ICC, that the qualification of judges was an issue the UK delegation in Rome worked tirelessly towards, brought up the complementarity principle and emphasized that "The ICC statute is full of safeguards against politically motivated prosecutions". (Standing Committee 2001c, 12.30 pm) Cook attempted to further convince the MPs of the safeguards by a comparison to UK's allies:

"Yes, we are confident that our service men will be protected against malicious prosecution. If anyone is in any doubt about whether that confidence is well placed, I should say that none of our other NATO allies took the interpretation of the United States; and, like us, many of those other NATO allies have service men in foreign posts." (House of Commons 1998, vol. 316, col. 807)

Strong assurances were needed. The Opposition's obvious counterargument was a scenario where the ICC would take a different view and challenge the UK's decision that a particular situation did not constitute a crime. Conservative MP Howarth characterized the complementarity principle as a "ghastly word that has been introduced specifically for this statute" and pointed out that no assurances can be given that a UK Prime Minister could never be indicted by the ICC. (House of Commons 2001b, vol. 368, col.342) In Committee, Conservative MP Blunt demanded that Minister of State John Battle must accept the fact that the ICC could interpret differently what it means to genuinely prosecute a case (Standing Committee 2001c, 12.30 pm) and MP Howarth envisaged the possibility of a clash between

what "the ICC perceives as willingness to proceed and what we believe is justified". (Standing Committee 2001g, 11.am)

As an answer, the supporters called for trust in that the ICC will work properly and in that the quality of the UK justice system is such that possible challenges made by the ICC would futile. To MP Blunt's charge above, Minister of State Battle answered that "it is about having confidence in the court as an institution, not considering whether a particular personality with an axe to grind is the person making the decision" (Standing Committee 2001c, 12.30 pm); and to Howarth, above, the Solicitor-General disagreed on the grounds that "article 17 of the statute is clearly drawn. *The ICC could not conceivably adopt an interpretation of the clause that would not recognize justice as it is done in this country"*. (Standing Committee 2001g, 11.am)

Thus, many arguments referred to the quality of the UK justice system to disregard the ideas that the ICC could challenge the UK's decisions and that the UK would not be willing to prosecute if need be. Minister of State Vaz contended that "we are confident that we could demonstrate that there was a remedy in British justice" (House of Commons 2001a, vol. 336, col. 947) and Foreign Secretary Cook deemed that "Members on both sides of the House should have a robust confidence that the British legal system […] can satisfactorily demonstrate to the International Criminal Court that such allegations have been properly investigated". (House of Commons 2001a, vol. 366, col. 222) For MP King, the issue was simply unthinkable: "I cannot envisage circumstances in which, for example, the British Government conducted their own investigation, the ICC felt that we were not able to prove that the investigation was sufficiently thorough or unbiased". (House of Commons 2001a, vol. 366, col. 261)

Furthermore, it was unthinkable that the UK would for some reason be unwilling to prosecute its own nationals if a need for that would arise. Minister of States Battle assured that "We are unlikely to be unwilling or unable. […] the purpose of the court is to catch states whose judicial systems have collapsed and whose dictatorial regimes refuse to punish their own abusers of human rights. That is the idea. I do not believe we are in that bracket". (Standing Committee 2001c, 12.30 pm)

Solicitor-General Cranston argued similarly:

"I assure the Committee that in no conceivable circumstances would we be unwilling to act. Article 17 of the statute defines unwillingness to act in terms of shielding a person or delaying

in such a way as to defeat the object of the legal process. There are no conceivable circumstances in which the United Kingdom would act in that way." (Standing Committee 2001g, 11.00 am)

It was taken as granted that should a case arise, the UK would pursue it, and pursue it in earnest and prosecute the individuals responsible. So much confidence did the supporters have in the UK and the complementarity principle that arguments to persuade the Opposition of its point were often expressed in very categorical terms. Foreign Secretary Cook ensured in April 2001 that although he is aware that some in the armed forces have concerns over the ICC, "Those concerns are misplaced" and that UK personnel "will never be prosecuted" by the ICC because UK would handle prosecutions itself. (House of Commons 2001a, vol. 366, col. 222) Later on he emphasized this point in even more forceful terms by characterizing his statement in the following way: "That is certainly unequivocal. No one could point to anything in that statement that lacks conviction; it is a comprehensive statement." (House of Commons 2001a, vol. 366, col. 234)

Similar statements of conviction were heard often throughout the debates. MP King also contended that UK personnel will never be brought before the ICC, either in theory of practice and inquired from Conservative MP Howarth "Does not the hon. Gentleman understand the concept of complementarity?" (House of Commons 2001a, vol. 366, col. 260) Minister of State Battle attributed the Opposition's insistence on the issue of the armed forces to a "fundamental misunderstanding"; the ICC will not affect the army's rules of engagement in any way and thus "The Bill is no threat" to the UK. (House of Commons 2001a, vol. 366, col. 279) Battle repeated the point in the last debate in May 2001: "The ICC poses no threat to our armed forces". (House of Commons 2001b, vol. 368, col. 348)

