Burden Sharing in the International Criminal Justice System

A research paper on states' motives for enforcing sentences from the international criminal courts and tribunals

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List of Acronyms

CPT	Committee on the Prevention of Torture
EU	European Union
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
NATO	North Atlantic Treaty Organization
SCSL	Special Court for Sierra Leona
UNHCR	Office of the United Nations High Commissioner for refugees
UN/UNO	United Nations Organization

Abstract

Up to today, it has been challenging to find states which are willing to enforce sentences handed down by the ad hoc international criminal tribunals as well as by the International Criminal Court. Yet, as to allow for these institutions to function properly they depend on cooperation with states agreeing to share the burden.

Various International Relations theories as well as economic theories have developed explanations as how state cooperation is to be explained. Starting from the theory of 'collective action'[1] in particular, research was conducted into examples of burden sharing, namely environmental policies, collective security and, most recently, refugee protection.

This research paper aims to uncover motives for states for entering into sentence enforcement agreements and sharing this particular burden. In order to do so, this paper will first determine the relevant International Relations theories that shaped the concept of burden sharing then establish an analytical framework by analysing previous research by Eiko Thielemann[2] and Alexander Betts[3] as to finally evaluate interviews conducted with representatives from member states of the International Criminal Court. I conclude that individual motives as well as solidarity play a role in signing sentence enforcement agreements.

[1] Olsen, Mancur, *The Logic of Collective Action : Public Goods and the Theory of Groups*, Harvard University Press, 1965

[2] Thielemann, Eiko R., "Between Interests and Norms : Explaining Burden-Sharing in the European Union", *in Journal of Refugee Studies,* vol. 16, n°3, 2003

[3] Betts, Alexander, " Public Goods Theory and Refugee Protection : The Role of the Joint-Product Model in Burden-Sharing Theory ", *in Journal of Refugee Studies*, vol. 16, n°3, 2003

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1. Introduction

Hans Morgenthau as well as E.H. Carr, in two of the foundational texts in the field of International Relations,[4] were the first to attempt to provide students of the discipline[5] with an analytical framework for international politics.[6] Yet, rather than presenting general patterns in international relations, Morgenthau relied on historical illustrations.[7] Since then, the discipline experienced various debates on whether 'science' was even possible when it comes to international relations as they depend on changing historical conditions[8] and the theories attempting to explain the world are ultimately political as well.[9] Some, such as Thomas Hobbes[10] or E.H. Carr[11] derived state behaviour from the imperfect human nature whilst others believe in universally abstract principles, which only fail because of "lack of knowledge and understanding, obsolescent social institutions, or the depravity of certain isolated individuals and groups."[12] Be that as it may, today, there are many theories explaining why states behave in a certain manner. According to the theory considered, a state has different motives to engage in cooperation with other states. Yet, cooperation is paramount when it comes to the creation of a 'public good', a term introduced by economic theories. Relying on different aspects concerning cooperation in International Relations theories, scholars developed the collective action theory[13] which in turn served to explain the phenomenon of burden sharing and related issues such as the free rider problem.[14]

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[4] Morgenthau, Hans, *Politics among Nations, The Struggle for Power and Peace*, Alfred A. Knopf, New York, 1968 ; Carr, E.H., *The Twenty Years' Crisis 1919-1939, An Introduction to the Study of International Relations*, Palgrave, 2001

[5] In this thesis, the term International Relations is used to describe the field of studies whereas 'international relations' describes the relations between states

[6] Burchill, Scott, Linklater, Andrew (ed.), *Theories of International Relations*, 5th edition, Palgrave Macmillan, United Kingdom, 2013, p. 1-2

[7] *Ibid.*, p. 2

[8] Chomsky, Noam, *World Orders Old and New,* Colombia University Press, New York, 1994, p. 120

[9] Burchill, Scott, Linklater, Andrew (ed.), *op.cit.*, p. 2

[10] Hobbes, Thomes, De Cive, J.C. for R. Royston, London, 1651 (available on http://www.unilibrary.com/ebooks/Hobbes,%20Thomas%20-%20De%20Cive.pdf)

[11] Carr, E.H., *op.cit.*

[12] Morgenthau, Hans, *op.cit*., p. 3

[13] Olsen, Mancur, *op.cit.*

[14] Ringius, Lasse, et. al., "Burden Sharing and Fairness Principles in International Climate Policy, *in International Environmental Agreements: Politics, Law and Economics,* vol. 2,

The international criminal justice system very much relies on sharing different burdens such as hosting international criminal courts and tribunals, hosting convicted persons or relocating witnesses, to name just a few.

This research paper attempts to uncover states' motives when signing a sentence enforcement agreement with international criminal courts and tribunals. These are bilateral agreements between international criminal courts or tribunals and individual states regarding the conditions of imprisonment, the distribution of costs arising from the imprisonment and the legal framework applicable, domestic or international, in case of pardon or commutation of the sentence. When the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established,[15] the Secretary-General suggested, "given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside of the territory of the former Yugoslavia. States should be encouraged to declare their readiness to carry out the enforcement of prison sentences […]".[16] For the International Criminal Tribunal for Rwanda (ICTR), established in 1994[17] no such recommendation had been made and Rwanda was even explicitly mentioned as a possible state of enforcement in the statute.[18] Yet, the founder of both tribunals opted for a voluntary cooperation scheme for enforcement of sentences by third states.[19] However, even though the political will to end impunity and judge individuals having committed crimes such as genocide, crimes against humanity or war crimes was present, finding states willing to enforce sentences proved to be rather a challenging task. In the case of the ICTY, for example, in 1994 the President of the Security Council requested the support of the Secretary-General in obtaining such agreements from states.[20] Subsequently the Secretary-General sent out a letter to all members of the UN and Switzerland. In 1994, to stress the urgency of the

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2002; Thielemann, Eiko R, *op.cit.,* 2003; Oneal, John R.,"The Theory of Collective Action and Burden Sharing in NATO", *in International Organization*, vol. 44, n°3, World Peace Foundation and the Massachusetts Institute of Technology, 1990

[15] UN Doc. S/RES/827 (1993)

[16] UN Doc. S/25704 (1993), §121

[17] UN Doc. S/RES/955 (1994)

[18] UN Doc. S/RES/955 (1994), Art. 26

[19] UN Doc. S/25704, Art. 27 ; UN Doc. S/RES/955, Art. 26, UN Doc. A/CONF.183/9, Rome Statute, Art. 103 (1998)

[20] UN Doc. S/1994/1090 (1994)

matter, a second letter followed this first request, this time specifically directed to 35 members.[21] "A favourable response was received only from Pakistan, Bosnia and Herzegovina, Norway, Germany, Finland and the Islamic Republic of Iran. The majority of Member States did not express an eagerness to assist: most States simply did not respond, many said they were unable to help, some indicated they were not yet in a position to respond and others indicated a willingness to assist only if their own nationals or residents were convicted."[22] Over the years, however, slowly but steadily more states have agreed to host ICTY convicts.[23] Currently, sixteen countries have sentence enforcement agreements with the ICTY[24], seven with the ICTR[25] and it is evident that without state cooperation these international institutions, as Antonio Cassese in an article from 1998 very adequately described the ICTY remain a 'giant without arms and legs.'[26]

The first International Criminal Court (ICC) established by a treaty in 1998, that is, the Rome Statute,[27] adopted a similar system for the enforcement of sentences through voluntary cooperation.[28] Therefore, it does not come as a surprise that the ICC faces similar issues when finding states willing to enter into such a bilateral agreement. To this day, eight states have a sentence enforcement agreement with the ICC.[29] However, if the ad hoc tribunals as well as the ICC are to function properly, meaning that sentences handed down can actually be enforced, the support of many countries is needed, especially in the case of the ICC, where in

[21] Hague Yearbook of International Law, Yugoslavia, Tribunal, Martinus Nijhoff Publishers, vol. 8, 1995, § 138

[22] *Id.*

[23] Hague Yearbook of International Law, Yugoslavia, Tribunal, Martinus Nijhoff Publishers, vol. 13, 2000, § 249

[24] http://www.icty.org/sid/137 (accessed on 20.07.14), and Germany has four ad hoc agreements

[25] http://www.unictr.org/Legal/BilateralAgrements/tabid/99/Default.aspx (accessed on 20.07.14)

[26] Cassese, Antonio, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", *in European Journal of International Law,* vol. 9, 1998, p. 13

[27] UN Doc. A/CONF.183/9

[28] UN Doc. A/CONF.183/9, Part 10

[29] see Annex (ICC)

theory, people from all over the world could be convicted.[30] It is therefore crucial to identify countries that are willing to take up this responsibility.

This research paper aims to answer the following question: What are motives for a state to share the burden of enforcing sentences within the international criminal justice system and, consequently, enter into a sentence enforcement agreement? However, as to answer this question, two further questions have to be answered first namely: How do International Relations theories explain cooperation among states? And what are states' motives for burden sharing behaviour, what is the nature of sentence enforcement agreements and how can the latter be seen as an example of burden sharing?

1.1. Operationalization

Burden sharing, in this paper, is defined as voluntary engagement of a state in an issue area that is potentially of a global concern. In previous literature the term is always used in connection with the theory of collective action.[31] The collective action theory has first been developed by Mancur Olson in "The Logic of Collective Action: Public Goods and the Theory of Groups" in 1965.[32] The theory heavily relies on economic concepts such as the 'public good', that is, "goods that are indivisible and cannot be denied to any member of a group, regardless of whether that member contributed to their provision."[33] In other words, they are non-excludable and non-rival and therefore create an incentive to free ride.[34] Thus, in international relations, the term 'burden sharing' has been used to describe the contributions to the NATO

[30] UN Doc. A/CONF.183/9, Art. 12,13,14,17

[31] Oneal, John R.*, op.cit.*, p. 379 ; Manne, Alans, Richels, Richard, "The Greenhouse Debate : Economic, Efficiency, Burden Sharing and Hedging Strategies", *in Energy Journal*, vol. 16, n°4, 1995, p. 11 ; Thielemann, Eiko R., *op.cit.*, 2003, p. 253

[32] Olson, Mancur, *op.cit*

[33] *Ibid.*, p. 12

[34] Thielemann, *op. cit.,* 2003*,* p. 256

defence budget[35] and, at a later stage, contributions in the area of refugee resettlement and protection[36] as well as in international climate policy.[37]

Sentence enforcement agreements, defined as bilateral agreements between the courts and tribunals and individual states, agreeing to host convicted persons on their territory under conditions laid down by the court[38] seem to fit well with the scenarios described since these agreements are part of the voluntary cooperation with the international courts and tribunals. Consequently, even though the provision of the good, that is, hosting convicted persons in the domestic prison system, is crucial to the international criminal justice system, not providing it does not exclude other members of the international community form the benefit, that is, ending impunity and serve justice, allowing them to free ride. In that sense, burden sharing has to be understood in a broad context as "the question of how costs of common initiatives […] should be shared between states."[39] At this point, one should mention that apart from the proper sentence enforcement agreements, some states have declared their willingness to host their own citizens and nationals and/or persons with a sentence not longer than the national maximum. These declarations of willingness will not be considered as burden sharing since the conditions for enforcing a sentence are fairly limited and so far, no such state has enforced a sentence, yet, for the analysis of why states hesitate to conclude a proper sentence enforcement agreement they will be considered. In this research paper, for the sake of time, but also because the ICC is the only court with, theoretically, global

[35] Olsen, Mancur, Zeckhauser, Richard, "An Economic Theory of Alliances", *in Review of Economics and Statistics*, 1966 ; Oneal, *op.cit.*

[36] Suhrke, Astri, "Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action", *in Journal of Refugee Studies*, vol. 11, n°4, Oxford University Press, 1998 ; Betts, Alexander, *op.cit.*; Thielemann, Eiko R., "Burden Sharing : The International Politics of Refugee Protection", Working Paper 134 prepared for the conference 'Immigration Policy after 9/11 : US and European Perspectives', The Center for Comparative Immigration Studies, University of Californiy, San Diego, 2006

[37] Carraro, Carlo, Siniscalco, Domenico, "International Environmental Agreements: Incentives and Political Economy", *in European Economic Review*, vol. 42, Elsevier Science B.V., 1998; Ringius, Lasse, et. al., *op.cit*

[38] http://unmict.org/enforcement-of-sentences.html (accessed on 4 July 2014); http://www.coalitionfortheicc.org/?mod=enforcement (accessed on 4 July 2014)

[39] Thielemann, Eiko R., *op.cit.,* 2003, p. 253

jurisdiction,[40] only representatives of member states which have a sentence enforcement agreement with the ICC (8)[41] or have declared their willingness to the ICC to host their own nationals and residents and/or persons whose sentence length does not exceed the domestic maximum (8)[42] have been approached to determine answers to the research question of what states' motives are in signing sentence enforcement agreements.

Furthermore, burden sharing in this paper is seen as a particular form of state cooperation. Consequently, before dealing with motives for entering into sentence enforcement agreements, it has to be explained how cooperation among states is possible. 'Cooperation' here, can be seen as a 'value commitment', according to Reus-Smith and Snidal, 'ranging from order through minimal norms of sovereignty to achievement of higher order social values through international governance.'[43]

Moreover, 'motive' is defined as "a reason for doing something"[44], sometimes used as synonym to 'motivation'.[45]

Finally, by the term 'international criminal justice system' the criminal justice system established by the United Nations resolutions[46] and the Rome Statute[47] is referred to. This paper will not focus on the entire international criminal justice system but only on the cooperation between the international criminal courts and tribunals and states.

