

**DOES THE EVOLUTION OF INTERNATIONAL CRIMINAL LAW  
END WITH THE ICC? THE “ROAMING ICC”: A MODEL  
INTERNATIONAL CRIMINAL COURT FOR A STATE-CENTRIC WORLD  
OF INTERNATIONAL LAW**

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*“If women, children, and old people would be murdered a hundred miles from here ... wouldn’t you run to help? Then why do you stop this decision of your heart when the distance is 3,000 miles instead of a hundred?” Raphael Lemkin<sup>1</sup>*

I. INTRODUCTION

Getting the world to agree on any issue of global importance is an extremely arduous task.<sup>2</sup> Almost all international agreements require years of negotiations,

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1. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 26-7 (Harper Perennial ed., 2003) (2002). Raphael Lemkin was a fascinating person and an even more fascinating story that should inspire anyone who works in any area of international criminal law to work even harder for the advancement of the field. Lemkin’s story starts as a young Jewish lawyer who used his academic credentials to escape Nazi controlled Poland. He ended up in the U.S.A, where he spearheaded efforts to bring attention to the atrocities being committed by Nazis, which at the time were relatively unknown to the world. This quote comes from a speech he gave in North Carolina while touring the U.S.A. trying to drum up support for U.S. military intervention against Germany—before the U.S. entered the World War Two—in order to stop the Nazi concentration camps. Lemkin invented the crime of and coined the term “genocide”. After World War Two, he worked tirelessly to persuade Nuremberg Tribunal officials to recognize “genocide” in any way, shape, or form. Then, Lemkin set out on a crusade to make genocide an international crime by working without sleep or distraction during the negotiations of the Genocide Convention, becoming an absolute pest to international diplomats, constantly pleading with them to form a formidable genocide treaty. After the signing of the Genocide Convention, Lemkin went almost directly to work, trying to persuade the U.S. Senate to ratify the treaty. Tragically, but most unsurprisingly, Lemkin died of a heart attack in 1959 while waiting in a public relation’s office, waiting to lobby for the ratification of the Genocide Convention almost 11 years after the U.S.A. signed the treaty. *See id.* at 17-78.

2. *See e.g.*, Alison Purdy, *The Kyoto Protocol*, Guardian, Feb. 16, 2005, at <http://www.guardian.co.uk/climatechange/story/0,12374,1415660,00.html>; Fact Sheet, *infra* note 334 (exhibiting an example of the world’s inability to agree on important world issues).

thousands of miles traveled, hundreds of hours drafting, not to mention the money needed to bring about these agreements. Taking into consideration the laborious and costly nature of international relations in tandem with the divergent positions of many States on international criminal law, the 1998 Rome Statute of the International Criminal Court (Rome Statute) that established the International Criminal Court (ICC) must be viewed as a tireless, monumental success.<sup>3</sup> Despite the United States' (U.S.) ongoing unwillingness to partake in the ICC,<sup>4</sup> it cannot be ignored that the time, effort, and money that went into fashioning the Rome Statute resulted in 104 nations becoming ICC State Parties.<sup>5</sup> As a result, the ICC is currently functional, and most importantly, already adjudicating alleged international criminals.<sup>6</sup> However, the ICC has the lofty goal of ending international impunity,<sup>7</sup> and it is only natural to question if the ICC is sufficiently capable of achieving such a gargantuan feat?

For any international criminal system to pledge that all future international criminals will receive punishment, the most basic requirement that such an international criminal system must fulfill is the guarantee that not one criminal will find State sanctuary from prosecution anywhere in the world. Accordingly, only an international criminal enforcement mechanism backed by all nations could make such a guarantee, because an international criminal only needs one safe haven to escape justice. The ICC falls well short of obtaining full international support considering that some of the most powerful countries—U.S., Israel, Russia, China, and India—are not State Parties to the ICC. At present, the lack of full worldwide support significantly reduces the likelihood that ICC can deliver on its mandate, particularly its goal of catching and punishing all international criminals.

From this shortcoming of the ICC, it becomes evident that a true international criminal system demands the inclusion and participation of every sovereign State. An international criminal enforcement mechanism without an all-inclusive global identity cannot solve a dilemma that rises to the level of international crime. Far from being simply a semantic critique, any and all legitimate goals of an international criminal system, be it international peace and security, deterrence of international crime, or the end of international impunity, cannot be realized with only partial cooperation, because an international criminal system short of full universal support lacks the integrity and reliability necessary to fulfill its purpose.<sup>8</sup>

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3. See Rome Statute of the ICC, *infra* note 207. The Rome Statute established the ICC, but the Rome Statute did not enter into force, and thus create a working ICC, until the 60<sup>th</sup> country became a State Party, which occurred on July 1, 2002. International Criminal Court, *Establishment of the Court*, <http://www.icc-cpi.int/about/ataglance/establishment.html>.

4. See Fact Sheet, *infra* note 334 (exemplifying the U.S. opposition to the ICC).

5. *Establishment of the Court*, *supra* note 3.

6. See International Criminal Court, *Situations and Cases*, <http://www.icc-cpi.int/cases.html>.

7. United Nations, *Establishment of an International Criminal Court*, <http://www.un.org/law/icc/general/overview.htm>.

8. A domestic analogy of this critique would be if there were laws against murder in only 38 U.S. states. Such a gap in criminal coverage would illegitimize the U.S. criminal system and would cast doubt on the U.S.' desire and willingness to punish murderers. Of course, the response to this critique would be that unlike domestic law, this is the nature of international law, for any international legal

Therefore, anything less than the membership of every single nation cannot rationally be deemed an adequate *international* criminal enforcement mechanism. Otherwise, the world is left with an international criminal system, like the ICC, riddled with holes from which international crime thrives.

The purpose of this Note is to propose a theoretically different international criminal tribunal, one with the potential to bring about full worldwide participation. This Note’s proposed international criminal system, called the “Roaming International Criminal Court” (Roaming ICC), brings together the three elements necessary to create a *truly international* criminal system: reality of the Westphalian State-centric system of international law,<sup>9</sup> the philosophic and legal beliefs of the opponents of the current ICC, and the philosophic and legal beliefs of the proponents of the current ICC. The result is a plausible international criminal system that will be the best equipped to face the challenges of prescribing, adjudicating, and enforcing international criminal law in all instances.<sup>10</sup>

This Note will methodically trace the evolution of international criminal law, starting in Part II with an analysis and critique of universal jurisdiction. Considered the backbone of international criminal law, universal jurisdiction weaves in and out of all subjects in international criminal law. The purpose of Part II will be to define universal jurisdiction and its many forms, compare and distinguish universal jurisdiction from other areas of this Note, and finally conclude that universal jurisdiction practiced by individual States or international tribunals cannot represent an effective international criminal system.

Part III will focus on the most notable international criminal tribunals of modern era: the International Military Tribunal at Nuremberg (Nuremberg), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the

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mechanism—be it international environmental law, international maritime law, or international trade law—does not enjoy complete universal support. However, international criminal law differs from all other types of international law, because international criminal law deals with the base, the unrighteous, and the evil. There is a reason why the practice of law is often divided between criminal law and everything else. Accordingly, the fight against the commission of international crimes requires the world’s undivided support at a minimum.

9. The terms “Westphalia” and “State-centric” should be considered interchangeable when used in this Note. Moreover, variations on these terms will be used in this Note liberally, such as Westphalian world order, Westphalian State-centric world of international law, State-centric world order, Westphalian order of international law. More or less, all of these terms refer to the same idea. Specifically, Westphalia refers to the treaties that ended the Thirty Years War (1618-1648), commonly known in their collective form as the Peace of Westphalia. See Treaty of Peace of Münster, Fr.-Holy Roman Empire, Oct. 24, 1648, 1 Parry 271; Treaty of Osnabrück, Swed.-Holy Roman Empire, Oct 24, 1648, 1 Parry 119. “[B]oth law and society looked different after the Peace of Westphalia established the modern secular state and the society of such states . . . [a]n international (inter-state) system assumes a conception and a definition of a state; the Peace of Westphalia (1648) confirmed that conception.” DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 2-3 (4th ed. 2001). The social, political, and legal power infrastructure of the world has State-centric since Westphalia; thus, this State dominance of world power has been labeled the Westphalian world order.

10. See O’Keefe, *infra* note 14, at 747 n.50 (citing the multitude of humanitarian conventions, which is evidence that the world community is capable of agreeing on important world issues, a capability that must be used to create the Roaming ICC).

International Criminal Tribunal for Rwanda (ICTR). A quick overview of the precedent set down by Nuremberg will help shed light on the analysis, both factual and legal, of the ICTY and ICTR. International criminal law, by its very nature, adjudicates the worst human behavior imaginable. Therefore, the sections devoted to the ICTY and ICTR thoroughly examines the underlying conflicts and the facts that led to the creation of these two *ad hoc* tribunals as a reminder of the very reasons why the world must have a fully functioning, fully backed international criminal system. Part III will conclude that *ad hoc* tribunals, while necessary for the former Yugoslavia and Rwanda conflicts, are not viable international criminal enforcement mechanisms for the world at large.

Part IV will detail the creation of the ICC, the structure of the ICC, and the benefits of the ICC over its *ad hoc* tribunal predecessors. However, is the evolution of international criminal law supposed to end with the ICC? Part V will answer this question in the negative, primarily because the current ICC is contrary to the reality of a State-centric world of international law. The Westphalian system of State domination over the international legal order, while certainly challenged and altered in recent years, is not in jeopardy of radical change or of future demise. An effective international criminal system must embrace the State-centric reality of international law, in that it must be tailored to work in our State-centric world. In promoting such a philosophical change in the international community's approach to creating an international criminal system, Part V will introduce the Roaming ICC and explain its benefits. As will be demonstrated, the central appeal of the Roaming ICC is that it incorporates every single nation, appeases both sides of the current ICC debate, and brings about an effective international criminal enforcement mechanism to punish those that perpetrate the worst of human behavior.<sup>11</sup>

## II. UNIVERSAL JURISDICTION: ANALYSIS OF THE CONTROVERSIAL JURISDICTION PRINCIPLE

The concept "universal jurisdiction" does not have a consistent definition, which is a revealing sign of its limitations. As cited in a recent International Court of Justice (ICJ) opinion, "[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law"<sup>12</sup> However, for this

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11. Just as important as it is to discuss what this Note is about, it is just as important to discuss what it is not about. The focus of this Note is not jurisprudential, in that the legality or illegality of specific international criminal laws will not be discussed. Rather, this Note will instead focus on philosophical legal ideas, particularly pertaining to jurisdictional issues associated with international criminal law.

12. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.), 2002 I.C.J 3, 165 (Feb. 14) (dissenting opinion of Judge Van den Wyngaert), available at <http://www.icj-cij.org/docket/files/121/8144.pdf> [hereinafter Arrest Warrant]. For point of reference, customary international law should be defined and differentiated from conventional international law. Customary international law, historically and presently, is the centerpiece of international law. CARTER ET. AL, *infra* note 385, at 120-121. Customary international law along with international conventions/treaties and principles of law accepted by the world's legal systems are the sources of international law recognized by the ICJ. Statute of the International Court of Justice art. 38(1), June 26, 1945, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. Considering that there is not an

Note’s purposes, universal jurisdiction is a principle of law that enables and/or requires a State to exercise jurisdiction over specific crimes without a connection between the offense, offender, or victim and the State exercising jurisdiction.<sup>13</sup> In the hierarchy of legal principles in international law used to justify the jurisdiction of a State to act, the universal jurisdiction principle is often used only in the absence of any other legitimate option.<sup>14</sup> Whereas other international legal principles ground jurisdiction in a nexus between the actor, victim, place, or state interest with the exercising state, universal jurisdiction is void of such a nexus.<sup>15</sup> Instead, universal jurisdiction focuses on the nature of the crime, in that the crime is so repulsive and threatening to international security<sup>16</sup> that the mere occurrence

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international legislative body that enacts laws for the world, it is an academic and legal pursuit to identify international law. Convention/treaty law is relatively easy to identify, because it is written down in a legal instrument. Customary international law is a far harder item to identify. The generally accepted elements of customary international law—and the elements used to identify customary international law—are state practice (objective element) and *opinio juris* (subjective element). North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 3, 41-45 (Feb. 20), available at <http://www.icj-cij.org/docket/files/52/5561.pdf>; CASSESE, *infra* note 59, at 156-60; CARTER ET. AL, *infra* note 385, at 124-25; International Law Association, Committee on Formation of Customary (General) International Law, *Final Report on the Committee Statement of Principles Applicable to the Formation of General Customary International Law* 8 (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> [hereinafter CIL Report]. The Restatement on Foreign Relations best summarized how customary international law is formed when it simply stated that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation (*opinio juris*).” Restatement of the Law (Third) Foreign Relations Law of the United States § 102 (2) (1987) (alteration added) [hereinafter RST Foreign Relations]. “State practice” can include diplomatic relations between States, international acts or inactions of States, internal practices of State, decision by State tribunals, decisions by international or regional tribunals, practice of international organs, treaties, juristic writings, etc., but state practice need not be perfectly uniform or include absolute consent of all nations to be bound in order for a customary international law to form. RST Foreign Relations, *supra* note 12, § 102 cmt. b; CASSESE, *infra* note 59, at 162; CARTER ET. AL, *infra* note 385, at 121-22. Depending on the subject matter of a proposed customary international law, state practice must be practiced over a sufficient duration of time, uniformly and consistently applied, and generally practiced worldwide. GURUSWAMY ET AL., *International Environmental Law and World Order* 102-04 (1999). Finally, customary international law can develop out of a convention or treaty, and a convention or treaty could be a codification of an already existing customary international law or crystallization of a potential customary international law. CASSESE, *infra* note 59, at 167-69; CARTER ET. AL, *infra* note 385, at 127-28.

13. Universal jurisdiction has been defined in many ways. *E.g.*, International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 2-3 (2000), <http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf>; Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT’L & POL. 503, 510 (2004) (defining universal jurisdiction).

14. See Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 400 (2001); Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concepts*, 2 J. INT’L CRIM. JUST. 735, 744 (2004).

15. See Bottini, *supra* note 13, at 511-12; Broomhall, *supra* note 14, at 400; O’Keefe, *supra* note 14, at 745-46. (explaining the differences between universal jurisdiction and other jurisdictional principles).

16. Not any crime is subject to universal jurisdiction, but only a limited amount of criminal conduct determined to be of such a degree that the commission of the criminal conduct itself translate into a right of a State to act or use universal jurisdiction, if need be. See BROOMHALL, *infra* note 59, at

of the criminal act justifies legal response by any State or appropriate international organization.<sup>17</sup> Despite being devoid of a traditional nexus, the legitimacy of universal jurisdiction itself is not questioned, as the principle of universal jurisdiction is a customary international law.<sup>18</sup>

“... [T]he term ‘universal jurisdiction’ is shorthand for ‘universal jurisdiction to prescribe’ or ‘universal prescriptive jurisdiction’...”<sup>19</sup> This definition highlights an essential aspect of universal jurisdiction worth noting. When jurists and other international legal commentators commonly used the term “universal jurisdiction”, it is in reference to the universal jurisdiction to prescribe, not to enforce.<sup>20</sup> For example: universal jurisdiction, absent other jurisdictional principles, means that a State *prescribes* genocide committed by a foreign tyrant in another State, against foreign persons, and not in conflict with the prescribing State’s national interests - as a violation of their domestic law, conventional international law, and/or customary international law-, but the State cannot *enforce* their domestic genocide law and/or any type of international law prohibiting genocide unless the tyrant comes within the State’s territory or the State decides to try the tyrant *in absentia*.<sup>21</sup>

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17. Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* 28 (2001), [http://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/unive_jur.pdf) [hereinafter Princeton Principles] (showing that the focus of universal jurisdiction is on the nature of the crime committed). In addition to determining that universal jurisdiction is justified due to the nature of the criminal conduct, international legal scholarship also adds that the need for a forum to adjudicate these heinous international crimes and the consensus among States—gauged by customary or conventional international law— regarding the reprehensibility of such criminal conduct also justifies the use of universal jurisdiction. *Final Report on the Exercise of Universal Jurisdiction in Respect to Gross Human Rights Offenses*, *supra* note 13, at 2-3; Monica Hans, Comment, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 *TRANSNAT'L LAW* 357, 360, 392-93 (2002); Sriram, *infra* note 18, at 305, 375, 377; see Menno T. Kamminga, *Universal Civil Jurisdiction: Is it Legal? Is it Desirable?*, 99 *AM. SOC'Y INT'L L. PROC.* 123 (2005) (explaining that a justification for universal civil jurisdiction is that the “unlawful conduct is a matter of international concern.”).

18. Princeton Principles, *supra* note 17, at 29 (stating that a judicial body of any State may exercise universal jurisdiction in connection with serious crimes under international law such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 *NEW ENG. L. REV.* 337, 346-47 (2001); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 *AM. U. INT'L L. REV.* 301, 314 (2003).

19. O’Keefe, *supra* note 14, at 745.

20. *Id.* at 750 (“The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement in absentia, just as there is enforcement *in personam*. In turn, since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former, at least as a matter of reason.”); see Sriram, *supra* note 18, at 316 (“In essence, under universal jurisdiction, a state is competent to judge an accused alleged to have committed certain international crimes and found in its territory”). Later on in this Note, there will be a discussion on jurisdiction to adjudicate, which will add another layer of jurisdictional analysis to this discussion. See *infra* section IV, 3.

21. Broomhall, *supra* note 14, at 400; O’Keefe, *supra* note 14, at 750. This example is an oversimplification of “prescribe”, because every country “prescribes” differently. Prescribe could

Turning now to application, the practice of universal jurisdiction, as defined by international legal scholars, is bifurcated into permissive and mandatory forms.<sup>22</sup> The distinction between permissive and mandatory universal jurisdiction hinges on whether a State exercises universal jurisdiction from a customary or conventional international law obligation.<sup>23</sup> As the adjectives connote, the difference between the practice of mandatory and permissive universal jurisdiction is the degree of obligation imposed on States. Permissive universal jurisdiction occurs when a State has the option to exercise universal jurisdiction under the guise of a customary international law violation, and the State *may* enact domestic legislation that conforms to customary international law.<sup>24</sup> Permissive universal

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include legislative and/or judicial action by a State, depending on if the State already has domestic legislation against, for example, war crimes that comports with customary or conventional international law prohibiting war crimes. Jurisdiction to adjudicate, while an important issue in this discussion on universal jurisdiction, is not addressed in this Note's section on universal jurisdiction, because jurisdiction to adjudicate "generally follows jurisdiction to prescribe", in that if a State prescribes genocide, it follows that the State can adjudicate genocide violators. SADAT, *infra* note 200, at 112-119 (discussing jurisdiction to adjudicate in the context of universal jurisdiction, international criminal law, and domestic States). See *infra* section IV, 3. Additionally, the example used does not include a situation where a State's authorities enter another State to enforce its own laws that the invading State has prescribed as internationally criminal. A State going to such ends to enforce its laws extraterritorially, however, is very unlikely in world affairs.

22. Broomhall, *supra* note 14, at 401-405; see Bottini, *supra* note 13, at 516-521 (describing the interplay between universal jurisdiction pursuant to customary and pursuant to conventional international law). It should be noted that traditionally, universal jurisdiction is not split up into these two forms, but rather, universal jurisdiction is historically thought only to be permissive. Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY, INT'L L. REV. 1, 72 (2000). However, Prof. Broomhall introduced the bifurcation of universal jurisdiction into permissive and mandatory forms, highlighting the different impacts that customary and conventional law have on the practice of universal jurisdiction. Some even argue that under customary international law, universal jurisdiction is mandatory now, "[f]rom this perspective, universal jurisdiction flows directly from the fact that the core crimes of international criminal law rest on norms of *jus cogens* that give rise to obligations *erga omnes*." Broomhall, *supra* note 14, at 405; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 64 (1996).

23. Broomhall, *supra* note 14, at 401. ("In ordinary usage, 'universal jurisdiction' encompasses both permissive and mandatory forms, where a state may and where a state must exercise jurisdiction. This largely parallels the distinction between the doctrine's manifestations under customary and under conventional international law"). Although his terminology is different and his analysis of universal jurisdiction possesses more nuances, Prof. Summers makes similar discussion about "conventional universal jurisdiction" stemming from conventional international law and "customary universal jurisdiction" coming from customary international law. See Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B. U. INT'L L. J. 63, 73-88 (2003).

24. Broomhall, *supra* note 14, at 400-01, 404-05; Hans, *supra* note 17, at 362. A State acting under permissive universal jurisdiction, or said differently, acting under a customary international law obligation, is not required to enact domestic legislation at all in order to ground jurisdiction for the violation of a customary international law. The State or non-State actor can simply ground jurisdiction over a defendant for violating customary international law without every having any domestic legislation on point, theoretically speaking. See, e.g., Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144 ter du Code judiciaire,

jurisdiction is attractive in some respect, because it justifies a State in grounding universal jurisdiction over a defendant for violations of customary international law, or international law that the entire world is obligated to abide by and uphold,<sup>25</sup> regardless of a complete consensus of States.<sup>26</sup> Yet, without a defined entity consistently acting as the announcer and enforcer of customary international laws, the murky contours of this type of international law discourages States from enforcing such laws.<sup>27</sup> Also, States can simply ignore customary international law obligations with little to no repercussions<sup>28</sup> given that States have the discretion not to use universal jurisdiction to prosecute a customary international law violation.<sup>29</sup>

Alternatively, mandatory universal jurisdiction occurs when a State must exercise universal jurisdiction under its conventional international law obligations—which are obligations beset from conventions or treaties—and such a State *must* enact domestic legislation that conforms to the conventional international law that it has ratified.<sup>30</sup> Commonly, a requirement to practice

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Apr. 23, 2003, M.B., May 7, 2003 *translated in* 42 I.L.M. 749 (2003); *see* Steve R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003). However, due to the desire for jurisdictional clarity, some States prefer or require that domestic legislation effectuating a customary international law is enacted, and jurisdiction over the defendant is grounded in both the domestic law and the customary international law. As will be discussed in the paragraph below devoted to traditional application of universal jurisdiction, Prof. Sriram accentuates this point by focusing on the diversity of laws that domestic courts rely on when exercising universal jurisdiction, and classifying States into two categories accordingly. Prof. Sriram calls one “pure universal jurisdiction” and the other “universal jurisdiction plus”. Some States simply ground jurisdiction for the violation of customary or conventional international law—assuming the conventional international law at issue is self-executing and/or the country does not require domestic legislation in the ratification process of a convention/treaty—and simply do not rely on domestic legislation on point, if it exists at all. Other States will ground jurisdiction over an individual for a violation of customary or conventional international law *and* for a violation of some domestic legislation on point. *See* Sriram, *supra* note 18, at 306-311, 358-361.

25. It must be remembered that customary and conventional international law can play off each other, with one helping creating the other and vice versa. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995), *available at* <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27); *supra* note 12.

26. BROOMHALL, *infra* note 59, at 110; Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 52-59 (1996). This does not consider the persistent objector rule, which theorizes that States that consistently express their opposition to and act in opposition to a potential customary international law are not bound by that custom if it were to become recognized sufficiently as a customary international law by the international community. However, the persuasiveness and authority behind the persistent objector rule is not clear or supported adequately. CARTER ET. AL, *infra* note 385, at 124; CASSESE, *infra* note 59, at 162-63.

27. METTRRAUX, *infra* note 113, at 14-18.

28. *See, e.g.*, In the Dispute Between Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17, and 20, Apr. 12, 1977, 20 I.L.M. 1 (1981) (exemplifying the ability of a sovereign nation to walk away from customary international legal obligations).

29. *See* Broomhall, *supra* note 14, at 401.

30. Broomhall, *supra* note 14, at 401; Hans, *supra* note 17, at 362-63. Again, the requirement to

mandatory universal jurisdiction is included in conventions and treaties through an *aut dedere aut judicare* ("either prosecute or extradite") provision, where a State must prosecute a suspected violator of a conventional international law or extradite the alleged offender to another State Party to the convention/treaty that will prosecute the violation.<sup>31</sup> Furthermore, the same convention or treaty will require the State to enact domestic legislation prohibiting the conduct at issue in the convention or treaty.<sup>32</sup> Notwithstanding the wholly theoretical difference between *aut dedere aut judicare* provisions and pure universal jurisdiction,<sup>33</sup> *aut dedere aut judicare* provisions and the corresponding required domestic legislation exemplifies how conventions and treaties can feasibly bind State parties to abide by and practice universal jurisdiction, just like any contract binds the parties to the terms of the deal. Nevertheless, this oversimplification of the convention and treaty process glosses over the major drawback to mandatory universal jurisdiction, which is the extreme difficulty associated with getting States to obligate themselves, in writing, to practice universal jurisdiction. In addition, a sovereign State agreeing to an *aut dedere aut judicare* provision in a convention or treaty does not unequivocally bind a signatory party to prosecute or extradite, because there is no true central enforcement mechanism to force a sovereign State to fulfill its conventional international law obligations, nor has *aut dedere aut judicare* itself

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enact complying domestic legislation depends on the domestic rules on ratifying that a State Party to a convention or treaty uses. Some states, like Botswana and Slovakia, automatically make every convention or treaty these countries sign enforceable domestic law. See Handbook for FCTC Ratification Campaigns, Infact Report (Infact, Boston, MA), at 24, 37, available at [http://www.stopcorporateabuse.org/files/pdfs/Ratification%20Handbook\\_English2005.pdf](http://www.stopcorporateabuse.org/files/pdfs/Ratification%20Handbook_English2005.pdf). Other states, like Canada, require domestic legislation in order for a convention or treaty that Canada signed to be ratified and thus enforceable domestically. See *Id.* at 39. A majority of States, like the U.S.A., have hybrid ratification procedures unique to those countries. See, e.g., U.S. CONST. art. II, §2, cl. 2. All of this could be moot if the convention or the treaty itself is self-executing, meaning that a country signing a convention or treaty makes the convention or treaty enforceable law within the signing country. See RST Foreign Relations, *supra* note 12, § 111 cmt. h.

31. See e.g., International Convention Against the Taking of Hostages, pmbl, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/english/law/cat.htm> (containing typical examples of these prosecute or extradite provisions that are common in international treaties).

32. Broomhall, *supra* note 14, at 401; Hans, *supra* note 17, at 362-63.

33. Arrest Warrant, *supra* note 12, Joint Separate Opinion of Judge Higgins, Kooijmans and Buergenthal, para. 41; Bottini, *supra* note 13, at 516-17; Broomhall, *supra* note 14, at 401. Broomhall emphasizes that mandatory universal jurisdiction "...is not truly 'universal,' but is a regime of jurisdictional rights and obligations arising among a closed set of states' parties...Under customary law, states are (at least in the prevailing view) merely permitted to exercise universal jurisdiction over, for example, piracy on the high seas or crimes against humanity. The phrase 'universal jurisdiction' more accurately describes matters of custom than it does the jurisdiction that arises only *inter partes* through a convention." *Id.* This is a theoretical difference, because in reality, a defendant could, under either mandatory universal jurisdiction or permissive/pure universal jurisdiction, be charged by a foreign State that has no other jurisdictional nexus with the defendant. So, regardless if the defendant is brought before a domestic court pursuant to a customary or conventional international law obligation of said State, the outcome is the same, and the defendant will argue that the domestic court does not have jurisdiction over him/her.

become unequivocal customary international law.<sup>34</sup>

While the permissive/mandatory paradigm helps establish a strong theoretical understanding of universal jurisdiction in application, this Note is primarily concerned with what the empirical evidence of States practicing universal jurisdiction reveals. First, the evidence shows that the lion's share of universal jurisdiction activity, historically and presently, is by individual States acting as pseudo-international legal bodies.<sup>35</sup> It should not come as any surprise that sovereign States, rather than international organizations or international tribunals, practice universal jurisdiction more often considering the historical primacy of the sovereign "State" in international law<sup>36</sup> and that universal jurisdiction was initially formulated for States to use to combat piracy.<sup>37</sup> Therefore, traditionally, States have a monopoly over the practice of universal jurisdiction. Second, the evidence also supports the conclusion that when a State exercises universal jurisdiction, the State will either justify jurisdiction over a defendant solely for violating the State's

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34. A sovereign nation, being a sovereign, can choose neither to prosecute nor extradite, unless *aut dedere aut judicare* reaches the level of customary international law. However, "prosecute or extradite" provision have not attained the status of customary international law, and this is the reason why ICTY intervention in former Yugoslavia was somewhat legally objectionable, because the actors in the former Yugoslavia conflict did not violate customary international procedural law, i.e. *aut dedere aut judicare*. Michael J. Kelly, *Cheating Justice By Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare Into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 497-503 (2003) (offering both sides of the argument that *aut dedere aut judicare* itself is not customary international law). Even if *aut dedere aut judicare* did gain customary international law status, this Note has highlighted that customary international law obligations can simply be ignored by a sovereign State.

35. Broomhall, *supra* note 14, at 403 (explaining that universal jurisdiction usually means an individual State prosecuting a suspect on behalf of the international community); see e.g., Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide*, REDRESS TRUST REP., <http://www.redress.org/publications/UJEurope.pdf> [hereinafter Redress Memo]; Ariana Pearlroth, *Universal Jurisdiction in the Europe Union: Country Studies*, REDRESS TRUST REP., <http://www.redress.org/conferences/country%20studies.pdf> [hereinafter New Redress Memo]. These two reports exemplify that universal jurisdiction is primarily practiced by sovereign States, because the clear majority of present-day universal jurisdiction cases are undertaken by individual European countries.

36. See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (1982) (stating that "international law is primarily concerned with states"); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-88 (2003) (explaining that all things international law stem from the State, because the State is the primary actor in the international arena); Sammons, *infra* note 49, at 114-15.

37. See CASSESE, *infra* note 59, at 435-36. It should be stressed that the first evolutionary step in international criminal law was sovereign States applying universal jurisdiction. As the Note progresses, the move away from sovereign States being the only participants in international criminal law will be shown by the introduction of the Nuremberg Tribunal, the ICTY, and the ICTR. In order for these tribunals to practice international criminal law, these tribunals used a combination of universal jurisdiction and the delegation of sovereign authority by the U.N. or international community to do so. The most recent evolutionary step in international criminal law is the ICC, where a combination of universal jurisdiction and explicit State consent via treaty law allows the ICC to practice international criminal law.

own domestic laws even if an international law on point exists,<sup>38</sup> or the State exercises "universal jurisdiction plus", whereby the State justifies jurisdiction over a defendant for violations of both its domestic laws and an international law on point.<sup>39</sup> Extremely rare is the situation where a State uses universal jurisdiction to gain jurisdiction over a defendant in order to apply an international law exclusively,<sup>40</sup> and even rarer, where universal jurisdiction is applied by a non-State actor.<sup>41</sup>

Sovereign States, historically and practically, are the predominant universal jurisdiction participants; however, the international legal community argues extensively whether international tribunals, both old and new, exercise or have exercised universal jurisdiction through the delegation of the power to use universal jurisdiction from sovereign States.<sup>42</sup> Even though the purpose of this Note is not to decide this issue definitively, the concept of "universal jurisdiction" should not be conflated with international tribunals as one in the same.<sup>43</sup> International tribunals practice "international jurisdiction", or delegated authority from the international community to adjudicate international crimes.<sup>44</sup> The

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38. S.R. RATNER & J.S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 161 (2nd ed., Oxford University Press, 2001); O'Keefe, *supra* note 14, at 746 (discussing the reality that the practice of universal jurisdiction usually means that a domestic court take jurisdiction over a person without a direct connection to the State (i.e. universal jurisdiction), but does not apply international law, but the State's own domestic law).