The principle of complementarity was one of the most often used arguments to assure the Opposition that the ICC would not be able hurt the UK. So much did the issue come up that as the Committee's work was drawing to a close, Minister of State Battle reminded MPs that UK personnel will never go to the ICC and that complementarity means that "the ICC will not get a look in. That point is sometimes neglected by the Opposition." (Standing Committee 2001h, 6.45 pm) In the last debate in the House of Commons, Foreign Secretary Cook demanded that *"It is time the Opposition gave up arousing – in their own way, mischievous – fears about an outcome that will never happen"*. (House of Common 2001b, vol. 368, col. 330)

The argumentation technique used within this theme was argument by dissociation. Whereas the first four themes concentrated on links between the two and associated the UK and the

ICC, this last theme concentrates instead on breaking the links between the UK and its personnel and the ICC and its jurisdiction. Dissociation aims at a conclusion that does not recognize a hoped or accepted link between two elements. The goal is to show that a certain link does not exist, thus allowing one to disregard arguments based on the existence of that link as irrelevant. If one wishes to show that two elements are not compatible with each other, dissociation helps by remodelling the conception of reality to such where they are separate from each other. (Hauser 1986, 187)

The ideas of UK committing heinous crimes, of UK nationals in the ICC and of the ICC challenging decisions made by the UK was distanced from reality by dissociation. Supporters disregarded it as unthinkable that the ICC could doubt the justice system and decisions made by the UK and thus constructed an image of the ICC that was as far removed from the UK as possible. The aim was to separate by argument the UK and the ICC: to show that the Opposition's fears about the ICC impeding the actions of the UK were wrong and therefore, irrelevant.

5.4 The Analysis and the Theoretical Framework

This part deepens the analysis conducted thus far by integrating the themes of argumentation to the theoretical discussion. The debates in the House of Commons over the ICC and the ICC Bill echo many of the theoretical points put forth in Chapter 2. The viewpoints and issues discussed pertaining to the human rights and atrocities regimes, legalization and legalism, realism and idealism and constructivism and the different logics of action emerge from the statements and arguments made both by the Opposition and the supporters of the Court. The UK Government's foreign policy of the time also became visible in the debates.

To a large extent, the Opposition's arguments highlight a realist outlook on international relations and reveal the underlying concern that the ICC will ride roughshod over the UK's sovereignty. In essence, it argued that the UK's powerful role in international relations should be reflected in its relationship to the ICC. For example, the concerns of the minority controlling the majority resemble the realist idea that in international relations, powerful states inherently should and do have more of a say. Instructive is the following statement by Blunt that in the Rome Statute, "There is no recognition of the contribution that each nation makes to world security or of the balance of influence in the world". (House of Commons 2001b, vol. 368, col. 321) Furthermore, the Opposition's arguments to a large extent follow the logic of consequences, discussed in Chapter 2. They reveal that primary importance was placed on the

UK's national interest, which becomes clearly visible in the fear of the ICC impeding the military operations of the UK, especially should the UK be attacked and need to resort to self-defense. This is not to say that the Opposition regarded the ICC as wholly a 'bad thing'; rather, that the ICC could be useful when and if it would work and behave as the UK would like it to. This highlights the ideas of the logic of consequences, that norms are followed when they happen to coincide with the goal one is interested in achieving.

5.4.1 Ethical Foreign Policy

The Government's foreign policy at the time provides context for the debates. As discussed, the Blair Government and especially Foreign Secretary Cook were advancing what they termed as an ethical foreign policy, the aim of which was to bring human rights at the centre of UK foreign policy. Support for the ICC was part of this policy and naturally the issue came up during the debates.

Ethical foreign policy was referred to by both the Opposition and supporters of the Court. The Government's actions concerning the ICC were evaluated against the promoted ethical foreign policy. Through this, the Opposition criticised the ICC Bill and the Government's actions. Conservative MP Gillan saw that the ICC Bill was for the Government "one of their do-gooding poses". (House of Commons 2001b, vol. 368, col. 309) Shadow Foreign Secretary Maude disparaged the Government's actions with the ICC Bill and saw that the Bill "is now being bounced through on a strict guillotine so that the Foreign Secretary can try to add little lustre to his chipped and damaged ethical foreign policy". (House of Commons 2001b, vol. 368 col. 334) When the issue of universal jurisdiction was debated in Committee, Conservative MP Blunt tied the issue to foreign policy when he wanted to "see the colour of the Government's ethical money." (Standing Committee 2001j, 3.45 pm)

Quite to the contrary, the supporters saw the ICC as a good possibility to advance an ethical foreign policy. MP King pointed to the failures of the past when perpetrators of international crimes have not been brought to justice and saw that that can no longer be the case because "it does not square with an ethical foreign policy." (House of Commons 1999, vol. 336, col. 931) Labour MP Tony Colman stated that he is "proud of the Government's ethical foreign policy" and that ratifying the ICC's Rome Statute "is a key part" of it. (House of Commons 1999, vol. 336, col. 937)

The foreign policy context of the time is well visible in the debates. The ICC was a way for the Government to advance its ethical foreign policy. Especially the argumentation that the

UK should be among the first 60 states to ratify the ICC and that it should lead by example echo the Government's wish that its actions concerning the ICC should be taken as a sign of success of its ethical foreign policy and that the Government is serious about promoting human rights worldwide. For that, the endorsement of the ICC worked as a good example: supporting the Court was one way to achieve this and enhance the UK's positive image.