1.2. Methodology

In order to establish how different International Relations theories explain cooperation among states, various handbooks as well as books and articles from

[40] UN Doc. A/CONF.183/9, Rome Statute, Art. 13-15
[41] Austria, Belgium, Colombia, Denmark, Finland, Mali, Serbia, United Kingdom
[42] Andorra, Czech Republic, Liechtenstein, Lithuania, Luxembourg, Slovakia, Spain, Switzerland; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed on 12 July 2014)
[43] Reus-Smit, Christian, Snidal, Duncan (ed.), *The Oxford Handbook of International Relations*, Oxfors University Press, Oxford, Great Britain, 2008, p. 22
[44] http://www.oxforddictionaries.com/definition/english/motive (accessed on 21.07.14)
[45] http://www.oxforddictionaries.com/definition/english/motivation (accessed on 21.07.14)
[46] UN Doc. S/RES/827 ; UN Doc. S/RES/955
[47] UN Doc. A/CONF.183/9

authors representing a particular school of thoughts will be consulted. The selection was limited to schools which deal extensively with the topic of state cooperation.[48] As to answer the question of why states, under certain circumstances would decide to cooperate in sharing a burden arising from a 'public good', the second part will develop an analytical framework from previous examples of burden sharing, in particular, environmental agreement, collective security agreements and refugee protection. For this purpose, academic articles will serve as source of information. And finally, in order to answer the question of why states would share the burden when it comes to enforcing sentences in the international criminal justice system, interviews will be conducted. As mentioned above, in June and July 2014, for time reasons, only member states of the ICC have been approached. For that purpose an e-mail with a request for an interview on the topic was sent out to all the concerned embassies in The Hague. Out of the 16 requests, six agreed with an interview, either with the legal advisor in The Hague or a member of the respective Foreign Ministry over the phone. Six embassies replied to the preliminary questions in the e-mail in a written statement and four did not respond up to the time of completion of this paper. Furthermore, two experts on the topic of state cooperation with the ICC, in particular when it comes to sentence enforcement agreements had been approached: Hirad Abtahi, First Legal Adviser and Chief of the Legal and Enforcement Unit of the Presidency of the ICC, as well as the Legal Adviser of the embassy of Norway since the Norwegian Ambassador at the moment is head facilitator for cooperation between member states and the ICC.

The interviews were semi-structured and followed a similar line of questions which was not established by looking at the analytical framework, but was more general. Yet, naturally it always had to be adapted to the situation of the country or institution in question. None of the interviews had been recorded since parts of the conversations were confidential, however notes were taken during the interview. Also, interviewees had the opportunity to read through the parts of the paper relevant to their interview as to assure they had not been misquoted and some of the statements were changed which had an impact on their analysis.

[48] see chapter 2

States with a Sentence Enforcement Agreement with the ICC

Country	Communication	Code[49]
Austria	Interview	R1
Belgium	Interview	R2
Colombia	Interview	R3
Denmark	Interview	R4
Finland	-	-
Mali	-	-
Serbia	Interview	R5
United Kingdom	Interview	R6

States having declared their willingness to host someone under certain conditions

Country	Communication	Code
Andorra	-	-
Czech Republic	Written statement	RA
Liechtenstein	Written statement	RB
Lithuania	Written statement promised but out standing	-
Luxembourg	-	-
Slovakia	Statement by phone	RD
Spain	Written statement	RE
Switzerland	Interview	RF

Further respondents

Respondent	Expertise	Code
Legal adviser to the Norwegian Embassy, Irvin Høyland	Facilitation of the cooperation between the ICC and its member states and experience as a state of enforcement of sentences handed down by the ICTY	RC
First Legal adviser to the ICC, Hirad Abtahi	Head of the Legal and Enforcement Unit of the ICC	H.A

1.3. Outline

In order to determine what animated those states to share the burden and agree to this voluntary cooperation with the ICTY, ICTR and ICC, first, different international relations theories will be analysed as to explain how and why cooperation among states is possible (Chapter 2). Second, assuming that signing sentence enforcement

[49] R stands for respondent. Further, numbers have been chosen for countries that already have a sentence enforcement agreement and a letter for such that have a declaration of willingness. Norway was also given a letter since the interview not only concerned Norway's function as facilitator but also the countries' experience with sentence enforcement agreements. Finally, for the respondent of the ICC his initials serve as code.

agreements is a particular form of cooperation - burden sharing, previous studies of the most popular examples of burden sharing in international relations such as the protection of the environment, collective security agreements and refugee protection, will be looked at as to develop an analytical framework for identifying motives for burden sharing (Chapter 3). Then, with the help of the set of motives established in the third chapter, it will be explained how sentence enforcement came to be, what they consist of and what issues they might bring with them (Chapter 4) before analysing the interviews conducted with state representatives from states which have a sentence enforcement agreement with the ICC (Chapter 5).

2. International Relations Theories on State Cooperation

"Man has always lived in groups. […] one function of such a group is to regulate relations between its members. Politics deals with behaviour of men in such organized permanent or semi-permanent groups. […] Man in society reacts to his fellow men in tow opposite ways. Sometimes he displays egoism, or the will to assert himself at the expense of others. At other times he displays sociability, or the desire to co-operate with others, to enter into reciprocal relations of good will and friendship with them. […] No society can exist unless a substantial proportion of its members exhibits in some degree the desire for co-operation and mutual good will."[50] Whether states' behaviour can be deduced from human nature is for others to determine. However, it seems logical that if states want to have mutually beneficial relations, a certain degree of cooperation is desirable, even necessary. This is particularly true as states became increasingly interdependent in the 20th and 21st century.[51] Since the beginning of the studies of international relations with Thucydide in Ancient Greek[52] where inter-state relations where mostly defined by power and security[53] the field of International Relations has come a long way. This chapter aims to show, how different international relations theories explain

[50] Carr, E.H., *op.cit.,* p. 91
[51] Williamson, Jeffrey G., „Globalization, Convergence, and History*", in The Journal of Economic History*, vol. 56, n°2, June 1996, p. 277
[52] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.,* p. 20
[53] Morgenthau, Hans, *op.cit.,* p. 4

cooperation among states. As has been mentioned before, not all theories deal with the topic of state cooperation.[54] Therefore, the analysis has been limited to realism, neo-liberal instutionalism, constructivism and the English School. It is important to note beforehand that these theories do not share the same approach when describing the phenomenon of state cooperation,[55] and therefore might not have the same reasoning. In that sense, it is hoped that in analysing them simultaneously, a more comprehensive picture of why states would cooperate appears. This, at a later stage, will then allow to determine particular motives for states when it comes to burden sharing, a specific form of state cooperation.

2.1. Realism

Realism is considered the oldest theory of International Relations, reaching back as far as Thucydide in Ancient Greece.[56] In his footsteps followed Niccolo Machiavelli, Thomas Hobbes and more recently Kenneth Waltz and Henry Kissinger. Even though there are different forms of realism, they all share four basic assumptions:

- Groupism: Politics is being carried out between groups as well as within them and the most important of those human groups is considered to be the state.
- Egoism: all groups are driven by self-interest which comes from the deeply rooted egoism that every human has in them.
- Anarchy: Since there is no universal government the political system on the international level is considered to be anarchical in nature where the units (states) can only survive by through the principle of self-help.
- Power politics: The previous three assumptions lead naturally to the last assumption that international relations are guided by power and security politics. [57]

Furthermore, the unit of analysis, whether one is looking at classical realism by Thomas Hobbes or structural realism by Kenneth Waltz is the state.[58] But where as

[54] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.,* p. 23
[55] *Ibid.,* p. 17
[56] *Ibid.,* p. 206
[57] *Ibid.*, p. 133
[58] Burchill, Scott, Linklater, Andrew (ed.), *op.cit.,* p. 45

classical realism assumes that all units are equal,[59] structural realism is aware of the fact that not all states have the same capabilities and possibilities due to material inequalities and hence differences between states in international relations do not stem from functional differences but differences of capabilities and the international system witnesses a change in great powers and polarity, that is, the numbers of great powers at the top of the system.[60] Contrary to liberalists view, any gain or loss in power has to be considered in relation to other states gains or losses.[61] The relativity of power in an anarchic world pushes the states to balancing rather than bandwagoning. This means that great powers oppose to other great powers, rather than cooperating with them and small states have to guess who might be the strongest, align with them and hope that this generates favourable treatment.[62] From the above can be deduced that cooperation is therefore greatly hindered. At this point, the prisoner's dilemma, also very important for the neo-liberal approach to international relations can be introduced. In a nutshell, it assumes that two criminals are held separately after having committed a crime together, and the police offered each a plea bargain for giving up their partner. In case both did not say anything the sentence would be lower than when both turned on their partner. However, if one cooperated (with their partner in crime by remaining silent) and the other didn't, the sentence for the one not cooperating would be even lower, hence cooperation can be considered very risky since it might generate a worse outcome than e.g. when acting egoistically and the other player cooperates. For that reason, both will not cooperate with their partner and give them up even though both remaining silent produces overall the better outcome.[63] This theoretical game served for realists to explain why cooperation is difficult to achieve in international relations. In order to understand how realists would interpret burden sharing it is furthermore important to look at realists' opinion on norms and institutions. Keeping in mind that the main motive of state behaviour, according to Waltz, is its survival,[64]

[59] *Ibid.*, p. 36
[60] *Ibid.*, p. 37
[61] *Ibid.*, p. 40
[62] *Ibid.*, p. 37-40
[63] *Ibid.*, p. 39
[64] *Ibid.*, p. 43

norms as well as institutions are considered to be structural in the domestic order. 'They create the hierarchy of power and differentiation of function that are the hallmarks of a well-ordered domestic polity, but that are present only rudimentarily in international society'.[65] Even though some realist authors admit to norms and institutions having an important influence even at a global level,[66] most realists would agree that "unlike the solitary individual who may claim the right to judge political action by universal ethical guidelines, the statesman will always make his decision on the basis of the state's interest."[67] In that sense, realists would argue that states' actions are guided by the interest of survival and the gain of power, greatly hindering cooperation.[68]

2.2. Neoliberalism institutionalism

Before talking about neoliberal institutionalism, it seems important to point out the most important features of liberalism in general. Liberalisms' intellectual roots originate from the European Enlightenment.[69] In contrast to the realist approach, liberalists' assume that the world order is not dominated by war but by peace and that this peace stems from the fact that all units of analysis, states, are (economically) depending on each other.[70] However, in the eyes of neoliberal institutionalist such as Robert O. Keohane, the field of international relations is anarchistic in its nature[71] and cooperation only emerges in view of personal advantages following "the principles of sovereignty and self-help."[72] With this in mind, Keohane introduces the principle of reciprocity as one principle guiding international relations. According to Keohane, there are two types of reciprocity:

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[65] Snyder, G.H., Process Variables in Neorealist Theory, in Security Studies, vol 5., n°3, 1996, p. 169
[66] Burchill, Scott, Linklater, Andrew(ed.), *op.cit.*, p. 48
[67] Russel, G. Hans J. Morgenthau and the Ethics of American Statecraft, Baton Rouge, 1990, p. 51
[68] Burchill, Scott, Linklater, Andrew(ed.), *op.cit.*, p. 36-45
[69] *Ibid.,* p. 57
[70] *Ibid.*, p. 58-61
[71] Keohane, O. Robert, Reciprocity in International Relations, in International Organzations, vol 40, n°1, Massachusetts Institute of Technology and the World Peace Foundation, 1986, p. 1
[72] *Id.*

Specific reciprocity where the subjects exchange things of equivalent value and this exchange is limited in time.[73] This principle clearly is linked to the economic game theory and its prisoners' dilemma.[74] The second type of reciprocity he calls diffuse reciprocity where the participants "do not receive direct rewards for their cooperative actions [and] can be maintained only by a widespread sense of obligation."[75] In other words, this form of reciprocity cannot be established in the short run but is important when it comes to the stability of a social system. In that sense Keohane tries to explain why states contribute to public goods ("Goods that are indivisible and cannot be denied to any member of a group, regardless of whether that member contributed to their provision"[76] – which generates the free-rider problem). This form of reciprocity is commonly also explained by the theory of collective action introduced by Mancur Olson in 1965.[77] Members of a group hence contribute to a good not because they expect an immediate return from it but more likely because they wish the continuation of a society they are part of, where they can count on mutual respect, good behaviour and a shared set of values.[78] Furthermore, Keohane underlines that states often engage in both forms of reciprocity in order to maximise the benefits of both of them. [79] Hence, liberalists are convinced that states would more and more come away from the idea of egoistic nation-states and move toward free trade and multilateral agreements.[80] Neoliberal institutionalist went even further in saying that state cooperation is realised within institutions.[81] 'Institution', [sometimes also referred to as regimes,][82] in this sense means a set of rules which govern state behaviour in specific policy areas'.[83] Neoliberal institutionalism, until the 1980s called regime theory, first addressed the phenomenon of actually existing international institutions facilitating cooperation in

[73] *Ibid.*, p. 4
[74] *Ibid.*, p. 8
[75] *Ibid.*, p. 20
[76] *Ibid.*, p. 12
[77] Olson, Mancur, *op.cit.*
[78] *Ibid.*, p. 20
[79] *Ibid.*, p. 27
[80] Burchill, Scott, Linklater, Andrew(ed.), *op.cit*, p. 66
[81] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit*, p. 201
[82] Krasner, S.D., « Structural Causes and Regime Consequences : Regimes as Intervening Variables », *in International Organization*, vol. 36, 1982, p. 185
[83] Burchill, Scott, Linklater, Andrew(ed.), *op.cit*, p. 67

various areas. Interestingly, neoliberal institutionalist explained the existence of such institutions through three core concepts of the realist theory: 'states, power, and interests'.[84] In more detail, this means that institutions are not considered proper entities and states remain the principal actors within international relations where power politics and interests guide the state behaviour.[85] In addition, as shown above, they make use of the game theory and microeconomic tools to analyse issues, as do realists, yet because of their focus on cooperation and institutions, this new branch, called neoliberal institutionalism was born.[86] Especially after the decay of the Soviet Union when the world order shifted from bipolar to unipolar, with the United States as power centre, neoliberal institutionalists' arguments experienced an upswing as organizations such as NATO lived on and even got stronger. Whereas realists had always pointed out that institutions occurred only in areas of 'low politics' and served the powerful to follow their interests, neoliberal institutionalists would agree that institutions are created due to self-interested state behaviour and that there are cooperation issues but that institutions have the power to defeat those so-called collective action problems and allow states to reach mutually rewarding outcomes.[87] Hence, for neoliberal institutionalists it does not come as a surprise that in situations where a 'Prisonner's Dilemma' occurs, states have tried to establish institutions in order regulate their behaviour and finally achieve their preferred outcome.[88] Regulation does not only stipulate punishment in case of a breech of the rules, but it is assumed that there is a certain 'linkage' between issues so that when a state commits a violation in one area, this might have an impact on another area.[89] It could be imagined that this also works the other way around, that is, in case of positive cooperation a state might expect benefits from this in another issue area. Stephen Krasner further argues that great powers can use their power to

[84] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit*, p. 203
[85] *Ibid.*, p. 203
[86] *Ibid.*, p. 205
[87] *Ibid.*, p. 208
[88] *Id.*, p. 208
[89] Hasenclever, Andreas, Mayer, Peter, Rittberger, Volker, *Theories of International Regimes, Cambridge Studies in International Relations,* Cambridge University Press, Cambridge, United Kingdom, p. 35

bargain for their most preferred outcome.[90] In that sense, 'states outside the club are left with a choice: they may join the club but there is a substantial component of coercion along with the voluntarism in the choice'.[91] Furthermore, Zürn and Efinger have come up with a hierarchical structure as to the likelihood of successful cooperation within an institution depending on the issue area: economic issues are more likely to be resolved by institutions than issues concerning rules, such as human rights. Issues concerning security are situated in between those two poles.[92]
To sum up, the game theoretic approach permitted neoliberalists a relatively flexible framework to look at international relations including not only security and power concerns but also values and ideologies in their analysis and hence giving them a relevance in this field, which is thought to be dominated by power and interests.[93] Therefore, first, cooperation is not only possible but a goal in various issue areas and the motives can range from better economic outcomes to shared values.