39. Sriram, *supra* note 18, at 356, 360 (defining universal jurisdiction plus as "claims about the universal nature of the crime are combined with reliance on ordinary domestic criminal legislation or other principles of extraterritorial jurisdiction... Judges may seek to assert jurisdiction in accord with specific provisions of domestic legislation that provide explicitly for extraterritorial application of criminal legislation, or with domestic legislation incorporating provisions of treaties that provide for such jurisdiction, or with domestic criminal legislation. In some of these cases, judges simultaneously maintain that jurisdiction could be based in addition to, or solely on, universal jurisdiction").

40. See, e.g., Arrest Warrant, *supra* note 12, available at <http://www.icj-cij.org/docket/files/121/8126.pdf> (exhibiting an example of a sovereign state using universal jurisdiction to apply international law within a domestic court).

41. Potential non-State actors would be international tribunals. See next section on *ad hoc* international criminal tribunals for more insight into international entities exercising universal jurisdiction.

42. Bottini, *supra* note 13, at 513-14 (differentiating between universal jurisdiction and international tribunals); Morris, *supra* note 18, at 350-51; Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 26-30, 35-37 (2001) (arguing that States cannot delegate jurisdiction in regards to third parties, and the delegation of universal jurisdiction to international tribunals is not binding or feasible); *but see* Damir Arnaut, *When in Rome...? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 549-53 (2003) (making persuasive arguments that universal jurisdiction can be delegated to international tribunals, specifically through treaty processes).

43. Bottini, *supra* note 13, at 513-14.

44. *Id.*; see *infra* note 113; *infra* note 221. The question becomes, where did the international community get the jurisdiction it just delegated to the international tribunal to adjudicate these international crimes? Presumably, it could come from consent of the delegating State(s), or from the UN's delegated authority to enforce international peace and security on behalf of Member States, or from the customary/permissive or mandatory/conventional universal jurisdiction obligation that individual States of the international community have that requires them to adjudicate such criminal conduct. The latter would in fact be a situation where an international tribunal was exercising delegated

possibility, however, that international tribunals could, or do, practice universal jurisdiction should not be discounted.<sup>45</sup> Nonetheless, international tribunals can, do, and have grounded jurisdiction in a multitude of legal jurisdictional principles other than the universal jurisdiction principle.<sup>46</sup> Hence, it is best, conceptually, to perceive universal jurisdiction as a means to an end, and international tribunals as actors, just like States, that are able to use universal jurisdiction.<sup>47</sup>

For all its potential, universal jurisdiction remains an unrealized and underused idea.<sup>48</sup> Some have suggested that the lack of sufficient investigation and academic inquiry into universal jurisdiction is the reason preventing world-wide acceptance and usage of universal jurisdiction.<sup>49</sup> However, the explanation for universal jurisdiction's underutilization may be grounded in mere pragmatism.

The lack of a "link or nexus with the [exercising] forum" makes universal jurisdiction facially undesirable to States.<sup>50</sup> Although universal jurisdiction grounds itself in the moral responsibility of States to apprehend violators of such abhorrent conduct, it simply does not possess enough legal persuasiveness, in comparison to other jurisdictional principles, to enlist States into using universal jurisdiction regularly. For some, universal jurisdiction poses a direct threat to the Westphalian State-centric construct of international law,<sup>51</sup> and practicing universal

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universal jurisdiction. See SADAT, *infra* note 200, at 116-117.

45. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 240 (1999) (stating that "the ICC can exercise universal jurisdiction when a situation is referred to it by the Security Council"); Arnaut, *supra* note 42, at 551-53. Given the fact that the ICTY and ICTR have jurisdiction over genocide, crimes against humanity, and war crimes (more or less equally) and both *ad hoc* tribunals stated that these international crimes do give rise to universal jurisdiction, an argument can be made that the ICTY and ICTR are actually undertaking universal jurisdiction. Prosecutor v. Tadić, *supra* note 25, ¶ 62; Prosecutor v. Ntuyahaga, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, ¶ 1 (Mar. 18, 1999). Not to mention, the ICTY and ICTR are adjudicating violations of international law that occurred in places outside of the tribunals' country of residence, done by foreign people, against foreign people, so by definition, it can be argued that they are exercising universal jurisdiction.

46. See Morris, *supra* note 18, at 350 (discussing that international tribunals, specifically the ICC, can ground jurisdiction in universality principle and other legal principles). An example of an international tribunal grounding jurisdiction over an international crime without universal jurisdiction would be the Nuremberg Tribunal, as a majority of scholars argue. See *infra* section III, A. Important to know that in regards to the Roaming ICC proposal of this Note, the Roaming ICC is an international tribunal that would not ground jurisdiction in the universality principle exclusively.

47. In order to understand this entire Note fully and correctly, it is imperative to keep this paragraph in mind when reading the sections devoted to the ICTY and ICTR, the ICC, the Roaming ICC.

48. See Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 245 (2001).

49. See Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implication for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 113-14 (2003) (stating that the "incomplete theoretical development of universal jurisdiction", due to a lack of investigation by legal commentators and others, has led to the under-usage of the jurisdictional principle).

50. Hervé Ascensio, *'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals'*, 1 J. INT'L CRIM. JUST. 690, 699 (2003).

51. Summers, *supra* note 23, at 83; see e.g. Arrest Warrant, *supra* note 12; Regina v. Bartle ex

jurisdiction breaches conservative notions of sovereign authority, sovereign immunity, and immunity for State officials.<sup>52</sup> Although these antiquated notions of sovereignty are perceived to be the biggest roadblocks to proper enforcement of international criminal law, universal jurisdiction must mesh with the reigning Westphalian world order, or else be doomed to under-usage. Additionally, questions surround the legal legitimacy of universal jurisdiction, specifically its clarity, internal consistency, and adherence to other legal principles.<sup>53</sup> The disproportionate use of universal jurisdiction by developed countries against the citizens of developing countries calls into question whether the doctrine is fair and predictable, and whether universal jurisdiction instigates sovereign inequality.<sup>54</sup> Allowing universal jurisdiction to be practiced in domestic courts is called undemocratic by some, because the practice of universal jurisdiction is principally judge-made law that has little to no legislative input and may not reflect the "...deepest commitments of their own political communities."<sup>55</sup> Finally, sovereign States using universal jurisdiction have patently failed and will continue to fail at bringing justice to the commission of international crimes. Relying on States to conduct international criminal cases remains the linchpin problem for universal jurisdiction.<sup>56</sup> Sovereign states have the luxury of pursuing or ignoring international law violations,<sup>57</sup> and coupled with the lack of experience, resources, cooperation, and numerous procedural obstacles that face a State court in exercising universal jurisdiction,<sup>58</sup> it is easy to see why universal jurisdiction is often avoided. Although the State-centric model of universal jurisdiction fails to

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parte Pinochet, [2000] 1 A.C. 147 (H.L. 1999), *reprinted in* 38 I.L.M. 581, 634-38 (1999) (separate opinion of Lord Hutton) (discussing the conflicting, competing interests of having immunity for high government officials versus the need for accountability for those that commit international crimes).

52. Arrest Warrant, *supra* note 12, at 22-23; Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 149 (2004) (arguing that state sovereignty is the most important facet of international order and authority); Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 269-70 (2000).

53. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 50-194 (Oxford Univ. Press 1990); Sriram, *supra* note 18, at 368-69.

54. Sriram, *supra* note 18, at 369-71; Bottini, *supra* note 13, 554-57; *see e.g.*, Redress Memo, *supra* note 35, New Redress Memo, *supra* note 35.

55. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L. J. 1057, 1101-02, 1091-93 (2004); *see also* Bottini, *supra* note 13, 550-52 (explaining that universal jurisdiction violates the commonly held legal principle of due process of law, because of differences in domestic criminal laws, disagreement over what crimes spur universal jurisdiction, and the defendant in a foreign country, "may not possess any knowledge of their laws, penalties, or criminal procedures. There are sometimes great differences among members of the international community in the definitions of crimes, the determination and extent of the penalties,...").

56. Broomhall, *supra* note 14, at 399; *see* Bottini, *supra* note 13, at 506, 557-561 (discussing in depth why universal jurisdiction lacks sufficient incentive to national authorities—which are present in other jurisdictional principles—to proceed with a case).

57. *See* Bottini, *supra* note 13, at 514; Scharf, *supra* note 26, at 52-59.

58. BROOMHALL, *infra* note 59, at 118-126; *See* Broomhall, *supra* note 14, at 410-18 (listing all the reasons a national court would refrain from taking on a universal jurisdiction case, such as finances, evidence, security, witnesses, inexperience).

fulfill the global need for an effective international criminal enforcement system,<sup>59</sup> the continued use of universal jurisdiction by States should not be discouraged, because such State practices will play a vital supplementary role in enforcing international criminal law and developing an effective international criminal system.<sup>60</sup>

### III. TRIBUNALS

#### A. Nuremberg Tribunal: Overview of the First International Criminal Tribunal

"The international court established to adjudicate at Nuremberg marked the creation of the first such tribunal to evaluate war crimes and crimes against humanity."<sup>61</sup> The jurisdictional theory of the Nuremberg Tribunal is not entirely clear, for a majority of international legal scholars contend that the Nuremberg Tribunal was simply the Allied forces (U.S., U.S.S.R., U.K., and France) exercising their newly attained sovereign authority over Germany, or more specifically, exercising criminal judicial functions as the newly established government of the defeated Germany.<sup>62</sup> However, one argument gaining legitimacy is that the Nuremberg Tribunal constituted the first example of sovereign States acting as the judicial agents of the international community through "a type of universal jurisdiction theory."<sup>63</sup> This argument promotes the belief that the Nuremberg Tribunal was an extension or adaptation of traditional universal jurisdiction, particularly the idea of collective universal jurisdiction whereby each Allied power could have exercised universal jurisdiction over the Nazis for international crimes individually, but the Allied powers instead choose to adjudicate the Nazi international criminals collectively; thus, combining each Allied powers' ability to adjudicate "international crimes over which there exists

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59. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT* 112-127 (2003) (cataloguing numerous reasons States have abstained from practicing universal jurisdiction); ANTONIO CASSESE, *INTERNATIONAL LAW* 452-53 (2<sup>d</sup> ed. 2005); SADAT, *infra* note 200, at 10.

60. See William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 2-4, 16-20, 75-101 (2002) (detailing the benefits and characteristics of a system of courts exercising universal jurisdiction); see e.g., Redress Memo, *supra* note 35; New Redress Memo, *supra* note 35.

61. Laurie A. Cohen, Comment, *Application of the Realists and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT'L L. & FOREIGN AFF. 113, 143 (1997); but see SADAT, *infra* note 200, at 27, fn. 22 (explaining that historical examples of international criminal tribunals, prior to the Nuremberg Tribunals, do exist, but none of them possesses the legal significance as that of the Nuremberg Tribunal); see also SCHABAS, *infra* note 331, at 7 (describing how the distinguished jurists and judge B. V. A. Röling maintained that the Tokyo and Nuremberg tribunals were not "international tribunals in the strict sense" but were more aptly described as "multinational tribunals").

62. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, U.S.-USSR-UK-Fr., June 5, 1945, 60 Stat. 1649, TIAS 1520; The International Military Tribunal (Nuremberg) Judgment and Sentence *reprinted in* 41 AM J. INT'L L. 172, 172, 216, 248 (1947) [hereinafter Judgment of Oct. 1, 1946]; See SADAT, *infra* note 200, at 28; Morris, *supra* note 18, at 342-45 ("The Nuremberg tribunal, then, likely was not an instance of the exercise of universal jurisdiction in the post-war trials"); Morris, *supra* note 42, 37-43.

63. Tonya J. Boller, *The International Criminal Court: Better Than Nuremberg?*, 14 IND. INT'L & COMP. L. REV. 279, 304 (2003).

universal jurisdiction.”<sup>64</sup> While it is inconsequential for this Note’s purposes which argument prevails, it is undisputed that the Allied forces established jurisdiction over the defeated Nazis through the “Charter of the International Military Tribunal, annexed to the London Agreement, [which] provided the blueprint for the Nuremberg Tribunal.”<sup>65</sup>

The Charter of the International Military Tribunal was a joint agreement of the Allied Forces enumerating international criminal charges that the Allied forces could bring against Nazi suspects, specifically charges for the violation of international laws against war crimes, crimes against peace, and crimes against humanity.<sup>66</sup> Evidence in support of these charges was overwhelming, and understandably, there was considerable world-wide support, led by the U.S., for the judicial adjudication of the Nazis’ use of concentration camps and other criminal activities.<sup>67</sup> However, the international community’s ability to prosecute the Nazis for their conduct was limited given that international criminal law, at the time, was scant and what law did exist was vague.<sup>68</sup> Consequently, the Nuremberg Tribunal has been criticized for taking part in the application of *ex post facto* laws, and criticized further that even if the Nuremberg Tribunal applied valid laws, these international laws did not impose individual criminal responsibility for their violation.<sup>69</sup> The Nuremberg Judgment, in answering these objections, plainly stated that these crimes existed through custom and treaties at the time of their commission, and that “[c]rimes against international law are committed by men,

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64. SADAT, *infra* note 200, at 117; *see* Judgment of Oct. 1, 1946, *supra* note 62, at 216 (stating that when the Allied Powers applied international customary and conventional laws against the defeated Nazis, “they have done together what any one of them might have done singly” . . .) This breed of universal jurisdiction is termed “universal international jurisdiction”, such where a collection of States have universal jurisdiction over an international crimes due to its *jus cogens* status, and rather than argue over primacy of jurisdiction, the States agree to form a non-State actor to adjudicate the crime or crimes. However, this concept is altered a bit in the ICC, in that the formation of the non-State actor to adjudicate the crime(s) is formed prospectively, not in an *ad hoc* fashion, like the Nuremberg, ICTY, and ICTR. This idea is discussed more in depth later in this Note. *Infra* note 220 and accompanying text.

65. M&S YUGO, *infra* note 60, at 3; SADAT, *infra* note 200, at 27-8.

66. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 284, 288, 59 Stat. 1546, 1548 *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544; CASSESE, *supra* note 59, at 439.

67. CARTER ET. AL., *infra* note 385, at 1085; CASSESE, *supra* note 59, at 439; POWER, *supra* note 1, at 31-7; Cohen, *supra* note 61, at 118-35 (chronicling the long list of evidence against the Nazi suspects, and exhibiting the international and public opinion for an international tribunal to try the Nazis).

68. Cohen, *supra* note 61, at 137 (asserting that the only international criminal laws available at the time of the Nuremberg trial was the Hague Convention and Geneva Convention, which had little international criminal precedent associated with them); Remarks by M. Cherif Bassiouni, Panel Session, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC’Y INT’L L. PROC. 56, 62-63 (1986); Remarks by Telford Taylor, *id.*, at 57-58.

69. CASSESE, *supra* note 59, at 440-41; M&S YUGO, *infra* note 60, at 9; SADAT, *infra* note 200, at 30; Boller, *supra* note 63, at 310. For an explanation on the importance of individual criminal liability, read relevant portions of Mettraux’s book. *See* METTRAUX, *infra* note 113, at 9-12.

not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...<sup>70</sup> Yet, the Nuremberg Tribunal, having been established by the victors of World War II, has not fully escaped the criticism of “victor’s justice”.<sup>71</sup>

Despite these and other legitimate concerns, the Nuremberg Charter, Tribunal, and subsequent Judgment represents the most significant development in the advancement of international criminal tribunals, international criminal law, and indeed, one of the greatest developments in international law itself.<sup>72</sup> The Nuremberg Tribunal established the foundational principles of international criminal law, which includes the principle that any individual—including generals and presidents—can be held criminal responsible for violations of international law, and the principle that international law preempts national law.<sup>73</sup> These and other foundational international criminal law principles instituted by the Nuremberg Tribunal, Charter, and Judgment—commonly referred to as the Nuremberg Principles—were determined to be customary international law by the U.N. General Assembly and the U.N. International Law Commission.<sup>74</sup> Additionally, the Nuremberg Tribunal produced much needed international criminal law precedent,<sup>75</sup> and legitimized the use of law in fair trials with due process as a method of correcting international wrongs.<sup>76</sup> Prospectively, the Nuremberg Principles influenced a majority of international human rights

70. Judgment of Oct. 1, 1946, *supra* note 62, at 221; CASSESE, *supra* note 59, at 440.

71. M&S YUGO, *infra* note 60, at 9. It is hard not to believe that the Nuremberg Tribunal was, to some degree or another, unfair and an example of victor’s justice. The Allied forces surely committed international crimes during one of only two world wars. Regardless of this glaring defect, the Nuremberg Tribunal was an invaluable moment in international criminal law.

72. BROOMHALL, *supra* note 59, at 19, 42, 49 (stating that the Nuremberg legacy gave birth to “modern system of human rights protection” and “underpin(ned) the relationship between sovereignty and the international system in the post-War era”); M&S YUGO, *infra* note 60, at 9; *see* CARTER ET. AL, *infra* note 385, at 976, 1085. Although there was a sister tribunal to the Nuremberg Tribunal, commonly called the Tokyo Trials, this tribunal does not carry the same amount of historical and legal weight as the Nuremberg Tribunal, because the Tokyo Trials were fundamentally unfair to defendants. SADAT, *infra* note 200, at 27; M&S RWANDA, *infra* note 123, at 8 n.42 (“[i]n his dissenting opinion, the French Judge at Tokyo expressed his view that ‘so many principles of justice were violated during the trial that the Court’s judgment certainly would be nullified on legal grounds in most civilized countries’”). Furthermore, the Tokyo Trials were formed by military order of the U.S. Supreme Commander of the Allied Forces at Tokyo. Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, April 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

73. Charter of the International Military Tribunal, *supra* note 63, art. 7; SADAT, *infra* note 200, at 29, 30.

74. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946), *available at* <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement> [hereinafter Nuremberg Principles]; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int’l L. Comm’n 364, UN Doc. A/CN.4/SER.A/1950/Add. 1, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf).

75. *See e.g.*, Nuremberg Principles, *supra* note 74.

76. M&S YUGO, *infra* note 79, at 9, 10.

conventions, and provided invaluable legal precedent and philosophical support to subsequent international tribunals, to Alien Tort Claims Act jurisprudence in U.S. courts, and to the enforcement of international criminal law in many domestic forums around the world.<sup>77</sup>

### B. ICTY

#### 1. The History of the Former Yugoslavia and Facts that Led to the Formation of the ICTY

Geographically, former Yugoslavia was situated inside the Balkans, a large, rugged region of southeastern Europe. The Balkans peninsula is one of the most historically rich and fervently fought-over areas of the world. Ethnic wars, centuries-long occupations, and social struggles have littered its history for longer than a millennium.<sup>78</sup> The Balkans’ turbulent history, for the most part, is credited to the struggle between three religious groups that each possess very strong, distinct identities: Roman Catholic Croats, Orthodox Christian Serbs, and Muslims who mainly constitute converts to Islam while the area was under the Ottoman Empire rule.<sup>79</sup> The advent of World War II and the Nazi occupation of the Balkans revived inter-ethnic fighting in the region, which eventually resulted in the execution of thousands of Croats, Serbs, and Muslims.<sup>80</sup> However, the Balkans’ misery ended with the creation of the former Yugoslavia—the Socialist Federal Republic of Yugoslavia—after the end of World War II, which was a loosely federated nation under the Communist rule of Josip Tito.<sup>81</sup>

The former Yugoslavia was made up of several republics, namely Bosnia-Herzegovina (Bosnia), Serbia, Croatia, Macedonia, Montenegro, and Slovenia.<sup>82</sup>

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77. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶414 (31 July 2003), available at <http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf>; SADAT, *infra* note 200, at 28; Paul L. Hoffman, *Justice Jackson, Nuremberg and Human Rights Litigation*, 68 ALB. L. REV. 1145, 1145-1152 (2005) (emphasizing the practical and theoretical impact of the Nuremberg Tribunal and Nuremberg Principles on international human rights conventions, Alien Tort Claims Act jurisprudence in U.S., and in other countries’ jurisprudence as well); Henry King, Jr., *Commentary: The Modern Relevance of the Nuremberg Principles*, 17 B.C. THIRD WORLD L.J. 279, 280 (1997) (characterizing the Nuremberg trials and the Nuremberg Principles as extremely influential in the formation of most major human rights conventions/treaties).

78. POWER, *supra* note 1, at 285; ARNOLD SHERMAN, *PERFIDY IN THE BALKANS* 26-29 (Psychogios Publications 1993) (giving overview of Balkan history); Cervoni, *infra* note 171, at 490; Andras Riedlmayer, *A Brief History of Bosnia-Herzegovina*, (1993), <http://www.kakarigi.net/manu/briefhis.htm> (chronicling the history of the Bosnia).

79. VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* 18 (1995) [hereinafter M&S YUGO]; Cervoni, *infra* note 171, at 489-90; Riedlmayer, *supra* note 78.

80. M&S YUGO, *supra* note 79 (detailing how Croat forces ethnically cleansed Serbs in Croatia, and Serbs retaliated with the ethnic cleansing of Croats and Muslims under Serb control); Cervoni, *infra* note 171, at 491 (detailing the international crimes that occurred under Nazi occupation of the Balkans); Riedlmayer, *supra* note 78.

81. M&S YUGO, *supra* note 79; Cervoni, *infra* note 171, at 491; Riedlmayer, *supra* note 78.

82. M&S YUGO, *supra* note 79; Aileen Yoo, *Kosovo: Jerusalem of Serbia*, WASH. POST, available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/kosovo.htm> (last updated July 1999) (discussing Yugoslavia’s communists roots).

Despite social, political, cultural, and economic prosperity under Tito, ethnic tensions in the former Yugoslavia were not solved, but rather squelched with “stern repression”.<sup>83</sup> The fifty plus years of “pent-up hatred” shared among these three groups for each other lead to a large degree of anxiety and tension in the former Yugoslavia—especially in Bosnia—during the late 1980’s to early 1990’s as a result of the power vacuum that occurred after the death of Tito and the collapse of Soviet influence in the area.<sup>84</sup> In the summer of 1991, the situation evolved into violence as Bosnian Muslims, Bosnian Serbs, and Bosnian Croats clashed with each other in armed conflicts over the future of Bosnia.<sup>85</sup> On the one hand, the Bosnian Muslims—who were the largest group in Bosnia—desired Bosnia to secede from what was left of the former Yugoslavia.<sup>86</sup> On the other hand, Bosnian Serbs who were militarily and financially supported by Slobodan Milošević’s Federal Republic of Yugoslavia did not want Bosnia to secede from Yugoslavia for military, cultural, and historical reasons.<sup>87</sup> In late 1991 and into 1992, Bosnian Muslims and other groups successfully orchestrated the secession of Bosnia from the former Yugoslavia through un-“representative” elections that were mainly boycotted by Bosnian Serbs, and Bosnia was recognized by the world community as a sovereign nation.<sup>88</sup>

The internationally recognized secession of Bosnia from the former Yugoslavia naturally agitated the more militarily powerful Bosnian Serbs—who declared themselves as another independent nation called the Serbian Republic of Bosnia and Herzegovina in 1992, later to be renamed Republika Srpska—into directing large-scale military onslaughts against the Bosnian Muslim and Bosnian

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83. M&S YUGO, *supra* note 79; Cervoni, *infra* note 171, at 491.

84. Cervoni, *infra* note 171, at 491-92; Kalinauskas, *infra* note 86, at 387-388; see Tim Ito, *Bosnia and Herzegovina*, WASH. POST, <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/bosnia.htm> (last updated October 1998) (discussing the history of the Bosnian conflict).

85. M&S YUGO, *supra* note 79, at 19-20; Mark A. Bland, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, and Prospects*, 2 IND. J. GLOBAL LEGAL STUD. 233, 238-39 (1994) (discussing the beginning of the Bosnia conflict). Samantha Power offers a concise, yet thorough investigation into the lead-up to and actual commission of international crimes in Bosnia, reciting all that this Note has and will describe. POWER, *supra* note 1, at 247-81.

86. Bland, *supra* note 85; Mikas Kalinauskas, *The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia*, 50 U. KAN. L. REV. 383, 389-90 (2002).

87. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 4, 87 (Feb 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>; Bland, *supra* note 85 at 239; see M&S YUGO, *supra* note 79, at 19-20. In light of Milošević’s death mid-trial, it is still being litigated at the ICTY as to the criminal responsibility, if at all, that Serbian superiors have for the military and financial support the Federalist Republic of Yugoslavia gave to Bosnian Serbs during the Bosnian war. See, e.g., Prosecutor v. Perišić, Case No. IT-04-81-T, Amended Indictment, (Sept. 26, 2005), available at <http://www.un.org/icty/indictment/english/per-ai050926e.pdf>.

88. Bland, *supra* note 85, at 239; M&S YUGO, *supra* note 79, at 19-20; Kalinauskas, *supra* note 86, at 389.

Croat populations.<sup>89</sup> “The ensuing three-year war between the Bosnian Muslims, Bosnian Croats and the Bosnian Serbs would prove to be one of the most brutal conflicts in recent memory.”<sup>90</sup>

As U.N. and European Union attempts to broker a cease-fire and peace in Bosnia failed, it became apparent through many public and private international observers that international crimes were occurring in Bosnia.<sup>91</sup> A U.N. report found that Bosnian Serbs militias, with the help of Yugoslavian military forces, were “making a concerted effort...to create ethnically pure regions...” of Bosnia,<sup>92</sup> which included the forced mass deportation of Muslims, mass executions of Muslims, whole-scale destruction of Muslim towns, and creation of over 400 Serb controlled detentions centers where Muslims were tortured and killed in the thousands.<sup>93</sup> Although popular media characterized Bosnian Serbs and Serbs elsewhere as the sole perpetrators of international crimes during this war, Muslims and Croats in and out of Bosnia were very much involved in their own ethnic cleansing campaigns, albeit on relatively smaller scales.<sup>94</sup> Regardless of which group deserves what portion of blame, the commission of international crimes during Bosnia’s succession from the former Yugoslavia led to death of over 250,000 civilians and the displacement of millions more.<sup>95</sup>

## 2. U.N. Intervention

The growing accounts of atrocities combined with the unwillingness on the

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89. M&S YUGO, *supra* note 79, at 19-20; Kalinauskas, *supra* note 86, at 389; *see* Ito, *supra* note 84.

90. Ito, *supra* note 84.

91. M&S YUGO, *supra* note 79, at 20-21.

92. The Secretary General, *Further Report of the Secretary General Pursuant to Security Council Resolution 749*, ¶ 5, *delivered to the Security Council*, U.N. Doc. S/23900 (May 12, 1992); Cervoni, *infra* note 171, at 492-93.

93. M&S YUGO, *supra* note 79, at 21-22; Kalinauskas, *supra* note 86, at 389-90.

94. M&S YUGO, *supra* note 79, at 22; Kalinauskas, *supra* note 86, at 390; Ito, *supra* note 84; *see generally* SHERMAN *supra* note 78 (making a persuasive case that each Bosnian ethnic group had plans and/or undertook plans to “ethnically cleanse” Bosnia of the other ethnic groups, and further argued that US/UN/NATO intervention in Bosnia in defense of Muslims and Croats and against Serbs was arbitrary, because each Balkan ethnic group was equally reprehensible for war crimes, genocide, crimes against humanity, and other international crimes); *but see* POWER, *supra* note 1, at 307-10 (stating that attempts to blame all ethnic groups in Bosnia for committing international crimes distorts the reality that Serbs were by far the worse international criminals in Bosnia during this war, and such distorting efforts were done by Western countries as an excuse for not intervening into the Yugoslavian war). Regardless of the rhetoric on both sides of the argument, international crimes were committed by Croats and Muslims in and outside of Bosnia, and have been and are being adjudicated by the ICTY. *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, (July 30, 2006), *available at* <http://www.un.org/icty/oric/trialc/judgement/ori-jud060630e.pdf>; Prosecutor v. Gotovina et al., Case No. IT-06-90-PT, Joinder Indictment, (July 24, 2006), *available at* <http://www.un.org/icty/indictment/english/got-joind060724e.pdf>.

95. Virginia Morris & Michael P. Scharf, *Preface to M&S YUGO*, *supra* note 79; M&S YUGO, *supra* note 79, at 22 (stating the over 2.1 million people, or over 50% of the Bosnian population were “killed or driven from their homes...”); POWER, *supra* note 1, at 251 (estimating 200,000 Bosnian deaths); Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT’L L. 347 (2004).

part of the world community to intervene militarily and the ineffectiveness of economic sanctions<sup>96</sup> led to passage of U.N. Security Council Resolution 780 in 1992 that created a commission of experts to investigate and collect evidence regarding alleged violations of international criminal and humanitarian law in the former Yugoslavia.<sup>97</sup> This U.N. Commission submitted its report concluding that violations of international humanitarian law were in fact occurring in the former Yugoslavia and formally endorsing the formation of an *ad hoc* international tribunal to adjudicate these violations.<sup>98</sup> Pursuant to this report, the U.N. Security Council passed U.N. Security Council Resolution 808 (Resolution 808) in 1993 that "...officially" declared 'ethnic cleansing' in the former Yugoslavia to be a 'threat to international peace and security'...<sup>99</sup> and most importantly, confirmed the U.N. Security Council's intention to create an *ad hoc* tribunal.<sup>100</sup>

Although Resolution 808 was the first stage in creating the ICTY, in that it obligated the U.N. to create such an *ad hoc* tribunal, "[t]he Security Council did not indicate in Resolution 808 either the legal basis or the method for establishing the tribunal."<sup>101</sup> In order to assist the Security Council on how to create the an *ad hoc* international criminal tribunal, Resolution 808 mandated that the Secretary-General issue a report on the legally acceptable methods of creating what would later become the ICTY.<sup>102</sup> This report evaluated three options: Security Council Resolution, General Assembly negotiations, or treaty negotiations.<sup>103</sup> Both Treaty and General Assembly negotiations were discarded as viable options, mainly because time requirements needed for negotiations of any type did not comport with the expressed urgency to create the ICTY.<sup>104</sup> Adopting the U.N. Security

96. Allison Marston Danner, *When Courts Make Law: How The International Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 19 (2006).

97. S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992), available at <http://daccess-ods.un.org/TMP/4597908.html>; M&S YUGO, *supra* note 79, at 24-26; Kalinauskas, *supra* note 86, at 393.