5.4.2 The Two Regimes and Legalism

Points put forth in the discussion of the human rights and atrocities regimes were visible in the debates. This was mostly seen in the first theme of argumentation, breaking the culture of impunity and the ICC's role in it.

As discussed in chapter 2, human rights have risen in importance since the Second World War and the need to protect them has become one of the central tasks of states. The human rights regime can be characterized through two different theoretical points, the security and legalistic theories of human rights. To some extent, both can be seen in the debates. The wish of the UK to build support for the ICC and to get as many states as possible to become parties can be taken as an aim to integrate states to the framework the ICC represents. For example Minister of State Vaz expressed the Government's wish that they want many more countries to sign the Rome Statute (the number was at 89 at the time in October 1999) and told the House that they have encouraged others to do so bi- and multilaterally. Being party to the ICC if not forces, at least strongly encourages states to respect human rights; and as per the security theory, states that respect human rights are less likely to become aggressors and thus security increases. (Posner 2009, 183) The legalistic theory views human rights as having value in themselves and the concern for their protection should go beyond state borders and be institutionalized. (Posner 2009, 183-4) Those who do not respect human rights and perpetrate heinous crimes need to be brought to responsibility for their crimes. Within the culture of impunity this, however, is not often done and the ICC was seen as one way with which to break that culture. Thus, the need for the ICC rises from the idea that human rights themselves are worthy of protection.

The importance of human rights has to a large extent become epitomized in the atrocities regime, which in essence encompasses the idea of institutions that are established to bring to justice those individuals that perpetrate international crimes. In the atrocities regime, the ICC represents the latest and the highest development. Arguments in support of the ICC that

referred to it as an important institution for breaking the culture of impunity and advancing individual responsibility invoke clearly the idea of an atrocities regime.

The atrocities regime is closely related to the idea of legalization and legalism and emphasizes that certain actions are not only unacceptable but unlawful. Belief in the effectiveness of legalization and legalism clearly underlies the arguments put forth of the ICC. Overall, support for the ICC stems from the idea of establishing institutions of law within international relations (legalization) and of the, in Gary Bass's terms, principled belief that war criminals should be put on trial (legalism). (Bass 2000, 20) Through this, the supporters of the Court also moved forwards from the sort of idealism that puts faith in international law, institutions and legalism. Belief in the ICC's ability to bring perpetrators to justice and belief in its deterrence power reflects well that belief in legalism that has gained popularity within the international community in the past few decades.

The belief in legalism underlines to a large extent the overall supportive position taken by those arguing for the ICC and is also visible in the statements made by the MPs. During the April 2001 debate, Foreign Secretary Cook argued that the UK should ratify the Rome Statute because the ICC gives practical expression to that "those who commit crime should not go unpunished and that justice should be available to the victim through legal process. Those are strong principles, but they also have a powerful practical effect." (House of Commons 2001a, vol. 366, col. 224) This argument points to a belief in the appropriateness of legalism as a solution to the problem posed by the culture of impunity. Solicitor-General Cranston expressed similar belief and argued that ending the culture of impunity is important to achieving peace:

"[…] we would take the view as a point of principle that justice, generally speaking, provides the best foundation for long-term peace. We believe that identifying and bringing to justice those persons who have committed the most serious crimes possible is the best foundation for reconciliation in war-torn societies. (Standing Committee 2001g, 11.45 am)

In addition to such legalistic arguments, also the more pragmatic legalism was visible in the statements. As discussed, pragmatic legalism refers to belief in the value of legalism, while at the same time acknowledging that politics and power influences the advancement of legalism and its institutions. This sort of pragmatism was present in arguments that although something had to be given up to reach agreement in Rome, it was worth the sacrifice because otherwise there would be no ICC at all. Foreign Secretary Cook argued that although the possibility to opt-out for a period of seven years was not preferred by the UK, "it was well worth agreeing

to in order to get abroad a number of countries that would not otherwise have supported it". (House of Commons 1998, vol. 336, col. 812) MP Worthington conceded that the ICC is likely to the partial because actions of the powerful, such as the Russians and the Chinese, will likely never be prosecuted but even though partiality is "a huge imperfection […] we gain more by establishing and International Criminal Court than by delaying". (House of Commons 2001a, vol. 366, col. 240) In terms of argumentation techniques, these arguments were quasi-logical and based on sacrifice, where reference is made to what one has surrendered to achieve the certain result. (Hauser 1986, 183) These arguments invoke the idea of pragmatic legalism, where justice tempered by consideration of politics and power is better than no justice at all.