2.3. Constructivism

Realism and neoliberalism are both to be considered rational choice theories, that is, they both apply rationalist economic theory, reaching opposite results when it comes to potential state cooperation.[94] Another debate within the field of International Relations was between these aforementioned rationalist theories and post-positivist theorists. Various post-positivist theories, such as constructivism are opposed to the assumption that states are always perfectly informed to make their decision, pointing out that the perception of a situation and the behaviour of their fellow actors are as important in decision-making. As is often falsely assumed, this does not mean that international relations from a constructivist point of view are mostly focussed on norms. In fact, most constructivist scholars would agree that states' behaviour is guided by power and interests.[95] However, in general,

[90] Krasner, Stephen, « Global Communications and National Power : Life on the Pareto Frontier », *in World Politics*, vol. 43, p. 336-66
[91] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit*, p. 211
[92] Hasenclever, Andreas, Mayer, Peter, Rittberger, Volker, *op.cit.,* p. 63
[93] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 201-217
[94] Burchill, Scott, Linklater, Andrew(ed.), *op.cit*, p. 217
[95] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 310

constructivist would argue that the power as well as the interests are 'socially constructed', hence the label constructivism.[96]According to Alexander Wendt 'a fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of the meanings that the objects have for them.'[97] Meanings as well as practices in a socially constructed world create patterns of behaviour which can change over time as meanings and practices change.[98] Even though constructivism has established itself as an important current of thought, International Relations Theorists argue that it isn't a substantive or coherent position and does not originate from the field of International Relations but is a wide-ranging approach to social theory.[99] Therefore, constructivism is capable of giving further explanations on international relations issues such as, overcoming the 'pure' materialism and rationalism the two previously explained current of thoughts suggest to be the motivator and explanation for state interaction and state behaviour.[100] In that sense, the motives for cooperation do not change to what has been mentioned in the previous theories, yet, these motives are not only guided by material facts but also by perceptions.

2.4. English School

This branch of international relations theories has its origins in the 1970s and, as its name points it out, was mostly spread among British scholars.[101] Even though English school scholars accepted various assumptions from other paradigms, it has become a distinct school of thought dispersed all over the world.[102] Intellectually some situate it in between realism and idealism,[103] whereas others look at it as being in between mainstream theories such as realism and liberalism and more

[96] *Ibid.*, p. 300
[97] Wendt, Alexander, « Anarchy is what states make of it : the social construction of power politics », *in International Organization*, vol. 46, 1992, p. 396-397
[98] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.,* p. 300
[99] Jørgensen, Erik K., *International Relations Theory, A New Introduction*, Palgrave Macmillan, New York, 2010, p. 160
[100] *Ibid.,* p. 160-164
[101] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 269
[102] *Ibid.*, p. 267-268
[103] Burchill, Scott, Linklater, Andrew(ed.), *op.cit.*, p. 89

critical approaches, together with constructivism.[104] Be that as it may, English school scholars accepts realist as well as neoliberalists' assumptions such as the international order is anarchical in its nature, that states face a security dilemma and the importance of the principle of state sovereignty.[105] They agree with the realists' view of the danger in the world, yet they are also willing to discuss more recent phenomena such as humanitarian intervention and the idealist concept of universal principles.[106] However, they do not agree on whether or not these principles are actually universal and whether there is such a thing as universal rights and norms.[107] Yet, what they agree on is that great powers use their influence to spread their values.[108] In fact, a major theoretical point of the English School is that states form an international society, that is, 'a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements'.[109] This clearly adds a cultural perspective.[110] Within this society, states benefit from certain rules such as the limitation of the use of force and the respect of property, yet they do not give up or transfer their sovereignty.[111] From the definition above it is important to note therefore, that sovereign states are the prime members of this international society.[112] Historically, Wight argued, there have been three international societies so far, all with a high level of unity concerning their language and culture. He is talking about Ancient China, the Greco-Roman and the modern society of states.[113] Other states that were not considered

[104] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 268
[105] Burchill, Scott, Linklater, Andrew (ed.), *op.cit.*, p. 88-90
[106] *Ibid.*, p. 90
[107] *Ibid.*, p. 90-92
[108] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*, p. 92
[109] Bull, H., Watson, A., The Expansion of International Society, Clarendon Press, Oxford, 1984, p. 1
[110] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*, p. 99
[111] *Ibid.*, p. 94-96
[112] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 272
[113] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*, p. 94

equal therefore remained outside of this international society.[114] An example of this is China, which was not recognized as equal members and denied sovereignty until 1942, which considerably influenced the relations between the Western countries and China.[115] Yet, states are not considered the only members of the international society. Non-state actors such as international non-governmental organizations, which are in an advisory position to international organizations such as the United Nations, do have their say, for example, in drafting some multilateral treaties.[116] As for the types of international society, there are two different axes within the English School. Advocates of a pluralist international society argue that 'the institutional framework is geared toward the liberty of states and the maintenance of order among them. The rules are complied with because, like rules of the road, fidelity to them is relatively cost free but the collective benefits are enormous.[117] A solidarist international society however, is characterized by the collective enforcement of a set of international rules, and more importantly, as a guardian of human rights.[118] In addition, the individual is also considered to be a member of the international society, even though less powerful than states which nevertheless are commonly concerned for their individuals' safety and welfare.[119] Yet, both camps agree on the differentiation between system and international society, where an international society presupposes a system.[120] A system does have some inter-state interaction but there is no common set of rules.[121] In that sense, according to Tim Dunne 'actors in the state system can have structured interactions with members of international society – they may even comply with treaties and other rules – but these interactions remain systemic unless the parties grant each other mutual respect and inclusion into international society.'[122] It is also possible that an international society falls back into a system, great powers often being its greatest threat, by violation the

[114] *Id.*, p. 94
[115] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 272
[116] *Ibid.*, p. 273
[117] *Ibid.*, p. 274
[118] *Ibid.*, p. 275
[119] Jørgensen, Erik K, *op.cit.*, p. 110-111
[120] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 276
[121] *Id.*
[122] *Ibid.*, p. 277

set of common rules and values in pursuit of their interests.[123] A third very important concept of the English School is that of world society. It can be seen as being parallel to the international society yet; it comprises all shared values interest 'linking all the parts of the human community'.[124] This includes claims such as human rights, autonomy of indigenous people, open border for transnational corporations and retrospective justice.[125] Advocates of the English School therefore see in the existence of humanitarian law, the text of United Nations Charter as well as in the more recent development of international criminal law a clear sign of the evolvement of the international society, some even speak of a transformation of the international society to a world society.[126] All in all, it can be said that the English School has found a way, overcoming issues in the realist as well as idealist theories by proposing a holistic approach, looking at various parts of society and civility, something realist have never considered important and yet not succumbing to the idealists' arguments that states are capable of settling their most essential differences on grounds of moral and justice.[127] Therefore, reaching the state of an international society is very difficult and far from being lasting. Yet, according to Andrew Linklater, whether closer to the camp of realists or idealists, concepts raised by the English School such as 'system', 'society' or 'community' will have an important influence in todays' analysis of international and diplomatic relations as well as the change in the world order.[128] Again, cooperation therefore is not only possible but preferable, not only when it comes to financial or security gains but also in other areas like human rights. Furthermore, since this theory combines ideas frm different theories, the motives that lead to said cooperation consist of a combination of the motives from the theories mentioned above.

[123] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*., p. 92-93
[124] Bull, H., *The Anarchical Society : A Study of Order in World Politics*, Macmillan, London, 1977, p. 279
[125] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.*, p. 278
[126] *Ibid.*, p. 278-279
[127] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*., p. 112
[128] *Id.*

2.5. Conclusion

With the growing interdependence between states, a process often also referred to as globalization,[129] has changed the field of study of International Relations, in- or decreasing the relevance of some schools and adding new ones. This chapter attempted to establish a comprehensive picture of how different International Relations theories explain the phenomenon of state cooperation.

It has been shown that realists consider international relations as dictated by power and security politics and the anarchy and egoism dominating these relations greatly hinder cooperation. Furthermore, even though emphasising power as the main national interest[130] has its value, completely denying the relevance of ethics[131] or moral principles in international relations[132] "not only cannot bear critical scrutiny but prove not even to reflect the considered views of most leading self-identified realists – despite their unfortunate tendency to repeat and emphasise such indefensibly exaggerated claims".[133]

In contrast to realists' view, neo-liberal institutionalists, even though considering power as an important national interest, acknowledge the (economic) interdependence of states. This interdependence leads states to form so-called institutions to overcome the Prisoner's Dilemma. Therefore, the theory of collective action explains how states have found a way to provide public goods by regulating their behaviour within these institutions. This finding will be important when looking at states' motives in burden sharing as will be shown later. Hence, in the view of neo-liberalists behaviour is less guided by egoism and more by the wish of upholding a functioning society, thereby introducing ideas of mutual respect, good behaviour or shared values in the field of International Relations.

Finally, whereas constructivists add that states' interests are not only determined by materialism and rationalism but considers also socially constructed motives and the importance of perception in international relations, advocates of the English School

[129] Smith, Steve, et. al. (ed.), *The Globalization of World Politics : An Introduction to International Relations*, Oxford University Press, United Kingdom, 2014, p. 9-14
[130] Morgenthau, Hans J., *op.cit.*, p. 4, 10
[131] Carr, E.H., *op.cit*, p. 153
[132] Morgenthau, Hans J., *op. cit.,* p. 9
[133] Burchill, Scott, Linklater, Andrew (ed.), *op.cit*., p. 53

add concepts such as 'system', 'international society' and 'world society' explaining how states are connected with each other and other actors in the field of International Relations. Further more the English School discussed concepts such as 'universal principles', for example when it comes to 'justice', recognizing that these might be culturally biased. All the above aspects have to be kept in mind when looking at why states cooperate and share the burden in certain issue arenas. Therefore, the next chapter will analyse examples of burden sharing in International Relations to determine motives for states in these scenarios.

3. Burden Sharing within the International Context

The previous chapter illustrated how state cooperation can be explained within different schools of thought and more importantly, that these schools of thoughts are not just co-existing but overlap and complement each other. Hence, different theories will have their influence in explaining burden sharing - a particular form of cooperation. The term of burden sharing, as has been mentioned in chapter 1.1., always comes up in relation with the collective action theory. Collective action is required when the international community deals with the provision of a public good. In this paper, ending impunity and serving justice, the ultimate results of sentence enforcement agreements, are considered to be public goods, since, as required by the definition of a public good, the provision thereof is 'non-rival' and 'non-excludable'.[134] Therefore, in order to establish an appropriate framework to analyse the motives for signing these agreements, previous literature on examples of burden sharing will be consulted.

The term 'burden sharing' has come up in the international context mostly in relation to environmental regulation, military alliances and development cooperation.[135] In an article from 2003, Eiko Thielemann developed an analytical framework to determine why states would enter into burden sharing schemes. He

[134] Thielemann, Eiko R., *op.cit.,* 2003, p. 256

[135] Noll, Gregor, Negotiating Asylum, The EU Aquis, Extraterritorial Protection and the Common Market of Deflection, The Raoul Wallenberg Institute Human Rights Library, vol. 6, Martinus Nijhoff Publishers, The Hague, 2000, p. 264

suggests two approaches to look at burden sharing: the cost-benefit approach that follows a 'logic of expected consequences' and the norm-based approach that follows a ' logic of appropriateness'. [136] Whereas the 'logic of expected consequences' is based on the rational choice model where actors choose the best course of action by evaluating various alternatives, the 'logic of appropriateness' considers actions to be guided by identities and roles shaped by the international context.[137] The norms and practices are seen as socially constructed and known to all the actors.[138] Furthermore, the rational choice model states that "actors assess their goals, interests, and desires independently of institutions [whereas] norm-based approaches emphasize that the motivations, choices and strategic calculations of political actors are framed by the institutional context."[139] In that sense, where the first approach argues that the actor acknowledges the irrationality egoism in a particular situation and assumes a gain through cooperation, the second approach considers that cooperation is also possible because the actors have a sense of solidarity.[140]

The theoretical frameworks have been established through various case studies of burden sharing, the most popular thereof being environmental protection, collective security and refugee resettlement and protection which will serve as illustrations.