98. The Secretary-General, *Letter Dated 9 February 1993 from the Secretary General Addressed to the President of the Security Council*, ¶¶ 31-60, ¶¶ 72-74, delivered to the Security Council, U.N. Doc. S/25274 (Feb. 10, 1993); M&S YUGO, *supra* note 79, at 28-29; Cervoni, *infra* note 171, at 493 ("In October of 1992, after more than a year of engaging in ineffective scare tactics in light of well-documented atrocities, the UN Security Council...finally decided to act."); Kalinauskas, *supra* note 86, at 393.

99. Cervoni, *infra* note 171, at 493.

100. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993), available at <http://daccess-ods.un.org/TMP/298421.8.html>; M&S YUGO, *supra* note 79, at 31.

101. M&S YUGO, *supra* note 79, at 40; Danner, *supra* note 59, at 19; see Ralph Zacklin, *Some Major Problems in the Drafting of the ICTY Statute*, 2 J. INT'L CRIM. JUST. 361 (2004).

102. S.C. Res. 808, *supra* note 100, ¶ 2; see Kerry R. Wortzel, *The Jurisdiction of an International Criminal Tribunal in Kosovo*, 11 PACE INT'L L. REV. 379, 387 (1999) (exhibiting the importance of UN Resolution 808, and the legal authority behind the ICTY).

103. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 18-30, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Res. 808 Report].

104. *Id.* at ¶¶ 19-22; M&S YUGO, *supra* note 79, at 40-42; Zacklin, *supra* note 101, at 361-62 (explaining additionally that treaty negotiations only bind those that sign and ratify the treaty, and it would be inconceivable that parties to the Bosnian conflict would sign onto such a treaty).

Council Resolution approach,<sup>105</sup> the U.N. Department of Legal Affairs, with assistance from States and non-governmental organizations, drafted a proposed statute for the ICTY.<sup>106</sup> The draft statute of the ICTY was adopted without change and little to no debate by Security Council members in U.N. Security Council Resolution 827 (Resolution 827) of 1993, marking the U.N. Security Council's second and final step in creating the ICTY.<sup>107</sup>

As asserted by the U.N. Security Council, the cumulative effect of Resolution 808 and 827 gave the U.N. Security Council the legal authority to create the ICTY. As previously mentioned, the U.N. Security Council decided in Resolution 808 that the situation in the former Yugoslavia was a "threat...to...international peace and security" in violation of Article 39 of the U.N. Charter.<sup>108</sup> Consequently, Resolution 808 triggered the U.N. Security Council's ability to use Article 41 of the U.N. Charter, which states that "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision."<sup>109</sup> Article 29 of the U.N. Charter and ICJ's jurisprudence on Article 29 confirmed the U.N.'s ability to create subsidiary, judicial bodies as a "measure...to give effect to its decision".<sup>110</sup>

Theoretically speaking, a UN *ad hoc* tribunal, like the ICTY, is a product of each U.N. Member State bestowing a part of its sovereignty, specifically "a measure of criminal jurisdiction", to the U.N. Security Council to establish an international criminal tribunal to adjudicate violations of international law on behalf of the Member States.<sup>111</sup> The precedent created by the Nuremberg Tribunal validates that States individually or collectively have the power to create tribunals

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105. See M&S YUGO, *supra* note 79, at 41-42 (explaining that the U.N. Security Council Resolution approach was expeditious and binding on all states).

106. Res. 808 Report, *supra* note 103, at annex; M&S YUGO, *supra* note 79, at 32-33; Danner, *supra* note 59, at 19-20; Kalinauskas, *supra* note 86, at 393; see Zacklin, *supra* note 101, at 361.

107. S.C. Res. 827, U.N. Doc. S/RES/827, (May 25, 1993), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>; M&S YUGO, *supra* note 79, at 33-34; Danner, *supra* note 59, at 20 ("For the first time since Nuremberg and Tokyo, an international court was endowed with the authority to punish violations of the laws of war. A step that had been steadfastly resisted by delegates at the Diplomatic Conferences in 1949 and 1974-77 was, in the press of events in 1993, embraced by the Security Council almost without comment."); Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT'L L. & COM. REG. 407, 420 (2001); Christopher S. Wren, *Judge Says Yugoslavia Impedes Work of War Crimes Tribunal*, N.Y. TIMES, Nov. 9, 1999, at A7.

108. S.C. Res. 808, *supra* note 100; Chapter VII of U.N. Charter, Article 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security." U.N. Charter, ch. 7, art. 39.

109. M&S YUGO, *supra* note 79, at 42-44; Caianiello & Illuminati, *supra* note 107, at 420-21; Kalinauskas, *supra* note 86, at 395-96.

110. U.N. Charter, art. 29; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53-56 (July 13), available at <http://www.icj-cij.org/docket/files/21/2123.pdf>; Kalinauskas, *supra* note 86, at 395-96.

111. M&S YUGO, *supra* note 79, at 45.

for the exclusive reason of adjudicating violations of international criminal law.<sup>112</sup> Correspondingly, this power to create tribunals was one of the powers Member States bestowed to the U.N. Security Council to use towards effectuating their decisions, or in the case of the former Yugoslavia, to give effect to its decision in Resolution 808 to maintain international peace and security.<sup>113</sup>

As an *ad hoc* tribunal with limited territorial, temporal, and personal jurisdiction,<sup>114</sup> the ICTY was bound to adjudicate only law that was “beyond any doubt customary international law” at the time of the conflict<sup>115</sup> Otherwise, the ICTY would be plagued with additional, complex jurisdictional questions, such as if the former Yugoslavia—or any of the sovereign nations that came out of the Yugoslavian conflict—was a State Party to a particular convention or treaty and if such convention or treaty imposed criminal responsibility on individuals?<sup>116</sup> Consequently, the subject matter jurisdiction of the ICTY consisted of four

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112. *Id.*

113. The establishment of an international criminal jurisdiction can be achieved only by States which, in effect, confer on the international court a measure of the criminal jurisdiction which every State possesses as an essential element of its sovereignty. As recognized by the Nuremberg Tribunal, any State or group of States may decide to establish a court for the purpose of exercising jurisdiction with respect to crimes under international law. In this particular instance, the States that were members of the Security Council decided to establish an international criminal jurisdiction by means of a binding decision of the Council. In doing so, these States acted not as individual States on their own behalf, but rather as the Security Council exercising its right to adopt measures for the maintenance of international peace and security on behalf of the Member States of the United Nations. *Id.*; but see Prosecutor v. Milutinović et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, ¶¶ 46-8 (May 6, 2003) (separate opinion of Judge Patrick Robinson) (arguing that while theoretically true that the U.N. could have formed the ICTY or like court via Nuremberg-type delegation of jurisdiction, the ICTY was in fact formed by the Security Council independently exercising its Chapter VII powers to adopt measures for the maintenance of international peace and security, and not upon delegated authority from States). Judge Robinson’s opinion on universal jurisdiction is worth reading. He clarifies that “a large part of the difficulty in determining whether an international criminal tribunal such as the Nuremberg IMT, the ICTY or the ICTR exercises universal jurisdiction is explained by the failure to distinguish between the basis for the creation of that tribunal (a question that raises the issue of the delegation by States of their jurisdictional powers to an international tribunal), and the jurisdiction that is actually exercised by it by virtue of its Statute or customary international law.” *Id.*, at ¶ 34.

114. Pursuant to its Statute, the ICTY possessed limited temporal jurisdiction (only international crimes committed after January 1, 1991) limited personal jurisdiction (only people, not corporations, or States), and limited territorial jurisdiction (only areas under the territory of the former Socialist Federal Republic of Yugoslavia). Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, arts. 1, 6, 8, U.N. Doc. S/RES/827 (May 25, 1993), available at <http://www.un.org/icty/legal/doc-e/basic/statut/statute-feb06-e.pdf> [hereinafter ICTY Statute].

115. Res. 808 Report, *supra* note 103, ¶ 34; M&S YUGO, *supra* note 79, at 51-52; GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 5 (2005).

116. M&S YUGO, *supra* note 79, at 51-52; see METTRAUX, *supra* note 113, at 6-7; but see Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 63 et seq. (Dec. 5, 2003), available at <http://www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf> (convicting the defendant of “terror” and “attacks on civilians” based on Additional Protocol I of Geneva Conventions, not considered customary law at the time); *infra* section III, D. On a similar note, because U.N. Security Council decisions only bind States, it was necessary for the Security Council—in the case of ICTY and ICTR—to create a subsidiary judicial body that could make judicial decisions on individuals and have those decisions be binding, rather than recommendations. M&S YUGO, *supra* note 79, at 44-47; M&S RWANDA, *infra* note 123, at 102, 106.

categories of customary international criminal laws:<sup>117</sup> grave breaches of the Geneva Convention; violations of the laws and customs of war; genocide, and crimes against humanity.<sup>118</sup>

(This Note would fail to recognize the full scale of international crimes committed in the former Yugoslavia if it did not mention that after the creation of the ICTY in 1993, the commission of international crimes within the former Yugoslavia continued at a shocking pace. Probably the most horrific international crimes occurred in the UN-protected Srebrenica enclave of Bosnia in 1995 where over 7,000 Muslim men and boys were executed and many more Muslim women, young children, and elderly were deported.<sup>119</sup> Additionally, the Serbian siege of Kosovo in the late 1990's also ended in the commission of international crimes that resulted in the death of over 11,000 Muslims and the mass deportation of Muslims out of Kosovo.<sup>120</sup> These later episodes of international crimes in the former Yugoslavia, however, are being adjudicated by the ICTY as well.<sup>121</sup>)

### C. ICTR

#### 1. The History of Rwanda and Facts that Led to the Formation of the ICTR

Colonization by European powers significantly shaped the history of Rwanda, which is a common story among African countries. Unfortunately, Europe's influence over Rwanda did not cease when the last colonizers left. The foundation

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117. The term "customary international criminal law" will be used often in this Note, and refers to international criminal laws that have attained customary international law status. The term "conventional international criminal law" will also be used, and refers to international criminal laws created by convention or treaty. However, it is important to remember that most conventional international criminal laws do not attach individual criminal liability for their violation, but rather obligates State Party to the convention or treaty to enforce the law of the convention or treaty, and the convention and treaty will only make the State Parties directly responsible for their violation. See *infra* section III, D; IV, A.

118. ICTY Statute, *supra* note 114, arts. 2-5. For an easy to understand comparison of the difference in subject matter jurisdiction of the ICTY and the ICTR, read former ICTY President and Judge McDonald's article on international criminal tribunals. Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463, 466-67 (2001). Additionally, the *ad hoc* tribunals' statutes were formulated with Judges in mind, "[t]he Statutes of the *ad hoc* Tribunals (ICTY and ICTR) contain much more than the skeletons of the crimes that are within their jurisdictions. The definitions of these crimes and the application of the law of international crimes in general, therefore, call further refinement to be made by the Court which has been entrusted by the Security Council with the task of apply to Statute whilst ensuring that it was not thereby legislating new international law. METTRAUX, *supra* note 113, at 5 (alteration).

119. DAVID ROHDE, *End Game: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre since World War II*, at XVI, 388, 402; POWER, *supra* note 1, at 411-421. Power's entire portrayal of the international crimes that occurred in Srebrenica is amazing in its own right. See POWER, *supra* note 1, at 391-441. Yet, nothing gives a more riveting and captivating story of all facets of the Srebrenica massacres and mass deportations than Rohde's book *End Game*. See generally ROHDE, *supra* note 119.

120. POWER, *supra* note 1, at 466, 472.

121. See, e.g., Prosecutor v. Popović et al., Case No. IT-05-88-PT, Consolidated Amended Indictment, (Nov. 11, 2005), available at <http://www.un.org/icty/indictment/english/pop-scai060614.pdf>; Prosecutor v. Milutinović et al., Case No. IT-05-87-PT, Third Amended Joinder Indictment, (June 21, 2006), available at <http://www.un.org/icty/indictment/english/milu-3aji060621e.pdf>.

of the international crimes that occurred in Rwanda in 1993 unquestionably grew out of Rwanda's colonial days.<sup>122</sup> Prior to the influx of a German population into Rwanda at the end of the nineteenth century,<sup>123</sup> the two main socio-ethnic groups that comprise Rwanda, the Hutus and Tutsi, are believed to have shared a peaceful co-existence.<sup>124</sup> Despite stereotypical physical differences between the two groups, some ethnographers and historians believe Tutsis and Hutus are not exclusive ethnic groups, and furthermore, most Tutsis and Hutus share the same language and religion.<sup>125</sup> Unfortunately, minor social, economic, and political differences between Tutsis and Hutus were brought to the forefront after German colonizers took control of Rwanda, doing so by using Tutsis as the proxy rulers over the Hutu population.<sup>126</sup> Belgium took control of Rwanda after World War I, and instituted a brutal hierarchical system whereby Tutsis were molded and manipulated into the ruthless ruling class of Rwanda and Hutus were subject to excessive forced labor, which in turn, created a bright line in Rwanda's population between Tutsis and Hutus.<sup>127</sup> The most lasting effect of Belgium's rule was an identification card system instituted in 1933 that labeled Rwandans as either Hutu or Tutsi, which later played an enormous role in the genocide and international crimes that played out in Rwanda in 1994.<sup>128</sup>

As Belgian colonizers' rule over Rwanda drew to an end, Belgium switched allegiance to the Hutus, encouraging them to revolt against the ruling Tutsi, which eventually led to the Hutu population seizing control of the country in 1959.<sup>129</sup> The following decades in Rwanda resulted in the mass exodus of Tutsis into neighboring countries, Hutu domination, and "...numerous massacres of members of the Tutsi tribe in Rwanda,...in 1963, 1966, 1973, 1990, 1992, and 1993."<sup>130</sup> After the bloody fighting between the Hutu-dominated Rwanda government and Tutsi rebels ceased in 1993, the U.N.-backed Arusha Accord was signed, which

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122. See generally, Paul J. Magnarella, *Special Issue: Rwanda 10 Years On. I.) How Could It Happen? The Background and Causes of the Genocide in Rwanda*, 3 J. INT'L CRIM. JUST. 801 (2005) (tracking the pre-colonial and colonial history of Rwanda and its effect on the genocide that occurred in 1994 that led to the creation of the ICTR).

123. VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 49 (1998); *id.* at 802 [hereinafter M&S RWANDA].

124. Magnarella, *supra* note 122, at 803; *but see* Magnarella, *supra* note 122, at 802-06 (explaining that Tutsis held a higher social class, possessed a majority of the political and military power, and essentially the ruling class of Rwanda in comparison to the larger group. Being Tutsis was widely considered nobility whereas being Hutu was considered peasantry).

125. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 4, 33 (1999), available at <http://www.hrw.org/reports/1999/rwanda/index.htm#TopOfPage>; M&S RWANDA, *supra* note 123, at 48-9; *see* Magnarella, *supra* note 122, at 804-805.

126. M&S RWANDA, *supra* note 123, at 49; Magnarella, *supra* note 122, at 806-07; *see* Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 43 (2005).

127. DES FORGES, *supra* note 125, at 34-38; Magnarella, *supra* note 122, at 807-08.

128. DES FORGES, *supra* note 125, at 37-38; M&S RWANDA, *supra* note 123, at 49; Magnarella, *supra* note 122, at 808.

129. DES FORGES, *supra* note 125, at 38-39; M&S RWANDA, *supra* note 123, at 50; Magnarella, *supra* note 122, at 809.

130. M&S RWANDA, *supra* note 123, at 47; DES FORGES, *supra* note 125, at 39-40; Magnarella, *supra* note 122, at 809-12.

called for the political and military integration of the Hutus and Tutsis into a single government.<sup>131</sup> However, a retrospective view of Rwanda at this time reveals the specter of genocide lurking beneath the surface. Even before the negotiations of the Arusha Accord, Hutu hardliners grew weary of their increasingly moderate President Juvénal Habyarimana, and these hardliners, which included close allies of President Habyarimana, laid the groundwork to kill every single Tutsi in Rwanda.<sup>132</sup> The genocidal framework included: stockpiling massive amounts of machetes and six million dollars worth of firearms all across Rwanda,<sup>133</sup> training large amounts of Hutus on "methods of mass murder and indoctrination in ethnic hatred",<sup>134</sup> constant radio transmission encouraging genocidal intent against Tutsis, and similar radio banter labeling the Arusha Accord as an agreement between Tutsis rebels and Hutu sympathizers.<sup>135</sup> President Habyarimana, while returning from a meeting in Tanzania on the implementation of the Arusha Accord, was assassinated when his plane was shot down by Hutu hardliners, who in turn blamed Tutsis rebels for the assassination in numerous radio addresses to the population of Rwanda.<sup>136</sup>

What followed the assassination was "...the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki" and a "...rate of slaughter...three to four times that of the number of Jews killed in the Holocaust."<sup>137</sup> Within 30 minutes of the crash, the elite Presidential Guard sealed off the airport,—which stopped any attempts by the U.N. to investigate the airplane crash—checked every single Rwandans' identity card, and executed any identified Tutsis.<sup>138</sup> After the assassination of President Habyarimana and the airport massacre, the Hutus hardliners executed their plan for genocide, which spread like an angry beehive throughout the country.

The assassins' first priority was to eliminate Hutu opposition leaders...After that, the wholesale extermination of Tutsis got underway... With the encouragement of [radio] messages and leaders at every level of society, the slaughter of Tutsis and the assassination of Hutu oppositionists spread from region to region. Following the militias' example, Hutus young and old rose to the task. Neighbors hacked neighbors to death in their homes, and colleagues hacked

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131. DES FORGES, *supra* note 125, at 123-26; M&S RWANDA, *supra* note 123, at 50-51; Magnarella, *supra* note 122, at 813.

132. DES FORGES, *supra* note 125, at 3-5; M&S RWANDA, *supra* note 123, at 51-53; Magnarella, *supra* note 122, at 814.

133. DES FORGES, *supra* note 125, at 3-5, 127; M&S RWANDA, *supra* note 123, at 52.

134. M&S RWANDA, *supra* note 123, at 52; *see* Magnarella, *supra* note 122, at 814.

135. DES FORGES, *supra* note 125, at 4-12; M&S RWANDA, *supra* note 123, at 51-52; Magnarella, *supra* note 122, at 814.

136. DES FORGES, *supra* note 125, at 5-6, 181-85; M&S RWANDA, *supra* note 123, at 53; Magnarella, *supra* note 122, at 815.

137. Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551, 556; 585 (2000).

138. M&S RWANDA, *supra* note 123, at 54.

colleagues to death in their workplaces. Doctors killed their patients, and schoolteachers killed their pupils. Within days, the Tutsi populations of many villages were all but eliminated... Radio announcers reminded listeners not to take pity on women and children.<sup>139</sup>

As the days wore on, militias “were sent to rural areas not just to kill, but to force the local people to kill. Often, people were compelled to kill their neighbors or members of their own families. The extremists’ aim was for the entire Hutu population to participate in the killing.”<sup>140</sup> One hundred days later, 800,000 Tutsis, and Hutus that were perceived as sympathizers, were killed, representing ten to eleven percent of Rwanda’s total population.<sup>141</sup> The genocide did not stop until exiled Tutsis rebels—who were just as cognizant of the international crimes occurring in their country as the rest of the world yet received little to no international support in their efforts—invaded and amazingly fought their way into control of Rwanda.<sup>142</sup>

## 2. U.N. Intervention

Unsurprisingly, the very first similarity that the creation of the ICTR shared with the creation of its predecessor, the ICTY, was the international communities’ inability to do anything swiftly in reaction to the international crimes occurring in Rwanda. Adding insult to injury, the mere thought of setting up the ICTR only came about well after genocide and hostilities were “virtually over.”<sup>143</sup> Even the impassioned pleas by the newly elected prime minister of Rwanda for the formulation of an international tribunal and a report by an U.N. High Commissioner for Human Rights detailing the criminal events in Rwanda were not enough to persuade the U.N. Security Council or the U.S. to live up to their respective duties to act in the face of genocide.<sup>144</sup> Fortunately, the U.N. Special Rapporteur for Rwanda submitted his extensive report to the U.N. Security Council which “finally spurred the Security Council to acknowledge that ‘acts of genocide have occurred in Rwanda’” in Security Council Resolution 925<sup>145</sup> and caused U.S. Secretary of State to testify before the U.S. Senate that “[i]t’s a terrible situation that calls out for international action.”<sup>146</sup>

Using the ICTY as a precedential template, the U.N. Security Council instituted a Commission of Experts for Rwanda to investigate violations of

139. Magnarella, *supra* note 122, at 815.

140. M&S RWANDA, *supra* note 123, at 58 (stating that one estimate had half of the Hutu population participating in the genocide).

141. DES FORGES, *supra* note 125, at 15-16; M&S RWANDA, *supra* note 123, at 55; Drumbl, *supra* note 126, at 42; Magnarella, *supra* note 122, at 816; Tiefenbrun, *supra* note 137, at 556.

142. Drumbl, *supra* note 126, at 44.

143. Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT’L L. 501, 505 (1996); see M&S RWANDA, *supra* note 123, at 61.

144. M&S RWANDA, *supra* note 123, at 61-62; see DES FORGES, *supra* note 125, at 24-25, 640-44.

145. S.C. Res. 925, at 1, U.N. Doc. S/INF/50 (June 8, 1994), available at <http://daccess-ods.un.org/TMP/5305671.html>.

146. *Christopher Urges Trial Over Genocide in Rwanda*, WASH. POST, July 1, 1994, at A29.

international humanitarian law.<sup>147</sup> Despite the clear indication by the Commission of Experts that violations of international humanitarian law in Rwanda called for the establishment of an *ad hoc* tribunal,<sup>148</sup> bureaucratic and diplomatic wrangling dragged on for months. While the international community wrestled with the decision to create either a separate *ad hoc* tribunal for Rwanda or add jurisdiction over Rwanda to the 18 month old ICTY, the government of Rwanda fluctuated in its support for an *ad hoc* Rwanda tribunal, ultimately ending in official opposition to the formation of such a court.<sup>149</sup> However, the Rwanda's leadership indicated that the government would cooperate if such an *ad hoc* tribunal was created despite its official opposition, thus clearing the way for the U.N. Security Council to pass Resolution 955 (Resolution 955) in 1994 establishing the ICTR.<sup>150</sup>

In Resolution 955, the U.N. Security Council determined that "genocide and other systematic, widespread and flagrant violations of international humanitarian law" committed in Rwanda "constitute a threat to international peace and security."<sup>151</sup> Relying on its precedent in forming the ICTY, Resolution 955 additionally called for the creation of an *ad hoc* tribunal to combat the threat to international peace and security in Rwanda; thus, the ICTR was created in one resolution with an attached ICTR statute, rather than the two resolutions that created the ICTY.<sup>152</sup> Except for this minor difference in legislative history, the U.N. Security Council established both the ICTY and ICTR pursuant to its powers under Chapter VII, particularly Article 39 and 41, and created both *ad hoc* tribunal based on the same legal and philosophic theories.<sup>153</sup>

The ICTR and the ICTY diverge, however, in terms of subject matter jurisdiction. Even though "[t]he ICTR Statute was modeled closely on that of the ICTY",<sup>154</sup> as reported by the Secretary General, "...the Security Council elected to take a more expansive approach to...the applicable law than the one underlying the

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147. S.C. Res. 935, U.N. Doc. S/RES/935, ¶ 1 (July 1, 1994), available at <http://daccess-ods.un.org/TMP/1393874.html>.

148. *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935*, ¶¶ 146-49, delivered to the Security Council, U.N. Doc. S/1994/1125 (Oct. 4, 1994); Raymond Bonner, *U.N. Commission Recommends Rwanda 'Genocide' Tribunal*, N.Y. Times, Sept. 29, 1994, at A13.

149. M&S RWANDA, *supra* note 123, at 66-71.

150. S.C. Res. 955, U.N. Doc. S/RES/955, ¶ 1 (Nov. 8, 1994), available at <http://daccess-ods.un.org/TMP/2132961.html> [hereinafter Res. 955]; M&S RWANDA, *supra* note 123, at 71-72.

151. Res. 955, *supra* note 150, at 1; M&S RWANDA, *supra* note 123, at 103; Akhavan, *infra* note 152, at 502.

152. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 7, delivered to the Security Council, UN Doc. S/1995/134, ¶¶ 1; 9 (Feb. 13, 1995) [hereinafter Res. 955 Report]; M&S RWANDA, *supra* note 123, at 101; Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 502 (1996) ("In establishing the Rwanda Tribunal, however, the Security Council decided that 'drawing upon the experience gained in the Yugoslav Tribunal, a one-step process and a single resolution would suffice.'"); Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 103, 109 (1997).

153. See *infra* Part III, Section B. ICTY / U.N. Intervention. This same legal/philosophic theories discussed in this section apply to the ICTR as well.

154. Danner, *supra* note 59, at 23.

statute of the [ICTY].”<sup>155</sup> Two circumstances dictated a subject matter change in the ICTR. First, genocide and crimes against humanity played a more prevalent role in Rwanda and in the U.N. Security Council’s reactions to Rwanda compared to the former Yugoslavian situation.<sup>156</sup> Second, the armed conflict that occurred in Rwanda was an internal armed conflict and purely incidental to the international crimes committed in Rwanda,<sup>157</sup> thus certain international humanitarian laws did not apply.<sup>158</sup> Consequently, several aspects of the ICTR statute differ from the ICTY statute: the preamble of the ICTR statute specifically mentions genocide and the first international criminal offense listed is genocide;<sup>159</sup> Article 3 of the ICTR statute on crime against humanity does not require a nexus with an armed conflict, but rather requires a nexus between the proscribed inhumane acts and discriminatory grounds;<sup>160</sup> the grave breaches provisions of 1949 Geneva Conventions are not included in Article 4 of ICTR dealing with war crimes, because those provisions only deal with international armed conflicts and; Article 4 of ICTR statute does include common Article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II, which are provisions that apply to internal armed conflicts.<sup>161</sup>

#### D. The Flaws of the Ad Hoc Tribunals

There is no doubt that the ICTY and the ICTR are tremendous triumphs in international criminal law.<sup>162</sup> These *ad hoc* tribunals have unquestionably chipped away at international impunity, added considerably to international criminal jurisprudence, exemplified the viability of international criminal law, and established the willingness of the international community to fight international hostilities with the rule of law.<sup>163</sup> The UN *ad hoc* tribunals’ most notable

155. Res. 955 Report, *supra* note 152, ¶12; M&S RWANDA, *supra* note 123, at 127; Cervoni, *supra* note 171, at 497-498; *but see* METTRAUX, *supra* note 113, at 10 (indicating that this distinction by the Secretary General between the subject matter jurisdiction of the ICTY and ICTR might have been “an unintentional distinction”).

156. Cisse, *supra* note 152, at 109-110.

157. *Id.* at 107.

158. M&S RWANDA, *supra* note 123, at 142; Akhavan, *supra* note 152, at 503; Tiefenbrun, *supra* note 137, at 562-63. It is imperative to stress that the belief at the time of the creation of the ICTR that international humanitarian law did not unequivocally apply to internal armed conflicts, as opposed to international armed conflicts, has changed dramatically since the ICTR’s creation. Today, international humanitarian law is applied to internal armed conflicts. Prosecutor v. Tadić, *supra* note 25, ¶¶ 128-30; 133-34; M&S RWANDA, *supra* note 123, at 128-30.

159. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Pmb., art. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Cisse, *supra* note 152, at 109-110.

160. ICTR Statute, *supra* note 159, art. 3; Akhavan, *supra* note 152, at 503; *see* M&S RWANDA, *supra* note 123, at 126.

161. ICTR Statute, *supra* note 159, art. 4; M&S RWANDA, *supra* note 123, at 126; Akhavan, *supra* note 152, at 503.

162. M&S RWANDA, *supra* note 123, at 37; Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT’L & COMP. L. REV. 667, 738 (1999); Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies*, 21 WIS. INT’L L.J. 527, 541 (2003).

163. Tolbert & Solomon, *infra* note 164, at 36-37 (stating additionally that the *ad hoc* tribunals

contribution is its impact on the future, for the "[ICC]...would not have been possible without the ad hoc tribunals' trailblazing work."<sup>164</sup> Without intentionally trampling on the predominantly positive legacy of the ICTY and ICTR, it is imperative to point out that these and any other *ad hoc* tribunals are merely stepping stones towards the realization of a true international criminal law system, and not end goals in themselves. An examination of the various types of problems faced by both the ICTY and ICTR illustrates the serious inadequacies with *ad hoc* tribunals.

On a practical level, the ICTY and ICTR were forced to confront a whole host of problems intrinsic with being *ad hoc* tribunals. As *ad hoc* tribunals, the ICTY and ICTR each had to be built from the ground up, literally and figuratively.<sup>165</sup> In the case of the ICTR, all of the components that any judicial institution needs to operate, such as roads, courtrooms, legal staff, and detention units, were far from being finished before the ICTR began working.<sup>166</sup> During the time wasted on establishing the entire infrastructure of these *ad hoc* tribunals, there were no mechanisms in place to protect evidence and, as in the situation with the ICTY, to stop further international crimes from occurring.<sup>167</sup> Not surprisingly, being required to build the ICTY and ICTR from scratch made both not only time-consuming, but also overly expensive.<sup>168</sup>

Both *ad hoc* tribunals suffered from severe logistical and administrative nightmares.<sup>169</sup> The ICTY labored through years of little to no cooperation from

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"...have an international legal basis and avoid the label of 'victor's justice'... [the *ad hoc* tribunals] have been widely viewed as conducting fair trials, providing a measure of justice to victims, and removing war criminals from the seats of power and thus 'clearing the ground' for more responsible government.") *see generally* Payam Akhavan et al., *The Contribution of the Ad Hoc Tribunals to International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1509 (1998).

164. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 37 (2006).

165. Everything and anything imaginable that is associated with operating a judicial tribunal had to be established for both the ICTY and ICTR from scratch. Hiring thousands of employees, creating hiring procedures, establishing document storage systems, building detention centers for suspects, finding buildings where the tribunal and its satellite office would be placed, developing internal tribunal rules and procedures, starting health care programs for personnel, purchasing security systems, wiring the buildings for internet, and so on, are components of any judicial tribunal that in the case of the ICTY and ICTR, were non-existent and needed to be established in order for these tribunals to function. And in the future, all of the money and time that went into creating the ICTY and ICTR will finish with these institutions shutting down forever.

166. Erik Mose, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 921-22 (2005); Akhavan, *supra* note 152, at 508-509.

167. SADAT, *infra* note 200, at 31.

168. Olivia Swaak-Goldman, *Recent Developments in International Criminal Law: Trying to Stay Afloat Between Scylla and Charybdis*, 54 INT'L & COMP. L. Q. 691, 693-94 (2005); *see* Akhavan, *supra* note 152, at 508-509.