Key points put forth within the human rights and atrocities regimes became visible in the debates. Furthermore, what arises from the general tone of the support for the ICC is a belief in legalism but also an acknowledgement of the need of pragmatism. The framework set by the regimes and legalism as a way to solve some problems of international relations, mainly the culture of impunity, clearly surrounds the debates.

Key ideas of realism highlight the Opposition's overall position during the debates. This was also visible in connection to legalism. Whereas legalism has its basis in idealism, criticism of it is often very realist-inspired. As identified in chapter 2, realists question the emphasis that is given to legalism and doubt its effectiveness in a system where, realists argue, power and interests still prevail. This viewpoint underlined the Opposition's arguments about the ICC and its functioning in international relations. Conservative MP Garnier's statement captures well the realist-inspired critique of legalism:

"We are talking about power, backed by military might. There can be no such thing as universal jurisdiction or a universal court unless it is backed by military power. In a civilian context, it is difficult to enforce the law without a police force, so it will be extremely difficult to enforce the law of the ICC without military might. […] Let us not pretend, in signing up to the ICC, that we can do so in any spirit other than one that confronts the nastiness of war, the need for military might and the political will to back up our policies." (Standing Committee 2001h, 5.02 pm)

In this statement the realist critique that international law cannot work without states and is influenced by the realities of power is well visible. The argumentation of the supporters of the ICC and of the Opposition mirror well both legalism and its realist critique. These differences

can also be identified with the concepts of the different logics of action and is further discussed in that context below.

5.4.3 The Argumentation and the Constructivist Framework

To a large extent, the argumentation in the debates can be seen to highlight many of the constructivist points introduced in Chapter 2. Constructivism takes the view that structure that surrounds actors influences them and their behaviour; and in turn, those actors influence and shape the structure.

Overall, the influence of the structure that surrounds the ICC became visible in the debates. When the MPs referred to the culture of impunity and failures in the past and when they sought support for their arguments from the existing body law they used argumentation influenced by the structure, formed by international criminal law and its institutions. This structure is also characterized by the human rights and atrocities regimes which are a part of it and which inform states of what is considered (at least by a majority of states) to be appropriate behaviour. Furthermore, the status that legalization and legalism have taken in international relations guide actors (that view legalism positively) to perceive international courts as an effective way to punish those that transgress what is considered to be 'good' behaviour. For this, the ICC functions as a way to identify and judge the breakers of the rules. By defining appropriate behaviour, the structure constrains actors by limiting the choices they can make, given that they want to act according to what is taken as proper and right behaviour. When MPs refer to existing law, they make visible the structure that surrounds the ICC. Such influence can be seen, for example, in the following statement by MP Browne: "The statute [of Rome] has been agreed by sovereign nations that discussed and negotiated a draft statute in a concentrated fashion against a set of international standards that they all accepted." (House of Commons 2001b, vol. 368, col. 338)

Browne's reference to 'standards that all accept' points to the influence of what is considered by the majority to be appropriate behaviour on the ICC and its establishment. Browne went on to argue that

"At this stage, we cannot say, in effect, to the ICC, "Go away and practise on all the wee countries and when you have got it right and are up to a standard that we think is appropriate, then we will let our people be subject to its jurisdiction." We cannot do that." (House of Commons 2001b, vol. 368, col. 338)

Should the UK do so, Browne argued, the UK would in effect give up its leadership role. (House of Commons 2001b, vol. 368, col. 338) This represents the third theme of argumentation that the UK should lead by example and as with the arguments concerning existing law, this argumentation echoes to a large extent constructivist thinking. Arguments in support of the ICC that emphasize leading by example have at their basis the idea that one's behaviour can affect others negatively or positively. Furthermore, that behaviour can also constitute the structure, in the same way as the structure can influence actor's behaviour. By showing a good example, the UK can influence the behaviour of others and reinforce a structure in which international law and the rule of law are taken as positive and worthwhile issues. Not only was support for the ICC important for the Government's ethical foreign policy, it was also important for the way the UK was to be perceived by others and for the way its actions can influence the behaviour of other states. This became clear when the supporters argued that the UK needs to set a good example and pointed to the possible dire consequences suspecting the ICC, and its behaviour once it started it work, could have not only for the Court, but for the UK and its image as well. As mentioned, what sort of a message is staying outside the ICC's jurisdiction for a civilized country to send? This concern for image and influence was also noticed by the Opposition. MP Blunt criticized that

"They [the Government] will not want to be seen to be outwith the general mood in the international community […] It can properly be argued that the Government are excessively sensitive to public opinion not only in the United Kingdom but in the global village, and that is why we are the only permanent member of the Security Council of the United Nations likely to ratify the treaty without a reservation." (Standing Committee 2001a, 11.15 am)

Here Blunt refers aptly to the way in which the Government was seen to be concerned for its image among other states; and at the same time, to the constructivist view that states are influenced by other states and by what is perceived as appropriate behaviour within the international community.