3.1. The cost-benefit approach

Within the cost-benefit approach, and therefore, the 'logic of expected consequences', Thielemann identifies two main motives for states to opt for cooperation. The first motives is driven by the assumption that "cooperation produces positive-sum benefits."[141] Hence, in situation where states are confronted with the provision of a public good it is beneficial to share the burden since one state cannot attain the same level by acting on its own.[142] This line of argument, for

[136] Thielemann, Eiko R., *op.cit.,* 2003, p. 254
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Ibid.*, p. 255
[141] *Id.*
[142] *Id.*

example, can be seen when it comes to collective security. The foundation of the NATO in 1949 had three major goals: Frist, limiting the Soviet expansionism, second, stopping the emergence of national militarism in Europe by a strong presence of the US and third, strengthening the European political integration.[143] Members of the NATO benefited from financial aid in order to rebuild their countries and most importantly from the so-called security umbrella. In that sense the collective action theory was able to explain why self-interested actors opted for cooperation in this situation. Another example of when unilateral action might be considered impossible is within the issue of environmental protection and this for two particular reasons: first, the environment can only be efficiently protected when *all* the international actors participate and second, acting individually might have serious negative economic consequences.[144] The European Union's (EU) decision to adopt the Kyoto Protocol and then attempts to convince others to join them has, according to Groenleer and Van Schaik, to be understood in this light.[145] Finally, in the case of refugee protection states have an interest to deal jointly with refugee crises, not only to minimize numbers of refugees they host on their territory but also to create security and stability.[146]

When it comes to the provision of a public good however, there is always the risk of free riders, that is, members of the group benefitting from this good without contributing to its creation. This is true for all examples above. In his book from 1965, Mancur Olson even goes as far as to state that, in situations where there is a larger, "there is […] a surprising tendency for the 'exploitation' of the great by the small."[147] Later research however found that this was not quite true anymore in the case of collective security[148] as well as for refugee protection.[149] Therefore, recently, a more accurate version of the public good theory has been introduced: the joint-

[143] http://www.nato.int/history/nato-history.html (accessed on 19.01.14)
[144] Groenleer, Martijn L.P., Van Schaik, Louise G., United We Stand? The European Union's International Actress in the Cases of the International Criminal Court and the Kyoto Protocol, in JCMS, vol. 45, n°5, 2007, p. 985
[145] Groenleer, Martijn L.P., Van Schaik, Louise G., *op.cit.,* p. 985
[146] Suhrke, Astri, *op.cit.,* p. 400
[147] Olson, Mancur, *op.cit.,* p. 3
[148] Oneal, John R., *op.cit.,* p. 386
[149] Betts, Alexander, *op.cit.,* p. 279

product model.[150] In short, the joint-product model suggests that some public goods, like collective security or refugee protection vary in their degree of 'publicness' and therefore can provide some private benefits to some members of the group and furthermore reduce the incentives to free ride.[151] Still in the line of argument of the cost-benefit analysis Betts comes up with two sets of explanation, the first related to ethical and humanitarian norms, resulting in 'excludable prestige benefits' and 'excludable altruistic benefits' and the second related to 'state-specific security benefits'.[152] Applied to the issue of refugee resettlement, his argument is the following: By excludable prestige benefits Betts understands that resettling refugees might give states political leverage. As an example he says that it is possible that since the Netherlands have – in particular in monetary terms - contributed largely to the UNHCR this might have resulted in Ruud Lubbers, a Dutch national, having been appointed for the post of UN High Commissioner for Refugees.[153] Excludable altruistic benefits, on the other hand, are less tangible as they are based on the norms prevalent in a certain state rather than on a positivist cost-benefit calculation. The argument is that the cost-benefit calculation can also be seen as socially constructed. Hence, according to Betts, states such as the Netherlands or the Scandinavian countries have had long-standing traditions in providing humanitarian aid and there has often been a strong demand on a domestic level to do so. Consequently, there is a perceived benefit from being the provider such help.[154] It therefore does not come as a surprise that the Scandinavian countries as well as the Netherlands are part of the top ten receiving countries of resettled refugees in 2012.[155] As for the second explanation, state-specific security benefits, this is more linked to contributions to the UNHCR. It is interesting to note that, again, Nordic States and the Netherlands have often not labelled UNHCR contributions, whereas the United States as well as France, Italy, the UK and Belgium largely 'earmarked'

[150] Sandler, Todd, Forbes, John F., « Burden Sharing, Strategy, and the Design of the NATO », *in Economic Enquiry*, vol. 18, n°3, 1980, p. 425 ; Betts, Alexander, *op.cit.,* p. 277
[151] Betts, Alexander, *op.cit.,* p. 277-278
[152] *Ibid.,* p. 286
[153] *Ibid.,* p. 286-287
[154] *Ibid.,* p. 287-288
[155] http://www.unhcr.org/52693bd09.html (accessed on 29.04.14)

those and hence determining their purpose.[156] Betts suggests that this may be linked to the perceived 'asylum threat' that in particular countries face from immigration which might arise from their former colonies.[157]

A second motive, according to Thielemann, for states to share the burden after a cost-benefit analysis, is the 'insurance rationale', that is, sharing the burden, even though not beneficial to everybody initially, might create an insurance case of a future crisis and, in the long term, reduce costs.[158] However, this only applies for situations where the group members perceive the same issue as a threat.[159] Applied to the examples at hand, the argumentation could be the following:

When the European Union in 2001 acted in unison by adopting the Kyoto Protocol it reacted to the perceived threat of environmental catastrophes.[160] Yet, this can also be interpreted as a reaction to the withdrawal from it by the Bush administration by choosing this progressive development of the environmental policy.[161] Hence the active part of the EU can be interpreted first, as a demonstration of the EU's conviction of the importance of the protection of the environment[162], that is, this group of states share a common conviction or set of values. In addition, they felt that this could strengthen their political position against the United States[163], giving the EU a character of an international actor rather than an 'intergovernmental' actor.[164]

The insurance rationale in this example, can therefore be identified by the EU member states demonstrating unity on a subject in order to also individually be assured support against political or economic repercussions that might result from not following the United States' policy.

As for the example of collective security, the NATO not only played an important role during the Cold War but also survived the fall of the Soviet Union, proved great flexibility and took new functions within emerging conflicts such as during the Balkan

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[156] Betts, Alexander, *op. cit*., p. 288-289
[157] *Ibid.,* p. 292
[158] Thielemann, Eiko R., *op.cit.,* 2003, p. 256
[159] *Id.*
[160] Groenleer, Martijn L.P., Van Schaik, Louise G., *op.cit.*, p. 984
[161] *Id.*
[162] *Ibid.*, p. 989
[163] *Ibid.*, p. 990
[164] *Ibid.*, p. 992

Wars but also outside the territory of Europe.[165] Here the insurance rational lies in the fact that the member states support the NATO even though the Cold War is over, in anticipation of future crises and the acknowledgement that acting within this institution allows to better surmount these crises.

Finally, in case of the refugee protection, as already mentioned above, the threat perceived in this case consists of massive inflow of refugees as well as international instability.[166]

3.2. Norm-based approach

As for the cost-benefit approach, for the norm-based approach under the 'logic of appropriateness', Thielemann identifies two different motives for states to show solidarity in particular issue areas. This idea has less to do with the idea that states face a 'tragedy of the commons'[167] related to the public good to be provided but that, in contrast, the members of a group are acting "according to the principle of universalization, i.e. acting as they would wish all others to act as well."[168] Solidarity therefore can be seen as an alternative to the cost-benefit rationale out of a 'Prisoner's Dilemma'.[169] The first motive behind solidarity, according to Thielemann is therefore that members show commitment to the outcome of decisions made by the collective. Hence, for example in situations where the action of one actor does not necessarily make the difference, the demonstration of solidarity with the decision matters for this line of argument.

This definitely was the case when the EU opted for the progressive environmental policy by adopting the Kyoto Protocol, where the European actors seemed convinced of the importance of the environmental protection.[170] As for the military alliance, NATO, the fact that the Western world shares political, economic but also cultural

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[165] *Id.*

[166] Suhrke, Astri, *op.cit.,* p. 400

[167] Hardin, Garrett, « The Tragedy of the Commons », The population problem has no technical solution ; it requires a fundamental extension in morality, *in Science*, vol. 162, 1968

[168] Thielemann, Eiko R., *op.cit.,* 2003, p. 257

[169] *Id.*

[170] Groenleer, Martijn L.P., Van Schaik, Louise G., *op.cit.,* p. 989

views seems, in Oneal's view helpful in the creation of a public good.[171] Hence, these shared norms are crucial for states to consider cooperating on in an issue area. In case of refugee protection, the fact that the Scandinavian Countries and the Netherlands have strongly embedded humanitarian norms could serve as an alternative explanation to the plain cost-benefit analysis and provide reasoning for their leading positions when it comes to resettling refugees and contributions to institutions within the field.[172]

Finally, and closely related to the first motive for solidarity is the motivation that states do not want to benefit unless the other members receive the same benefit or are not harmed by the state receiving a benefit, which in short, demonstrates a concern for the well-being of others.[173] The European countries, showing unity and, hence, reducing probable economic consequences for just a few could be interpreted in this way.[174]

3.3. Conclusion

Studies into why states adhere to burden sharing in particular areas of international relations are fairly recent, starting with the analysis of Mancur Olson developing the collective action theory and what solutions states found to the problem of how to provide a public good in the case of collective security. Later, similar analyses have been made in the area of environmental protection and, more extensively, refugee protection. Hence from the analytical frameworks developed by the different authors, a combination of the work by Thielemann and Betts seem to cover a wide range of possible motives. There are two different approaches, a cost-benefit approach and a norm-based approach which both hold two particular motives, namely: 'cooperation produces positive sum benefits' and the insurance rationale on the one hand, and, on the other hand, solidarity, either to the cause of an institutions and its members decisions or with the well-being of the fellow members. Furthermore, within the cost-benefit analysis, Alexander Betts argues that public

[171] Oneal, John R., *op.cit.,* p. 386-387
[172] Betts, Alexander, *op.cit.,* p. 288
[173] Thielemann, Eiko R., *op.cit.,* 2003, p. 257-258
[174] Groenleer, Martijn L.P., Van Schaik, Louise G., *op.cit.,* p. 989

goods' degree of 'publicness' varies and therefore, states might have further motives to share a burden, e.g. in order to gain political leverage in another issue area, create an excludable altruistic benefit or a state-specific benefit. It is important to note at this point, that although most of these motives draw heavily on the neo-liberal institutionalist theory in International Relations by focusing on economic concepts,[175] more than one theory on cooperation has had its influence in explaining how burden sharing was possible. Most scholars still give high importance to the idea of national interests being guided by the strive for power, be it of military, political or economic nature. So, realism, although in his pure form not applicable still has its influence, not only in burden sharing, but in general on many International Relations theories. Constructivism, on the other hand, serves as to demonstrate the importance of perception and identities when it comes to collective actions and the influence of the English School can be seen in the idea that the international order, anarchic in its nature still permits a fairly high degree of organization – and therefore cooperation in issues where a public good has to be provided and many would assume that there would be high incentives to free ride.

The analytical framework established by authors mentioned above with the illustrations from the three examples of burden sharing will then serve to analyse the interview results in chapter five as to determine, why states have signed sentence enforcement agreements. But before this question can be answered, the following chapter will illustrate the historical background of sentence enforcement agreements as well as what they consist of on a legal basis and challenges that might arise when signing such agreements.

[175] Betts, Alexander, *op.cit.,* p. 275

Table of motives for cooperation identified by Thielemann and Betts[176]

Cost-benefit approach 'logic of expected consequences'	**Norm-based approach** 'logic of appropriateness'
- cooperation produces positive-sum benefits - insurance rationale - *excludable prestige benefits* - *state-specific benefits*	- Solidarity by abiding to a collective decision - Solidarity to members as not to benefit when they don't
- *excludable altruistic benefits*	

4. Sentence Enforcement Agreements

As has been established in chapter 1.1., sentence enforcement agreements consist of bilateral agreements between a state and an international criminal court or tribunal, which, apart from showing a conditional willingness to enforce sentences, determines the conditions under which a person convicted by one of those institutions is to serve their sentence on the territory of the respective country. Sentence enforcement agreements, in this paper, will for the first time, be analysed as an example of burden sharing. This approach has been chosen, determining that the support of the international criminal justice system and serving justice on an international level through voluntary cooperation with the courts and tribunals can be compared to the provision of a public good. In that sense, entering into sentence enforcement agreements relates to the previous examples of burden sharing in that it attempts to provide a public good that concerns the international community as a whole. Furthermore, the topic of international criminal justice is, similarly to the environmental protection or the protection of refugees, related to shared values of the international community, such as the acknowledgement of the importance of a sane environment or acceptance of some basic human rights.

Hence, before trying to explain how sentence enforcement agreements came about, what they consist of on a legal basis and what issues they entail, this chapter will

[176] Thielemann, Eiko R., *op.cit.,* 2003 ; Betts, Alexander, *op.cit. ;* Betts contributions introduced in Thielemann's model are in italic

attempt to justify why enforcing sentences can be seen as an example of burden sharing.

4.1. Enforcing sentences – an example of burden sharing?

When the Security Council established the ad hoc tribunals, the ICTY[177] and the ICTR[178] the respective resolutions are very clear on the goal of those institutions: The restoration and maintenance of peace in the respective region by halting the serious violations of international humanitarian law. The resolutions also stress that in order to be able to prosecute individuals having committed crimes such as genocide, crimes against humanity and war crimes *all* states have to cooperate.[179] When finally in 1998 the first permanent International Criminal Court was established[180] the determination by the member state to serve justice and create peace on a global level was unequivocal.[181] Furthermore, the member states in the Rome Statute affirmed "that the most serious crimes of concern to the international community as a whole must no go unpunished and that their effective prosecution must be ensured by […] enhancing international cooperation." [182] In that sense, the international community is clear about the fact that in order for the international criminal justice system to be effective, cooperation is crucial. In order to obtain the public good, in this case, serve justice and support the international criminal justices system in its efforts to do so, all states are requested to share this burden by financial contributions but also cooperation in matters of arrest, extradition to the tribunals and the court but also the protection and relocation of witnesses, and last but not least, the enforcement of sentences. Thus, the enforcement of sentences, a vital part of any criminal justice system, can justifiably be seen as an extension of the provision of the public good, that is, serving justice and supporting the international criminal justice system. This is true even though in the case of the ad hoc tribunals, cooperation is compulsory since the resolutions were passed under Chapter VII of

[177] UN Doc. S/RES/827 (1993)
[178] UN Doc. S/RES/955 (1994)
[179] UN Doc. S/RES/827 (1993), preambular part; UN Doc. S/RES/955 (1994), preambular part
[180] UN Doc. A/CONF.183/9
[181] UN Doc. A/CONF.183/9, preambular part
[182] UN Doc. A/CONF.183/9, preambular part

the United Nations Charter,[183] whereas the cooperation resulting from the Rome Statute can be seen as voluntary since the member states were free to join the treaty. Nevertheless, when it comes to enforcing sentences, both sorts of institutions share the same approach as will be shown in the subsequent paragraphs. Yet, it is important to note that 'public' "does not mean that the good must be produced by some governmental body. [It] implies only that no one in the group can be excluded from access to the good and/or that one person's consumption of the good does not hinder another's consumption"[184] which creates an incentive for some members to free ride.[185] Nevertheless, as has been mentioned before, actors often realize that acting collectively is more efficient than acting on an individual basis.[186] These considerations by a state definitely are part of the cost-benefit analysis and will be applied to the burden sharing example of enforcing sentences in chapter 5.1.