169. To this day, these types of problems persist. The ICTY, for instance, has not been able to secure the arrest of General Ratko Mladić, who allegedly directed the Srebrenica massacres, and the alleged mastermind behind the commission of international crimes by Serbs, Serbian politician Radovan Kravdić. BBC News, *The Hague's Wanted Men*, <http://news.bbc.co.uk/2/hi/europe/1935955.stm#km> (last visited October 19, 2007).

former Yugoslavian States and Western countries.<sup>170</sup> Most disturbing was the fact that extraditing indicted individuals, serving subpoenas, or carrying out court orders were near impossible tasks.<sup>171</sup> This severe lack of cooperation was caused by the “toothless” language in the U.N. Resolutions that created the ICTY, which effectively undercut the ICTY’s authority over indicted suspects.<sup>172</sup> If a State refused to cooperate with the ICTY, the ICTY’s only recourse was to complain to the U.N. Security Council.<sup>173</sup> Although the Dayton Peace Agreement (DPA)<sup>174</sup>—an agreement between the former Yugoslavian republics that included provisions mandating their cooperation with the ICTY—was created to fix these cooperation issues, the DPA could not fully cure the structural problems inherent in the ICTY.<sup>175</sup> As for the ICTR, it may have experienced more State cooperation than its sister UN *ad hoc* tribunal, but it endured through allegations of corruption, terribly inadequate facilities, and severe pre-trial delays and detentions.<sup>176</sup> Combining these problems with complaints about their physical location and poor outreach programs, and both UN *ad hoc* tribunals appear distant, ineffective, political, and illegitimate to the affected populations.<sup>177</sup> Indeed, the population of Rwanda and the former Yugoslavia themselves have expressed these precise negative opinions in regards to the ICTY and ICTR.<sup>178</sup> As a result, the ICTY and ICTR are unable to gain authenticity with those who were the most affected by the tragedies in the former Yugoslavia and Rwanda.

Theoretically and legally, *ad hoc* tribunals like the ICTY and ICTR have additional faults. Focusing first on the legal perspective, both *ad hoc* tribunals apply international criminal law which is far from flawless, as illustrated by the subsequent conduct of these tribunals’ chambers. While both the ICTY and ICTR were given statutes by the U.N. Security Council to use, the scope of their

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170. Danner, *supra* note 59, at 24-25; Kalinauskas, *supra* note 86, at 399.

171. Rocco P. Cervoni, *Beating Plowshares Into Swords—Reconciling the Sovereign Right to Self-Determination With Individual Human Rights Through an International Criminal Court: The Lessons of the Former Yugoslavia and Rwanda as a Frontispiece*, 12 ST. JOHN’S J. LEGAL COMMENT. 477, 510 (1997); Kalinauskas, *supra* note 86, at 399-400; See Igor Jovanovic, *Serbia and the UN War Crimes Tribunal: An Historical Overview*, S.E. EURO. TIMES (Belgrade), Jan. 24, 2004 available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/articles/2005/01/24/reportage-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/articles/2005/01/24/reportage-01) (reporting either specific instances or reports of Bosnian war criminals evading the ICTY).

172. Cervoni, *supra* note 171, at 509.

173. *Id.* at 508-09.

174. See generally General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996) (signing of which was meant to cure the jurisdictional issues regarding the ICTY obtaining former Yugoslavian criminal suspects).

175. See Cervoni, *supra* note 72, at 514 (arguing that the DPA had no real effect on the situation of Bosnian war criminals evading extradition or other means of being subjected to the ICTY); Kalinauskas, *supra* note 86, at 399-410 (discussing the lack of cooperation and structural problems with the ICTY, but additionally discussing the unfortunate consequences on ICTY’s mandate that came from the ICTY having to resort to other enforcement measures, which including using NATO).

176. See Tiefenbrun, *supra* note 137, at 589.

177. Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT’L L. 467, 512-514 (2005); see *id.* at 564-65; 583-584.

178. Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT’L & COMP. L. 89, 90.

jurisdiction *ratione materiae* and the definitions of the crimes within their jurisdiction were left to the *ad hoc* tribunals to determine.<sup>179</sup> In the case of the ICTY, the U.N. Security Council and the ICTY Appeals Chambers specifically directed the ICTY to make their jurisdictional determinations and crime definitions based solely on customary international criminal law that existed at the time of the Yugoslavia conflict, because those are the only international crimes that without doubt applied to the potential defendants at the time of commission.<sup>180</sup> Although the ICTY today diligently follows the rule that only customary international criminal law applies within ICTY Chambers,<sup>181</sup> the influential *Tadić* Appeals Chambers hinted at the application of international *conventional* law to ground jurisdiction over a defendant,<sup>182</sup> and an ICTY Trial Chamber actually did ground jurisdiction over a defendant based on treaty law.<sup>183</sup> In relation, the ICTR, following what it believed was the broader mandate given to it by the U.N. Secretary General to use international customary *and* conventional law,<sup>184</sup> has used international *conventional* law to ground jurisdiction over a defendant's conduct and/or define crimes it applies against defendants much more expansively than its' sister UN tribunal.<sup>185</sup>

By permitting such judicial conduct, the ICTY and ICTR exposes itself to legitimate legal criticism. The most notable concern is the problem evident in the legal distinction between "illegality and criminality."<sup>186</sup> Facially, international conventional laws only bind States, not individuals,<sup>187</sup> so it is illegal, but not criminal for anyone to violate international conventional law or treaties.<sup>188</sup> Only the ratifying State is liable for the violation of an international conventional law, and depending on the international conventional law violated, an individual who violated an international convention or treaty law would only become liable for such a violation if a ratifying State gained jurisdiction over the violator and choose to prosecute the individual.<sup>189</sup> Criminality, on the other hand, refers to violations of either customary international criminal law or international conventional laws

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179. METTRAUX, *supra* note 113, at 5; *see supra* section III, B-C.

180. Res. 808 Report, *supra* note 103, ¶ 29; *see e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶¶ 110, 139, 141 (July 29, 2004), *available at* <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf>.

181. *See* METTRAUX, *supra* note 113, at 9.

182. Prosecutor v. Tadić, *supra* note 25, ¶ 143.

183. Prosecutor v. Galić, *supra* note 116, ¶¶ 63 et seq.

184. *See* Res. 955 Report, *supra* note 152, ¶ 12.

185. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 604-607 (Sept 2, 1998); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 353 (May 15, 2003).

186. METTRAUX, *supra* note 113, at 9.

187. There exist *conventional* international criminal laws that create individual criminal responsibility for violations of provisions within these international convention or treaty, such as Genocide Convention or the ICC's Rome Statute. Rome Statute of the ICC, *infra* note 207, art. 25; *see* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, 6, Dec. 9, 1948, 102 Stat. 2045, 78 U.N.T.S. 277, *available at* [http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm) [hereinafter Genocide Convention]. However, these types of conventions/treaties are the extreme minority.

188. METTRAUX, *supra* note 113, at 8-9, 11.

189. *Id.* at 8.

that have attained the status of customary international criminal law whereby the violation includes individual criminal responsibility for the perpetrator of the violation.<sup>190</sup> Therefore, when the ICTY and ICTR grounds jurisdiction<sup>191</sup> over defendants for violating international conventional law alone or in conjunction with other reasons, these *ad hoc* tribunals are artificially attaching individual criminal responsibility to “illegality”, or violations that have not attained criminal status as a matter of customary international law.<sup>192</sup> The ICTY and ICTR, hence, show a willingness not only to charge a defendant with a violation of a conventional international law, but also to convict the defendant, in part or in whole, due to this violation, simply because the Judge says the violation itself is criminal. Consequently, the jurisdictional and judicial purity of these *ad hoc* tribunals is called into question in light of their failure to take the critical step of demonstrating that a conventional international law has attained individual criminal responsibility as a matter of customary international law.

There is an additional concern surrounding the use of international conventional law by *ad hoc* tribunals. Oftentimes, the use of international conventional law confuses the clarity of the crimes charged by and the jurisdiction asserted by the *ad hoc* tribunals. Specifically, many international conventional laws used by the ICTY and ICTR are outdated and some crimes listed under the ICTY and ICTR statute only exists in international customary law, so the use of international conventional law in tandem with customary laws or exclusively sacrifices uniformity in the development of customary international criminal law.<sup>193</sup> Accordingly, *ad hoc* tribunals lack the legal justification to prosecute under most conventional international law, and should properly be relegating to using customary international criminal laws only. Yet, this is not an attractive predicament considering that customary international criminal law is not easily defined and amorphous in nature.

From a theoretical perspective, the very notion of *ad hoc* international criminal tribunals is disjointed when one considers the context within which these tribunals were formed and the underlying crimes that these tribunals adjudicate.

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190. *Id.* at 9, 11. Technically, attaining criminality status means that the individual can be criminally prosecuted for the violation without any need for a domestic State to prosecute the individual. However, that presumes that the individual was under the jurisdiction of an international tribunal that could prosecute the individual (i.e. ICTY, ICTR, ICC). In reality, a violation of an international custom or international conventional law that has attained customary international criminal law status would most likely be prosecuted by a domestic nation that had legitimate jurisdiction over the perpetrator.

191. When the word “jurisdiction” is used in this way, it is meant to include jurisdiction to adjudicate.

192. See METTRAUX, *supra* note 113, at 5-11. There are circumstances where a conventional international law/treaty could be applied against a defendant without legal questions being raised. In the case of the ICTY and ICTR, it would be where a defendant was charged with a violation of a convention/treaty that either Yugoslavia or Rwanda was a ratifying member of, and the corresponding violation can be legally proven to include individual criminal responsibility for the perpetrator of the violation. “But that is not the same as suggesting...that, regardless of its crystallization under customary international law, the treaty *itself* may form the basis of a criminal conviction.” *Id.* at 9.

193. See *id.* at 11.

The moral outrage expounded by the world community in regards to the former Yugoslavian and Rwandan war crimes, crimes against humanity, and genocide was unmistakably intense.<sup>194</sup> Additionally, it is beyond doubt that the underlying acts that led to the creation of these *ad hoc* tribunals represent the absolute worst and most reprehensible human behavior. Juxtapose these examples of unforgivable human conduct and subsequent widespread intense outrage next to the ultra-political, slow to materialize, and problem-riddled ICTY and ICTR, and the incongruence is readily apparent. The world's reaction of disgust and condemnation to these instances of grotesque international criminal conflicts must justly be followed by the fair adjudication of the breaches of international criminal law in an already established forum or tribunal. Anything less than an established tribunal for the prosecution of alleged war crimes, crimes against humanity, genocide, etc. intrinsically casts doubt on the veracity of the world's contempt against such deplorable human behavior. The method of creating the *ad hoc* tribunals, moreover, is ridiculed as undemocratic and unfair, because the ICTY and ICTR were bestowed with the requisite sovereign authority to practice international criminal jurisdiction indirectly from U.N. States pursuant to U.N. Security Council resolution, which means all these States ceded away their sovereignty without a vote on or a genuine chance to "engage in a debate about their cession of sovereignty."<sup>195</sup>

The lack of a permanent international criminal tribunal creates *ex post facto* institutional problems as well, for the formation of the tribunal occurs after the commission of the crime. This last point differs from *ex post facto* criminalization, or the criminalization of conduct after the conduct occurs,<sup>196</sup> because an *ex post facto* institutional problem instead focuses on the lack of an institution to adjudicate breaches of international criminal law. Within a domestic jurisdiction, it would be unfair if the jurisdiction criminalized conduct X and never created or expressed any intention to create an institution responsible for adjudicating conduct X, but then indicted an individual for committing conduct X and created

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194. See POWER, *supra* note 1, at 251, 276; Bland, *supra* note 85, at 234; Cervoni, *infra* note 72, at 483-84; J.F.O. McAllister Washington, *Atrocity and Outrage: Specters of Barbarism in Bosnia Compel the U.S. and Europe to Ponder: Is It Time to Intervene?*, TIME, Aug. 17, 1992 available at <http://www.time.com/time/archive/preview/0,10987,976238,00.html>; see, e.g., Editorial, *Bosnia Without Illusions – Bosnian Crimes Against Humanity*, NAT'L REV., Aug. 31, 1992, at 12, available at [http://www.findarticles.com/p/articles/mi\\_m1282/is\\_n17\\_v44/ai\\_12666339/pg\\_1](http://www.findarticles.com/p/articles/mi_m1282/is_n17_v44/ai_12666339/pg_1). It must be highlighted that unlike the entire world's reaction of moral outrage to the international crimes being committed in Bosnia, the response to the international crimes occurring in Rwanda was different. Unfortunately, only non-governmental organizations and like international organizations called for intervention into Rwanda, and powerful nations were simply indifferent to the Rwandan situation or intervened with small, relatively inconsequential forces. See Toby Gati, *Intelligence and the Use of Force in the War of Terrorism*, 98 AM. SOC'Y INT'L L. PROC. 150, 152, (2004) (explaining the importance of NGO's in bringing the world's attention to the international crimes in Rwanda); Marlise Simons, *France is Sending Force to Rwanda to Help Civilians*, N.Y. TIMES, June 23, 1994, at A1; see *UN Body Concedes It Failed Rwanda, Security Council Vows To Do More Next Time*, GLOBE & MAIL, Apr. 15, 2000, at A25.

195. SADAT, *infra* note 194, at 31.

196. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

an institution to prosecute the individual after the fact. Applying this same idea to the international arena, there might be agreement or codification that conduct X is internationally criminal, but without defining the forum in which conduct X crimes will be adjudicated, proper notice is not given to potential defendants that these crimes will be enforced. Concurrently, “*ad hoc* tribunals give the impression of arbitrary and selective prosecution”,<sup>197</sup> because *ad hoc* tribunals are only designed to try particular international criminals, not all international criminals.<sup>198</sup> For this reason and others, *ad hoc* tribunals are seen as unfair, partial, and only applicable in narrow circumstances.<sup>199</sup> Law can only be applied fairly if the bricks and mortar created to house the law and the flesh and bones charged with enforcing the law exist, because without people and institutions, law is merely symbolic.

#### IV. ICC: LATEST DEVELOPMENT IN INTERNATIONAL CRIMINAL LAW

“The International Criminal Court is the last great international institution of the Twentieth Century. It is no exaggeration to suggest that its establishment could reshape our thinking about international law.”<sup>200</sup> The creation of this “last great international institution of the Twentieth Century” did not materialize overnight. The ICC is the product of more than a century of international diplomacy in tandem with the learned experiences of the ICTY and ICTR.<sup>201</sup>

Prior to its establishment, the ICC was preceded by a multitude of beneficial, but ultimately unsuccessful international efforts to create the world’s first permanent international criminal tribunal.<sup>202</sup> The catalytic events which propelled

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197. SADAT, *infra* note 196, at 31. For some, the word “*ad hoc*” in the context of international criminal law means “selective”. Antonio Cassese, *Is The ICC Still Having Teething Problems?*, 4 J. INT’L CRIM. JUST. 434 (2006).

198. The UN, which was the most important single institution in bringing about the ICC, itself criticized *ad hoc* tribunals as being “selective justice”, due in part because the institutions themselves are built only after the crime is committed. See *Establishment of an International Criminal Court*, *supra* note 7.

199. *Summary Record of the 2300<sup>th</sup> Meeting*, [1993] 1 Y.B. Int’l Comm’n 16, ¶ 4, U.N. Doc. A/CN.4/SR.2300, available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_sr2300.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2300.pdf) (“In the first place, as every lawyer knew, *ad hoc* courts were not the best method of administering criminal justice. The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result.”) M&S YUGO, *supra* note 79, at 38; see M&S RWANDA, *supra* note 123, at 39-46.

200. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 8 (2002) (continuing by stating that “[f]or if many aspects of the Rome Treaty demonstrate the tenacity of traditional Westphalian notions of State sovereignty, there are nonetheless element of supranationalism and efficacy in the Statute that could prove extremely powerful. Not only doe the Statute place State and non-State actors side-by-side in the international arena, but the Court will put real people in real jails. Indeed, the establishment of the Court raises hopes that the lines between international law on the one hand and world order on the other are blurring, and that the normative structure being created by international law might one day influence or even restrain the Hobbesian order established by the politics of States.”).

201. SADAT, *supra* note 200, at 42.

202. BROOMHALL, *supra* note 59, at 27-30, 63-66; *id.* at 21-45 (documenting the many episodes of international negotiations that either were failed attempts to create an ICC-like institution—which contributed to the creation of the ICC anyway—or episodes that generally contributed to the future creation of the ICC).

the international community over the proverbial hump that previously inhibited the creation of a permanent international criminal tribunal were undoubtedly the ICTY and ICTR.<sup>203</sup> The mere existence of the ICTY and ICTR, not to mention the trailblazing role in legal precedent that the ICTY and ICTR forged for the ICC, convinced the world community of the viability of a permanent international criminal court.<sup>204</sup> While the successes of the *ad hoc* tribunals spurred the world community into action, the ills of the *ad hoc* tribunals laid out shortcomings for the ICC to avoid, and to a degree, further accentuated the need for a permanent international criminal tribunal.<sup>205</sup> With this in mind, numerous governmental and non-governmental delegations from across the globe underwent the arduous and fragile task of meshing the varied legal backgrounds of the world, the varied beliefs on international criminal law, and the varied proposals put forth by each delegation into a single agreement to create a permanent international criminal court.<sup>206</sup> Their effort culminated in the Rome Statute of the International Criminal Court (Rome Statute) in 1998, which marked a new era in international law.<sup>207</sup> The following sections offer an historical, legal, and analytical overview of the ICC, which will serve as a context illustrating the problems solved and the issues missed by the ICC.

A. "Constitutional Moment": ICC's Revolutionary Jurisdiction to Prescribe

"When the creation of an international criminal court was first conceived, the focus was to build an effective prosecution and punishment regime"<sup>208</sup> In order to build such a regime, the ICC *had* to be "[t]he first permanent international criminal court..."<sup>209</sup> Yet, permanence was not the only factor necessary to create such a regime, for how such a regime was to be constructed became ever more important. The Rome Statute Framers, in deliberating on the method for creating the ICC, were influenced greatly by the ways in which Nuremberg, the ICTY, and the ICTR came to be, and also by the lessons learned from past futile attempts to create a permanent international criminal tribunal in a State-centric world of international

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203. BROOMHALL, *supra* note 59, at 71 (discussing the catalytic impacts of the ICTY and ICTR, including substantive and procedural international criminal law formation and successes of State cooperation, on the formation of the ICC); SADAT, *supra* note 179, at 39-40.

204. BROOMHALL, *supra* note 59, at 70; Bottini, *supra* note 13, at 504 (comparing the attitude of the world towards a permanent international criminal court before and after the ICTY and ICTR).

205. SADAT, *supra* note 200, at 40 ("even the problems they (ICTY/ICTR) faced . . . did not dampen enthusiasm for the ICC. Rather, they highlighted the urgent need for a permanent institution."). One of the stated goals of the ICC is "[t]o remedy the deficiencies of *ad hoc* tribunals." *Establishment of an International Criminal Court*, *supra* note 7.

206. BROOMHALL, *supra* note 59, at 70-76; SADAT, *supra* note 179, at 1-9, 275; Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 *FORDHAM INT'L L.J.* 750, 752 (2002) (describing the negotiation process needed to create the ICC statute).

207. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999, available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) [hereinafter Rome Statute].

208. Lee, *supra* note 206, at 758.

209. PBS.org, Online News Hour, *U.N. Creates International Criminal Court*, [http://www.pbs.org/newshour/updates/court\\_04-11-02.html](http://www.pbs.org/newshour/updates/court_04-11-02.html) (last visited Oct. 15, 2007).

law. Given that there is no supreme sovereign authority on this planet,<sup>210</sup> the historical foundation of all international laws is a “horizontal” system where the only actors are sovereign, independent States.<sup>211</sup> As a result, the only examples of international criminal law in practice is the few instances where the domestic courts of sovereign States are willing to apply international criminal law using some form of universal jurisdiction,<sup>212</sup> and the even fewer instances where sovereign States consent to the creation of an *ad hoc* international criminal tribunal.<sup>213</sup> With the reality being that States have a monopoly over the implementation of international criminal law and that the “horizontal” international law system is diametrically at odds with the inherently “vertical” legal concept of criminal law,<sup>214</sup> the Rome Statute Framers knew that a new approach was required in order to establish the ICC properly. More traditional international law-making approaches simply failed in creating a permanent international criminal court in the past, and new ideas and methods were required for the international community to accomplish the immense task of succeeding where others had failed.

As a result, the negotiations that preceded the creation of the Rome Statute were unlike any treaty negotiations in the history of international diplomacy. The Rome Statute, considering all of the facets of its creation, can be considered a “[c]onstitutional moment’... a sea-change in international law-making” where true *legislative* behavior, a more or less unheard of concept in international rulemaking, was being undertaken by the international community.<sup>215</sup> Such international legislative action by the international community, as displayed during the creation of the Rome Statute, differs from traditional treaty or convention lawmaking in several respects.<sup>216</sup> First, the Rome Statute is not a “suppression convention” where State Parties agree, in the form of a treaty, that conduct X is criminal and that each State Party must make sure conduct X does not occur on its territory or anywhere within the State Party’s control by passing domestic legislation criminalizing conduct X.<sup>217</sup> For this reason alone, it is said that

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210. SADAT, *supra* note 179, at 11 (stating that one of the objections to the creation of an permanent international criminal tribunal “has been the absence of an international sovereign power with the authority to exert prescriptive jurisdiction over the human beings of the world”).

211. BROOMHALL, *supra* note 59, at 65; CASSESE, *supra* note 59, at 5-6.

212. Again, domestic courts applying international criminal law includes the possibility that the court is applying customary and/or conventional international criminal law, and that the court uses permissive or mandatory universal jurisdiction to gain jurisdiction over the defendant(s) solely or in combination with domestic jurisdiction statutes. *See supra* section II.

213. Also, this statement does not imply that the international criminal tribunals were using universal jurisdiction in all instances. *See supra* section II; III. A.-C; *supra* note 44, 46.

214. *See* BROOMHALL, *supra* note 59, at 59, 65.

215. SADAT, *supra* note 200, at 11-14, 78-79, 108-09, 277; *see also* BROOMHALL, *supra* note 59, at 31, 67; *but see generally* United Nations Convention on the Law of the Sea art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397. The Law of the Sea Convention, while another example of groundbreaking quasi-legislating by the international community in the creation of true international law, cannot be said to have the same implications or severity of legislating as the Rome Statute. SADAT, *supra* note 179, at 13.

216. *See* SADAT, *supra* note 200, at 12-13 (stating that given the circumstances surrounding the creation of the Rome Statute, it cannot be feasible to explain the legitimacy of the Statute on “classic theory of contract between absolute sovereigns (treaty-making) . . .”).

217. BROOMHALL, *supra* note 59, at 12-14, 37. These suppression conventions are the exact kind of

suppression convention impose obligations on States, not on individuals directly.<sup>218</sup> Additionally, it is these suppression conventions that give rise to the already discussed “mandatory universal jurisdiction”, or said differently, an obligation on a State Party to a convention or treaty to comply with the convention or treaty by discharging the State Party’s jurisdictional authority—be it via territorial, nationality, passive personality, etc.—by making conduct X criminal domestically and punishing its commission within the State Party’s territory or anyone under State Party’s control.<sup>219</sup> In contrast to suppression conventions, the Rome Statute legislated directly that certain actions of individuals are internationally criminal per violation of Rome Statute law using a new form of universal jurisdiction that requires no subsequent State party legislation. Building off of the concept of “universal inter-state jurisdiction”,<sup>220</sup> in developing the concept of “universal international jurisdiction”,<sup>221</sup> the Framers of the Rome

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conventions/treaties that give rise to “mandatory universal jurisdiction” discussed above in this Note’s section dedicated to universal jurisdiction. *See supra* section II.

218. BROOMHALL, *supra* note 59, at 13, 37.

219. *Id.* at 12-14, 37. The conduct criminalized under such suppression conventions, which in turn give rise to mandatory universal jurisdiction, are commonly called “treaty crimes”. *Id.* at 30; *see also* SADAT, *supra* note 179, at 109. Note of clarification: Sadat refers to the conceptual ideas of “mandatory universal jurisdiction” and “permissive universal jurisdiction (concepts discussed extensively earlier in this Note) as “universal inter-State jurisdiction.” It is from this concept of universal inter-state jurisdiction, as Sadat describes, that the Rome Statute alters this concept into universal international jurisdiction. *Infra* note 220.

220. The term “universal *inter-state* jurisdiction” is no different from the term “universal jurisdiction” used prevalently in this Note. Sadat defines universal inter-state jurisdiction no differently from the definition of universal jurisdiction used in this Note, “...the well-accepted theory of universal jurisdiction that derives from the idea that when criminal activity rises to a certain level of harm..., or sufficiently important interests of the international society are threatened, any State may apply its laws to the act, ‘even if it occurred outside its territory, even if it has been perpetrated by a non-national, and even if its nationals have not been harmed by [it]’” SADAT, *supra* note 200, at 109-10 (footnote omitted). Inserting the term “inter-state” simply accentuates the use of universal jurisdiction by States, rather than non-State actors. The larger concept of “absolute” universal jurisdiction is simply *any* entity exercising universal jurisdiction over individual(s) under the same theory already discussed heavily in this Note. SADAT, *supra* note 200, at 109; *see supra* section II.

221. SADAT, *supra* note 200, at 109-10. “Universal international jurisdiction” is not the same, but similar to the concept of “international jurisdiction” mentioned earlier in this Note. *Supra* note 44 and accompanying text. International jurisdiction is the broader concept, and universal international jurisdiction is a subset of international jurisdiction. As stated above, international jurisdiction is where a non-State actor (i.e. an international tribunal like Nuremberg) receives delegated authority from State(s) to prescribe particular conduct as internationally criminal, adjudicate an individual(s) for commission of the international crime(s), and hopefully enforce their decisions through some means. Under the concept of international jurisdiction, there is no inquiry into the source of jurisdiction from which the delegating State(s) delegate jurisdictional authority to the non-State actor in the first place. If the delegated authority comes from the territorial jurisdiction of the delegating State(s), it would be said that the tribunal is practicing “territorial international jurisdiction.” If, however, the source of the jurisdiction that the State(s) delegates to the non-State actor stems from universal jurisdiction, this can be said to be “universal international jurisdiction”, as is the situation where the ICC Prosecutor will receive referrals from the Security Council, but not entirely the situation where the Prosecutor initiates their own investigation or an ICC State Party refers a case to the ICC Prosecutor (i.e. that would be territorial, or even nationality, international jurisdiction). In the U.N. Security Council referral situation, the ICC will initiate investigations into a suspected international crime using true universality principle,

Statute criminalized, in specific circumstances,<sup>222</sup> certain conduct of foreign individuals in foreign lands against foreign victims “by embodying prescriptive norms for the international community as a matter of substantive criminal law.”<sup>223</sup> Specifically, the Rome Statute allows the ICC “to supplement, or even displace,” national criminal laws applied pursuant to territorial principle in favor of the international criminal code set forth in the Rome Statute applied pursuant to universal international jurisdiction.<sup>224</sup> Hence, without any prerequisite for State Party legislations, the Rome Statute applies obligations on individuals directly by establishing a criminal code that is “universal in thrust and unbounded by geographical scope.”<sup>225</sup>

Second, the method in which the Rome Statute was formed deviated from traditional convention and treaty creation methods, where the default rule is that decisions during negotiations are only made by consensus or unanimity, a blatant and traditional ode to sovereignty.<sup>226</sup> Instead, the Rome Statute negotiations employed legislative voting procedures whereby super or simple majority votes resolved disputes and also brought about final substantive decisions.<sup>227</sup> Third, in a true sign of unparalleled international legislating the Rome Statute empowered the ICC to exercise jurisdiction to prescribe, to adjudicate, and to enforce, all in one document, which are jurisdictional powers that have historically been “the most jealously guarded precinct of State sovereignty.”<sup>228</sup> A further indication that the

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because the State where the crimes occurred would not have anything to do with U.N. Security Council referring a situation to the ICC Prosecutor for possible investigation and prosecution, and the ICC Prosecutor—an non-State actor— obviously has no connection to the crime or criminal. Sadat defines universal international jurisdiction as, “[t]he international community as a whole, in certain limited circumstances, to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in thrust and unbounded in geographical scope.” *Id.* at 110.

222. Rome Statute only makes criminal “the most serious crimes of concern to the international community as a whole.” Rome Statute, *supra* note 207, art. 5(1). As will be discussed later in this Note, this is a pretty blurry line to draw.

223. SADAT, *supra* note 200, at 108-110. As discussed previously and will be discussed further in this Note, it is not as if the State Parties to the Rome Statute conjured up previously unheard of international laws, but were negotiating on the codification of already existing, but undefined customary international criminal laws, “the elaboration and adoption of an international criminal code as part of the Rome Treaty was perhaps the least controversial of the three jurisdictional axes within the Rome Statute, for the four categories of crimes within the Statute were consider *jus cogens* norm by most writers, even though their precise definition had not yet been completely agreed upon by all States.” *Id.* at 108 (footnote omitted).

224. *Id.* at 108.

225. *Id.* at 110. The end result of the Rome Statute negotiations is that “the universality principle [universal jurisdiction] has been extended from a principle governing inter-State relations to one of general prescriptive international law . . .” *Id.* at 116-17 (alteration).

226. See generally INT'L L. COMM'N, REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, U.N. Doc. ST/LEG/SER.B/21 (1985).

227. SADAT, *supra* note 200, at 11-14, 109, 280.

228. BROOMHALL, *supra* note 59, at 68; SADAT, *supra* note 200, at 107-108 (describing the Rome Statute as, “[t]hrough a rather extraordinary process, these three jurisdictional categories classically known to international law have been transformed from norms providing ‘which State can exercise authority over whom, and in what circumstances,’ to norms that establish under what conditions the international community . . . may prescribe international rules of conduct, adjudicate breaches of those

Rome Statute possesses a unique international legislative quality is that the ICC is an independent legal and judicial entity, completely distinct from the U.N.<sup>229</sup> Finally, explicitly not permitting States to condition their signatures with reservations or deviations from the laws and procedures set forth in the Rome Statute solidifies the unprecedented legislative nature of the Rome Statute's creation.<sup>230</sup>

*B. Role of Customary International Criminal Law in the ICC*

While it is notable that the Rome Statute negotiations were radically different from treaty norms, the most revolutionary aspect of the Rome Statute was the Rome Statute itself. In the realm of international criminal tribunals, predecessors of the ICC were not created by treaty.<sup>231</sup> The ICC, therefore, was the byproduct of an extraordinary international act whereby an international criminal tribunal, including its substantive and procedural attributes, was created from the ground up through treaty negotiation between sovereign States. Aside from the obvious length of time treaty negotiations take, establishing the first permanent international criminal tribunal pursuant to treaty possesses advantages over other options, such as the ability to clarify and refine complex international criminal laws, create new binding substantive and procedural laws if need be, allow sovereign voices to be heard, and choose how treaty laws are to apply, if at all.<sup>232</sup> The difficult obstacle of creating the ICC demanded that the ICC be created by treaty negotiation rather than by other options, such as U.N. resolution,<sup>233</sup> but treaty negotiations complicated the relationship between customary international law, the historical hallmark of international criminal law, and the ICC. Past international criminal tribunals, including Nuremberg, ICTY, and ICTR, relied heavily on customary international law, because those international criminal tribunals were simply forums to adjudicate already existing customary

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rules, and enforce those adjudications"); see Antonio Cassese, *On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 6 (1998) (stating that one of the most precious powers of sovereignty is criminal/penal jurisdiction).