Furthermore, in light of the constructivist framework, it can be seen that by setting an example, the UK could act as a norm promoter, endorsing norms that take as appropriate behaviour the protection of human rights and individual responsibility: that those who commit international crimes should be brought to justice. As defined by Finnemore, norms are shared expectations of what actors view as appropriate behaviour. (Finnemore 1996, 22) States promote norms and when enough powerful states endorse a norm, others are pushed to adopt it and the behaviour it purports through the process of socialization. In this, international

organizations can function as platforms for norm promotion. These institutions, once created, can then influence states; they are mutually constitutive. By endorsing the ICC and the behaviour that goes with it, the UK acts as a good example, influencing others to do the same. Once the ICC is established, norms purporting the protection of human rights and individual responsibility can be further promoted and eventually, the ICC will influence states and their behaviour. Of the ICC's hoped influence, the clearest example is the belief that the ICC can function as a deterrent to possible future perpetrators. Thus envisaged Minister of State Battle:

"[…] the Governments ratifying the statute […] are fully aware of the possibility of prosecution. The key point is that the nationals of those countries know that it is possible that they will be prosecuted if they commit those crimes—they could be ``got" by the ICC. That will act as a deterrent". (Standing Committee 2001f, 3.00 pm)

In this way, it is seen that once the ICC is established, it will in turn influence the behaviour of states by impeding them of inappropriate and in legalistic language, criminal behaviour.

It was seen by the supporters of the Court that the UK's behaviour concerning the ICC would affect other states and their behaviour. The central argument was that the UK should have a positive, not a negative influence. MP Worthington noted that "We must set up the International Criminal Court and thus establish a framework for the compliance of countries such as America and China, which are not currently involved in it". (House of Commons vol. 366, col. 349) In even more a constructivist spirit MP Corbyn argued that the ICC will *"ensure that any country that signs up to the treaty* [the Rome Statute] *will—yes—expose itself to possible prosecutions under it but, in doing so, it will set an example, a standard and a norm."* (House of Commons 2001b, vol. 366, col. 345)

By endorsing the ICC, the UK will set an example; influence the behaviour of others; and reinforce in a positive way the structure that encompasses the protection of human rights through international legal institutions. On the other hand, this structure also influences the behaviour of the UK by setting the standards of what is deemed appropriate behaviour. The discussion is continued in the framework of the different logics of action.

5.4.4 The Argumentation and the Different Logics of Action

Point put forth both in the logics of consequences and appropriateness were discernible from the debates. This is not surprising given that often involved are parts from both logics of

action. As discussed, within the frame of the logic of consequences, actors pursue their interests and norms and rules are followed if they coalesce with those interests. The logic of appropriateness, on the other hand, is driven by social structure and actors look to norms and rules to determine what type of action is available. Behaviour is directed by considerations of what is good, desirable and appropriate. (Finnemore and Sikkink 1998, 912-3)

As mentioned, whereas the Opposition's argumentation highlights more the points of realism and the logic of consequences, the supporter's arguments resonate more with an idealist outlook that mirrors the logic of appropriateness. For example, when under debate was an Opposition amendment to allow more discretionary powers to the UK Secretary of State over the ICC, Conservative MP Stephen Day called the amendment "a dose of reality that goes beyond the pure moral question" (Standing Committee 2001c, 11.15 am), criticizing the supporter's position as one based too much on considerations of morality, not reality.

Overall, the emphasis in the support for the ICC was that establishing the Court is something that is right and morally desirable. This is most clearly visible in arguments for the ICC's role as an institution that can help break the culture of impunity. Moreover, arguments about the UK need to ratify the Rome Statute as soon as possible and of the importance of the UK setting an example to others put forth the idea that endorsing the ICC is a morally good thing to do. The UK was to lead by example and provide moral leadership. MP King noted in the 1999 debate that "The international community requires moral leadership on the issue, and I expect our Labour Government to show it." (House of Commons 1999, vol. 336, col. 932) Similarly did MP Ellman, who noted that by endorsing the ICC, the UK can "set a moral lead". (House of Commons 2001. vol. 366, col. 256)

Endorsing the ICC as appropriate behaviour became visible in the argumentation. Solicitor-General Cranston referred to this when he defended the inclusion of the crime of aggression in the Rome Statute as justified "in terms not only of a dry, legal analysis but of the horrors that are still occurring throughout the world. It is a moral argument." (Standing Committee 2001j, 3.30 pm) MP Browne saw that the best defence for the ICC arises from particular principles and argued also against a more realist logic of consequences that emphasizes power:

"The contribution of sovereign nations to international justice must not be judged according to the number of citizens that they have or according to the size of their standing armies. Their contribution must be judged according to principles of decency, law and justice. Britain has given many of those principles to the world. Arguments about the ICC should be tested

against those principles, not against some pretended self-interest." (House of Commons 2001b, vol. 368, col. 339)