Yet, even if burden sharing is less seen from an economic perspective and more from the point of view of solidarity and part of the norm-based approach,[187] enforcing international sentences within the international criminal justice system can equally be seen as an example of burden sharing. This can be justified by the fact that in general, the states actions are guided by the institutional norms laid down in the respective statute or treaty and that, in particular, enforcing sentences is an action that results from this institutional context.[188]

After having established that it is justified to consider enforcing sentences handed down by the ICTY, ICTR or ICC as burden sharing, the subsequent paragraphs will have a closer look at the historical background of those agreements, their legal basis and challenges they might entail.

[183] Charter of the United Nations, Chapter VII

[184] Russett, Bruce M., Sullivan, John R., "Collective Goods and International Organization", *in International Organization,* vol. 25, n°4, 1971, p. 846

[185] Thielemann, *op. cit.,* 2003*,* p. 256

[186] *Ibid*., p. 845

[187] see chapter 3.2

[188] Thielemann, Eiko R., *op.cit.,* 2003, p. 254

4.2. Enforcing Sentences of the International Criminal Justice System through bilateral agreements

4.2.1. The history and evolvement of sentence enforcement agreements

The history of sentence enforcement agreements as part of the international criminal law enforcement system is fairly recent as is the history of international criminal tribunals in general. Neither the tribunals in Nuremberg or Tokyo had established such agreements. In contrary, the convicted war criminals, if not hanged, were to serve their sentences in national penitentiary centres, not forgetting that those were under the control of the Allied Forces.[189] It was only in 1993 and 1994 respectively, in the Statutes of International Criminal Tribunal for the Former Yugoslavia and the Statutes of the International Criminal Tribunal for Rwanda that the sentences handed down by the courts were to be executed by states declaring their willingness to do so.[190] Since, during the establishment of the ICTY the war had still been ongoing, the Secretary General in his *Report Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)* stated that the sentences were to be enforced outside the territory of the Former Yugoslavia.[191] As for the ICTR, this had not been laid down. In fact, Rwanda was explicitly mentioned as a country of enforcement in article 26 of the ICTR Statutes and article 22 of the Special Court for Sierra Leone (SCSL) Statutes even gave preference to Sierra Leone. Yet, for various reasons such as national security, the possible incapacity of the domestic enforcement system to actually execute the sentences as well as humanitarian issues such as overcrowding and sanitary conditions, none of the sentences has been enforced in the countries where the crimes occurred.[192]

Clearly, the experience of the ad hoc tribunals had an important influence on the creation of the International Criminal Court.[193] Without being too extensive on the

[189] Penrose, Mary M., Spandau Revisited : The Question of Detention for International War Crimes, *in New York Law School Journal of Human Rights,* vol. 16, 1999-2000, p. 555

[190] UN Doc. S/25704, Art. 27; UN Doc. S/RES/955, Art. 26

[191] UN Doc. S/25704, §121

[192] Hola, Barbora, Van Wijk, Joris, Life After Conviction at International Criminal Tribunals: An Empirical Overview, in Journal of International Criminal Justice, vol. 12, 2014, p. 114

[193] McDonald, Gabrielle Kirk, "The International Criminal Tribunal for the Former Yugoslavia", *in American University International Law Review,* vol. 13, 1998, p. 1438

comparisons between the two kinds of courts, there are a few aspects that have to be noted in view of sentence enforcement agreements of the ICC. The most important factor to notice is that the Rome Statute consists of an international treaty where countries are under no obligation to join, whereas the ad hoc tribunals had been created by a Security Council resolution under chapter VII of the United Nations Charter and is therefore binding for all UN member states.[194] This left some with fears that the ICC would be even more vulnerable and dependent on state cooperation than the previous ad hoc tribunals.[195] Furthermore, whereas the ad hoc tribunals only deal with one particular situation, the ICC might eventually have jurisdiction over situations from all over the world, hence the importance of equal distribution when it comes to sharing the burden - and in this particular case - the enforcement of sentences.[196]

Despite all these challenges, the importance of enforcement in relation to the credibility of an international criminal justice system had always been recognized by the different delegations, to the degree that international cooperation and enforcement – which originally consisted of one part in the draft of the Rome Statute – consisted of two distinctive parts in the final statute.[197] Furthermore, a dual system of enforcement was introduced.[198] On the one hand, there is the enforcement of sentences and on the other, the possibility for the court to impose fines, forfeiture measures and reparation orders.[199] For the ICC, identical to the ICTY and ICTR, the enforcement of sentences will be born by states declaring their willingness to do so. Yet, according to William Schabas, differing from the ad hoc tribunals, the ICC "retains much more direct control over the enforcement [due to]

[194] Tolbert, David, "Case Analysis : The International Tribunal for the former Yugoslavia and the Enforcement of Sentences", *in Leiden Journal of International Law*, vol. 11, n°3, 1998, p. 667

[195] McDonald, Gabrielle Kirk, *op.cit.,* p. 1438

[196] A.H

[197] Abtahi, Hirad, Koh, Steven Arrigg, "The Emerging Enforcement Practice of the International Criminal Court", *in Cornell International Law Journal,* vol. 45, n°1, Winter 2012, p. 2

[198] *Ibid.*, p. 1-2

[199] *Ibid*, p. 4

the strictness of the applicable norms, as well as their detail."[200] The fact that the enforcement of sentences had been subjected to national justice systems and therefore not been equal for all prisoners had been criticised in the case of the ad hoc tribunals.[201] In the case of the ICC where the enforcement is balanced between the court and states.[202] Moreover, the ICC has opted for a way out in case no suitable country could be found; the convicted persons could serve their sentence at a prison facility in the host country, the Netherlands.[203] This underlines the fact that it has been taken into account that finding states that are willing to take up the burden to host a perpetrator of international crimes on their territory could pose a considerable challenge for the ICC.

4.2.2. The challenge of finding states of enforcement

The lobbying for suitable states for the enforcement of sentences of the ICTY was launched fairly early on in 1994 by a request of the Secretary-General to all the member states of the United Nations and Switzerland.[204] Later that year, to stress the urgency of the matter, a second letter followed this first request, this time specifically directed to 35 members.[205] "A favourable response was received only from Pakistan, Bosnia and Herzegovina, Norway, Germany, Finland and the Islamic Republic of Iran. The majority of Member States did not express an eagerness to assist: most States simply did not respond, many said they were unable to help, some indicated they were not yet in a position to respond and others indicated a willingness to assist only if their own nationals or residents were convicted."[206] Furthermore, different judges at the Tribunals took part in the lobbying for states to get involved by signing sentence enforcement agreements. Hence, in 1997, Judge Meron from the ICTY had been very concerned about the future of the tribunals since there were only very few states which had implemented the new legislation

[200] Schabas, William A., *The International Criminal Court: A Commentary on the Rome Statute,* Oxford University Press, 2013, p. 1067
[201] *Ibid.*, p. 1066-1067
[202] Abtahi, Hirad, Koh, Steven Arrigg, *op.cit.,* p. 4
[203] UN Doc. A/CONF.183/9, Art. 103
[204] Hague Yearbook of International Law, Martinus Nijhoff Publishers, vol. 8, 1995, § 137
[205] *Ibid.*, § 138
[206] *Id.*

and there were no enforcement or witness relocation agreements.[207] Gabrielle Kirk McDonald, judge and, at the time, president of the ICTY, pointed out that the tribunals reached their next phase with the first judgements in sight and that it became increasingly urgent to find states for the enforcement of sentences.[208] In the same year, Italy became the first state to sign such an agreement.[209] The negotiations had been initiated by the former president of the ICTY, Antonio Cassese who then handed over this task to the registry.[210] In a meeting by the Security Council in 2004 on issues concerning the ad hoc tribunals, Judge Meron was invited and appealed again to the states to support the efforts by the registry and to answer to request for further sentence enforcement agreements. At that time, only ten such agreements had been signed between the ICTY and states.[211] As scholar Mary Penrose pointed out: 'The continued inertia and ambivalence demonstrated by the international community is inexplicable. Although the political will existed to establish a criminal tribunal for the purpose of trying individuals accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the Tribunals to function as designed.'[212] Currently, sixteen countries have signed an agreement with the ICTY and six countries have signed agreements with ICTR.

From the very low out put of judgements[213] and the fact that the Rome Statute provides the ICC with a way out,[214] one might assume that sentence enforcement agreements might not have been high up on the priority list of the Assembly of State parties. Yet, the presidency, responsible for this task, had been sending out letters,

[207] McDonald, Gabrielle Kirk, *op.cit.*, p. 1429
[208] *Ibid.*, p. 1427
[209] see Annex, Ad hoc Tribunals
[210] Tolbert, David, "Reflections on the ICTY Registry", *in Journal of International Criminal Justice*, vol. 2, 2004, p. 483
[211] UN Doc. S/PV.5086, p. 29
[212] Penrose, Mary M., "Lest We Fail: The Important of Enforcement in International Criminal Law", *in American University International Law Review*, vol. 15, n°2, 1999, p. 361
[213] so far there is only one final judgement and this came as a surprise since the accused, Germain Katanga, recently discontinue his appeal (http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx (accessed on 10.07.14))
[214] UN Doc. A/CONF.183/9, Art. 103§4

requesting states to enter into such agreements since very early on.[215] In addition during the annual sessions numerous resolutions call on states to enter into particular agreements such as sentence enforcement agreements.[216] Finally, parallel to its first indictment in 2005,[217] the ICC was able to conclude its first sentence enforcement with Austria.[218] Yet, the concern over the low number of sentence enforcement agreements remains: In a report on cooperation in 2013, the court pointed out that in the near future, several final judgement might be handed down and, as has been proven by the experience of the ad hoc tribunals, it was important to have a large choice in states of enforcement as to find a suitable location for the convicted to serve their sentence.[219]

4.2.3. The process of negotiating a sentence enforcement agreement

Sentence enforcement agreements, as has been mentioned before, consist of bilateral agreements where a state indicates its willingness to host international prisoners. This has been foreseen by the respective statutes.[220] States declaring their willingness were, in a later stage, approached by the Registrar and negotiated the content of the agreement. Hence, there is no legal obligation for a state to engage in this sort of cooperation with the tribunals. Sentence enforcement agreements in case of the ad hoc tribunals are based on a model agreement established by the United Nations and the ICTY.[221] If then a person is convicted, the registrar will approach the state a second time with concrete information on the prisoner and the prisoner's sentence and the state is required to promptly declare whether they will host this particular person.[222] In that sense, the prisoners are then accepted on an individual basis, giving the state a chance to decline a certain prisoner. This practice

[215] UN Doc. A/60/177 (First Report of the International Criminal Court), 01.08.2005
[216] ASP 5th Session, ICC-ASP/5/Res.3 ; ICC-ASP/6/Res.2 ; ICC-ASP/7/Res.3 ; ICC-ASP/8/Res.2 ; RC/Res.3 ; ICC-ASP/9/Res.3 ; ICC-ASP/10/Res.2 ; ICC-ASP/11/Res.5 ; ICC-ASP/12/Res.3
[217] http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx (accessed on 12.08.14)
[218] ICC-PRES/01-01-05
[219] ICC-ASP/12/35, § 36
[220] UN Doc. S/25704, Art. 27 ; UN Doc. S/RES/955, Art. 26 ; UN Doc. S/RES/1315, Art. 22
[221] Tolbert, David, *op.cit.*, 2004, p. 482
[222] Tolbert David, *op.cit.,* 1998, p. 664

is also referred to as double consent.[223] Currently, sixteen countries have signed an agreement with the Tribunal and six countries have signed agreements with ICTR.[224] Sentence enforcement at the ICC, analogously to the ad hoc tribunals, also relies on double consent.[225] The sentence enforcement agreements with the ICC are part of the framework agreements, together with witness relocation and protection agreements, interim release agreements and, most recently, possible agreements on release of persons, thus allowing the court to function properly and independently.[226] The sentence enforcement agreements, as well as the other framework agreements, are based on a model agreement,[227] similar to the one developed within the ad hoc tribunals. In practice, once a state declares its willingness to enter into a sentence enforcement agreement, the model enforcement agreement will be sent out, opening the negotiation process between the respective state and the Presidency's Enforcement Unit.[228] Within that process, the country in question has the possibility to amend this model agreement or attach certain conditions, if the court agrees to them.[229] This back and forth between the Presidency's Enforcement Unit and the state is lengthy due to various reasons: The work on an agreement may be slowed down by the fact that, in certain cases, the Ministry of Foreign Affairs as well as the Ministry of Justice are involved in this process. Furthermore, every state attaches different levels of priority to concluding such agreements.[230] Hence, Mr. Abtahi, Head of the Legal and Enforcement Unit of the ICC, in an interview stated that the process of negotiating enforcement agreements with states would remain complex.[231] At the moment, eight countries

[223] Hola, Barbora, Van Wijk, Joris, *op.cit.*, p. 115
[224] see Annex
[225] UN Doc. A/CONF.183/9, Art. 103 ; Abels, Denis, Prisoners of the International Community, The Legal Position of Persons Detained at International Criminal Tribunals, Asser Press, The Hague, 2012, p. 462
[226] ICC-ASP/12/35, § 27-29
[227] ICC-ASP/12/35, § 27-29
[228] Abtahi, Hirad, Koh, Steven Arrigg, *op.cit* ., p. 7
[229] UN Doc. A/CONF.183/9, Art. 103 (1)(b)
[230] A.H.
[231] A.H.

have signed sentence enforcement agreements with the ICC, one of which has not entered into force yet.[232]