229. Rome Statute, *supra* note 207, art. 1, 2; SADAT, *supra* note 200, at 78-9.

230. Rome Statute, *supra* note 207, art. 120. This concept of not allowing reservation by Rome Statute signatory States must be distinguished from the Roaming ICC's concept of not allowing any deviations from the substantive and procedural Roaming ICC laws passed by Roaming ICC signatory States. See *infra* section V, B. Under the Rome Statute, when a State signs the Rome Statute, it cannot condition its signature/ratification with reservations to the substantive and procedural laws set forth in the Rome Statute. While this idea is also incorporated in the Roaming ICC proposal, when this Note says that Roaming ICC State Parties are not allowed to deviate from the substantive and procedural Roaming ICC laws, it is meant that the Roaming ICC State Parties cannot deviate from the Roaming ICC substantive and procedural laws that those State Parties enact into their own jurisprudence. See *infra* section V, B. This is not a reference to conditional signatures.

231. Both *ad hoc* tribunals were created by U.N. Resolutions. See *supra* section III, B-C. Nuremberg was a pseudo-treaty, but better described as either an agreement among Allied Powers on how to handle war criminals or the Allied powers acting as new government of Germany in exercising criminal jurisdiction. See *supra* section III, A.

232. SADAT, *supra* note 200, at 261 (detailing treaty advantages in regards to the ICC); see M&S YUGO, *supra* note 72, at 40 (explaining the advantages of creating the ICTY pursuant to treaty).

233. BROOMHALL, *supra* note 59, at 67-68.

international criminal laws.<sup>234</sup> Although it would be disingenuous to argue that customary international criminal law did not heavily influence the international criminal laws established under the Rome Statute, customary international law does not have the same relationship with the ICC as it did with Nuremberg, ICTY, and ICTR.<sup>235</sup> Differing from its predecessors, the ICC would solely adjudicate “the criminal code for the world”,<sup>236</sup> or the laws legislatively created under the Rome Statute negotiations, and apply those laws prospectively;<sup>237</sup> hence, customary international criminal law is not the legal foundation of the ICC nor is it required that the ICC only apply customary international criminal law. Yet, customary international criminal law, by its nature, continues to evolve independently from the ICC<sup>238</sup> and the extent to which existing or future customary international criminal law would or would not influence the crimes enumerated in the Rome Statute or the future work of the ICC was an issue that needed resolution.

The dilemma surrounding the relationship between customary international law and the ICC is borne out of the political reality of the treaty making process, a reality that was particularly prevalent during the Rome Statute negotiations. Negotiations on any contentious international legal issue, like creating a permanent international criminal court, will involve a battle between two age-old competing interests: “sovereignty” and “international rule of law”.<sup>239</sup> In the context of the Rome Statute negotiations, “international rule of law” supported the creation of a treaty that would attract sufficient State support to create an impartial, authoritative, and legitimate international criminal system, whereas “sovereignty” supported a treaty that would safeguard the independence, power, and discretion of all States.<sup>240</sup> As these competing interests expectedly bore themselves out during the Rome Statute negotiations in the form of the political compromises, anxiety grew over the effect such compromises would have on existing customary international criminal law, “[t]he concern arose that the treaty-making process

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234. It can be argued that Nuremberg partook in pseudo-legislating international criminal laws, as pointed out earlier in this Note. *See supra* section III, A. Nevertheless, none of these predecessor international criminal tribunals could be said to legislate international criminal laws. As pointed out elsewhere in this Note, each of these predecessor tribunals, being tribunals that were created after the commission of the crimes, were relegated to adjudicating laws that stood at the time the alleged suspects committed the crimes. *See supra* section III, A-C. The ICC is not limited in this fashion, however, and can thus formulate laws that it will adjudicate in the future, regardless if they existed at the time the Rome Statute was initially created.

235. SADAT, *supra* note 200, at 11-12.

236. *Id.* at 263.

237. The Rome Statute’s use of the term “[f]or purpose of this Statute” indicates that the criminal laws under the treaty are not customary international criminal laws, but laws specifically legislated for use by the ICC. Rome Statute, *supra* note 207, art. 6, 7(1), 8(2).

238. *See* SADAT, *supra* note 200, at 263.

239. BROOMHALL, *supra* note 59, at 68. “The former President of the [ICTY], Antonio Cassese, describes the choice in stark terms: either one supports the international rule of law, or one supports State sovereignty. The two are not, in his view, compatible.” *Id.* at 56. Cassese’s statement directly highlights the eternal conflict waged between the international rule of law and State sovereignty, and how this conflict is ever present in international law/politics/diplomacy. This idea will be addressed more fully later in this Note.

240. *Id.* at 67-68.

might, rather than advance the cause of international justice, actually produce definition of crimes that would be ‘lowest common denominator’ definitions far more restrictive than those generally believe to be part of customary international law...”<sup>241</sup> To squelch these worries, Article 10 was added, “[n]othing in this [Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”<sup>242</sup> At first blush, Article 10 appears to permit the existence of two sets of equally universal international criminal law that differ from each other, one being the more restrictive Rome Statute<sup>243</sup> and the other being pre-existing customary international criminal law. However, as noted, customary international criminal law will continue to evolve; thus, Article 10 does not partition the Rome Statute from customary international criminal law, but instead is an admission that political compromises were made during the Rome Statute negotiations and these compromises are the floor, or the “minimum rules of conduct and [those outside the tribunal] (and the Court itself) must read it that way.”<sup>244</sup> Consequently, Article 10 creates a “pick and choose” mechanism, whereby the parts of the Rome Statute that pair back on contemporary customary international criminal law are limited in application to the ICC, and the more progressive parts of the Rome Statute are its contributions to the development of customary international criminal law.<sup>245</sup> Furthermore, as customary international criminal law continues to develop in the future, Article 21 permits the ICC to use these developments to supplement its decision as a type of “gap filler”:<sup>246</sup> “[t]he Court shall apply...where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”<sup>247</sup> While the future will determine if the Rome Statute Framers made a mistake or were brilliant in allowing for the existence of a law outside of the Rome Statute, their recognition and subsequent action to detail the relationship between the Rome Statute and customary international criminal law shows a subjective belief on the part of the Rome Statute Framers that they were truly legislating a world criminal code.<sup>248</sup>

### C. *The Structure of the ICC and Its Jurisdiction to Adjudicate*

The end result of the Rome Statute negotiations was the ICC, an international legal and judicial body unlike any other in history. The Rome Statute clearly was an unprecedented exercise of international prescriptive jurisdiction, and as a result,

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241. SADAT, *supra* note 200, at 267.

242. Rome Statute, *supra* note 207, art. 10.

243. The ICC is universally applicable to all—regardless if an individual is from a State that has not ratified the Rome Statute—when a case is referred to the ICC from the U.N. Security Council.

244. SADAT, *supra* note 200, at 263. Sadat also states that “article 10 retains tremendous importance not as a rule of decision but as a principle of interpretation.” *Id.*

245. *Id.* at 269. This idea is not foreign, for the Nuremberg Judgment echoed a similar sentiment in regards to the Nuremberg Charter when it said that the Charter was an “expression of international law existing at the time of its creation” while simultaneously “a contribution to international law.” Judgment of Oct. 1, 1946, *supra* note 62, at 186, 216-17.

246. SADAT, *supra* note 200, at 270.

247. Rome Statute, *supra* note 207, art. 21(1)(b).

248. SADAT, *supra* note 200, at 271.

the ICC is the first international tribunal to possess prospective subject matter jurisdiction over any international crime, which in the ICC's case is jurisdiction over genocide,<sup>249</sup> crimes against humanity,<sup>250</sup> war crimes,<sup>251</sup> and aggression.<sup>252</sup> Yet, there are substantial limits placed on the ICC by the Rome Statute that make the ICC very different from a domestic court. The Rome Statute bestowed the ICC with limited temporal and personal jurisdiction, failing to give the ICC jurisdiction over past international crimes and jurisdiction over corporations or States.<sup>253</sup> The most significant restraint on the ICC is on its jurisdiction to adjudicate. Unlike any domestic court in any domestic jurisdiction, the Rome Statute does not allow jurisdiction to adjudicate to follow naturally from jurisdiction to prescribe.<sup>254</sup> Only in limited instances will the ICC be able to adjudicate the commission of an international crime(s) that the Rome Statute prescribed as internationally criminal. To illustrate the regimen created to determine when the ICC can exercise its jurisdiction to adjudicate, the first step will be to discuss the separate organs of the ICC and their roles, followed by a discussion on how the ICC's jurisdiction to adjudicate is triggered and the limits of the ICC's jurisdiction to adjudicate.

The ICC is divided into four main parts: The Presidency, the Judiciary, the Registry, and the Office of the Prosecutor.<sup>255</sup> The Presidency is primarily called upon to ensure the "proper administration of the Court, with the exception of the Office of the Prosecutor",<sup>256</sup> which includes managing the Judges in the Judiciary, deciding if an increase in Judges is necessary,<sup>257</sup> and anything else that the Rome Statute may in the future call the Presidency to do.<sup>258</sup> The Presidency is made up

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249. Rome Statute, *supra* note 207, art. 6.

250. *Id.* at art. 7.

251. *Id.* at art. 8.

252. The crime of aggression or crimes against peace was not specifically defined under the Rome Statute, thanks in part to its highly controversial status. The crime of aggression is prescribed under the Rome Statute in theory. Rome Statute of the ICC, *supra* note 207, pmbl., art. 5(2). However, aggression will not become justiciable until it is defined pursuant to the Rome Statute's amendment procedures, which will be an ongoing, slow process for the ICC to undertake. Rome Statute, *supra* note 207, art. 121, 123; BROOMHALL, *supra* note 59, at 46-7; SADAT, *supra* note 200, at 134-8.

253. Rome Statute, *supra* note 207, art. 1, 11, 25(1).

254. For example, if a domestic jurisdiction prescribes murder as criminal, the adjudication of murder in that domestic jurisdiction by that domestic jurisdiction's judiciary will always occur. The ICC does not make such a smooth transition from jurisdiction to prescribe to jurisdiction to adjudicate, as will be described below.

255. Boller, *supra* note 63, at 282; *see* SADAT, *supra* note 200, at 86-98. While not specifically an organ of the ICC, there also exist the Assembly of State Parties, which is charged with general oversight of the ICC's "operations and functioning", including management and budget oversight, changes to amount of judges, potential amendments to the Rome Statute, and alterations to ICC's Criminal, Procedural, and Evidentiary rules. Rome Statute, *supra* note 207, art. 112(2)(a-b, d-e); SADAT, *supra* note 200, at 98-99. A decision made by the Assembly of the Parties is made by consensus, but if there is no consensus, a decision is made by either supra-majority or simple majority depending on the type of decision. Rome Statute, *supra* note 207, art. 112(7).

256. Rome Statute, *supra* note 207, art. 38(3)(a)

257. *Id.* at art. 36(2).

258. *Id.* at art. 38(3)(b).

of full time Judges elected by a majority of their peers.<sup>259</sup>

The Judiciary, or what the Rome Statute identifies as the “Appeals Division, a Trial Division and a Pre-Trial Division”,<sup>260</sup> is made up of eighteen Judges from signatory State Parties to the ICC, with strict regulations on the term limits, election procedure, moral character, and geographic makeup of the Judges.<sup>261</sup> Selection of Judges also includes a consideration of an equitable geographic distribution of Judges and legal systems, equal distribution of gender,<sup>262</sup> their special expertise in specific areas of concern,<sup>263</sup> competence and experience in criminal law and procedure, and competence and experience in international law, particularly humanitarian law and law of human rights.<sup>264</sup> Each Judge within the Judiciary serves a non-renewable nine year term,<sup>265</sup> which was agreed upon to avoid the politicization of Judge selections. However, some argue the term-limit diminishes the legitimacy, institutional memory, and competence of the Judiciary.<sup>266</sup> Once the Judiciary is set, the Judges are tasked with organizing themselves within the Appellate, Trial, and Pre-Trial divisions.<sup>267</sup> While almost all legal systems are familiar with Trial and Appellate divisions, the Pre-Trial division is a civil law concept that is “actively involved in the organization and supervision of the case by the Prosecutor during the pre-trial phase”,<sup>268</sup> which, among other things, includes deciding whether reasonable evidence exist to proceed with an investigation or begin a prosecution,<sup>269</sup> hearing challenges to admissibility or jurisdiction of the ICC,<sup>270</sup> preserving evidence, protecting national security information,<sup>271</sup> and confirming charges for admittance to Trial division.<sup>272</sup>

The Registry, while handling the operation of the ICC with respect to non-legal matters,<sup>273</sup> has immensely important responsibilities that have direct impact on ICC cases.<sup>274</sup> Chief among those responsibilities is the selection and facilitation

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259. *Id.* at art. 35(2), 38.

260. *Id.* at art. 34(b).

261. *Id.* at art. 36(3); Boller, *supra* note 63, at 282-283.

262. Rome Statute, *supra* note 207, art. 36(8)(a).

263. *Id.* at art. 36(8)(b).

264. *Id.* at art. 36(3)(b)(i-ii).

265. *Id.* at art. 36(9)(a).

266. SADAT, *supra* note 200, at 87-88. Another contentious issue is the power to issue majority and minority judicial opinions by both Trial and Appeals Chambers, and separate opinions by the Appeals Chambers, which the ICC Judiciary does have. Rome Statute of the ICC, *supra* note 207, art. 74(5), 83(4). A good overview of the arguments surrounding this issue are found in Sadat’s book. SADAT, *supra* note 200, 88-90.

267. Rome Statute, *supra* note 207, art. 38(1).

268. SADAT, *supra* note 200, at 91.

269. Rome Statute, *supra* note 207, art. 15(4), 53(2).

270. *Id.* at art. 15(3), 17-19, 57(2).

271. *Id.* at art. 57(3)(c).

272. *Id.* at art. 61.

273. *Id.* at art. 43(1).

274. SADAT, *supra* note 200, at 96. Registrars in the ICTY and ICTR manage the detention units, maintain court records, handle all language related services, and control the Tribunals’ budget. M&S YUGO, *supra* note 79, 168-70; M&S RWANDA, *supra* note 123, at 396-98.

of defense counsels for suspects.<sup>275</sup> Registry is controlled by a full-time, elected Registrar, and the possibility does exist for the appointment of a Deputy Registrar.<sup>276</sup>

The highly controversial Office of the Prosecutor, a separate entity from all other ICC organs,<sup>277</sup> has a Prosecutor and Deputy Prosecutor that are subject to very similar membership requirements and election procedures as the Judiciary.<sup>278</sup> The main purpose of the Office of the Prosecutor is to make determinations as to the appropriateness of exercising the ICC's jurisdiction to adjudicate:<sup>279</sup> "[t]he Prosecutor is responsible for receiving referrals and substantiating information on crimes within the jurisdiction of the [ICC], for examining those referrals and for conducting investigation and prosecutions."<sup>280</sup> There are three avenues from which the Prosecutor can commence an investigation or prosecution: referrals from a State party, referrals from the U.N. Security Council, or investigations and prosecutions started *proprio motu* (on his or her own motion).<sup>281</sup> Bestowing State Parties and the U.N. Security Council with substantial power to determine when and where the Prosecutor acts is clearly inserted in the Rome Statute to appease the sovereignty of States;<sup>282</sup> however, allowing the Prosecutor, in limited circumstances, to initiate investigations/prosecutions on their own proves that the Rome Statute Framers understood that political, economic, and other non-legal reasons would inhibit States and the U.N. Security Council, in many instances, from referring cases to the ICC.<sup>283</sup> Furthermore, an independent Prosecutor would bring legitimacy and effectiveness to the ICC and give an incentive to States to

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275. SADAT, *supra* note 200, at 98.

276. Rome Statute, *supra* note 207, art. 43(4-5).

277. *Id.* at art. 42(1).

278. *Id.* at art. 42(4); Boller, *supra* note 63, at 283.

279. As alluded to elsewhere in this Note, jurisdiction to prescribe and jurisdiction to adjudicate are related, but different. *Supra* note 254 and accompanying text. Using the ICC as an example, jurisdiction to prescribe certain conduct as internationally criminal revolves around this Note's prior discussion on universal international jurisdiction, or the ICC's jurisdiction to deem particular conduct as internationally criminal wherever it takes place. *Supra* note 220 and accompanying text. The subsequent conversation here discusses whether the ICC can/should adjudicate an individual(s) who has violated the Rome Statute. Hence, jurisdiction to prescribe is the *legislative* power to make certain conduct criminal, and jurisdiction to adjudicate is the *judicial* power to judge whether certain laws have been violated. The theoretical jump from jurisdiction to prescribe to jurisdiction to adjudicate is not so immediate under the ICC regime in comparison to domestic jurisdiction, because under domestic regimes, jurisdiction to adjudicate follows naturally from jurisdiction to prescribe; only restricted by reasonableness. *Supra* note 254 and accompanying text. However, under the ICC, the State consent regime, the principle of complementarity, and the principle of *ne bis in idem* are three ways the ICC is restricted from adjudicating Rome Statute crimes that the ICC has prescriptive jurisdiction over and could theoretically prosecute. SADAT, *supra* note 200, at 112.

280. SADAT, *supra* note 200, at 95; Boller, *supra* note 63, at 283.

281. Rome Statute, *supra* note 207, art. 13.

282. Additionally, the U.N. Security Council option was included to take care of situations where international crimes occurred exclusively domestically, and that certain State was either not party to the Rome Statute, was a State Party that refused to adjudicate the case domestically, or a State Party that refused to refer a situation to the ICC. See BROOMHALL, *supra* note 59, at 207.

283. BROOMHALL, *supra* note 59, at 78-82; SADAT, *supra* note 200, at 112-19.

initiate their own investigations or prosecutions of Rome Statute violations.<sup>284</sup>

The manner in which any “situation”<sup>285</sup> is referred to the Prosecutor by a State Party or U.N. Security Council or if the case is started by the Prosecutor *proprio motu*<sup>286</sup> will determine which jurisdictional rationale to adjudicate is implicated and the processes that the Prosecutor must follow in order to commence an investigation. If a situation is referred to the Office of the Prosecutor by a State Party or initiated *proprio motu*, the Prosecutor’s jurisdiction to adjudicate requires implicit State Party consent, in that either the territorial State in which the suspected violations of the Rome Statute occurred or the State of the suspect’s nationality is a State Party to the Rome Statute or has consented *ad hoc* to ICC’s jurisdiction.<sup>287</sup> While universal jurisdiction to adjudicate is not completely eliminated from the justification of the Prosecutor’s jurisdiction to adjudicate situations or cases referred by State Parties or started by *proprio motu* motion,<sup>288</sup> the Prosecutor’s jurisdiction to adjudicate State party referrals and *proprio motu* motions is “layered... [with] a State consent regime based on two additional [] principles of jurisdiction: the territorial principle and the nationality principle”, considered the two most fundamental jurisdictional principles of criminal law.<sup>289</sup>

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284. BROOMHALL, *supra* note 59, at 79-80; 86. Considering that the ICC makes the final decision on its jurisdiction to adjudicate, incentives include the avoidance of adverse international media exposure, diplomatic hardship, a duty to cooperate with the ICC, and legitimizing domestic legal system.

285. To protect the independence of the Prosecutor and legitimacy of the ICC, situations, not cases or suspects, are referred to the Office of the Prosecutor by a State Party or U.N. Security Council. *Id.* at 79-80.

286. If an investigation is started by a *proprio motu* motion of the Prosecutor, it is not limited to “situations”, because this allows victims and interested parties to “avail themselves of the Court”. *Id.* at 80.

287. Rome Statute, *supra* note 207, art. 12(2); BROOMHALL, *supra* note 59, at 80. It is an implicit consent from the State Party, because upon ratification of the Rome Statute domestically, the State Party has proactively and explicitly accepted the jurisdiction of the ICC over the crimes specifically enumerated and defined in the Rome Statute without the availability of reservations. Rome Statute, *supra* note 207, art. 5-9, 12(1), 120.

288. Universal jurisdiction plays a role in not only the ICC’s jurisdiction to *prescribe* certain conduct—as discussed above in section on universal international jurisdiction—but also in the Prosecutor’s jurisdiction to *adjudicate* situations/cases referred to the Office of the Prosecutor by a State Party or by *proprio motu* motion. *Supra* note 220 and accompanying text. In other words, universal jurisdiction is not completely excluded from an ICC case that started from a State Party referral or from a Prosecutor’s *proprio motu* motion, because the States Parties—even absent their presumed territorial and nationality jurisdiction to adjudicate such crimes—still have universal jurisdiction to adjudicate genocide, crimes against humanity, etc., as these crimes are *jus cogens*, and punishable by all States pursuant to customary international criminal law. Hence, a State Party that refers a case or a Prosecutor that starts their own investigation could, theoretically, need not find that the crimes occurred on the territory or by a national of a State Party in order to justify the adjudication, but this requirement was artificially imposed pursuant to the Rome Statute to ease the concerns of some States during negotiations.

289. SADAT, *supra* note 200, at 116-17; BROOMHALL, *supra* note 59, at 80-81. Broomhall also argues that, practically speaking, an additional precondition exist for the ICC to exercise its jurisdiction to adjudicate, that being the approval of the U.N. Security Council in situations referred to the ICC via State Party or by Prosecutor *proprio motu* motions. Under Article 16, no investigation or prosecution may be commenced or continued if the U.N. Security Council passes a Chapter VII resolution

In contrast, a referral from the U.N. Security Council does not require any explicit or implicit consent from any State Parties to justify the Prosecutor's jurisdiction to adjudicate, because the U.N. Security Council, acting pursuant to its Chapter VII powers to protect international peace and security,<sup>290</sup> can refer a situation to the Office of the Prosecutor that has occurred on the territory of a State or non-State Party and/or by a national of a State or non-State Party. Under U.N. Security Council referrals, the Prosecutor has jurisdiction to adjudicate anyone, anywhere in the world.<sup>291</sup> So, it can be said that situations investigated or prosecuted by the Prosecutor pursuant to a U.N. Security Council referral is universal jurisdiction to adjudicate in its purest form.<sup>292</sup>

Turning to the varied procedures that the Prosecutor must follow in regard to investigations and prosecutions, referrals of situations to the Office of the Prosecutor by State Parties or by the U.N. Security Council must overcome a lower threshold in order for the Prosecutor to initiate an investigation or prosecution, in that the Prosecutor must only establish that a reasonable basis exist for an investigation or prosecution to commence pursuant to Article 53.<sup>293</sup> Moreover, State Parties, the U.N. Security Council, and even the Pre-Trial Chamber in limited circumstances, can request reconsideration of situations referred to the Prosecutor that the Prosecutor subsequently concluded were void of a reasonable basis to investigate or prosecute.<sup>294</sup> *Proprio motu* investigations or prosecutions, on the other hand, must adhere to a much stricter procedure whereby the Pre-Trial Chambers "closely supervise cases in which the Prosecutor exercises his or her *proprio motu* investigative powers."<sup>295</sup> In addition to the requirement that the Prosecutor must find a reasonable basis to proceed with an investigation or prosecution pursuant to Article 53, the Prosecutor must apply for the Pre-Trial Chamber's approval for an investigation, which gives rise to further inquiry into the facts and law of the case by the Judiciary, and only after approval by the Pre-Trial Chamber may the Prosecutor proceed with the investigation or initiate a prosecution.<sup>296</sup> The more stringent procedure put upon the Prosecutor in respect to

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requesting the ICC to withdrawal from adjudicating a particular situation. However, this requires an affirmative, unified action by the overly political, divergent U.N. Security Council in order to *stop* a potential or ongoing investigation/prosecution. Plus, there still is not a literal requirement that the Office of the Prosecutor must receive authorization from the U.N. Security Council prospectively in order to adjudicate a situation. Rome Statute, *supra* note 207, art. 16; BROOMHALL, *supra* note 59, at 81-82.

290. Rome Statute, *supra* note 207, art. 13(b). The Security Council can only refer a situation pursuant to their Chapter VII powers to protect international peace and security, not pursuant to any other powers bestowed to the U.N. Security Council by the U.N. Charter. BROOMHALL, *supra* note 59, at 79.

291. SADAT, *supra* note 200, at 116-17.

292. *Id.* at 116-17.

293. Rome Statute, *supra* note 207, art. 53(1-2).

294. *Id.* at art. 53(3).

295. SADAT, *supra* note 200, at 95.

296. Rome Statute, *supra* note 207, art. 15. Broomhall believes the structural differences between referrals from a State Party and U.N. Security Council vs. cases started *proprio motu* by the Prosecutor boils down to the difficulty the Prosecutor has in obtaining Article 54 powers, which include the power

*proprio motu* investigations and prosecutions resulted from the fear that despite the benefits of an independent Prosecutor, political motivations and other non-legal impulses could contaminate the Prosecutor’s judgment, thus outside checks on the Prosecutor’s *proprio motu* powers were deemed necessary.<sup>297</sup>

Overarching the entirety of the ICC’s jurisdiction to adjudicate is the principle of complementarity, a concept constructed by the Rome Statute Framers.<sup>298</sup> The principle of complementarity is not to be confused as meaning concurrent. Rather, complementarity defines the admissibility of a situation or case to the ICC and sets the ground rules for ICC’s jurisdiction to adjudicate in a State-centric world where a State or multiple States and the ICC will possess simultaneous jurisdiction to adjudicate a situation or case.<sup>299</sup> The ICC may exercise its jurisdiction to adjudicate a situation only if: 1.) a State that has jurisdiction over a situation “is unwilling or unable genuinely to carry out the investigations” or a State with jurisdiction over the situation “decided not to prosecute” it; 2.) the situation is of “sufficient gravity” for the ICC to adjudicate and; 3.) the alleged suspect has not already been tried for the same conduct at issue.<sup>300</sup> Particular to situations referred by State Parties and prosecutions or investigations commenced *proprio motu*,<sup>301</sup> if the Prosecutor begins an investigation, the Prosecutor must notify the State or States that “would normally exercise jurisdiction over the crimes concerned” of a pending ICC investigation, and if a State contacted ask for the Prosecutor to defer, the Prosecutor must defer the investigation barring Pre-Trial Chamber authorization to the contrary.<sup>302</sup> However, the Prosecutor may revisit a deferred investigation if there is a “significant change of circumstances based on the State’s

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to make cooperation requests upon State Parties. BROOMHALL, *supra* note 59, at 79, n. 41.

297. BROOMHALL, *supra* note 59, at 79-80.

298. To reiterate in different words, to understand complementarity correctly—and the whole ICC’s jurisdiction to adjudicate for that matter—, remember that there is jurisdiction on one hand and admissibility on the other hand, within the context of the ICC. The ICC can have jurisdiction over a situation, but complementarity will make the ICC’s jurisdiction inadmissible. However, no situation would ever be admissible without the ICC having jurisdiction over it. Sadat gives a great discussion on jurisdiction and admissibility concepts under the ICC. SADAT, *supra* note 200, at 122-27.

299. *Id.* at 119. From the beginning of the Rome Statute, it is said that the ICC is “complimentary” to domestic/national jurisdictions, and thus the principle of complementarity conceptually defines when ICC jurisdiction to adjudicate is permissible or if a State has primacy of jurisdiction. Rome Statute, *supra* note 207, pmb1., art.1.

300. *Id.* at art. 17(1)(a-d); SADAT, *supra* note 200, at 119. A detailed discussion on the principle of complementarity and also how complementarity gives incentives for States to adjudicate international crimes is done by Broomhall. BROOMHALL, *supra* note 59, at 86-93.

301. The Rome Statute is vague on how the principle of complementarity relates differently, if at all, to situations referred to the Prosecutor via a State Party, U.N. Security Council, or cases started *proprio motu*. While Article 17 on complementarity does not refer to a distinction between the three types, Article 18 on complementarity only applies to *proprio motu* or State Party referral investigations/prosecutions. Rome Statute, *supra* note 207, art. 17-18. Sadat suggests that maybe complementarity is bypassed in situations referred to the Prosecutor by the U.N. Security Council, and if not bypassed, the situation is on the “fast track” to investigation and potential prosecution, because Article 18 does not apply. SADAT, *supra* note 200, at 123. Boller, on the other hand, states that the Prosecutor is under no deferral obligations or the principle of complementarity if the situation is referred to the Prosecutor via U.N. Security Council. Boller, *supra* note 63, at 287.

302. Rome Statute, *supra* note 207, art. 18(1-2).

unwillingness or inability to carry out the investigation.”<sup>303</sup> The hopeful end result of having a procedure of complementarity is that the investigation or prosecution of international crimes will occur one way or another, because either a sovereign State will take control of its opportunity to head up an investigation and prosecution of an international crime or the ICC will step into its place by exercising its jurisdiction to adjudicate the criminal conduct.

As highlighted from this Note’s look at the ICC, many of the criticism lodged against the *ad hoc* tribunals are not applicable to the ICC. Of most importance, the *ex post facto* institutional criticisms that dealt with the creation of *ad hoc* tribunals, or tribunals post-crime, is erased with the permanent ICC. First, it seemed illogical to put in such a tremendous amount of time, effort, and money to create the ICTY and ICTR, all for the adjudication of international crimes that occurred in individual conflicts of the past, rather than putting that time, money, and effort into creating a tribunal that would *prospectively* handle *all* future international crimes under its jurisdiction. However, this is exactly what the Rome Statute and ICC did, thus avoiding this criticism altogether. Second, having a permanent international criminal court validates and solidifies the international community’s commitment to adjudicate instances of genocide, crimes against humanity, and war crimes.<sup>304</sup> Lastly, making the ICC a permanent criminal tribunal confers legitimacy on its future actions and fairness to potential defendants, because a permanent institution alerts potential international criminals that the world is ready to punish them if they choose to commit international crimes.

The ICC possesses additional advantages over its *ad hoc* predecessors. Although the ICC has not handled enough cases yet to know its true speed and efficiency, it will nevertheless surely be able to adjudicate crimes, from time of commission to judgment, faster than the ICTY and ICTR because, unlike the *ad hoc* tribunals, the ICC is already established. In contrast, bringing justice to Rwanda and to the former Yugoslavia was delayed while the protracted political and logistical effort to create the *ad hoc* tribunals was underway, which unreasonably elongated the overall time it took these institutions to handle international criminal violations. Along the same line, lack of cooperation severely affected the ICTY’s ability to function as a judicial entity, and the Rome Statute Framers addressed this issue by incorporating into the Rome Statute an elaborate international cooperation regime.<sup>305</sup> The creation of the Rome Statute itself, a clear and uniform criminal code that the ICC must use primarily in its court rooms,<sup>306</sup> spares the ICC of dealing with the legality problems that the *ad hoc* tribunals were

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303. *Id.* at art. 18(3).