Minister of State Battle took to his aid just war theory, Thomas Aquinas and Aristotle when he argued against a purely realist viewpoint:

"He [Thomas Aquinas] tried to argue the role of reason against the use of force. He suggested that reason could overcome force and that we should not accept the view that might is always right. He implied that human beings together could in a reasonable way transcend violence. That is what the Bill is about." (Standing Committee 2001h, 6.15 pm)

In light of these statements, the supporter's position is represented as following to a larger extent behaviour characterized by ideas of the logic of appropriateness. However, as mentioned, both logics are often visible in particular action. Argumentation in support of the ICC also highlights, to some extent, the logic of consequences. When universal jurisdiction, which the Government did not adopt to the ICC Bill, was discussed, Conservative MP Garnier noted pointedly:

"I find it puzzling that the Government's fondness for morality, which underscored their arguments in favour of the ICC, seems to be crumbling somewhat. The hideous expression "practicality" is, perhaps, entering the argument. Can the Government assure me that they are not moving away from the so-called moral stance that they advanced when they introduced the Bill to the House of Commons?" (Standing Committee 2001j, 4.45 pm)

Indeed, it seemed that practicality did enter the Government's case. This was mostly visible in the argumentation that the UK should ratify the ICC as soon as possible. As discussed, reasons given for the haste were often practical in nature, referring either to the positive consequences of being a part of the ICC process from the start or to the negative consequences of staying out of it. In connection to this was raised the argument that joining the ICC corresponds with the UK's national interest. Foreign Secretary Cook made the point clearly when he argued that "it is plainly in our own national interest to be there when the crucial decisions are taken". (House of Commons 2001a, vol. 366, col. 217) MP MacLennan combined the two logics when he wondered why endorsing the ICC would somehow be contrary to the UK's interest when in fact, it corresponds with them perfectly:

"I find it unattractive that the Conservatives constantly presume an opposition between national interests and the interests of implementing the treaty. I perceive no such opposition.

To my mind, the treaty's implementation is precisely in the interests of this country, which has, like others, suffered the sort of international crimes that it is part of the statute of Rome's purpose to deter by the very existence of a mechanism for dealing with them.“ (Standing Committee 2001d, 5.45 pm)

Thus, support for the ICC to a large extent was premised on endorsing that the ICC and the norms and rules it represents are to be seen as morally good and appropriate. It was seen that not only is supporting the ICC beneficial and in some way, morally ‘right’, the UK could and should take a moral lead and encourage others to adhere to the appropriate behaviour that is defined by those norms and rules that have led to the ICC’s establishment and which the Court will in turn represent and reinforce. In addition, the argumentation to an extent also echoed point of the logic of consequences, visible when the support for the ICC’s was tied with the UK’s national interest. Given that the two logics are often present at the same time, this should not however be viewed as voiding the effect of considerations of the appropriate. As MP MacLennan argued, there is no reason why endorsing the ICC could not at the same time be appropriate and morally right and correspond to the UK’s national interests.

In addition to the logics of consequences and appropriateness, overall the logic of arguing provides an apt context for the analysis. As discussed in Chapter 2, the logic of arguing purports that through collective communication actors test their assumptions of how and if the norms of appropriate behaviour can be justified and which norms apply. When actors argue, they challenge the validity claims put forth by other actors. (Risse 2001, 6-7)

In the debates over the ICC, different norms can be seen to underlie the positions of the Opposition and the Government. As mentioned, it is disagreement over the truth or appropriateness of the other’s statements that leads to argumentation. In the ICC debates, on the whole, the disagreement can be characterized as a conflict between the norms of sovereignty and human rights and their protection. This can in turn be characterized through the theoretical framework, where the emphasis of sovereignty if framed by realism, critique of legalism and the logic of consequences; and emphasis on human rights by idealism, legalism and the logic of appropriateness.

The Opposition, in a more realist fashion, was concerned over how the ICC could affect the UK’s sovereignty and its ability to decide on one of its central part, the punishment of its own nationals. As mentioned, when a state joins the ICC, it in a way concedes a part of its sovereignty and thus joining can incur so-called sovereignty costs. This clashed with the position held by the supporters of the Court, that human rights and their protection should

prevail over sovereignty should a state's national commit international crimes. In this way, the debates over the ICC become contextualized by the wider debate within international relations: the effect of human rights and their protection on one of the most fundamental principles in international relations, that of sovereignty. As Dacyl notes, the 1990's marked a start of major changes in international relations and *"probably the most significant of these changes concerns the role of the sovereignty principle and human rights in international politics. It seems that these two concepts once again have been placed on a collision course with each other"*. (Dacyl 1996, 136) Here, on the one side is realism, emphasizing the importance of power, states, and state sovereignty; and on the other, there is idealism-inspired legalism that believes in the ability of law to solve problem and in the power of morality and norms. In constructivist language, sovereignty can be seen as a highly internalized norm and thus it is no wonder that debates concerning it are often heated. The sovereignty – human rights conflict is most visible in relation to the fifth theme of argumentation, dissociation between the UK and the ICC.