4.3. Challenges arising when signing sentence enforcement agreements

4.3.1. Legal hurdles

In case of the ad hoc tribunals, the model agreement proved to be very valuable for speedy negotiations and with some states very few amendments were made. [233] As for others the political will to enter into the agreement was there, yet, some legal issues arose. [234] In accordance with article 9 of the ICTY statutes, national courts and authorities are to give primacy to the decisions by the international tribunal.[235] When it comes to the enforcement of sentences this means that the tribunals keep a 'supervisory function'. Nevertheless, it has to be noted at this point that, in sharp contrast to the Rome Statute's article 110 as has been shown before,[236] the Rules of Procedure and Evidence (RPE) of the ICTY state that "If, according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility." [237] Still, the model agreement states that whereas domestic provisions will offer guidance for the day-to-day aspects of the sentence enforcement, in everything that touches directly upon the substance of the sentence such as pardon, commutation of the sentence and early release as well as the prison conditions, which have to meet certain human rights standards, the tribunals will remain in charge.[238] This can also be seen in the RPE of the ICTY, Rule 124: "The President shall, upon such notice, determine, in consultation with the members of

[232] see annex : ICC
[233] Tolbert, David, *op.cit.*, 2004, p. 483
[234] *Ibid.*, p. 482
[235] Tolbert, David, *op.cit.*, 1998, p. 659
[236] see chapter 4.2.1.
[237] IT/32/Rev. 43, Rule 123
[238] Tolbert, David, *op.cit.*, 2004, p. 483 ; see all the Sentence Enforcement by the ICTY(available on *http://www.icty.org/sid/137)* and ICTR (available on *http://www.unictr.org/tabid/99/default.aspx*

the Bureau and any permanent judges of the sentencing Chamber who remain Judges of the Tribunal, whether pardon or commutation is appropriate." [239] Therefore, some states had to introduce or amend their legislation by introducing particular acts or even amending their constitutions.[240] Legal issues that arose quite frequently concerning the fact that the power of granting parole lay with the head of state by the respective constitution.[241] This was solved by creating provisions that said that if a person became eligible for pardon, commutation of the sentence or early release under domestic law and the tribunal did not accept this, the person would be transferred back to the tribunal or to another country to serve the remainder of the sentence.[242]

Although the ICC keeps closer control over the enforcement of sentences, the legal issues that came up around the sentence enforcement agreements with the ICC [243] largely coincide with the issues that arose for the ICTY and the ICTR, especially those concerning pardon, commutation of the sentence and early release.[244] Yet, it seems that for some countries the domestic legal hurdles to enter into a sentence enforcement agreement seem to be more important than in others. For example, the fact the United Kingdom doesn't have a constitution allowed for flexibility on the matter and the *International Criminal Court Act 2001* sufficed to be able to enforce sentences.[245] In contrast, the Finnish President has, according to its constitution the right to pardon the convicted person. Hence, there was a conflict between the Finnish constitution and the Rome Statute. For this conflict to resolve, a special

[239] IT/32/Rev. 43, Rule 124
[240] Tolbert, David, *op.cit.*, 2004, p. 483
[241] *Id.*
[242] *Id.*
[243] UN Doc. A/CONF.183/9, Art. 110
[244] Kress, Claus, [et. al.] (ed.), The Rome Statute and Domestic Legal Orders, Volume II, Constitutional Issues, Cooperation and Enforcement, Nomos Verlagsgesellschaft Baden-Baden, Germany, 2005, p. 536-538, and p. 28-29 (Australia), p. 48-50 (Austria), p. 68-69 (Canada), p. 88-89 (Finland), p. 103-105 (France), p. 128-129 (Georgia), p. 150-151 (Germany), p. 183 (Ireland), p. 222-226 (The Netherlands), p. 273-275 (New Zealand), p. 289 (Norway), p. 326 (Slovenia), p. 341-342 (South Africa), p. 377-379 (Spain), p. 418-421 (Sweden), p. 455-456 (Switzerland), p. 467-468 (United Kingdom)
[245] International Criminal Court Act 2001, Part 4 (available on *http://www.legislation.gov.uk/ukpga/2001/17/contents)*

procedure for constitutional amendments had to be passed by the parliament.[246] Nevertheless, once the political will is there, the legal issues could disappear fairly quickly. Mr Abtahi from the ICC pointed out that this was also related to the fact that not all countries attached the same importance and priority to the enforcement of sentences handed down by international criminal courts and tribunals.[247] From the countries that have a sentence enforcement agreement with the ICC only one agreement is not entered into force, the main reason being the domestic constitutional procedure.[248] All the other respondents indicated that the domestic procedures had not been that complicated and/or there had been no conflicts with their constitution.[249] The implementation was sometimes facilitated due to the experience with the ad hoc tribunals.[250] The respondent from the Slovakian embassy stated that Slovakia had a sentence enforcement agreement with the ICTY, yet, since the domestic legislation allowing hosting an international prisoners had not been in place, no one could be accepted so far. Nevertheless, Slovakia was willing to treat the question of having a sentence enforcement within the next two or three years.[251] Lack of domestic legislation on the issue had also been the reason why the Czech Republic had only made a declaration of willingness to host their own nationals and residents. Yet, on 1st January 2014 "a new 'Act on International Judicial Cooperation in Criminal Matters' has entered into force (No. 104/2013 Coll), allowing […] prison sentences of international criminal tribunals [to be served] on Czech territory, but only after a bilateral treaty is signed."[252] Simply put this means that the domestic legislation is now in place to be able to enforce sentences, yet, this will only occur after a sentence enforcement agreement will have been signed. The Czech Legal Adviser of the embassy in The Hague added that the Czech Republic had approached the ICTY as to negotiate a sentence enforcement agreement and that, maybe, after collecting sufficient experience from the negotiations with the ICTY,

[246] Kress, Claus, [et. al.] (ed.), *op.cit.*, p. 89
[247] A.H.
[248] R3
[249] R1, R2, R4, R5, R6, RC
[250] R1, R2, R4, RC
[251] RD
[252] RA

would consider a sentence enforcement agreement with the ICC.[253] However, for the time being, the Czech Republic doesn't have a sentence enforcement agreement with either institution.

4.3.2. Costs

Another important issue that is not equal for all the states is the bearing of costs. The tribunals will bear the costs of transfer but once the prisoner is incarcerated, the state willing to hold them for the duration of their sentence has to bear the costs arising from that stay as well as the repatriation or the return of the body in case of death. However, in the case of some African countries the tribunals agreed to help looking for donor agencies that could support the authorities in bearing the costs. This is the case for Mali, Benin, Swaziland and also Rwanda.[254]

Concerning the costs arising from the sentence enforcement with the ICC, all the states have taken the same burden in paying for the expenses that arise for the enforcement of ICC sentences. In that sense, apart from costs concerning the persons transfer from (and possibly back) to the ICC and after completion of the sentence or their demise, and costs that might arise in the eventual case of an escape which are borne by the ICC, ordinary costs arising from the prison stay will be borne by the host state.[255] Similarly to the agreement with the ICTR, Mali's agreement with the ICC states that the host country is bearing the costs for the imprisonment of the convicted person but that the court as to approach donor states and organisations which might help Mali in fulfilling this task, especially when it comes to upholding international standards on prison conditions.[256] Obviously, since the agreement has been signed in 2012, Mali faced internal problems, which understandably made this issue lose its urgency for the time being.

Respondents often claimed that bearing the costs was the highest burden when it comes to the enforcement of sentences.[257] There were different reasons mentioned,

[253] RA

[254] See the sentence enforcement agreements between Benin, Mali and Swaziland and the ICTR, available on *http://www.unictr.org/tabid/99/default.aspx*

[255] see all ICC sentence enforcement agreements

[256] ICC-PRES/11-01-12

[257] R1, R4, R6, RA, RB, RC

why it was more costly to host an international prisoner than a domestic one. First, usually, the sentences of persons convicted by the international courts and tribunals are quite long.[258] Linked to this is that, already many countries have issue with prison facility capacities.[259] In order for the costs not to become too high the countries therefore try to assure that the person hosted 'fits their prison population'.[260] In essence, this means that their safety is assured without keeping them in solitary confinement, something that would not only drive up costs, but would also violate international standards on the condition of imprisonment such as UN Standard Minimum Rules for the Treatment of Prisoners,[261] the UN Basic Principles for the Treatment of Prisoners[262] or the recommendations made by the Special Rapporteur on Torture and other cruel, inhumane or degrading treatment in his report to the General Assembly in 2011.[263] Second, in general, the administration of the sentence is complicated since the person might need a translator and might require a particular diet. The Austrian respondent in this respect mentioned that since Austria did not have many problems with hosting prisoners from Bosnia since it was geographically close to the conflict. First, there were already persons from that region incarcerated in Austria, many prison warden spoke their language and therefore no particular preparations had to be made.[264] Furthermore, this also allowed the prisoners to have regular family visits,[265] something that had been rather difficult to accomplish in other countries.[266] Therefore, for reasons related to costs, such as the lack of prison facilities and more complicated administration due challenges associated to the language and the culture of the prisoner, some

[258] R1, R4, RC
[259] R1, R3, R4, R6, RB, RC
[260] R1, R4, R6, RC,
[261] http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx, (accessed on 15.07.14);
[262] UN Doc. A/RES/45/111 (*available on* http://www.un.org/documents/ga/res/45/a45r111.htm, accessed on 15.07.14) ;
[263] UN Doc. A/66/268
[264] R1
[265] R1
[266] R4, R6, RC

countries refuse to enter into a sentence enforcement agreement,[267] or might consider refusing to host a particular prisoner.[268]

4.3.3. Release

The question of what happens to persons after their release, or for that matter in case they get acquitted has not really been treated by the ICTY or ICTR. Only the sentence enforcement agreements between Austria and the ICTY as well as the agreement between the United Kingdom and the ICTY hold a clause saying that if a person illegally remains on the respective territory after their release they might get deported.[269] In an on-going research project by Barbora Hola and Joris van Wijk,[270] the two researchers uncovered that in case of the ICTY most people were able to return home, some even got welcomed as war-time heroes. Some others who provided information on other convicts entered into witness protection programmes, yet others, in particular the ICTR convicts, applied for asylum, as they didn't feel safe to return. The latter are the most problematic cases since no country has agreed to accept them. Yet, due to the UN 'Convention Relating to the Status of Refugee' from 1951, in particular the principle of non-refoulement,[271] which is considered being part of customary international law,[272] these people cannot be deported. Therefore, some of the ICTR released as well as some acquitted persons are for the time being stuck in a safe house in Tanzania.[273]

In view of the experience of the ICTR in particular, it doesn't come as a surprise that, so far, all countries that have a sentence enforcement agreement with the ICC contain a clause on the deportation of the person if they remain in the respective

[267] RB
[268] R1, R4, R6
[269] see the sentence enforcement agreements between Austria and the ICTY and the UK and the ICTY
[270] for more information see http://cicj.org/?page_id=121 (accessed on 31.07.14)
[271] Convention Relating to the Status of Refugees, Art. 31, available on http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf (accessed on 15.07.14)
[272] UN Doc. HCR/MMSP/2001/09 (Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees), §4, the declaration had been welcomed in a UN General Assembly resolution, UN Doc. A/RES/57/187, and said §4 adopted on 18.12.2001.
[273] Hola, Barbora, van Wijk, Joris, *op.cit.,* p. 129-130

country after their release.[274] However, as deportation is not always an option due to the non-refoulement principle, the ICC, as well as the ICTR, is looking for countries to accept such people. Yet, as to avoid the situation of a person stuck on their territory, some respondent speculated that in the future this could be a reason for their country to decline a particular prisoner.[275] Similarly, Switzerland, only allowing national and residents to serve their sentences in Switzerland, argued that enforcing a sentence would only make sense if this person had the chance to be reintegrated in Switzerland, in that sense acknowledging the importance of reintegration but also stating clearly that therefore, no other persons could be accepted.[276]

4.4. Conclusion

This chapter described how sentence enforcement agreements, regulating the relations between the international criminal court and tribunals and the respective states came to be. Furthermore, it illustrates how challenging it was and still is to find states declaring their willingness to carry this burden and finally issues that states meet before, during and even after enforcing a sentence. Moreover, this chapter allows to see that sentence enforcement agreements are related to other burden sharing examples for the following reasons: First, the provision of the good, serve justice and support the international criminal justice system can be seen as a public good. Therefore, the risk of free riding seems to be an issue not only when it comes to environmental protection, collective security or the resettlement of refugees but also in the case of enforcing sentences. Second, the enforcement of sentences, similarly to environmental protection and refugee resettlement, related to international humanitarian norms and human rights. It seems therefore adequate to analyse state's motives for entering into a sentence enforcement agreement with the ICC according to the framework established in chapter three, as, despite all the challenges and issues, there are states which have concluded such agreements.

[274] see all the sentence enforcement agreements, Rule of Speciality
[275] R1, R4, R6, RC
[276] 00.090, Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem International Strafgerichtshof und eine Revision des Strafrechts, 15.11.2000, chapter 2.9 Vollstreckung, p. 443

5. Motives for Singing Sentence Enforcement Agreements

As has been mentioned in the previous chapter, the ad hoc tribunals as well as the ICC had and still have to put considerable effort in finding states willing to enforce sentences handed down by them. Nevertheless, today, seventeen countries have a sentence enforcement agreement with the ICTY, six with the ICTR and eight with the ICC. In order to determine the motives for those states in sharing the burden by signing such an agreement, interviews have been conducted with member states of the ICC which have a sentence enforcement agreement with the latter. This limitation to the ICC only had to be made for time reasons.

As to establish their motives, the analytical framework established by the work on burden sharing in the case of refugee protection by Eiko Thielemann and Alexander Betts will be applied in this chapter.