304. Of course, this potentially will include the world’s commitment to adjudicate instances of aggression, but as stated earlier, the ICC has some work to do on defining aggression before the ICC can adjudicate cases of aggression. *Supra* note 252.

305. See Rome Statute, *supra* note 207, art. 86-111. However, despite this enforcement mechanism put in place, enforcement is still a weakness for the ICC as will be discussed later in this Note.

306. As discussed earlier in this Note, the use of customary international criminal law by the ICC remains an option; however, such use is not to be the primary law applied in the ICC, and is only supplementary. *Supra* section IV. B.

forced to face, as highlighted earlier. For instance, the ICC, unlike the ICTY and ICTR, will not be compelled to use confusing, ill-created customary international criminal law. In addition, the ICC will not have to decipher if certain violations of conventional international criminal laws is a criminal offense, or just illegal breaches. For the foregoing reasons, the ICC, as it presently stands, is without question a vast improvement over the *ad hoc* tribunals.

*D. The Flaws of The ICC: Is the ICC the Answer?*

The amazing amount of perseverance and cooperation necessary to create the Rome Statute resulted in an enormous international accomplishment when the ICC became reality on July 1, 2002.<sup>307</sup> Yet, it would be a disservice to the world's aspiration for a fully functioning, coherent international criminal system to call the ICC the answer. Substantively, structurally, and of gravest concern, conceptually, the ICC faces an uphill struggle that will not be overcome without either a revolution in the international legal order or momentous alterations to the ICC's structure. The struggle that awaits the ICC stems from two factors: internal defects within the ICC and the external realities of the Westphalian world order.

Internally, the ICC must confront some troubling issues. Of chief concern is that justifying the ICC's ability to go from "jurisdiction to prescribe" to "jurisdiction to adjudicate" is a complicated mess in comparison to domestic courts. Of course, this complicated mess stems from the self-inflicted negotiated compromises made between those who supported sovereignty and those who supported the international rule of law. However, the principle of complementarity, the multitude of jurisdictional preconditions, and all the other jurisdictional merry-go-rounds in the Rome Statute obscures when the ICC can adjudicate the subject matter of the Rome Statute or when it must defer to national proceedings.<sup>308</sup> This ultimately will impair the ICC's ability to operate without controversy.<sup>309</sup> In this respect, the ICC is a setback from its *ad hoc* tribunal predecessors, where both the ICTY and ICTR had primacy of jurisdiction over national proceedings, which inevitably means that the ICC will have to deal with significantly more jurisdictional battles than both *ad hoc* tribunals combined.<sup>310</sup> The Rome Statute does not provide any countermeasures to State Parties that abuse the complementarity system, whereby a State Party can feasibly launch a bogus investigation of an alleged international crime in order to deflect ICC intervention and/or to prevent any judicial action from taking place at all.<sup>311</sup> Additionally, the

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307. *Establishment of the Court*, *supra* note 3.

308. See BROOMHALL, *supra* note 59, at 83; SADAT, *supra* note 200, at 110-11, 114 ("Yet the Statute does not propose a bright line test for sorting the international from the national; that is, there is no 'interstate commerce clause requirement' such as we find in U.S. federal criminal law, . . ."). Amazingly, the Rome Statute's most explicit indication of when the ICC possesses jurisdiction to adjudicate is where the Rome Statute vaguely says that the ICC can adjudicate "the most serious crimes of concern to the international community as a whole." Rome Statute of the ICC, *supra* note 207, art. 5(1).

309. See BROOMHALL, *supra* note 59, at 83; SADAT, *supra* note 200, at 110-11, 114.

310. SADAT, *supra* note 200, at 85, 280.

311. *Id.* at 124. Although the Rome Statute states that the State Party must "genuinely" be unwilling or unable to prosecute in order for the ICC to adjudicate, there is question as to what

confusion surrounding when the ICC has jurisdiction to adjudicate is another reason supporting the conclusion that the ICC may be an unattractive forum to adjudicate international crimes. Limited financial resources, an inexperienced judicial system, potential adjudication away from the territory of the crime, and the inevitable difficulties in extraterritorially gathering evidence, running investigations, and apprehending suspects are all extremely valid reasons against bringing a case to the ICC.<sup>312</sup>

The most troubling internal problem with the ICC is its jurisdiction to enforce,<sup>313</sup> which “is paltry, at best...”<sup>314</sup> Unlike the ICC’s jurisdiction to prescribe and adjudicate, the ICC’s jurisdiction to enforce is far from groundbreaking, for the ICC depends almost completely on State Party cooperation to fulfill even the most basic judicial functions.<sup>315</sup> While there is nothing theoretically wrong with having a State-dependent enforcement structure, the ICC gives little motivating incentives to State Parties to comply or harsh penalties for not complying, and consequently, the ICC will go through the same enforcement hardships that afflicted the *ad hoc* tribunals.<sup>316</sup> Given that States are afforded enough discretion and power to undercut the ICC’s enforcement mechanism freely and purposefully - if so desired-, the ICC’s jurisdiction to enforce is uncomfortably at the whim of sovereign nations and ill-fated by design.<sup>317</sup>

The blame for all of these internal structural and substantive problems belongs with the Rome Statute Framers who attempted to achieve compromise between what the former President of the ICTY believes are completely

“genuinely” means and if the ICC is able to prove one way or another if the State Party is “genuinely” unwilling or unable to adjudicate themselves? Rome Statute, *supra* note 207, art. 17(1)(a-b); *see* SADAT, *supra* note 200, at 124.

312. SADAT, *supra* note 200, at 114.

313. Jurisdiction to enforce, in this Note, should be construed very broadly. It includes enforcing anything and everything that would come up during an investigation, pre-trial process, and/or trial. Anything, big or small, that a tribunal must enforce in order to work is encompassed under the term “jurisdiction to enforce”.

314. SADAT, *supra* note 200, at 11.

315. The ICC lacks an independent police force, and accordingly, cannot undertake the most basic judicial operations without State Party cooperation, including execute arrest warrants, freeze assets, order the production of documents, force witness to appear, issue subpoenas, impose penalties on State Parties that do not comply with the Rome Statute, or undertake judicial orders on the territories of State Parties, to name a few. SADAT, *supra* note 200, at 120-22; BROOMHALL, *supra* note 59, at 151-162 (giving detailed insight in the *ad hoc* tribunal enforcement problems, the enforcement mechanism of the ICC, and concluding that the enforcement mechanism depends heavily on cooperation and is subject to the old world order of sovereignty); Cassese, *supra* note 197, at 435 (“The second shortcoming is more serious. Like any other international criminal tribunal, the ICC relies heavily upon state cooperation, to the extent that it might be crippled in the absence of such cooperation.”).

316. The ICC can look simply to the troubles the ICTY and ICTR experienced to foretell the ICC’s future in this regard, because both *ad hoc* tribunals were also dependent on sovereign States for enforcement measures. BROOMHALL, *supra* note 59, at 151-162.

317. Stephan Rademaker, *Unwitting Part to Genocide: The International Criminal Court is Complicating Efforts to Save Darfur*, WASH. POST, Jan. 11, 2007, at A25 (illustrating the power of a State—China in this instance—to frustrate an ICC’s international criminal investigation in Sudan, all in the name of protecting China’s domestic and foreign interest in Sudanese oil).

incompatible interests: sovereignty and international rule of law.<sup>318</sup> As the ICC grows older and as these internal issues slowly develop into mammoth impediments, it will become even more evident that the Rome Statute Framers should have charted a different course for the ICC, specifically one that did not include unworkable compromises.

Perhaps the most egregious misstep of the Rome Statute Framers was in their misunderstanding of how a permanent international criminal court should *conceptually* be constructed in light of the undeniable external reality of the Westphalian international world order.<sup>319</sup> As a consequence of this misunderstanding, the ICC is ill-equipped for success in our State-centric world of international law because it frustrates the very essence of sovereignty, and accordingly, the odds are not in its favor that it can survive in this Westphalian world order.<sup>320</sup>

Doubts exist as to whether the Westphalian State-centric international world order still persists as it once did. There is a popular belief that the impact of globalization, the expanding recognition of human rights, and the growing legitimacy of international law has elevated the influence of multinational corporations and non-governmental organizations to new heights, and correspondingly, has chipped away at the authority of sovereign States on the world stage.<sup>321</sup> Similarly, another common conception is that the end of the Cold War brought about a new found willingness on the part of the international community to use the law as a preferred method of fighting international crime, even if this means violating the Cold War maxim that no one intervenes into the internal affairs of a sovereign State.<sup>322</sup> These beliefs, while true to a certain extent,

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318. Cassese, *supra* note 228, at 6-9 (stating that either one supports sovereignty or one supports international rule of law, for one cannot support both); see BROOMHALL, *supra* note 59, at 56, 68 (discussing the compromise made between State sovereignty and the international rule of law/effectiveness during the Rome Statute negotiations).

319. For purposes of this Note, Westphalian world order and State-centric world order are one and the same. Both refer to the historical and present-day system of world affairs in which sovereign States dominate everything, including international law, international diplomacy, and international politics. *Supra* note 9.

320. It should be noted that this point, and other similar ones, are not endorsements of unabashed sovereignty. Rather, one of the premises of this Note is that sovereignty still rules, and likely will always have a strong role in international affairs for the foreseeable future. Hence, an international criminal law system should construct itself around this undeniable reality.

321. It is popular conception, in and out of the legal world, that the power of sovereign States in the world is slowly eroding. This sentiment can be found in many different sources across the spectrum. See generally NON-STATE ACTORS IN WORLD POLITICS (Daphné Josselin & William Wallace eds., 2001); Christyne J. Vachon, *Sovereignty Versus Globalization: The International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons*, 26 DENV. J. INT'L L. & POL'Y 691 (1998); Ken Wiwa, Commentary, *Without Borders: In a World With No Borders, The Best-Connected Nation is King*, GLOBE AND MAIL (TORONTO), Sept. 27, 2003 at A27; Jeff Vail, *The New Map: Terrorism and the Decline of the Nation-State in a Post-Cartesian World*, <http://www.jeffvail.net/thenewmap.doc> (last visited Oct. 21, 2007).

322. BROOMHALL, *supra* note 59, at 185-86 ("The end of the Cold War brought with it a change in the way that issues were articulated, given priority, and responded to at the international level . . . More to the point, the collapse of the system of superpower confrontation has allowed human rights to take a

are overstatements and mischaracterizations of reality on the ground, for the prevailing international legal structure remains State-centric:

The end of the Cold War... has led to some attenuation of the link between territorial integrity and international stability, and has supported an increased willingness to consider intervention and the altering of borders... At the same time, the importance of the Cold War's end as a matter of *legal* change should not be exaggerated. The conditions inherent in the post-War order (dividing prohibitions and their enforcement, norms and behavior, and ultimately law and politics) have not themselves ceased to exist since 1989. Decisions in interpreting or applying the law, as well as action authorized through the Security Council, the (ICC) Assembly of State Parties, or NATO, unilaterally or otherwise, will continue to depend significantly on the auto-interpretation of self-interested States and on their calculus of national strategic, economic, and political costs and benefits... The same can be said of the "decline of sovereignty" and globalization. The term 'globalization' may be the 'the cliché of our times'... While globalization does have certain power in framing analysis of undoubtedly real transformations in a number of areas... the "distinctive attributes of contemporary globalization... by no means simply prefigures the demise of the nation-state or even the erosion of state power". On the contrary, "processes of globalization are closely associated with, although by no means the sole cause of, a transformation or reconstitution of the power of the modern nation-state."... The better view is that the foreseeable future does not hold the realistic prospect of a significant replacement or realignment of the institution of sovereignty, at least in any sense relevant to the establishment of the preconditions for regular, impartial enforcement of international criminal law.<sup>323</sup>

Of particular relevance to international criminal law, the fact that ultimate power still rest exclusively within the control of sovereign States lend itself to the conclusion that "there are few signs that the tension between the 'international order' rationale of international criminal law and the State-centric character of the 'Westphalian' system is likely to abate in the foreseeable future."<sup>324</sup> Specifically, sovereign States still hold onto two powers that disrupt the proper and effective implementation of international criminal law: sovereign States maintain a

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more prominent place in the discourse and the practice of States and international organizations . . . The increasing prominence, expansion, and refinement of international criminal law, and the project establishing an ICC . . . were also facilitated by this change.")

323. *Id.* at 184-88 (footnotes omitted); see also Gene M. Lyons & Michael Mastanduno, *State Sovereignty and the International Intervention: Reflection on the Present and Prospects for the Future*, in BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, 250, 250-51 (1995); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and The Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 145-74 (2005).

324. BROOMHALL, *supra* note 59, at 58.

“monopoly on legitimate force” and; enjoy the freedom to make legal decisions based solely upon non- or extra-judicial factors.<sup>325</sup>

As discussed elsewhere, the jurisdiction to enforce, or said simply, the ability to implement judicial decisions, to use military force, and to police other States remains in the hands of sovereign States, not the international community.<sup>326</sup> Furthermore, sovereign States freely make critical decisions on international criminal matters based upon “diplomatic, economic, strategic, and ‘purely political’” considerations, rather than applying international criminal law objectively and justly. Without an international constitution that divides powers among States, a large majority of the “legislative, executive, and adjudicative functions” exercised in the international arena rest within “the discretion of States.”<sup>327</sup> Until it can be said that the decision-makers on international criminal issues are reasonably impartial and predictable, and possess the requisite and unequivocal force to back up their decisions, any international criminal system must come to terms with “the State-centric character of the ‘Westphalian’ system”<sup>328</sup>

Taking into account the continued domination of the State-centric model of international law, the conceptual blunder committed by the Rome Statute Framers becomes more apparent. The Rome Statute Framers assumed that the only way to combat international crime was to convince sovereign States to agree upon the creation of a completely independent international organization that would have jurisdiction over international crimes, a jurisdiction traditionally under sole possession of sovereign States. In other words, the Rome Statute Framers shared the popular belief that the promotion of international rule of law can only occur at the expense of sovereignty. While the logic of this idea is not in itself controversial or unworkable in a perfect world, it is an idea that simply will not work in a State-centric world because it upsets the very core of sovereignty.

Nowhere is this sentiment better expressed than the U.S. stance on the ICC. The U.S. views the mere existence of the ICC as an abrogation of its sovereign independence, mainly because the ICC possesses a power in international criminal

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325. *Id.* at 58, 60.

326. *Id.* (“In fact, significant delegations of decision-making authority in vital areas of the policing, security, and military functions of States are not typically made in international law.”). Even international organizations set up to police others States, such as the U.N. and NATO, do not make truly international decisions on the actions of other States. Rather, these international entities are mechanism whereby Member States to these organizations exercise their powers behind the veil of an international organization as a means to mask their decisions of other States. *Id.* at 60.

327. *Id.*

328. *Id.* at 58. Broomhall concludes that if the enforcement of international criminal law intrinsically means “the revision” of the State-centric Westphalian world order, than “it would require a deep change in the international order, either through a marked decline in (or delegation of) sovereignty, or through a substantial convergence of interests among States (giving rise, for example, to an international police authority).” *Id.* Such drastic events are highly unlikely to happen, either today or in the foreseeable future. So, that is where the Roaming ICC proposal comes into play, because it brings about the enforcement of international criminal law without the need for such drastic events such as these to occur.

jurisdiction—albeit extremely limited—that the U.S. believes only sovereign States are meant to possess.<sup>329</sup> Specifically, the U.S. believes that allowing for the existence of an entity that is entirely independent from the sovereignty of the U.S. and permitted to adjudicate international crimes takes away a piece of U.S. sovereignty.<sup>330</sup> The U.S. would rather have sovereign nations, on their own, be responsible for adjudicating international crimes, or allow sovereign nations the opportunity to create *ad hoc* tribunals when needed, as the U.S. proposed should be done in Darfur, Sudan.<sup>331</sup> Yet, given that the ICC does have jurisdiction over international criminal activity and that the ICC's international criminal jurisdiction does come at the cost of sovereign States being unable to practice international criminal jurisdiction in limited circumstances, this fuels the U.S.' perception of the ICC as an unbridled foreign tyrant that if given one ounce of power, it will grow to encroach on the sovereignty of all States.<sup>332</sup> The legitimacy of this perception is not an issue, for the reality of the ICC slowly destroying the U.S.' or any other nation's sovereignty is beyond comprehension.<sup>333</sup> Nonetheless, as demonstrated by

329. Prior to becoming the U.S. Ambassador to the United Nations, John Bolton spoke on behalf of the U.S. Department of State on the topic of the ICC, stating:

[f]or a number of reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interests of the United States, and harmful to our presence abroad.

See *The United States and the International Criminal Court*, U.S. Dep't of State, Nov. 14, 2002, <http://www.state.gov/t/us/rm/15158.htm> [hereinafter Bolton Speech].

330. *Id.*

331. Fact Sheet, *infra* note 334 (trumpeting the use of *ad hoc* tribunals as an option to the ICC). Without a doubt, the U.S. is infatuated with the concepts of *ad hoc* tribunals. Despite it being common knowledge that *ad hoc* tribunals are costly, inefficient, and jurisdictionally unsound, the U.S. continues to run against prevailing world opinion that embraces a permanent international criminal court. This was demonstrated when the U.S. proposed for a UN resolution to create an *ad hoc* tribunal for the international crimes occurring in Darfur, Sudan even though the majority of the UN Security Council voted to refer the Darfur, Sudan situation to the ICC. U.N. SCOR, 60th Sess., 5158d mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005), available at [http://www.iccnw.org/documents/PVs\\_1593\\_DarfurReferral\\_31March05.pdf](http://www.iccnw.org/documents/PVs_1593_DarfurReferral_31March05.pdf); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 5 (2006).

332. See Bolton Speech, *supra* note 329 (“[O]ne might assume that the ICC is simply a further step in the orderly march toward the peaceful settlement of international disputes, sought since time immemorial. But in several respects, the court is poised to assert authority over nation states, . . . Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent.”); Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 362-63 (2004) (documenting the vehement words of Undersecretary of State for Arms Control and International Security John Bolton that the ICC will destroy U.S. constitution, and that the ICC is a risk to U.S. sovereignty).

333. Personally, this Note's author believes that countless human rights abuses and international crimes have been committed in the name of sovereignty or protected by the notion of sovereignty. Ideally, if States were to stop trumpeting the sovereignty horn, the international rule of law could make the world a more peaceful and stable place. Raphael Lemkin, as quoted by Samantha Power, best expressed the ills of State sovereignty in relation to international crimes, “Lemkin was appalled that the banner of ‘state sovereignty’ could shield men who tried to wipe out an entire minority. ‘Sovereignty,’

the U.S.’ fanatical rejection of the ICC, the *existence* of this perception within the U.S. government is not in question, and more likely than not, this perception even exist within some governments of State Parties to the Rome Statute. Without substantial changes to the ICC, the perception of the ICC being anti-sovereignty will put the ICC at odds with a multitude of sovereign States in the future, and given the power of the sovereign State in the Westphalian world order, the ICC will find itself in a very perilous position.

Unfortunately for the ICC, this perception might already be working against it. The U.S. has lodged a litany of legal complaints against the ICC, such as the overall power of the ICC, the independence of the Office of the Prosecutor, the jurisdiction of the ICC, and the ICC referral process, to name a few.<sup>334</sup> Despite the assurances of domestic and international legal organizations—including the American Bar Association—that the U.S.’ concerns are effectively addressed in the Rome Statute,<sup>335</sup> U.S. opposition to the ICC remains firm and may also prove destructive.<sup>336</sup> In fact, the U.S. opposition to the ICC is so fervent that the U.S. has taken proactive steps to nullify and undermine the ICC through legislation<sup>337</sup> and bilateral treaties.<sup>338</sup> Most disturbing is the American Servicemembers’ Protection Act, dubbed the “Hague Invasion Act”, which not only prohibits any sort of U.S. governmental cooperation with the ICC, but also authorizes the President to use military force to extract any U.S. citizens or U.S. protected individuals held in ICC custody in The Hague, which should not be forgotten is located in The Netherlands, an U.S. NATO ally!<sup>339</sup> Considering the U.S.’ persistent assaults on

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Lemkin argued . . . ‘implies conducting an independent foreign and internal policy, building of schools, construction of roads . . . all types of activity directed towards the welfare of people. Sovereignty cannot be conceived as the right to kill millions of innocent people.’” POWER, *supra* note 1, at 19.

334. See *Fact Sheet: The International Criminal Court*, U.S. Dept. of State, May 6, 2002, [http://www.state.gov/s/wci/us\\_releases/fs/9978.htm](http://www.state.gov/s/wci/us_releases/fs/9978.htm) (listing the U.S. objections to the ICC) [hereinafter *Fact Sheet*].

335. See A.B.A., *Recommendation that the United States Government Accede to the Rome Statute of the International Criminal Court*, at 5-9, Feb. 19, 2001, available at [http://www.iccnw.org/documents/ABARes\\_onUSFeb01.pdf](http://www.iccnw.org/documents/ABARes_onUSFeb01.pdf); Just. Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, *The International Criminal Court Monitor: The Newspaper of the NGO Coalition for the International Criminal Court* (New York), Issue 21, June 2002, at 3, 11, available at <http://www.iccnw.org/documents/monitor21.200106.english.pdf> (giving legitimate legal answers to each and every U.S. objection to the ICC).

336. BROOMHALL, *supra* note 59, at 168 (“Under the Bush Administration, such efforts to obtain a ‘fix’ have been abandoned, and replaced by a stance of active hostility . . .”); Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385-86 (2002) (cataloging U.S. Senators disparaging and anti-cooperative remarks about the ICC, including calling the ICC an “international kangaroo court”); Heindel, *supra* note 332, at 364-65 (alluding to the words of U.S. officials that not only do not support the ICC, but would rather it not exists).

337. Amann & Sellers, *supra* note 336, at 384.

338. Heindel, *supra* note 332, at 365-67; see generally Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L. L. REV. 1115 (2004).

339. American Servicemembers’ Protection Act of 2002, 22 U.S.C. § 7421 (2002), available at <http://vienna.usembassy.gov/en/download/pdf/aspa2002.pdf>; see Human Rights Watch, *Human Rights*

the ICC and its unresponsiveness to the counterarguments presented by ICC proponents, it is clear that the objections the U.S. holds against the ICC run deeper than mere issues with the language in the Rome Statute, and instead are motivated by the *perception* of the ICC as anti-sovereignty.<sup>340</sup>

The ICC may believe that it can go on successfully without U.S. support,<sup>341</sup> but the likelihood of this occurring is remote. The track record of large, hopeful international organizations existing without U.S. support is abysmal, considering that the lack of U.S. support already demolished one great international effort in the League of Nations<sup>342</sup> and arguably might spoil the greatest international agreement of all in the United Nations.<sup>343</sup> Although a majority of the world's nations signed and ratified the Rome Statute that brought about the ICC,<sup>344</sup> it is not beyond the realm of possibilities that the U.S. -a single, albeit powerful State- could destroy the ICC.<sup>345</sup> If the ICC hopes to corral U.S. support, the perception of the ICC as an international hegemon determined to demolish the sovereignty of all States must be eradicated. However, the question remains if it is even feasible for the ICC to squelch this perception? If it cannot, the ICC runs the risk of becoming the next ICJ, or even worse, a distant memory.<sup>346</sup>

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News, U.S.: 'Hague Invasion Act' Becomes Law: White House "Stops at Nothing" in Campaign Against War Crimes Court, <http://www.hrw.org/press/2002/08/aspa080302.htm> (last visited Aug. 3, 2007).

340. BROOMHALL, *supra* note 59, at 183; SADAT, *supra* note 200, at 280. It is not a surprise that the U.S.' opposition to the ICC is driven by a perception of the ICC as an infringement on U.S. sovereignty. During the U.S. Senate deliberation on ratifying the Genocide convention, which received strong international support and was ratified by many countries, the opposition of the U.S. government to ratifying the Genocide Convention was an almost carbon copy to the present day opposition of the U.S. government to acceding to the Rome Statute and ICC. When every single legal or logistical critique put forward by the U.S. government for not ratifying the Genocide Convention was shot down by overwhelming evidence, the U.S. government still maintained a position against ratification. There forward, it became evident that the U.S. opposition stemmed from the perception of the Genocide Convention as an infringement on U.S. sovereignty. "The core American objection to the treaty, of course, had little to do with the text, which was no vaguer than any other law that had not yet been interpreted in a courtroom. Rather, American opposition was rooted in a traditional hostility toward any infringement on U.S. sovereignty, . . . [i]f the United States ratified the pact, senators worried they would thus authorize outsiders to poke around in the internal affairs of the United States or embroil the country in an 'entangling alliance'" POWER, *supra* note 1, at 65-9. That quote could, word for word, be used to describe current U.S. opposition to the ICC. Moreover, the entire situation surrounding the U.S. and the Genocide convention accurately describe the situation and sentiment revolving around the U.S. government's present day opposition to the ICC.

341. BROOMHALL, *supra* note 59, at 182-83.

342. BROOMHALL, *supra* note 51, at 183; SADAT, *supra* note 200, at 43.

343. See Tom Regan, *US, UN: Can This "Unhappy Marriage" Be Saved?*, Christian Sci. Monitor, June 9, 2006, available at <http://www.csmonitor.com/2006/0609/dailyUpdate.html>.

344. See International Criminal Court, Assembly of State Parties, *The State Parties to the Rome Statute*, <http://www.icc-cpi.int/statesparties.html>, (last visited Oct. 17, 2007).

345. See BROOMHALL, *supra* note 51, at 183; SADAT, *supra* note 200, at 43. The fact that one sovereign State could bring down or even disrupt any large international institution that is supported by a majority of States also supports the finding that can the international legal order continues to be State-centric.

346. See Simi Singh, *The Future of International Criminal Law: The International Criminal Court (ICC)*, 10 TOURO INT'L L. REV. 1, 10-11 (2000) (warning that the ICC could become just as ineffective institution as the ICJ, and documents reasons why the ICJ is ineffective); *but see* Douglass Cassel, *Is*

#### IV. ROAMING ICC: AN INTERNATIONAL CRIMINAL SYSTEM MADE FOR OUR STATE-CENTRIC WORLD

##### A. *What Do the Flaws of the ICC Tell Us?*

It is not a stretch to label the internal problems and conceptual missteps of the ICC as alarming, for these issues raise considerable doubt as to the ability of the ICC to punish and deter the commission of international crimes. This is not to say the ICC is a failure, because the Rome Statute and the institution it created will be remembered as a watershed moment in the history of international criminal law. However, the world deserves a completely universal international criminal enforcement mechanism, because an all-inclusive system is a prerequisite to a truly effective system. Sadly, the current ICC cannot be considered as such. The question then becomes "what must be done to establish an international criminal enforcement mechanism that is sufficiently inclusive so as to properly deter and punish international criminals?"

Currently, the international legal community at large is bickering over the wrong issues regarding the ICC and the ICC's role in the progression of international criminal law. The focus of international debate has revolved around the internal problems with the ICC, specifically the structural and substantive facets of the Rome Statute discussed earlier.<sup>347</sup> While these issues are deserving of attention, such discussion does little to bring the world to a consensus over how to create a proper international criminal system, because many of these issues are secondary to the one issue that is fundamental to the development of an appropriate international criminal enforcement mechanism. This fundamental issue is one that this Note has already discussed briefly: How the Westphalian State-centric world order effects the development of international criminal law? In more basic terms, how to reconcile sovereignty with the international rule of law?

The reason why the resolution of this quandary is vital to the creation of a proper international criminal system is straightforward: if the sovereign authority of States is not upset by the creation of an international criminal system, in that the international criminal enforcement mechanism is not *perceived* by States as a threat to their sovereignty, such a system will have an greatly increased chance of surviving in our Westphalian world order. Considering the importance of this issue, it is disappointing that the Rome Statute Framers fell back onto the

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*There a New World Court?*, 1 NW. U. J. INT'L HUM. RTS. 1, 18-31 (2003) (showing that the ICJ's surge in caseload is an indication of the resurrection in the ICJ's importance); Chris Borgen, *Reconsidering the Reconsideration of the ICJ*, *Opinio Juris*, <http://lawofnations.blogspot.com/2005/06/reconsidering-reconsideration-of-icj.html> (arguing that the ICJ is not a very good judicial body, but is the one of the premier international legislative body).

347. By substantive and structural issues, this Notes means issues regarding the language of the Rome Statute and the internal structure of the ICC, which turn into arguments over, for instance, the independence of the Prosecutor, the level of cooperation State Parties must give, the limits of ICC jurisdiction, etc. Essentially, issues that are not conceptual, but more legal in nature. See Fact Sheet, *supra* note 334 (showing that a majority of the U.S.' official objections to the ICC—considered the main opponent of the ICC—deal with structural and substantive aspect of the Rome Statute and the ICC); *supra* section IV, D.

conventional, but unworkable conclusion that only through compromise of the uncompromisable—sovereignty and international rule of law—can an international criminal enforcement mechanism be agreed upon by sovereign States. Thus, the Rome Statute Framers' decision to promote the establishment of a detached, independent international institution bestowed with limited, yet significant international criminal jurisdiction over international crimes not only failed to resolve the dilemma between sovereignty and the international rule of law, but created deeper division among the international community. Where some States were willing to approve of the creation of the ICC at the cost of losing some sovereignty, other States balked at the idea of an international criminal system that jeopardized their unbridled sovereignty. The result of the Rome Statute Framers' miscalculation is a problematic ICC that has not received the support of the world's most powerful country, the U.S.<sup>348</sup> No matter how misguided the U.S. may be on the ICC issue, the reality is that an international criminal system without the U.S. holds a slim chance of being as effective as it would be with the preeminent international economic, military, and political leader.<sup>349</sup> Furthermore, a true sense of international justice can never be realized without the moral support and cooperation of the U.S.<sup>350</sup> Does this mean the rest of the world must back down to U.S. demands in order to achieve any semblance of an international criminal system? Certainly not, for having it the U.S.' way would abandon the much needed support of the rest of the world. Instead, this Note proposes a new option.

To set the stage for this new option, the following section delves deeper into the philosophical and conceptual pitfalls of the conventional method used to create international criminal institutions. To date, international efforts towards the establishment of an international criminal enforcement mechanism focused on either the *ad hoc*—Nuremberg, the ICTY, the ICTR—or prospective—the ICC—creation of an international criminal body without addressing the structural weakness of such options in a State-centric model of international law. This structural weakness exists because these prior mechanisms are grounded upon the murky realm that exists between, and outside, sovereign states. Thus, when the international community agrees to the formation of an international criminal enforcement mechanism whereby sovereign States are bound, to one degree or another, to an entity that exists outside of the realm of all sovereign States, this agreement is perched precariously beyond the strength of the Westphalian world order and cannot stand up to the concerns of State actors that stem from the very core of this order. Using the ICC as an example to clarify, the ICC is an entity that exists completely detached from the confines of any and all State Parties. The ICC

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348. See SADAT, *supra* note 200, at 280; see generally Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"*, 4 CHI. J. INT'L L. 223 (2003) (diagramming the U.S. position against the ICC, which is at the forefront of opposition to the ICC).