The dissociation in a way is perhaps the most intriguing and surprising argumentation that emerges from the debates. It does not represent a similar, positive argumentation about the ICC as do the other themes where the focus is more on the UK supporting the ICC because of the ICC's perceived positive value. The dissociation of the UK and from the Court rises from more a negative perception of the ICC where through dissociation the image of the Court as a threat needs to be diminished as much as possible in order to convince opponents to support it. Although otherwise viewed in a positive light, the supporter's had to heed to the clash between sovereignty and human rights as the Opposition constantly brought up the issue when they framed their criticism of the ICC Bill in terms of the ICC as a threat to UK sovereignty. This can also be seen to perhaps reveal something from the ultimate position of the supporters, that they did not see it as a possibility to argue, for example, that if a UK national would commit an international crime, the case perhaps *should* be handled by an international court because it is highly unlikely that if the national in question would be a high-ranking official, he or she would be prosecuted nationally either genuinely or at all. As mentioned in a statement by MP Worthington, the ICC will likely be partial and never prosecute those that are most powerful (above p. 113). He of course had China and Russia in mind, not the UK. Even if the first instance would not be to hand a case over to an international court, then at least the possibility of it could be left open; now, it was to a large extent wholly deleted as a possibility when the UK was vehemently dissociated from the ICC's jurisdiction.

Thus, in a way, at the foundation of the arguments that sought to dissociate first the UK from international crimes and second, from the ICC's jurisdiction, can be seen to be exactly what the supporter's themselves argued against; that the ICC in reality is meant for others, not for us. It is useful to remember Foreign Secretary Cook's statement in the 2000 BBC Newsnight: "*If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States"*. (Griffiths 2012b) To an extent, this echoes a rather realist view; that those who are influential and powerful enough do not have to worry about such things as international courts. What keeps UK nationals safe from the ICC's jurisdiction is, in the end, its status as a powerful state and UNSC member. This corresponds well with the criticisms of selectivity of international justice and trials and the way in which the ICC has been perceived as a tool for the powerful (as discussed in Chapter 3). This is not to say that most of the support given to the ICC during the debates was not very likely genuinely premised on the ideas of what is good and appropriate, but to point to the influence of *realpolitik*. Where the supporters were concerned that the UK would seem arrogant if it opted out from the ICC's jurisdiction (quote by MP Browne on p. 96), it is the position that UK personnel will never have to face the ICC that easily invites criticism of arrogance.

6. Conclusion

This thesis has focused on the UK's support for the ICC and the UK's ICC Bill from 1998 to 2001 by analyzing argumentation in the House of Commons debates. Rhetorical analysis was conducted to answer the research question of how the UK Government representatives and other Members of Parliament argued in support of the ICC. Five main themes of argumentation with which the ICC was supported and UK joining it justified were identified from the debates. Overall, supporters were enthusiastic about the ICC and saw it as a way to break the prevalent culture of impunity. Furthermore, it was contended that the UK should take a positive role concerning the ICC and on its part aim to set a positive example and encourage others to endorse the ICC. The argumentation during the debates echoed many of the points put forth in the theoretical discussion. The issue of the ICC and the UK's ICC Bill were contextualized by the human rights and atrocities regimes and belief in legalism and legalization that has spread in international relations in the past few decades. Belief in legalism also represents the more liberal and idealist theories of international relations. Support for the ICC was contended to represent 'good behaviour'. However, especially argumentation that sought to create distance between the UK and the ICC echoed more realist points of view and highlighted the importance of state sovereignty and a states right to decide and judge over its nationals. This connects the debates over the ICC to the wider issue of sovereignty versus human rights.

Much has happened after these debates were held in the House of Commons. In many ways the UK has remained a supporter of the Court and events echo the arguments put forth in the debates. The UK did ratify the ICC's Rome Statute and became a State Party in 2001. (The ICC 2012b) Changes in Government has not meant major changes to UK's policies concerning the ICC and relationship to the Court has remained rather similar under the Labour Government of Gordon Brown and even the Conservative Government of David Cameron. (Dodds and Elden 2008; Honeyman 2012) Clearest practical support by the UK has perhaps been the two UNSC referrals, by which the cases of Darfur and Libya were referred to the ICC. (ICC 2012a) On both occasions, the UK voted in favour of the referral resolution. In the meeting concerning Resolution 1593 by which the Darfur case was referred to the ICC, the UK's representative Sir Emyr Jones Parry stated the UK's support for the ICC "which is for us the most efficient and effective means available to deal with impunity and to ensure justice for the people of Darfur. (The UNSC 2005, 7; The UNSC 2011)

However, the relationship can not be viewed in a wholly a positive light. As discussed in Chapter 2, the UK has been criticised for its actions regarding the Article 98 agreements