5.1. Cost-benefit approach

The cost-benefit approach essentially boils down to the assumption that "the statesman [who] will always make his decision on the basis of the state's interest" [277] that it is less costly and more effective to cooperate with other states on a particular issue than acting alone. Hence, it is considered that a states' interests are external to the institution in which it is acting.[278] Therefore, Thielemann identifies two separate motives for cooperation in the cost-benefit approach: First, "the cooperation produces positive sum benefits" and second, states might follow an insurance rational, meaning that it is less costly in case of a future crisis to have already supported the institution even if in the short run this serves to lessen the pressure on only a few.[279]

Betts, basing his entire argumentation on the cost-benefit analysis and on the assumption that not all public goods have the same degree of 'publicness' adds

[277] Russel, G., *op.cit.*, p. 51
[278] Thielemann, Eiko R., *op.cit.,* 2003, p. 254
[279] *Ibid., p. 255-256*

three more nuanced motives to this: excludable prestige benefits, excludable altruistic benefits and finally, state-specific security benefits.[280]

5.1.1. Cooperation produces positive-sum benefits

When looking at the enforcement of sentences as a public good under the cost-benefit analysis, it can be assumed that there is no immediate benefit apart from serving justice, which will be closer looked at under the norm-based approach. To the contrary, as has been shown by chapter 4.2.2. enforcing sentences is quite costly and not all the member states of the ICC would be capable to carry this burden. Hence, the outcome of a positive-sum benefit seems true in that it is less costly to split the burden than if one state would be confronted with it. Yet, again, this seems to me more of a motive to act under the norm-based approach. This is true for two reasons. First, because it can be imagined that hosting international prisoners could in theory, and has been suggested in practice, be executed by a single state, since, for the time being, the convictions are limited in number. Additionally, the ICC is seen as a complementary to the domestic criminal justice system,[281] hence only admissible if a state is 'unable or unwilling' to investigate or prosecute.[282] Second, enforcing sentences is part of the voluntary contribution. Member states of the ICC already support the Court by paying contributions according to their financial situation[283] and therefore already participate in burden sharing when it comes to the provision of an international criminal justice system. Thus, engaging in enforcing sentences takes burden sharing even a step further. In that sense, the positive-sum motive seems to be only partly applicable and appears to be insufficient as to answer the question of why states would engage in enforcing sentences.

5.1.2. Insurance rationale

Turning to the second motive by Thielemann, the insurance rationale could be applicable to the fact that the Nordic countries seem to be well represented as

[280] Betts, Alexander, *op.cit.,* p. 275-277
[281] UN Doc. A/CONF.183/9, Preambular part
[282] UN Doc. A/CONF.183/9, Art. 17a
[283] http://www.iccnow.org/?mod=budgetbackground (accessed on 27.07.14)

countries of enforcement.[284] Apart from arguing that Nordic countries share a long-standing tradition when it comes to humanitarian norms and therefore share a common conviction, an argument that is also valuable when it comes to refugee protection where Nordic countries,[285] in view of the insurance rationale this engagement can be seen as a mutual assurance in that in the future, it will not only be one of them who has to carry this burden. This means that in case there were many convictions in the future, the more countries that share the burden, the less costly it would become for the individual (Nordic) state.

Although this might consist of an explanation for why these countries signed up, the benefit of distributing future costs still seems quite remote since at this point there is no impending future threat from an explosion in the number of sentences as the ICC is a complementary criminal law institution and the long proceedings allow for some sort of estimation of possible convictions.

All things considered, it is very interesting to consider, as Rooper and Barrira did in the case of refugee protection, signing a sentence enforcement agreement as an 'impure public good', generating some sort of private benefit for the countries engaging in it.[286]

5.1.3. Excludable prestige benefits

In his article Betts first mentions excludable prestige benefits create political leverage in another issue area.[287] He as well as Hasenclever argue that it is possible for states to acquire political leverage through this status, in this case as firm supporter of the international criminal justice system, which in turn might be helpful in inter-state negotiations in other issue-areas, resulting from the linkage to those.[288]

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[284] out of 8 states of enforcement, 2 are Nordic, and Norway will have one soon according to the representative at the embassy in The Hague (RC). Furthermore, in general, all the Nordic countries have sentence enforcement agreements, either with the ICTY, ICC or even SCSL (see Annex)

[285] Betts, Alexander, *op.cit.,* p. 288

[286] Rooper, Steven D., Barria, Lilian A., "Burden Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good", *in Journal of Conflict Resolution*, vol. 54, n°4, 2010

[287] Betts, Alexander, *op.cit,* p. 286

[288] *Id.*; Hasenclever, Andreas, Mayer, Peter, Rittberger, Volker, *op.cit.*, p. 35

Two respondents statements from states which have a sentence enforcement agreement with the ICC allowed for an interpretation that this might have been a motive for their countries engaging in this sort of cooperation with the court.[289] Colombia, for example, has signed a sentence enforcement agreement with the ICC in 2011.[290] However, at the moment of the signing up to the sentence enforcement agreement and even so today, the ICC had opened preliminary examinations in the situation in Colombia.[291] According to a Colombian governmental source, there had been many speculations as to why Colombia would enter into a sentence enforcement agreement at this point, one of which was that Colombia would, in case one of their nationals would actually be convicted in a later stage, this person might serve their sentence in Colombia. Yet they affirmed strongly that they sees this as pure speculations.[292] Nevertheless, it might be argued that showing good faith to the court by signing up to enforce sentences is hoped to show the Colombian determination in fighting impunity, also in their own case, as to avoid the Office of the Prosecutor from actually opening an investigation.

As for the sentence enforcement with Serbia, having such an agreement with the court was another attempt to show Serbia's good faith to the international criminal justice system.[293] During the past decade the relations between Serbia and the ICTY had been improving with Serbia creating the 'National Council for the Cooperation with the ICTY' and extraditing people to the ICTY. Therefore, according to the Legal Adviser to the Serbian embassy in The Hague, there were no reasons not to fully cooperate with the ICC as well.[294] Even though the political party in power in Serbia at the time didn't have it as a motive of the conclusion of the agreement, today, the leading party in power is hoping that all the remaining Serbian prisoners serving

[289] R3, R5, R6

[290] http://www.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202011/Pages/icc%20president%20to%20sign%20enforcement%20of%20sentences%20agreement%20during%20his%20visit%20to%20colombia.aspx (accessed on 14.07.14)

[291] http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/colombia/Pages/colombia.aspx (accessed on 14.07.14)

[292] R3

[293] R5

[294] R5

their sentences in European states might return home to serve the reminder of their sentences in Serbia.[295] Furthermore, it could also be speculated that this is another step in coming closer to Serbia's accession to the European Union.[296]

5.1.4. State-specific security benefits

What in Betts article is called state-specific security benefits arising from 'earmarking' contributions for the UNHCR seems to be less relevant when it comes to enforcing sentences from the ICC since there seems to be no security benefit arising from this. Thus, none of the respondents referred to this particular motive.

5.1.5. Excludable altruistic benefits

The final motive under the cost-benefit analysis provided by Betts, 'excludable altruistic benefits'[297] should be seen as a norm-based explanation[298] for a state specific benefit. In that sense, it might also fit the norm-based approach, yet, the fact that the motive is a 'benefit' and not 'solidarity' as will be shown in the subsequent paragraph suggests, that an analysis under the cost-benefit approach is more appropriate. In that sense Betts argues, similarly to constructivists, that socially constructed norms and objectives influence the political behaviour of a state.[299] In the example of refugee protection, but also applicable to sentence enforcement this means that states which have a strong domestic commitment to welfare and internationalism, and therefore strongly rooted humanitarian norms and human rights, benefit from being the provider of such help.[300] Betts refers to Andreoni's 'impure altruism' model where the latter states that the provider of a public good

[295] R5
[296] http://ec.europa.eu/enlargement/countries/detailed-country-information/serbia/index_en.htm (14.07.14)
[297] Betts, Alexander, *op.cit.,* p. 287
[298] *Id.*
[299] *Id.*
[300] *Ibid.*, p. 287-288

might actually benefit from doing so.[301] In that sense, Andreoni argues that the provider benefits privately by receiving "a warm glow for having done their bit."[302]

In the case of sentence enforcement agreements this argumentation could be applied to countries which have for a long time supported the international criminal justice system. Not only does it come natural to them to have a sentence enforcement agreement but it seems to be part of their identity. This can be seen in some statements made by different respondents.[303] For Belgium the support of the international criminal justice system is and always has been a focal point in their foreign policy. The Belgian respondent, for example, said that "Pour la Belgique c'est une évidence".[304] This idea can be seen also in the other case, since for example the Norwegian Legal Adviser at the embassy in The Hague opened with saying that Norway was going to have a sentence enforcement soon with the ICC[305] and his Danish colleague elaborated that Denmark also chose Kampala as a moment to sign it to for symbolical reasons but that it was always clear that Denmark was going to have such an agreement.[306] Hence, the benefit in this case would lie in the fact that enforcing sentences reinforces the perception that these countries are strongly engaged in the international criminal justices system and have done their part.

5.2. Norm-based approach

Up until now, all the motives mentioned hold some sort of benefit for the actor. The norm-based approach suggests that actors do not necessarily act according to the outcome providing the highest gain but that, in fact, solidarity can provide a way out of a situation of 'Prisoner's dilemma'.[307] Thielemann proposes again two different motives: On the one hand, he talks about solidarity "as a commitment to other members of a group" and on the other hand "as a concern for other members of a

[301] Andreoni, James, "Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence', *in Journal of political Economy*, vol. 97, n°6, 1989, p. 1448-1449
[302] *Ibid.,* p. 1448
[303] R1, R2, R4, RC
[304] R2
[305] RC
[306] R4
[307] Thielemann, Eiko R., *op.cit.,* 2003, p. 257

group".[308] In this approach it is considered that actions are shaped by the norms actors are influenced by within the institution.[309] From a single state's point of view it is further possible to see this as an attempt to an equal distribution of the burden or an attempt to up hold certain norms.[310]

5.2.1. Solidarity as a commitment to a group

In the argument by Thielemann, the motive of solidarity with the norms and values therefore is linked to the perception of a state of the importance of such norms and its willingness of upholding this set of norms.[311] In all the interviews as well as one written statement, sharing a common set of norms and values was mentioned as a motive.[312] Various respondents[313] mentioned that countries sign agreements on the enforcement of sentences in order to support the international criminal justice system. Contrary to the idea of Andreoni that providing support as to benefit from a 'warm glow',[314] one could also argue that countries support the International Criminal Court because they share the conviction that impunity for the most heinous crimes must end. The British respondent, for example, pointed out serving justice was a very strong motivation, and sees enforcing sentences also as doing right by the victims[315] and the Belgian respondent underscored the fact that the strengthening of the international criminal justice system has always been a primary objective of the Belgian foreign policy to the degree that Belgium is the country that has signed the highest number of these so-called framework agreements.[316] Hence, instead of assuming some sort of benefit, the norm-based approach merely considers this effort as solidarity with the norms and values within an institution. In that sense, the same statement is subject to two different interpretations and it would be speculation to choose one over the other.

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[308] *Id.*
[309] *Ibid.*, p. 255
[310] *Ibid.*, p. 258
[311] *Id.*
[312] R1-R6, RA, RC, RF
[313] R1-6. RC
[314] Andreoni, James, *op.cit.*, p. 1448
[315] R6
[316] R2

5.2.2. Solidarity to members of a group

The second motive guided by solidarity is the solidarity with members of the group and the refusal to benefit if they don't. The pattern, according to Thielemann, that can be seen in this behaviour relates to the equal distribution of the burden based on the actual capacity of the members.[317] In the interviews, many respondents pointed out that it was important to equally share the burden that arises not only from sentence enforcement agreements but also witness relocation, interim release agreements or agreements on released persons.[318] Furthermore, it was important, even though the Rome Statute provides a solution in case there was no country willing to accept a certain person,[319] to support and relieve the burden on the Netherlands since they had already made enormous efforts being the host state of many international criminal courts and tribunals.[320]

5.3. Further motives?

The above paragraphs analysed the interviews and statements according to cost-benefit and the norm-based approach. Yet, respondents also brought up further motives, which could not be linked to the previously discussed theories. There is one important factor that has come up in nearly all the interviews and statements: experience.[321] Interestingly, six out of the eight countries that have a sentence enforcement agreement with the ICC previously already had a sentence enforcement agreement with the ICTY or ICTR. Having eliminated all the legal hurdles at an earlier stage and knowing the implications of such an agreement apparently greatly facilitated the conclusion thereof. Furthermore, the Serbian Legal Adviser added that, having been a subject of international interest in the matter of international criminal justice, Serbia has in that way gained a lot of experience within this system, experience that they are eager to share. In addition, through Serbia's

[317] Thielemann, Eiko R., *op.cit.,* 2003, p. 258
[318] R1, R2, R3, R4, R5, R6, RC
[319] UN Doc. A/CONF.183/9, Art. 103(4)
[320] R1, R3, R4, R6,
[321] R1, R2, R4, R5, R6, RC, RD, RE

fight against organized crime, the facilities are in place to host international prisoners.[322]

Furthermore, in his interview the Norwegian respondent jokingly mentioned that since Denmark, Finland and Norway soon all were to have sentence enforcement agreements with the ICC it most likely would not be long before Sweden would also have one,[323] in this way also showing this unity that the Nordic states demonstrate on this particular issue. Although speculative and jokingly, the remark by the Norwegian representative, about Sweden also signing a sentence enforcement is interesting since the expert on neo-liberal institutionalism, Arthur Stein, argued that when there is a club, in this case the other Nordic countries having signed up, there is a certain coercion to join, even though joining this group is voluntary.[324] Similarly, the insurance rationale predicts that only countries with a similar perception of risk will share in,[325] in this case, the Nordic states concerned to share the costs resulting from the enforcement of sentences.

5.4. Conclusion

In this chapter, enforcing sentences has been analysed through the combined approaches by Eiko Thielemann, suggesting a cost-benefit approach and a norm-based approach and Alexander Betts who added that not all public good have the same degree of 'publicness' and therefore allowed to identify further motives under the cost-benefit approach.

Form the analysis above it can be seen that the motives for states to sign a sentence enforcement agreement are cost-benefit related as well as founded on the idea of solidarity. However, in the burden sharing example of sentence enforcement agreements the positive-sum benefits and the insurance rationale seem less relevant. This is because first, there are no direct benefits from enforcing sentences and second, there is only one final judgement at this point and no explosion in the number of convictions in sight. Yet, as has been seen, sentence enforcement

[322] R5
[323] RC
[324] Reus-Smit, Chirstian, Snidal, Duncan (ed.), *op.cit.,* p. 211
[325] Thielemann, Eiko R., *op.cit.,* 2003, p. 256

agreements can serve as political leverage for issue areas that are related to international criminal justice or reward the provider of support with a 'warm glow'. Nevertheless, solidarity with the cause, that is serving justice by supporting the International Criminal Court, as well as with the members of the group, especially the Netherlands seem to be very important motives for signing a sentence enforcement agreement. Yet, two motives, which additionally came up in the interviews, are experience and what one could call 'peer pressure'. Many respondents stated that previous experience in enforcing sentences or close knowledge of the international criminal justice system by having been a subject of it was an additional motivation. Also, even though jokingly, the remark by the Norwegian respondent on the possibility the all Nordic countries will have sentence enforcement agreements because that's what they are known for and because they want to follow the example of their neighbours is interesting to note.