349. BROOMHALL, *supra* note 51, at 163-64; SADAT, *supra* note 200, at 43; see Amann & Sellers, *supra* note 336, at 382 (stating that the U.S. will likely continue to distance itself from the ICC, which severely hampers the ICC's future).

350. SADAT, *supra* note 200, at 43.

is on the outside looking in on the sovereignty of all State Parties, or as the U.S. inartfully, but accurately put it, "the Court... [is] simply 'out there' in the international system."<sup>351</sup> Yet, despite its outsider status, the ICC can potentially bind sovereign State Parties to its jurisdiction.<sup>352</sup> Little thought has gone into the creation of an international criminal system tailored to the *strength* of our State-centric world, the strength being the domestic authority of each and every sovereign nation. Few question the power a sovereign State possesses over its territory, a power which derives from the State exercising dominion over its people and land. This unquestioned power of sovereign States is the strength of the State-centric system of international law, and this Note proposes that the ICC reinvent itself in order to harness this strength.

#### *B. Details of the Roaming ICC*

This Note's proposal is for the international legal community to reconceptualize the manner in which an international criminal system should exist. Instead of creating an independent, detached, outside entity that hovers over all sovereign States, the international community should adopt an international criminal system that exists within every sovereign State. The heart of the proposal is a decentralized international criminal system that would facilitate the creation of temporary courts of law manned by domestic, regional, and international Judges and Prosecutors that would exercise the same substantive and procedural international criminal laws in the prosecution and adjudication of an alleged international criminal violation, regardless of where the court resides geographically. The "Roaming ICC" proposal does not call for the abandonment of the current ICC in its entirety, but rather a reformulation of the conceptual infrastructure of the current ICC to reflect a new thinking of how an international criminal system should be. Accordingly, the aim of the Roaming ICC proposal is to make alterations to the framework of the current ICC, not to abolish it, and thus transform the current ICC into the Roaming ICC.

The Roaming ICC proposal has two essential components. The first component is the backbone of the Roaming ICC: the adoption of the Roaming ICC substantive and procedural laws into each State Party's domestic law. The Roaming ICC's substantive and procedural laws<sup>353</sup> would not be drastically different from the Rome Statute, except for changes to the Rome Statute's procedural laws that are necessary to mesh the diversity of international procedural

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351. Bolton Speech, *supra* note 329.

352. See Rome Statute of the ICC, *supra* note 207, art. 3 (inferring that the ICC is separate from any sovereign State, for it enters into agreements with the Hague for its occupancy, and can leave the Hague if need be).

353. As any honest lawyer would admit, the difference between substantive and procedural law can be as clear as mud. For purposes of this Note, Roaming ICC substantive law incorporates the jurisdictional concepts, general principles of law, and subject matter of the Rome Statute, save any obvious changes that would need to be made. By procedural, this Note means the rules that govern the conduct of an ICC trial, not the procedural rules associated with the complementarity system, or the procedural rules associated with the ICCs jurisdiction to adjudicate. The Roaming ICC gets rid of these procedural rules.

and court room rules.<sup>354</sup> More precisely, the Rome Statute's subject matter laws giving the current ICC jurisdiction over genocide, crimes against humanity, war crimes, and aggression<sup>355</sup> would also be the Roaming ICC's substantive law and the Rome Statute's procedural laws on prosecutorial duties, court room rules, and pre-trial procedures would become the Roaming ICC's procedural laws, and altogether, would form the law of the Roaming ICC from which every State Party would enact into their internal law, *word for word*. No State Party would be allowed to make reservations or amendments to either the substantive or procedural laws of the Roaming ICC, for absolute consistency from one State to another is critical for the success of the Roaming ICC.<sup>356</sup> While this concept of totally adopting the Rome Statute into the domestic law of a State has been followed by some current ICC State Parties,<sup>357</sup> others have not taken that course in regard to the Rome Statute.<sup>358</sup> It must be stressed that it is mandatory that the each State Party to the Roaming ICC adopt the substantive—including relevant jurisdictional aspects—and procedural components of the Roaming ICC jurisprudence into the State Party's domestic law without exception.<sup>359</sup> Otherwise, important jurisdictional aspects of the Roaming ICC would crumble.

The adoption of the Roaming ICC's substantive and procedural law into every single nation's domestic law may sound impossible, but there are indicators that this task is not as daunting as it might seem. There are numerous international treaties and conventions, not to mention the Rome Statute itself, that exhibit the world community's ability to agree on substantive laws against genocide, crimes against humanity, war crimes, and to a certain degree, aggression.<sup>360</sup> Taking the

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354. Because the current ICC is an international, independent body, their procedural laws (i.e. within the court room, pre-trial, etc.) were developed as such. However, the Roaming ICC, as will be shown, ends up operating in the domestic jurisdiction of any State Parties, so this facet of the Roaming ICC would necessitate more international negotiations to come up with internal procedural laws for the Roaming ICC that all States could agree with. This will be discussed later.

355. As noted, the aggression issue is still unresolved. *Supra* note 252. However, at the point in time when the stalemate over defining the crime of aggression is resolved, it would be incorporated into the Roaming ICC. At present, the crime of aggression would exist within the Roaming ICC as it does in the current ICC.

356. *See* Fact Sheet, *supra* note 334 (showing that the U.S. is critical of the fact that the Rome Statute does not allow States to add reservations, which in the Roaming ICC would be a similar requirement).

357. *See Implementation Strategies Adopted by: Australia, New Zealand, Canada, United Kingdom and South Africa*, INT'L JUSTICE (Human Rights Watch, New York, NY), Dec. 18, 2002, <http://www.hrw.org/campaigns/icc/docs/chart1.pdf>. Of course, it is not total, complete adoption, but rather a total adoption of the Rome Statute's subject matter laws.

358. *See Implementation Strategies Adopted by: Argentina, Spain, France, Switzerland and Belgium*, INT'L JUSTICE (Human Rights Watch, New York, NY), Dec. 18, 2002, <http://www.hrw.org/campaigns/icc/docs/chart3.pdf>.

359. Essentially, every State Party to the Roaming ICC would have mirror image jurisprudences in regards to the Roaming ICC.

360. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Genocide Convention, *supra* note 187; Hague Convention Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539; Rome Statute of the ICC, *supra* note 207. These international laws are examples of already agreed upon substantive laws against genocide, war crimes,

next step in having each country incorporate these laws without derogation into their own jurisprudence will take significant amounts of time and effort, but is far from an insurmountable task. The idea of adopting foreign material into a domestic jurisprudence is not an uncommon practice in the U.S., for the adoption of Restatements and Uniform Acts into the law of individual U.S. states occurs frequently and parallels the same logic as adopting Roaming ICC substantive and procedural law into the national law of all Roaming ICC State Parties.<sup>361</sup> However, crafting a procedural system that the Roaming ICC could use in any State and that Judges, Prosecutors, and Defense attorneys of varied legal background could work with will take careful negotiations and a tremendous amount of effort to accomplish, especially considering the gulf of differences between civil and common law criminal systems. Nevertheless, the current ICC contains procedural laws that a majority of the international community has already agreed to, and additions and/or modifications to this already existing procedural law is a good starting point from which to form an uniform, workable procedural system that every State Party could agree to implementing.

The second component of the Roaming ICC proposal exhibits what is the most radical difference between the Roaming ICC and the current ICC: the transition from a centralized to a decentralized legal entity. Two Articles in the Rome Statute allude to the possibility of the current ICC carrying out its judicial functions within a State Party's territory, but instead of this possibility being the exception, the Roaming ICC proposal would make this practice the rule.<sup>362</sup> In addition to each Roaming ICC State Party adopting the substantive and procedural law of the Roaming ICC into their domestic jurisprudence, each State Party must also agree to three contractual obligations in the Roaming ICC agreement: the State Party must allow Roaming ICC proceedings to occur within their territory; the State Party must fulfill their designated duties and obligations if a Roaming ICC proceeding were to occur in their territory; and the State Party must accept that international and regional Judges, Prosecutors, and other staff will enter its territory to fulfill their duties and obligations in a Roaming ICC proceeding. Making the Roaming ICC a decentralized court that could set up operation in the jurisdiction of any Roaming ICC State Party on demand is a change that unequivocally capitalizes on the strength of the State-centric system of international law, because pursuant to the Roaming ICC contractual agreement, the Roaming ICC would undertake its judicial proceeding within the domain of the State Party where the international crime occurred. The intended consequence being that the territorial jurisdiction and expertise of this State Party would be utilized in order to effectuate the Roaming ICC process.

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crimes against humanity, and aggression that could be adopted into each and every Roaming ICC State Parties' jurisprudence.

361. See generally Kristen D. Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (describing the philosophy and practice of adopting Restatements into U.S. state's jurisprudence, and the same practice could be used by Roaming ICC State Parties in adoption of Roaming ICC substantive and procedural laws).

362. Rome Statute, *supra* note 207, art. 3-4.

The basic setup of the Roaming ICC system would be a three-tiered hierarchy, with varying amount of judicial and prosecutorial authority dispersed throughout the branches of the Roaming ICC. Each level of the Roaming ICC would contain a panel of Judges and a Prosecutor's Office.<sup>363</sup> The highest level would be the Roaming ICC Presidential Authority made up of internationally chosen Judges and an internationally chosen Prosecutor's Office that would control ultimate prosecutorial discretion in all Roaming ICC cases.<sup>364</sup> The second highest level of the Roaming ICC system would be made up of multiple Roaming ICC Regional Authorities that would represent large regional territories of the world, such as Africa, Europe, Asia, North America, etc. Each Regional Authority, accordingly, would have Judges and Prosecutors nominated by and chosen from their respective region. Finally, the lowest level of the Roaming ICC framework would comprise the many Roaming ICC State Authorities that represent each State Party, with their own domestic Judges and Prosecutors.

An example of the course of events that would occur if an alleged international crime happened under the Roaming ICC regime will help elaborate on the structure and inner-working of the Roaming ICC. An alleged act of genocide occurs in State Party A in Region A. Either the Prosecutors Office for State A, the Regional Prosecutor's Office for Region A, the Presidential Prosecutor's Office, or a collaborative team of these offices may start an investigation into the alleged genocide.<sup>365</sup> The three prosecutorial offices shall cooperate to decide if a prosecution should go forward, but ultimate prosecutorial discretion on any prosecution would belong with the Presidential Prosecutor's

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363. Every Judge and Prosecutor would be trained in the laws and procedures of the Roaming ICC, thus equally useful in any State Party they may find themselves in. Also, membership requirements for Judges and Prosecutors will be the same as the current ICC membership requirements. As for all the other organs of the current ICC, they could stay centralized in the Presidential Authority under the Roaming ICC proposal, such as the Registry, defense counsel assignment department, victims and civil parties unit, witness protection unit, investigator's office, etc. However, these units would be able to work outside of the centralized unit, such as the Registry could have a satellite unit set up where Roaming ICC proceedings were taking place. This does not discount the possibility that Regional and State Party authorities would have similar departments and services.

364. All the Prosecutor Offices across the Roaming ICC network would cooperate per the Roaming ICC agreement and would defer to each other in certain circumstances. However, ultimate Prosecutorial discretion is best left to the Presidential Prosecutor's Office, because this office would be the most protected from the political and social implications on the ground where the international crime occurred and would presumably be the most objective in deciding if an *international* crime did occur and if it should be adjudicated. Again, information would flow freely among the Prosecutor's Offices, and the Presidential Prosecutor's Office would be obligated to consult with the State Party and Regional Prosecutor's Office in a majority of instances. The possibility exists that a procedure could be put in place where, if the State Party and Regional Prosecutor Office agree on one course of action and the Presidential Prosecutor's Office desires another course, the State Party and Regional Prosecutor's Office could overrule the Presidential Prosecutor's Office or appeal to a Pre-Trial Chambers for resolution.

365. Similar to the current ICC, each Prosecutor's Office, depending on which level it is from, will need permission by a Judge from its Roaming ICC level at certain stages in the investigation process in order to proceed with the investigation. However, when the Prosecutor's Office would need this permission is a detail not worth going into in this Note.

Office.<sup>366</sup> In addition, the Presidential Prosecutor’s Office would have ultimate discretion to decide if the Presidential Prosecutor’s Office, the Regional Prosecutor’s Office for Region A, or the Prosecutor’s Office for State Party A shall lead the prosecution of the case.<sup>367</sup> Once the investigation turns into an official prosecution, a Pre-Trial Judge from State Party A would be appointed to supervise pre-trial litigation, who would possess the same basic powers and responsibilities as a Pre-Trial Judge at the ICC.<sup>368</sup> Additionally, a panel of one Presidential Authority judge, one Region A judge, and one State Party A judge would be formed to handle select appeals lodged by parties against decision handed down by the Pre-Trial Judge. As a trial becomes closer to reality, a panel of Trial Judges would be formed consisting of one Judge from State Party A, one from Region A, and one from the Presidential Authority. The Judge from the Presidency shall be chief Judge, but each Judge would have equal weight in deciding procedural and substantive issues that arise as well as the ultimate judgment of the case. This mixed panel of Judges is just an extension of a concept already used by the UN-sponsored hybrid international criminal tribunals in Sierra Leone, Cambodia, and East Timor where domestic and international judges work on panels together.<sup>369</sup>

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366. However, there could be a procedure whereby the Roaming ICC State Party Prosecutor and the Regional Authority Prosecutor can bind forces to overrule a decision of the Presidency Prosecutor, which will alleviate U.S. concerns about overzealous international Prosecutors. Also, the idea of domestic and international prosecutors working together is not just a theory, but an idea currently at work at the UN-Cambodia criminal tribunal. See UN-Cambodia Agreement, *infra* note 369, art. 6.

367. The Presidential Prosecutor’s Office would make a determination like this upon consideration of resources, time/effort, effectiveness, suitable distance from the area where the international crimes took place, etc., Whatever Prosecutor that ends up prosecuting the case will be treated as a Prosecutor of the forum State Party. Furthermore, there will be no set rules on how the makeup of the Prosecutor’s team should be, such as what office must make up what percentage of the Prosecutorial team.

368. The background of this Pre-Trial Judge is debatable, but the existence of one is required. The Pre-Trial Judge could be from the same Authority “level” as the lead Prosecutor that prosecutes the case in chief, but could be from any Authority level. The Pre-Trial Judge would monitor the investigation of the alleged international crime, tackle the multiple pre-trial procedural issues that arise from investigations and preparation for trial, and confirm the indictment.

369. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.- Sierra Leone, Jan. 16, 2002, art. 2, U.N. Doc. S/2002/246, available at <http://www.sc-sl.org/scsl-agreement.html>; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UN-Cambodia, June 6, 2003, art. 3, 5, U.N. Doc. A/Res/57/228 B, available at [http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf) [*hereinafter* UN-Cambodia Agreement]; Agreement On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses in East Timor, U.N. Transitional Administration in East Timor, § 22, U.N. Doc. UNTAET/REG/2000/15 (2000) (pursuant to U.N. SCOR Res. 1272), available at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>; see David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, ASIAPACIFIC ISSUES, No. 61 (East-West Center, Honolulu, HI), Aug. 2002, at 1, available at <http://www.eastwestcenter.org/stored/pdfs/api061.pdf> [*hereinafter* AsiaPacific]. Cohen’s piece criticizes the hybrid tribunal idea, but mainly for funding reasons, which would not be an issue for the Roaming ICC, because the Roaming ICC structure will be able to pool resources from all three levels of the Roaming ICC—State, Regional, and Presidential—; thus alleviating and spreading out financial concerns associated with international criminal trials. *Infra* section V, D, 4. There has also been

The Roaming ICC proceedings would take place in State A in a pre-existing forum within State A.<sup>370</sup> Due to the alleged genocide occurring in State Party A in violations of State Party A's Roaming ICC laws adopted by State Party A's legislature or equal body, State Party A would have the obligation to carry out all logistical and necessary aspects of the trial, which would include arrest and detention of suspects, obtaining and securing evidence, victim and witness protection, forum security, subsequent enforcement of court decisions, etc.<sup>371</sup> After a judgment is reached in the case, the Roaming ICC proceedings within State A would be over, and the entire operation would be shut down. This entire Roaming ICC investigation, pre-trial, and trial process would be replicated in any State Party where an international crime occurred, or any State Party for that matter. Additionally, given the immense, yet decentralized structure of the Roaming ICC, many Roaming ICC proceedings could occur simultaneously in the territory of multiple Roaming ICC State Parties, assuming the need was present.

In regard to appeals, the Roaming ICC Appeals process would institute a different procedure from the current ICC. In order to avoid domestic bias and to afford the defendant the most practical opportunities to prove his or her innocence or correct procedural errors made at trial, the Roaming ICC appellate process would be two-tiered with the first appeal of the presumed genocide conviction in State Party A made to an panel of Judges solely from the Region A Authority, and the final appeal would face a panel of Judges solely from the Presidential Authority. To ease the worries of some Roaming ICC State Parties that there would be regional or international review of a Roaming ICC judgment reached within the territory of the State Party, appeals could only be made for procedural errors or grave misapplications of Roaming ICC substantive law that would be tantamount to subversion of the Roaming ICC process.

Having laid out an example of a hypothetical Roaming ICC proceeding, there is a noticeable parallel between the Roaming ICC and the UN-Lebanon tribunal. The UN-Lebanon tribunal is a hybrid international criminal tribunal currently under development, and like other UN hybrid tribunals, is the creation of an agreement between the UN and Lebanon to form an international criminal tribunal

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additionally criticism regarding the rift between the Cambodian and international Judges over procedural matters. See Seth Mydans, *Unwieldy Court Further Complicates Khmer Rouge Trial*, INT'L HERALD TRIB., Jan. 25, 2007, <http://www.iht.com/articles/2007/01/25/news/cambo.php>. However, this issue would not be a problem for the Roaming ICC, because negotiations prior to the world-wide adoption of the Roaming ICC's substantive and procedural laws would smooth out these types of issues. Also, one must remember that these tribunals are not all the same. For example, the UN-Cambodia criminal court would best be called a "mixed" or internationalized domestic criminal court, because it is not an international criminal tribunal in the strict sense. See SCHABAS, *supra* note 331, at 6.

370. If a violation occurs over separate countries, a decision by the Presidential Authority about the most suitable forum or where the most substantial violations occurred would decide the correct State Party forum. The possibility of a Roaming ICC proceeding not taking place where the international crime occurred will be addressed later in this Note. *Infra* section V, D, 1.

371. The Presidency and Regional Authority would be able to provide additional funds, manpower, and cooperation needed to carry out these functions (i.e. use their Victim's Unit or relevant personnel to assist the State Parties victim representation and protection efforts).

composed of international and domestic Judges and Prosecutors.<sup>372</sup> The objective of this tribunal is to handle the prosecution and adjudication of the Hariri assassination and related criminal offenses.<sup>373</sup> However, unlike other UN hybrid tribunals, the UN-Lebanon tribunal will apply Lebanese criminal penal law exclusively, rather than applying a mixture of international and domestic criminal law.<sup>374</sup>

The similarities between these two concepts is that the Roaming ICC system would be the mass institutionalization of the idea behind the UN-Lebanon tribunal, which in turn would facilitate the duplication of UN-Lebanon-like tribunals anywhere in the world where an international crime occurs or in any State Party hosting a Roaming ICC proceeding. Quite literally, the UN-Lebanon tribunal would be an example of the Roaming ICC system in action, specifically if a Roaming ICC proceeding was to take place in Lebanon.<sup>375</sup> Additionally, like the UN-Lebanon tribunal, a Roaming ICC proceeding would apply exclusively the local criminal law as well. However, the local criminal law applied would be the aforementioned Roaming ICC substantive and procedural law that every State Party would have already incorporated in its domestic law with verbatim precision. This correlation between the Roaming ICC and the UN-Lebanon tribunal indicates that there is an undercurrent of approval within the international community for the Roaming ICC proposal, because the international community has already legitimized and accepted—as evidenced by the planned creation of the UN-Lebanon tribunal—a fundamental precept of the Roaming ICC concept.

There are further tangible indications that the international community would embrace the Roaming ICC. The UN-Cambodian Tribunal that is now underway is best described as a “mixed” or internationalized domestic criminal tribunal, which means that despite substantial international presence at the tribunal, it is for all intents and purposes a domestic criminal court.<sup>376</sup> The very name of this tribunal indicates as such, the Extraordinary Chambers in the Courts of Cambodia

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372. The Secretary General, *Report of the Secretary General on the Establishment of a Special Tribunal for Lebanon*, annex, pmbl., art. 1, 8, 11, delivered to the Security Council, U.N. Doc. S/2006/893 (Nov. 15, 2006) [hereinafter UN-Lebanon Report]. Additionally, the UN-Lebanon tribunal would be independent of the United Nations and the Lebanese judiciary, and would have primacy of jurisdiction over domestic Lebanese courts. *Id.*, ¶ 6, attach. art. 4.

373. *Id.*, ¶ 1.

374. *Id.*, attach. art. 2; see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, UN-Cambodia, art. 3 new-8, Oct. 27, 2004, Reach Kram No. NS/RKM/0801/12 (2001) (Cambodia), available at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) [hereinafter UN-Cambodian Statute]; Statute of the Special Court for Sierra Leone, UN-Sierra Leone, arts. 2-5, Jan. 16, 2002, U.N. Doc S/2002/246, available at <http://www.sc-sl.org/scsl-statute.html>.

375. At time of publishing, the seat of this UN-Lebanon Tribunal has not been determined precisely. Along with the tribunal being located in Lebanon, there remains the possibility that the tribunal will be seated in The Hague, Utrecht, or elsewhere in Europe. However, regardless where this court takes place, many of the points made here still apply.

376. SCHABAS, *supra* note 331, at 6; UN-Cambodia Agreement, *supra* note 369, pmbl. art. 1, 31; UN-Cambodian Statute, *supra* note 374, art. 2 new.

(ECCC).<sup>377</sup> Each organ and department within this tribunal is equally represented by international and Cambodian personnel.<sup>378</sup> While it remains to be seen if this particular tribunal will be a total success, the existence of the ECCC further supports the potential reality of the Roaming ICC. Specifically, the ECCC would be another example of the Roaming ICC in action, because a Roaming ICC tribunal in Cambodia would similarly be operated in total by an equal or equitable distribution of international, regional, and domestic personnel. The ECCC—in its makeup and conceptual foundation—is more or less a carbon copy of a Roaming ICC tribunal at work, and as the ECCC continues towards becoming a genuine success, the Roaming ICC proposal gradually gains legitimacy as well.

To dispel any confusion about the nature of the Roaming ICC, once a Roaming ICC proceeding begins operation in a State Party's territory, this does not mean that this proceeding is a *de facto* State Party proceeding and/or subject to *all* of the State Party's domestic laws. For example, a Roaming ICC proceeding taking place in the U.S. does not mean that the person tried would be subject to or receive the benefit of all U.S. domestic laws, such as the 6<sup>th</sup> Amendment right to a jury trial. The Roaming ICC proceeding would be technically separate from the State Party. Theoretically, it is best to envision the State Party as an "active host" to the Roaming ICC proceeding. The State Party would contribute its jurisdictional supremacy—such as its police forces, investigators, subpoena powers—, its prosecutors and judges, its court rooms, and so on, to the Roaming ICC for use during the proceeding. This arrangement would be much like the relationship between The Netherlands and the ICJ, ICTY, and the ICC, where Dutch authorities and jurisdiction are often used for the benefit of these institutions, but the whole of Dutch law does not apply to either these institutions or the individuals being prosecuted.<sup>379</sup>

### C. What the Roaming ICC is Not

Just as important as it is to lay out what the Roaming ICC would be, it is also important to distinguish the Roaming ICC from other similar proposals. First, the Roaming ICC is not a "community of courts" idea, where the international criminal enforcement mechanism is, essentially, a web of domestic courts practicing international criminal jurisdiction over international crimes.<sup>380</sup> The

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377. UN-Cambodia Agreement, *supra* note 369.

378. UN-Cambodia Agreement, *supra* note 369, art. 3, 5-6; UN-Cambodian Statute, *supra* note 374, art. 10 new, 16, 23 new.

379. The Dutch-ICJ/ICTY/ICC arrangement is not completely parallel to the Roaming ICC/State Party arrangement, for those tried at either the ICTY or ICC are not being tried for violation of any Dutch criminal law, which an individual being tried at a Roaming ICC proceeding would be adjudicated with, theoretically, if tried in The Netherlands. This would be so under the Roaming ICC system because The Netherlands would have incorporated Roaming ICC's substantive and procedural laws into its own jurisprudence, so the person tried would be—technically speaking—prosecuted for violation of this law, regardless of where the events took place. This idea is further elaborated below. *Infra* section IV (D) (1).

380. See Burke-White, *supra* note 60, at 75-97. While some of the fundamental principles of the community of courts idea are present in the Roaming ICC, the difference is that the Roaming ICC involves international participation at a much larger scale and requires far more organization than the

community of courts concept differs in that it lacks active international participation and oversight, and is better described as an organic coalition of domestic sovereign States practicing international criminal law on their own.<sup>381</sup> The extensive involvement of the international community is necessary, because sovereign States, when left alone, have proven themselves to be untrustworthy in doing the job of the international community in fighting international crime.<sup>382</sup> Even international pressure on sovereign States to use domestic measures to punish the commission of international crimes has not shamed States into action.<sup>383</sup> The Roaming ICC, on the other hand, utilizes active international participation in the development of a system whereby an agreement between sovereign States and the international community<sup>384</sup> will obligate States to work with the international community in prosecuting and punishing international criminals. Specifically, sovereign States will assist by allowing the international community to "piggyback" onto the undisputed territorial authority and power of the sovereign State, enabling both the State and the international community to fight international crime in a collective manner. The Roaming ICC, basically, is the concrete institutionalization of an agreement between sovereign States and the international community to work together in enforcing international criminal law.

Additionally, the Roaming ICC is not a disjointed series of independent hybrid courts, or an agreement between the current ICC and an individual State to allow the ICC to set up a pseudo-hybrid court in the individual State.<sup>385</sup> These

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community of courts idea. Also, it is unknown what type of international criminal jurisdiction would be practice under the community of courts idea, be it territorial, nationality, or universal.

381. *Id.* at 86 ("The emerging community of courts is largely self-organizing and self-regulating. Though some of the principles that regulate the community are found in the Rome Statute, the community itself lacks any controlling or regulating authority. Therefore, the relationships and interactions among these courts are essential to the effectiveness of the emerging system of international criminal justice").

382. *See supra* notes 48-60 and accompanying text. Additionally, even assuming many domestic States were to practice international criminal law through whatever jurisdictional rationale, without a standard uniform procedure to be used by these domestic States and without an international oversight organization, these multiple domestic States end up applying diverse interpretations of international criminal law and apply them in overly diverse ways. *See, e.g.*, Redress Memo, *supra* note 35; New Redress Memo, *supra* note 35.

383. *See, e.g.*, *Universal Jurisdiction in Europe: The State of the Art*, Human Rights Watch Reports (Human Rights Watch, New York, NY), June, 2006, at 1-2, available at <http://hrw.org/reports/2006/ij0606/index.htm>; Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 589-595 (2003).

384. It is odd to use the term "international community" outside of the context of the Roaming ICC, because the international community is an abstract term, not a tangible entity, like a sovereign State. However, in the context of the Roaming ICC, the international community is the combination of every other State outside of the State where the trial would occur.

385. *See* Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 204-212 (2006). Lipscomb also makes mention of Article 3 and 4 as a basis for moving the ICC out of The Hague. However, Lipscomb's idea focuses on a one time use of these Articles as a statutory basis from which to create an ICC-Hybrid Tribunal in the Sudan. This Note's Roaming ICC proposal uses these Articles to promote a much more radical departure from the current ICC, where these Articles would be the springboard from which the current ICC would transform into a cohesive network of "ready to mix", but temporary

ideas, while following similar logic and promoting similar objectives as the Roaming ICC, are far less organized and developed than a potential Roaming ICC regime. To use the analogy of a hybrid tribunal to differentiate the Roaming ICC from these hybrid tribunals ideas: under the Roaming ICC framework, every State Party would have a pre-existing organization—the Roaming ICC State Authority, which in the instance of the U.S., could be an alliance between the Department of Justice and Federal Judiciary—to receive and work with the incoming constituents of the Roaming ICC Regional and Presidential Authorities, primarily being the Prosecutors and Judges from those authorities. The next series of steps from this point would include the State Party overseeing, if feasible, logistics for the trial,<sup>386</sup> the formation of the Judge's panel by the joint collaboration between each Roaming ICC Authority, and the joint decision by the Prosecutor's Offices from the varying levels of the Roaming ICC on which Prosecutor's Office will take on which duties. Therefore, a hybrid tribunal of sorts would materialize more or less overnight after the Roaming ICC decides to investigate and potentially prosecute an international crime, given that the infrastructure needed for an investigation, pre-trial, and trial would already be in place within the State Party—save some minor aspects—and only the makeup of the various Judges' Panel, Prosecutorial team, and Defense team would be left undetermined.<sup>387</sup>

Finally, the Roaming ICC is not a compromise between sovereignty and the international rule of law. The Rome Statute Framers' believed that only through compromise of these two diametrically opposed interests could an effective international criminal enforcement mechanism become reality. The Rome Statute Framers' belief deserves criticism, because there is no compromise in a game of "tug of war". One either wins or loses. The Roaming ICC proposal flips the paradigm away from compromise by creating an international criminal system structurally and conceptually built into the Westphalian world of sovereign States. In other words, the Roaming ICC is a system that ensures the international rule of law through the powers of sovereign States. Neither sovereignty nor the international rule of law is required to compromise in order to create the Roaming ICC. Consequently, sovereign States do not feel trampled by the international rule of law, and the international rule of law is not sacrificed in the name of sovereignty.

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hybrid tribunals in every State Party. *Id.* at 206-07.

386. Logistics, as already mentioned, would include all aspects necessary to undertake a trial, from the mundane to the critical, from providing a physical forum for the proceedings to apprehending suspects. However, some substantial assistance would be provided by the Roaming ICC Registry and other organs of the Roaming ICC Presidency, such as paperwork, international investigators, assistants to the Judges, etc.

387. While it might be only of academic interest, technically speaking, the Roaming ICC would "enter" the sovereign State in order to adjudicate the alleged international crime. It would not be as if, using the U.S. as an example, the U.S. was adjudicating international crimes with assistance from the Roaming ICC's Presidential and Regional Authorities. However, in actuality, the perception might be as such, because the U.S. would be responsible for ensuring the trial runs effectively, plus an American Judge and Prosecutor(s) would be actively participating in the trial along side Regional and Presidential Judges and Prosecutors.

*D. Advantages of the Roaming ICC*

The Roaming ICC possesses clear advantages over the current ICC, mainly due to the construct of the Roaming ICC being a workable international criminal system tailored to a State-centric world. The advantages, discussed below, are not only numerous, but substantial.