(BIAs) and due to financial reasons. Furthermore, the 2003 Iraq war has damaged the UK's image as a promoter of human rights and supporter of international law. Both the US and UK sought to interpret justifications for the Iraq invasion from a resolution (Res 1441) that, in the end, did not authorize the use of force in Iraq. The decision to invade without clear UN authorization has damaged the image of the UN and undermined its authority. For White, the 2003 Iraq war represents the culmination point of US and UK bullying tactics to change the principles on the use of force. (White 2009, 243-267) Furthermore, the war in Iraq and the following 'war on terror' and anti-terrorism measures from the use of torture to extraordinary renditions have had severe consequences for the image of the UK as an advancer of human rights and international law worldwide. Firm backing of Bush's policies and strategies by PM Blair and the Blair Government's failure to criticize questionable measures taken mostly by the US has severely undermined the UK's credibility concerning human rights in general and makes it difficult for the UK to comment on the human rights records of others. (Mepham 2007 60-63) All this stands as a clear paradox with the idea of an ethical foreign policy.

Events connected to the 2003 Iraq war have highlighted the way in which the UK was dissociated from the ICC in the debates. The UK has done what the MPs maintained during the debates and has prosecuted UK nationals for war crimes in the case of Corporal Payne and others, as mentioned in Chapter 3. (Rasiah 2009) To some extent, the Opposition's fears have materialized in the calls of bringing to justice Prime Minister Blair for the Iraq war. However, it remains highly unlikely that those calls would be answered either by the ICC or the UK itself.

Other instances cause suspicion about the UK's unequivocal support for the ICC. One example of this a conversation, made public by Wikileaks, held between UK, US and France in August 2008. The meeting concerned the ICC's indictment of Sudan's President Al-Bashir and the possibility of the UNSC deferring such an indictment under Article 16 of the Rome Statute for political purposes. The leaked document recites the UK's opinion that an Article 16 deferral could have potential leverage for achieving progress in Darfur and in the implementation of Sudan's peace agreement. At the same time, the UK emphasized that it does not want to be seen to be 'making deals' or 'politicizing' the ICC's work. (The Telegraph 2011) Another example is a September 2012 article which revealed that Sudan and Congo have received close to £2, 4 million from the UK for training and support of military and defence personnel. Both the situations are also cases open in the ICC. (The Guardian 2012) It seems justified to agree with Waugaman that the UK's ICC policy is one of *"principled yet pragmatic support"* and it has been *"challenged continuously by the task of*

balancing its principled support for international justice with practical policy decisions." (Waugaman 2006, 3)

In light of recent events, other interesting avenues for research can be identified. Analysing UK argumentation in relation to the two cases referred to the ICC by the UNSC, Darfur and Libya, could give interesting insight to UK's current views concerning the ICC and of the UK's foreign policy overall. Comparing these to UK argumentation in 1998-2001 could provide deeper understanding of possible changes in views and policy. Another interesting subject would be to study argumentation in connection to the case of Corporal Payne and Others to analyse, for example, how the matter was presented by the UK Government and/or discussed in UK mainstream media. Furthermore, arguments by other states could form an interesting area of further study. For example, France has supported the ICC but only conditionally by opting out from war crimes. Focus on France's argumentation concerning the opt-out could give interesting insight on France's views on the ICC and could also be compared to the views of the UK.

Current events, criticism towards the UK concerning its practices, the 2003 the Iraq war and the ICC and the fact that the cases open in the ICC all concern less powerful African states reinforces the criticism that international justice remains selective and is used as a tool by the powerful states. To a large extent, key realist points of the importance of states, their power and standing in international relations continues to hold true when it comes to international criminal law. Despite good, idealistic goals of ending the culture of impunity, of belief in legalism and of bringing those responsible for international crimes to justice - from wherever they might come from -, international criminal law and its institutions remain to be influenced by power and *realpolitik*.

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Appendix

Appendix I. Sources used in analysis

Where	When	What stage
House of Commons	July 20th 1998	Results of the Rome Conference introduced
House of Commons	October 27th 1999	Foreign Policy Debate
House of Commons	April 3rd 2001	Second Reading
Standing Committee	April 10th 2001 (morning)	Debate in Committee
Standing Committee	April 10th 2001 (afternoon	Debate in Committee
Standing Committee	April 24th (morning)	Debate in Committee
Standing Committee	April 24th 2001 (afternoon)	Debate in Committee
Standing Committee	April 26th 2001 (morning)	Debate in Committee
Standing Committee	April 26th 2001 (afternoon)	Debate in Committee
Standing Committee	May 1st 2001 (morning)	Debate in Committee
Standing Committee	May 1st 2001 (afternoon)	Debate in Committee
Standing Committee	May 3rd 2001 (morning)	Debate in Committee
Standing Committee	May 3rd 2001 (afternoon)	Debate in Committee
House of Commons	May 10th 2001	Third Reading and Report

Source: http://www.parliament.uk/business/publications/hansard/commons/