6. Conclusion

This paper aimed to uncover motives for states to enter into sentence enforcement agreements with international criminal courts and tribunals. Yet, before answering this question, it was important to determine how cooperation has been explained by various International Relations theories such as realism, neo-liberal institutionalism, constructivism or the English School. Although these theories have similar views concerning national interests', namely that they are guided by the strive for power and security, be that militarily or economically, they do not agree to what extent ethics and moral guidelines play a role in international politics. Furthermore, they have different ways of rationalising the world order and the possibility of states forming institutions to facilitate cooperation in situations of a 'Prisoner's Dilemma'. Moreover, there is a discussion as to what extent perceptions and identities play a role in making political decisions.

From these findings it was then possible to explain, why states would adhere to burden sharing, a particular form of cooperation. Particular, because it concerns only certain areas of international relations, that is, when the international community is

to create or uphold a public good such as a clean environment, collective security or refugee protection and stability arising from it. The analytical framework developed by Thielemann and Betts permitted to identify specific motives for states to participate in burden sharing. A combination of the two analytical frameworks previously applied to the burden sharing example of refugee protection permitted the following analysis of motives when it comes to question of why states would sign up to sentence enforcement agreements: On the one hand there is the cost-benefit approach, suggesting that a states' motivation in acting to provide a public good is related to the benefit a state might gain instead of acting on its own. On the other hand, the norm-based approach suggests that states also act out of solidarity, either with the norms and values shared in a particular group, or with members within the group. It is important to note that the motives are coloured by different views of International Relations theories, acknowledging a state's strive for power and gain in some form but also recognizing the importance of norms and values. Furthermore, socially constructed perceptions, and from these, motives play a considerable role.

Hence, before exploring motives for states to enter into sentence enforcement agreements according to the analytical framework, first, it was established how sentence enforcement agreements relate to previous examples of burden sharing and how the international community came to establish this particular system of enforcing sentences as well as how it was developed and improved over the years. Furthermore, challenges such as legal hurdles, high costs and challenges related to the release of international prisoners were described, uncovering counter arguments for states for entering into sentence enforcement agreements.

Nevertheless, up to this day, seventeen countries have a sentence enforcement agreement with the ICTY, seven with the ICTR and eight with the ICC. To answer the research question on why these states would enter into such agreements, interviews have been conducted with legal advisers at the embassies in The Hague as well as members from the respective Foreign Affairs Ministries of countries that are members of the International Criminal Court. The analysis of the interviews according to the analytical framework resulted in the following findings: In relation to sentence enforcement agreements, this paper has shown that even though there are no direct benefits from enforcing sentences a state can still benefit by gaining

political leverage in other issue areas or the improvement of its image. However, states do not only act according to cost-benefit calculations but, in fact, norms play a substantial role. Whether it is always truly altruistic or whether it might count as an example of 'impure altruism', e.g. an improvement of their image, is difficult to say. Be that as it may, as has been shown in the example of refugee protection by Thielemann and Betts, there is a awareness of sharing a set of values and norms first, related to human rights in the wider sense and the protection thereof and the idea that it should not be only one member of the group, in this case the Netherlands, carrying the burden arising from the international criminal justice system. In sum, both approaches, the cost-benefit approach as well as the norm-based approach provide motives applying to the burden sharing example of enforcing sentences. Yet, it is difficult to say which set of motives prevails as it is very difficult to determine the political leverage and linkage between issues for every state concerned, meaning that extensive knowledge on a state's political agenda would be required to make the necessary connections between the issue areas.

In that sense, even though norms and solidarity seem to present an important motive for a state to enter into a sentence enforcement agreement, especially because the voluntary act of enforcing sentences seems to be taking burden sharing a step further, from the view point of many International Relations theories and the particular theories concerning burden sharing, it would be naïve to think that states act purely out of solidarity. Russel and Morgenthau, on that matter stated that: "Unlike the solitary individual who may claim the right to judge political action by universal ethical guidelines, the statesman will always make his decision on the basis of the state's interest." [326] It is therefore interesting to note that experience seems to be an important factor when signing a sentence enforcement agreement. This motive, not mentioned by previous theories, leads to the assumption that countries which had already eliminated the legal hurdles, have the prison facilities in place and were familiar with the consequences of enforcing sentences, might have considered that this engagement linked to less effort and maybe another form of cooperation with the court. Hence, the motive related to experience could also be seen

[326] Russel, G., *op.cit*, p. 51

categorized under the cost-benefit approach as a form of 'impure altruism'. In addition, as has been shown in case of the Scandinavian countries, peer pressure and the importance of up holding their image might also play a role when signing a sentence enforcement agreement, a motive which doesn't seem to fit either of the approaches unless up holding their image would equally be interpreted as 'impure altruism', therefore resulting in some sort of benefit.

To sum up, even though some motives were mentioned by different respondents, it seems too early to detect a clear pattern. Obviously, the wish to assist a system, which intends to end impunity, is crucial, one should not forget that the ICC is also a political institution and enforcing sentences should also be considered under this angle.

7. Discussion

What does the above mean? There are a few factors that have to be taken into account when analysing motives of why states would enter into sentence enforcement agreements. First, not all countries allocate the same priority to having a sentence enforcement agreement and therefore the implementation of procedural international criminal law into the domestic system might not be the first concern. Second, not all countries are able to provide the internationally required prison standards. Further, if experience with the ad hoc tribunals as well as the fact that states require that a prisoner fits their prison population and considerations as to what happens to the person when the sentence is served play an important role it might be assumed that the task of finding states of enforcement will remain difficult. Even more so since also states which have a sentence enforcement agreement might refuse prisoners for the aforementioned reasons and in view of the fact that all of the persons currently before the ICC stem from one continent only. In that sense it will be interesting to see how much time elapses before a state of enforcement can be found for Mr Katanga, the first person to have a final judgement by the ICC.[327]

[327] http://www.coalitionfortheicc.org/documents/Sentencing_Katanga_23May.pdf (accessed on 10.07.14)

Another important factor which is related to enforcing sentences is the question of what happens to persons after they are released. As has been shown, above, assurance of the fact that a person will not remain of a host countries territory after their sentence is served can be considered important. Hence, the number of sentence enforcement agreements might increase when a solution to this challenge is found.

As to the theories in question, it seems helpful to consider the 'publicness' of good as varying to a certain degree. Yet, this can only apply, if motives from the cost-benefit approach are concerned. However, as to the motive of solidarity as well as the norms concerned in a particular case, it could be interesting to keep an open mind on cultural bias, meaning that so far, the theories actually applied to burden sharing presented a Eurocentric view. Furthermore, as this research paper has shown, the motives presented by earlier studies on burden sharing are not sufficient to explain why states would engage in enforcing sentences. Hence, it seems to consider aspects that are directly related to the topic at hand, in this case, the importance of experience and the possibility of peer pressure. Finally, motives such as 'excludable altruistic benefits' seem to be rather difficult to place in one of the two approaches and it seems that determining whether a state benefits in a certain case or whether it acts purely out of solidarity heavily depends on the interpretation of the reader. In that sense, it could be helpful to consider the two approaches, cost-benefit and norm-based, as overlapping in some cases rather than exclusive.

As to possible questions for further research, one could attempt to answer the question on cultural bias in burden sharing meaning that not everybody might consider hosting foreign prisoners as sharing a burden but more as in intrusion in domestic affairs. In the case of the ICC this could be particularly interesting, as so far, only persons from the African continent are facing a trial. Furthermore, to have a more comprehensive overview on motives for enforcing sentences, one could extend a similar research the ad hoc tribunals and the Special Court for Sierra Leone. In addition, the motives for signing a sentence enforcement agreement with an ad hoc tribunal could be compared to signing a sentence enforcement agreement with the ICC in view of the concern of countries only wishing to host prisoners that fit their own prison population. Moreover, if a similar research was conducted in

twenty years from now, the motives might more clearly be determined as one could split the countries which have a sentence enforcement agreement and actually host prisoners and those which have an agreement but do not host a prisoner for whatever reasons.

Further research is also necessary since much of the data gathered could not be used in this paper, this on request of the respondents. That shows, how sensitive the information around political motivations for entering into sentence enforcement agreements is. For this particular research paper this meant that some of the arguments have lost some of their strength or had to be erased entirely.

In that sense, this research paper presents a first attempt in identifying motives for states to enter into sentence enforcement agreements, yet, this can only be seen as preliminary research into a fairly recent field of study.

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Annex

Ad Hoc Tribunals

ICTY

Court	Country	Date of the agreement	Prisoners	Cost bearing	Monitoring/ Inspections
ICTY	Albania	19.09.08		Court: Transfer Country: Rest	CPT
	Austria	23.07.99	Jokic, D. Zigic Kordic Vasilijevic Dosen Sikirica	Court: Transfer Country: Rest	Authorities to be determined (not in the agreement)
	Belgium	02.05. 07	Zelenovic	Court: Transfer, also related to Art. 9 al.2 and 10 of the agreement Country: Rest	ICRC
	Denmark	04.06. 02	Borovcanin Brdanin Cesic Jokic, M.	Court: Transfer Country: Rest	ICRC
	Estonia	11.02. 08	Milosevic, D. Martic	Court: Transfer Country: Rest	ICRC
	Finland	07.05. 97	Nikolic, M. Delic Landzo Furundzija Aleksovski	Court: Transfer Country: Rest	ICRC
	France	25.02.00	Bala Stakic Radic Banovic	Court: Transfer Country: Rest	ICRC
	Germany (Ad hoc Agreements)	17.10. 00 14.11. 02 16.12. 08 16.06.11	Tadic Kunarac Galic Traculovski	Court: Transfer Country: Rest	ICRC
	Italy	06.02. 97	Martinovic Nikolic, D. Krnojelac Naletilic Jelisic	Court: Transfer Country: Rest	ICRC
	Norway	24.04. 98	Blagojevic Obrenovic Kovac Vukovic	Court: Transfer Country: Rest	ICRC

			Erdemovic Lukic		
	Poland	18.09. 08		Court: Transfer Country: Rest	ICRC
	Portugal	19.12. 07	Mrksic	Court: Transfer Country: Rest	CPT
	Slovakia	07.04. 08		Court: Everything out of Slovakia and costs arising unexpectedly that are not bearable for Slovakia	ICRC
	Spain	28.03.00	Rajic Mrda Josipovic Santic Todorovic	Court: Transfer Country: Rest	Parity Commission consisting of 2 members the ICTY and 2 members of Spain
	Sweden	23.02.99	Bralo Deronjic Plavsic	Court: Transfer Country: Rest	ICRC
	United Kingdom	11.03.04	Krajisnik Simic Babic	Court: Transfer Country: Rest	CPT
	Ukraine	07.08.07		Court: Transfer Country: Rest	CPT

ICTR

ICTR	Benin	26.08.99	Seromba Setako Barayagwiza Rugambarara Rutuganda Simba Bikindi Hategekimana Kajelijeli Kalimanzira Kanyarukiga Karera Nchamihigo Ndindabhizi Ntabakuze Ntakirutimana	Court: Transfer, but the Court is also looking for donor agencies in order to finance projects to upgrade the prison conditions for persons concerned by this agreement Country: Rest	ICRC
	France	14.03.03		Court: Transfer Country: Rest	ICRC
	Italy	17.03.04	Ruggiu	Court: Transfer Country: Rest	ICRC
	Mali	12.02.99	Ngeze Niyitegeka Ntawukulilyayo Renzaho Rukundo Ruzindana Semanza Serushago Akayesu Bagosora Bisengimana Gacumbitsi Imanishimwe Kambanda Kamuhanda Kayshema Muhimana Munyakazi Musema Nahimana	Court: Transfer, including repatriation of the person after the sentence is served or of their body in case of death Furthermore, the Court is also looking for donor agencies in order to finance projects to upgrade the prison conditions for persons concerned by this agreement Country: Rest	ICRC
	Rwanda	04.03.08		Court: - Transfer - Repatriation - Upgrading of ICTR quarters to international standards - Upkeep and maintenance costs (meals, communications,	ICRC

				incidentals, special medical care Country: - Safety and security - Prison wardens' remunieration and basic utilities - In case of death, the repatriation of the body and burial - Travel documents for repatriation	
	Swaziland	30.08.00		Court: Transfer, including repatriation of the person after the sentence is served or of their body in case of death Furthermore, the Court is also looking for donor agencies in order to finance projects to upgrade the prison conditions for persons concerned by this agreement Country: Rest	ICRC
	Sweden	21.04.04	Bagargagaza	Court: Transfer Country: Rest	ICRC

ICC

States having signed a sentence enforcement agreements with the ICC

Court	Country	Entry into force	Prisoners	Cost bearing	Monitoring/Inspections
ICC	Austria	26.11.05		Court: Transfer Country: Rest	Was not designated at the time
	Belgium	01.06.10		Court: Transfer Country: Rest	ICRC
	Colombia	-		Court: Transfer Country: Rest	ICRC
	Denmark	05.07.12		Court: Transfer Country: Rest	ICRC
	Finland	24.04.11		Court: Transfer Country: Rest	ICRC
	Mali	13.01.12		Court: Transfer Country: Rest, but the Court shall find donor countries and institutions	ICRC
	Serbia	28.05.11		Court: Transfer Country: Rest	ICRC
	United Kingdom			Court: Transfer Country: Rest	CPT

Germain Katanga from the DRC is the first and only person to have a final sentence by the ICC. It has not yet been decided, where he will serve his sentence.[328]

States having declared their willingness to host prisoners under certain conditions

Court	Country	Entry into force of the Rome Statute	Prisoners	Conditions?
ICC	Andorra	20.04.11		Nationals only, sentence cannot exceed national maximum
	Czech Republic	21.07.09		Nationals and residents only
	Lichtenstein	02.10.01		Nationals and residents only
	Lithuania	12.05.03		Nationals only
	Luxembourg	08.09.00		Nationals and residents only
	Slovakia	11.04.02		Nationals and residents only, application of the principle of convergence of the sentence
	Spain	24.10.00		Sentence cannot exceed national maximum
	Switzerland	12.10.01		Nationals and residents only

[328] http://www.coalitionfortheicc.org/documents/Sentencing_Katanga_23May.pdf (accessed on 10.07.14)