**1. Jurisdictional Prowess: An Enhancement on Jurisdiction to Prescribe and to Adjudicate**

The Roaming ICC would constitute a welcomed improvement over the current ICC in terms of its jurisdiction to prescribe and its jurisdiction to adjudicate. In regard to prescriptive jurisdiction, this Note has made much of the groundbreaking nature of the current ICC's jurisdiction to prescribe, namely that the Rome Statute exercised universal international jurisdiction when the Rome Statute Framers prescribed genocide, crimes against humanity, war crimes, and aggression as internationally criminal wherever it takes place. The Roaming ICC does not wish to tarnish or alter this accomplishment,<sup>388</sup> but enhance this feat by making the Rome Statute's subject matter laws perfectly uniform in every State Party's jurisprudence. As a result, the Roaming ICC's prescriptive jurisdiction would be impervious to challenge or criticism, and furthermore, would utterly validate the *truly international* reprehensibility of these crimes by making them verbatim entries into the national law of every State on Earth.<sup>389</sup> Additionally, if the law of every State Party is identical in respect to these international crimes, then the legitimacy of the Roaming ICC moving from prescription to adjudication is significantly improved, because it will mirror the treatment domestic courts give domestic criminal laws where the jurisdiction to prescribe is almost always followed by the jurisdiction to adjudicate.<sup>390</sup>

Jurisdictionally speaking, the greatest improvement of the Roaming ICC over the current ICC is its jurisdiction to adjudicate. The Roaming ICC will work from a superb jurisdictional position to adjudicate almost all situations of international criminal violations, because in a majority of circumstances, all the organs of the Roaming ICC framework will premise their jurisdiction to adjudicate on the most credible justification of them all: the territorial jurisdiction of the domestic

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388. Included in the Roaming ICC's desire not to tarnish or alter the Rome Statute/ICC's accomplishments in terms of jurisdiction to prescribe, the Roaming ICC proposal would not change anything in regards to the current ICC's relationship with customary international criminal law. The exact same structural concept that allows customary international criminal law to coexist with the Rome Statute would be incorporated in the Roaming ICC system. *See supra* section IV, B.

389. As already stressed, but worthy of more emphasis, the idea of adopting a substantive and procedural jurisprudence into every State's laws, word for word, sounds impossible on several levels. However, the world is not that far off from being able to do just this. The Rome Statute codified certain international crimes to an extent not demonstrated before, and the procedural experiences of the ICTY, ICTR, and in the future, ICC will bring the world closer to an agreement on the procedural aspects of adjudicating international crimes. Thus, the next step is to undertake the Roaming ICC proposal, and focus on negotiations—no matter how long—geared towards realizing this proposal's promise.

390. *Supra* note 254 and accompanying text.

Roaming ICC State Party to adjudicate violations of their own domestic laws.<sup>391</sup>

In the clear cut case of an international crime being committed within a Roaming ICC State Party, the suspect staying in the State Party where the crime was committed, and the decision to prosecute this individual is made after an investigation has concluded, then the State Party will apprehend the suspect, thus initiating the Roaming ICC adjudicative process. The Roaming ICC State Party will apprehend the suspect, because the afflicted State Party has a general interest and legitimate reason to adjudicate infractions of their own laws within their own borders, specifically in this case, violation of their Roaming ICC laws. As the suspect sits in custody,<sup>392</sup> the Roaming ICC State Party will be obligated pursuant to the Roaming ICC agreement to let the Regional and Presidential Authorities enter its territory in order to fulfill their respective adjudicative and prosecutorial roles under the Roaming ICC framework. Thus, when this type of clear cut violation occurs, the Roaming ICC State Party has its unquestionable territorial jurisdiction to adjudicate this infraction, and concurrently, the Regional and Presidential Authorities also legitimize their jurisdiction to adjudicate the suspect by linking itself, or said differently, by partnering itself with the State Party's definitive jurisdiction to adjudicate.

Although a majority of international crimes will occur in this manner described above—for instance, Rwanda, former Yugoslavia, Cambodia, Nazi Germany—in the absence of such a clear cut scenario, the Roaming ICC framework has other jurisdictional justification to adjudicate as well. In the case of a suspect fleeing the territory of the Roaming ICC State Party where the crime was committed or the territorial State Party clearly unwilling to investigate or prosecute, other Roaming ICC State Parties will have a jurisdictional basis for capturing and adjudicating the suspect if the suspect enters their territory, or for offering to accept the proceedings from the State Party unwilling to adjudicate the suspect. This jurisdictional basis spawns from the fact that the Roaming ICC jurisprudence would be a part of every Roaming ICC State Party's domestic law, and as already stressed, will be perfectly consistent from one country to another. As a consequence of every nation having the exact same Roaming ICC law, the concept of vicarious jurisdiction would exist for every State Party across the Roaming ICC network.

Vicarious jurisdiction possesses similar characteristics as universal jurisdiction, but is a distinct jurisdictional theory altogether. Under the concept of vicarious jurisdiction, a Roaming ICC State Party—State B—ends up prosecuting an individual who committed an international crime in another Roaming ICC State Party, State A. State B can prosecute this suspect because of the failure of State A—who initially possessed primacy of jurisdiction to adjudicate because the

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391. BARRY E. CARTER ET. AL., *INTERNATIONAL LAW* 650-653 (4th ed. Aspen Publishers 2003) (highlighting the elements of territorial jurisdiction, and the power of territorial jurisdiction).

392. There could be circumstances where a Roaming ICC investigation/pre-trial goes on without the presence of the defendant(s) in custody. However, their presence in custody would be mandatory for trial to begin. For literary ease, this Note assumes for this example that the suspect(s) is in custody.

offense happened on its territory—to adjudicate the suspect warrants and triggers State B to step in and adjudicate the suspect in State A’s place.<sup>393</sup> Vicarious jurisdiction, an concept present in German and Austrian jurisprudence,<sup>394</sup> differs from universal jurisdiction, because State B initially possesses a claim to adjudicate the suspect despite State A having primacy of jurisdiction.<sup>395</sup> State B has an initial claim to adjudicate the suspect, because the suspect breached State B’s Roaming ICC laws, but with the operative events occurring in another Roaming ICC jurisdiction, in State A. Conceptually, the vicarious jurisdiction idea comes from the theory that the sovereign authority of a State to adjudicate the commission of an international crime that occurs in its territory passes to the international community, or another State, once the territorial State abrogates its sovereign duty to adjudicate recognized international crimes.<sup>396</sup> Vicarious jurisdiction would be a codified jurisdictional concept under the Roaming ICC, for all Roaming ICC State Parties would have the same domestic laws in regard to Roaming ICC law. As a result of this codification, the ability but denial of State A to prosecute a suspect for committing a Roaming ICC crime within State A, or the fleeing of this suspect from a violation in State A into State B, would justify and motivate State B in apprehending or offering to prosecute the individual for violation of Roaming ICC laws in State Party A. The motivation for State B to apprehend or to offer to prosecute this suspect comes from not only the suspect violating the Roaming ICC laws present in State A’s jurisprudence, but the verbatim Roaming ICC laws in State B’s jurisprudence as well. Otherwise, State B’s failure to adjudicate this suspect would intrinsically undermine the validity of State B’s Roaming ICC laws. Furthermore, vicarious jurisdiction would pass from Roaming ICC State Party to Roaming ICC State Party at each failure of any of the State Parties to apprehend and prosecute, so the suspect could face prosecution in State C, State D, and so on, never finding a safe haven.<sup>397</sup> As a result of codifying vicarious jurisdiction, the Roaming ICC framework still maintains jurisdictional prowess in the face of fleeing suspects or a Roaming ICC State Party unwilling to prosecute.

The more complex situation is where a Roaming ICC State Party refuses to investigate or prosecute a Roaming ICC crime that occurred within its territory, the suspect staying within this State Party’s territory, *and* this State Party is unwilling to extradite the suspect to another Roaming ICC State Party for prosecution. However, this is an issue of potential military or hostile intervention into the territory of the Roaming ICC State Party unwilling to extradite, because the only

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393. See Bottini, *supra* note 13, at 512-13.

394. Strafgesetzbuch [StGB] [Penal Code] Allgemeiner Teil [AIT] § 7 (2) 1-2 (Germany); Strafgesetzbuch [StGB] [Penal Code] Allgemeiner Teil [AIT] § 65 (1)-(3) (Austria).

395. See Bottini, *supra* note 13, at 512-13.

396. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), available at <http://daccess-ods.un.org/TMP/7325911.html>; Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, xi-xiii (Dec. 2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>; Sammons, *supra* note 49, at 122-24.

397. Bottini, *supra* note 13, at 511-12 (discussing that a major goal of international criminal law is to eliminate safe haven, which unfortunately are a reality in today’s world).

way the suspect could face justice is if another State Party breaches the territorial sovereignty of the unwilling State Party in order to capture this individual. The Roaming ICC is not designed to answer a dilemma of military or hostile intervention, because the Roaming ICC is an international criminal enforcement mechanism, not an end run around acts of war. No system is capable of solving all international criminal situations – including the Roaming ICC – considering the unpredictable and overtly political nature of world affairs. Plainly put, the Roaming ICC can only go so far.

Nevertheless, the Roaming ICC system would incorporate normative measures to handle a situation like this, and could resort to its vast membership to bring about an acceptable solution. If a State Party refuses to cooperate with the Roaming ICC, fails to live up to their Roaming ICC contractual obligations, or refuses to extradite a suspect to a Roaming ICC State Party willing to prosecute, the initial step would be to allow individual State Parties to engage the uncooperative State Party in diplomacy. There are two valid reasons why other State Parties would be motivated to persuade the uncooperative State Party to change its way. First, all Roaming ICC State Parties will have a vested interest in maintaining the integrity of the Roaming ICC system, because it takes just one State Party being allowed to skirt its Roaming ICC contractual obligations to make the whole system unreliable and tarnished for the rest. Hence, the State Parties that want the Roaming ICC to work and/or are relying on the Roaming ICC to work when needed will have a self-interest in making other States Parties cooperate. Second, the idea of vicarious jurisdiction would persist even in this above described scenario, because the suspect has still violated the laws of *all* Roaming ICC State Parties, but unfortunately in a State Party unwilling to do anything about it.<sup>398</sup> Allowing a State Party to harbor an individual accused of violating a law that all nations have specifically adopted into their own domestic law directly undermines the validity of such a law; therefore, other Roaming ICC States Parties will want to persuade the uncooperative State Party to cooperate for everyone's benefit, least of which the persuading States' own benefit.

With these two reasons, other States will have plenty of diplomatic leverage and normative pressure to exert over an uncooperative State Party. Roaming ICC State Parties can inform the uncooperative State Party that not only is the State Party doing damage to its reputation by failing to live up to its contractual Roaming ICC obligations, but it is doing damage to its future ability to contract or have other States believe them at all in future negotiations of any sort. Furthermore, other State Parties can stake a claim over the harbored suspect pursuant to vicarious jurisdiction, which will put the uncooperative State Party on notice that there is much too lose and nothing to gain by staying uncooperative. As a precautionary measure, States could insert "Roaming ICC compliance" provisions into trade, economic cooperation, maritime, or any other kind of

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398. The only true way around a scenario like this would be to include a provision in the Roaming ICC agreement that all States will obey extradition requests, but such a provision would most likely be unacceptable to many sovereign States.

bilateral or multilateral treaties such that the benefit of a treaty will only flow to a country if the country is compliant with the Roaming ICC. As a last resort, the Roaming ICC would be able to refer the situation to the UN Security Council for resolution, which could include economic and diplomatic sanctions imposed upon the uncooperative State Party. As can be seen, despite the complexity of this type of situation, the Roaming ICC will still have plenty of concrete normative options at its disposal to solve this dilemma.

Finally, the Roaming ICC jurisdiction to adjudicate will be substantially simpler than the current ICC, because the current ICC's confusing and complex referral/deferral/complimentarity process will be eradicated under the Roaming ICC. The potential for political firestorms between current ICC State Parties and the Prosecutor's Office regarding future deferrals will be extremely high, and such political skirmishes will inevitably delay justice from happening. One of the main legal arguments put forward by the U.S. against the current ICC is the discretionary ability of the Prosecutor to avoid deferring a case to a national court, thus allowing the ICC to proceed with an internal ICC proceeding against the wishes of a State Party.<sup>399</sup> In contrast, deferrals will never be an issue under the Roaming ICC framework, because the actual judicial proceeding will take place in the affected forum, or in a neighboring State Party. As such, politics about deferrals and over-zealous Prosecutors will not be an issue that will bog down the Roaming ICC.

## 2. Internal Strength: A Reliable Jurisdiction to Enforce

Despite amendments within the Rome Statute to require cooperation with the current ICC's investigation and prosecution of suspects,<sup>400</sup> the Rome Statute cannot guarantee that the current ICC will not be plagued with the same enforcement problems that faced the *ad hoc* tribunals, particularly the ICTY. Evidence gathering, evidence protection, witness and victims security, witness summoning, enforcement of arrest warrants, the ability to arrest, and other necessary elements to any judicial proceeding were far from foregone conclusions for the *ad hoc* tribunals,<sup>401</sup> and the ICC is vulnerable to the same issues.<sup>402</sup> Cooperation agreements, while in principle seem to be a solution, cannot be trusted when it comes to international criminal matters, because it leaves far too much discretion with sovereign States. Although these necessary elements are never completely certain of occurring in any international judicial proceeding, the mere fact that a Roaming ICC proceeding will be administered primarily by a Roaming ICC State Party within that State Party's territory increases the odds that every part of an investigation, pre-trial, and trial will transpire. Seldom is it a worry in the

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399. Fact Sheet, *supra* note 334 (pointing out that a major U.S. objection to the ICC is the Prosecutor's ability to avoid having to defer a case).

400. See Rome Statute, *supra* note 207, pt. 9.

401. See Cervoni, *supra* note 72, at 510.

402. See Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, n.26 (2004) (forecasting that the ICC mechanism will experience the same enforcement flaws that plagued the ICTY).

domestic criminal context if a trial will take place, because of doubts that the suspect can be arrested, or evidence can be secured, or prosecutors will want to uphold the law. The goal of the Roaming ICC is to bring that level of certainty to the enforcement of international criminal law by relying on the State Party's experience, knowledge, and overall ability to facilitate an investigation and judicial proceeding within its own borders.

### 3. True Sense of Justice

The practice of prosecuting international crimes outside of the area in which the crimes took place has been substantially discredited.<sup>403</sup> Using the two *ad hoc* tribunals as examples, the prosecution of international criminals in The Hague and in Arusha created a multitude of problems in the affected areas of Rwanda and the former Yugoslavia. These severely traumatized populations felt disconnected from the proceedings, unaffected by the sentencing of these criminals thousands of miles away.<sup>404</sup> The supreme goal of criminal justice is to make the affected community whole and the ICTR and ICTY not only missed accomplishing this goal, but caused joint opposition among the affected communities against the tribunals.<sup>405</sup> There are no assurances that the current ICC's proceedings will not produce the exact same feelings among the communities ravaged by genocide, or the like, because the ICC will also be operating, from a distance, in The Hague. However, the Roaming ICC would not encounter such issues. The proceeding of any violation of the Roaming ICC laws would most likely take place where the crimes occurred. In the few situations where a Roaming ICC investigation and prosecution were to take place elsewhere, such proceedings would invariably take place in a nearby Roaming ICC State Party. Due to this feature of the Roaming ICC, affected communities will be more likely to rally around the proceedings, instead of opposing them.

### 4. Caseload Capacity and Pooling of Resources

As it stands today, the ICC, as a centralized, singular institution, holds neither the resources nor capability to handle adequately a plethora of simultaneous international criminal cases.<sup>406</sup> If international criminal cases start to pile up, the current ICC's inability to take on a large number of cases at once, and do so effectively, will force the ICC to make one of two unattractive decisions: it can put a finite limit on its caseload capacity, and hope national jurisdictions fill the void or; allow itself to become overloaded, which inevitably will result in undesirable consequences, such as delays in justice for the afflicted communities and

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403. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 300-08 (2003); Lipscomb, *supra* note 376, at 193-99.

404. See *Developments in the Law—International Criminal Law: II. The Promises of International Prosecution*, 114 HARV. L. REV 1957, 1971-72 (2001) (emphasizing that having the prosecution forum far away from the affected communities, such as the scenario with the ICTY and ICTR, creates a void in justice, and galvanizes the communities against the tribunals).

405. *Id.* at 1972.

406. See Bottini, *supra* note 13, at 547 (describing the logistic problems that the ICC will face in light of how the ICC is set up).

unreasonably long detention periods for suspects.<sup>407</sup> In contrast to the current ICC, the Roaming ICC is built to handle any number of international criminal cases simultaneously given that the Roaming ICC is a decentralized entity that possesses all the resources of its State Parties, its Regional Authorities, and the Presidential Authority. As such, the burden of simultaneous international criminal cases will be dispersed; therefore, Roaming ICC cases could occur in Somalia, Brazil, Albania, Vietnam, and Mexico all at once without one case detracting or harming another.

Another benefit of being larger and more decentralized than the current ICC is that the Roaming ICC would have a much larger pool of money to facilitate its investigations and trials, and create a funding mechanism that all States would support. While unnecessary here to determine the exact percentage each Roaming ICC Authority would pay towards financing a Roaming ICC proceeding, the breadth and the setup of the Roaming ICC structure will make certain that the financial fears that hang over the head of the Sierra Leone, Cambodia, and East Timor tribunals will not be replicated in Roaming ICC system.<sup>408</sup> In most circumstances, a Roaming ICC proceeding would be drastically cheaper than any other international tribunal, because a Roaming ICC investigation and trial would rely on the already financed, preexisting legal infrastructure of the State Party where the trial would take place to fund a majority of the trial and investigation costs. For example, the State Party's Judges, Prosecutors, investigators, administrative officers, court rooms, detention facilities, and so on would already be paid for, and would simply be reassigned to a Roaming ICC case. Conversely, the Regional and Presidential Authorities would be financially responsible for the peoples, goods, and services each Authority contributed towards the fulfillment of its obligations in a Roaming ICC proceeding, and additionally, would partly reimburse the forum State Party for the Roaming ICC's use of its preexisting legal infrastructure.<sup>409</sup> This reimbursement would give the forum State Party extra incentives to hold up their end of the Roaming ICC agreement as well.

In situations where a Roaming ICC proceeding takes place in a State Party where the international crimes did not occur, the afflicted State Party would be responsible for paying in part the hosting State Party.<sup>410</sup> Such an arrangement would give a financial enticement to the hosting State to accept the role as forum

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407. See Howard Morrison, *Experimental Justice: Do International Tribunals Work?*, 3-4, <http://www.leginety.com/articles/Experimental%20Justice-Do%20International%20Tribunals%20Work.pdf> (discussing the delay of justice issues associated with the *ad hoc* tribunals).

408. AsiaPacific, *supra* note 369, at 1; Rob Sharp, *Funding Crisis Threatens Khmer Rouge Trials*, THE INDEP., Mar. 12, 2008, available at <http://www.independent.co.uk/news/world/asia/funding-crisis-threatens-khmer-rouge-trials-794486.html>; see Sierra Leone Agreement, *supra* note 368, art. 6 (stating the Sierra Leone Tribunal will be financed by voluntary contributions by States, which to a legal mind, is incomprehensible, considering that allows for the possibility of a trial to end because of a lack of money).

409. Each Regional Authority would be funded in part by the States in the Region, and the Presidential Authority would be funded by all State Parties.

410. The Roaming ICC agreement would not prohibit any other financial agreement between the three Authorities, as long as it furthers the goal of international justice.

State Party, and allow for the afflicted State to put its resources towards punishing those responsible. Finally, as a last resort, if any State Party is or becomes financially or technically unable to fulfill their obligations in a Roaming ICC proceeding, the Regional and Presidential Authorities would assume the investigation and judicial responsibilities as well as the financial burden of the indigent State Party, if need be.

*E. Attractive to Opponents of the Current ICC*

For State and non-State opponents of the current ICC, like the U.S., the Roaming ICC alternative is less objectionable to the principle of sovereignty, and therefore, more likely to be adopted by all nations. The Roaming ICC effectively addresses two primary concerns shared by opponents of the current ICC: the infringement of an external, independent international institution on the sovereignty of the State, and the legitimacy of the jurisdiction asserted in an international criminal prosecution. For many States, like the U.S., it is unnerving to envision an independent, foreign legal entity potentially having international criminal jurisdiction over its citizens, mainly because the sovereign State would be cut out of having direct involvement in the judicial proceedings.<sup>411</sup> The hallmark of the Roaming ICC is that it is a conceptually decentralized court that temporarily “creates itself” within the territory of the crime or any State Party, so the Roaming ICC cannot be labeled external or foreign. Additionally, the Roaming ICC depends on the State Party in which it sits not only for the performance of a majority of investigatory and judicially necessary functions, but also on the allocation of domestic Judges and Prosecutor from the territorial State Party. Therefore, the Roaming ICC is not an independent hegemony asserting its authority over sovereign States. Instead, the Roaming ICC is set up to incorporate the sovereign influence of the State Party in which it sits, which includes everything from

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411. One of the U.S.’s grounds for opposing the ICC is that the ICC may attempt to gain jurisdiction over its soldiers, military personnel, high ranking military leaders, or foreign policy makers working abroad. Bolton Speech, *supra* note 329. This is a uniquely American concern, for no country maintains a military force abroad to the extent that the U.S. does. Under the Roaming ICC, it is imaginable that a U.S. military official or civilian foreign policy maker could be investigated and potentially prosecuted in a foreign Roaming ICC State Party. However, there are safeguards and incentives in place that would appease both the U.S. and international community if such a scenario would take place. First, the Roaming ICC State Party that initially began an investigation or prosecution against the U.S. military official could extradite the U.S. military official to the U.S., and the entire Roaming ICC process could take place in the U.S. The sending country would be assured, by the structural safeguards within the Roaming ICC agreement, that the U.S. and the international community would adjudicate the U.S. military official together, rather than the U.S. simply taking the soldier back with no assurances that any judicial proceedings will take place at all. Second, regardless if Roaming ICC proceeding took place in the extraditing country or in the U.S., it would be the exact same proceeding, so there would be no worry that the U.S. would hold a kangaroo court of some sort. The inverse of this, if the U.S. official were to stay in the Roaming ICC State Party that initially investigated or prosecuted the U.S. military official, and the U.S. did not seek extradition, the U.S. would at least be assured that the exact same proceedings would take place regardless where the Roaming ICC proceedings occurs. Additionally, because the U.S. would take part in the negotiations surrounding the jurisprudence of the Roaming ICC, the U.S. would indirectly influence all future Roaming ICC proceedings wherever they took place, even if it was a Roaming ICC prosecution against a U.S. general in Burundi, for instance.

domestic investigators to a sitting domestic Judge. Essentially, the Roaming ICC provides State Parties with both a sense of ownership over the Roaming ICC proceedings taking place within its territory and with “checks and balances” on the amount of influence that the Roaming ICC Presidential and Regional Authorities can assert, yet still maintaining a system whereby the international community can counteract any misgivings on the part of the State Party.

Much to the liking of opponents of the current ICC, through the adoption of the Roaming ICC laws into the domestic jurisprudence of all State Parties and the dependence of a Roaming ICC proceeding on the domestic State Party to help “run the show”, the Roaming ICC proposal adds an element of territorial legitimacy to the entire process of enforcing international criminal law. Objections as to the legitimacy of universal prescriptive and adjudicative jurisdiction used by the current ICC are answered, because the Roaming ICC attaches itself onto the unquestioned territorial power of the State Party, and the State Party’s own internal, pre-existing mechanisms, to enforce Roaming ICC’s criminal laws.

*F. Attractive to Proponents of the Current ICC*

It has been emphasized that the Roaming ICC proposal will gain the support of State and non-State opponents of the current ICC, because it calls for the active involvement of the sovereign State as a “check and balance” on unadulterated international intervention and provides jurisdictional legitimacy not found in the current ICC. However, their support will not come at the cost of losing the support of those States and non-States that are proponents of the current ICC. A chief reason that the proponents of the current ICC support the current ICC and not domestic courts applying international criminal law on their own is that the current ICC ensures that the location of the trial will not impact the substance of or the manner in which the law is applied, and allow for a completely transparent proceeding. Even though a Roaming ICC trial could take place in Mongolia or Chile, the Roaming ICC framework would also ensure the consistent application of the same rules and laws, and provide a transparent trial for the whole world to witness.

First of all, a Roaming ICC proceeding will not be completely left to the devices of the State Party, for every Roaming ICC proceeding will include the prosecutorial and judicial participation of the Roaming ICC Presidential and Regional Authorities. Secondly, given that each Roaming ICC proceeding will apply the exact same substantive law wherever the trial takes place, there will be no concern that a genocide trial in Sudan, for instance, will apply different substantive international criminal laws against genocide than the laws applied at a genocide trial in Laos. The manner in which a Roaming ICC proceeding occurs will not be of concern either, because the same procedural standards and practices—for instance, rights of defendants, pre-trial process, etc.—will be used during every Roaming ICC investigation, pre-trial, trial, and appeal regardless of its geographic location. Moreover, a future Roaming ICC trial in Nicaragua can use a past Roaming ICC trial in Indonesia for guidance, because every Roaming ICC Judge, Prosecutor, and Defense attorney will know that it can rely on Roaming ICC case law in light of the standardized laws and rules applied at every Roaming ICC proceeding. In light of regional and international officials participating in

many facets of a Roaming ICC proceeding, all Roaming ICC proceedings will supply a level of transparency that is not provided to the international community attempting to monitor a domestic State practicing international criminal law on its own. Such a level of transparency will deter Roaming ICC State Parties from actively undermining a Roaming ICC proceeding as well. Even if a State Party did disrupt a Roaming ICC proceeding, the level of transparency afforded would give the international community opportunity to bear legal and political pressure on the State Party to alter its harmful policies.

All of these above attributes, which are very important to proponents of the current ICC, are only realized if all the world's States agree to the substantive and procedural laws to be used by the Roaming ICC framework, and subsequently enact them into every State Parties' domestic law. Yet, the hard work and years that it might take to accomplish such a task will ensure legal consistency within the Roaming ICC framework, and accordingly, alleviate any apprehension that Roaming ICC judicial proceedings will be varied and unfair.

#### V. CONCLUSION: APPEASES BOTH SIDES OF THE DEBATE

As this Note has traced the development of international criminal law, specifically the international institutions trusted to adjudicate and enforce them, the consistent theme throughout has been the battle between sovereignty and the international rule of law. No matter what the answer to the riddle on enforcing international criminal law may be, it is undeniable that the conflict between sovereignty and the international rule of law sits squarely on top of the answer. Regardless of the approach, the clash between sovereignty and international rule of law has to be resolved in order to reach the solution.

For centuries, the dominant thought on enforcing international criminal law - assuming that countries even agreed on what international criminal law is - has surrounded compromise. How far can we push sovereignty on the creation of an international criminal system without sovereign States walking away from the table? How far can we undermine international rule of law in creating an international criminal enforcement mechanism until those that support international criminal law walk away from the table? The magical middle ground was sought, but never to be attained. The focus must switch from compromise to engineering an international criminal enforcement mechanism that does not need to stomp on either sovereignty or the international rule of law in order to become a reality.

The Roaming ICC has, at the very least, made strides towards achieving this engineering feat.<sup>412</sup> Tallying all of the advantages of the Roaming ICC, both proponents of sovereignty and proponents of the international rule of law will get an international criminal system that will appease both sides.<sup>413</sup> For the proponents

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412. Obviously, the Roaming ICC proposal is in a rude, preliminary form as offered in this Note. Yet, the theory still has the potential to accomplish what it claims it can accomplish.

413. Throughout this Note, the proponents of sovereignty and the opponents of the current ICC are one in the same. Conversely, proponents of the international rule of law and the proponents of the current ICC are one in the same as well.

of the international rule of law, the Roaming ICC will be an effective, comprehensive, and transparent international criminal system that is capable of delivering consistent and fair judicial proceedings to every corner of the globe. More importantly, the Roaming ICC will provide advantages, such as ability to avoid disenfranchising the local population and a better ability to sustain a judicial proceeding, that international rule of law proponents wish were included in the current ICC. For the defenders of sovereignty, the Roaming ICC will not be a foreign entity bent on snatching their citizens away to a far away court. Rather, the Roaming ICC will hold judicial proceedings right in the sovereign State Party's own territory and allow their own Judges and their own Prosecutor to assert influence over every prosecutorial and judicial decision. Most beneficial to the proponents of both sovereignty and the international rule of law is the jurisdictional solution offered by the Roaming ICC, for the Roaming ICC jurisdiction to adjudicate will either be grounded in a Roaming ICC State Party's territorial jurisdiction<sup>414</sup> or vicarious jurisdiction,<sup>415</sup> thus creating a quasi-universal jurisdictional system that both sides of the divide will embrace.

Many of the components of the Roaming ICC proposal may not be earth-shattering concepts in their own right, but the Roaming ICC is a conceptual amalgamation of these components that is truly unique.<sup>416</sup> The Roaming ICC takes many of these already used ideas, and extrapolates on them. The Roaming ICC seizes on many of these already discussed concepts, and institutionalizes them. The end result is a coherent system of international criminal enforcement that ensures the highest level of realistic certainty that sovereign States will work with the international community to fight international crime on a consistent and uniform basis, wherever such crime occurs.<sup>417</sup>

Finally, the reality of creating a Roaming ICC is not far-fetched, for the substantive law necessary to create the Roaming ICC is already in existence. True, time will be needed to fashion a set of procedural laws that all Roaming ICC State

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414. Pleases the opponents of the ICC.

415. Pleases the proponents of the ICC.

416. For instance, international criminal prosecution via universal jurisdiction is not a ground-breaking concept, but accomplishing the end result of that concept through an agreement that codifies an alliance between the use of territorial and vicarious jurisdiction is a ground-breaking idea. Hybrid tribunals is not a revolutionary idea, but creating an international criminal enforcement mechanism that would allow for the creation of hybrid tribunals overnight through an agreement between sovereign States and the international community is revolutionary.

417. Another way to think of the Roaming ICC is that it is a structural guarantee on the promise of suppression convention. In an ideal world, suppression convention would be *all* the world would need to fight international crimes, because every State would prosecute international crimes that occurred within their territory or extradite the international criminal to a State that would prosecute them. Yet, sovereign States were free to disobey their obligations set forth in these suppression conventions, because there was no real consequences for disobeying. The Roaming ICC creates a framework agreement between all sovereign States and the international community that gives motivation to sovereign States to allow for the joint adjudication of international crimes by the State itself and the international community—represented by the Presidential and Regional Authorities—within their territory, and further ensures that these adjudications will always takes place, and always be fair and consistent.

Parties will accept, and even more time to allow the adoption of the entirety of Roaming ICC's laws into the domestic law of each nation. However, the time necessary to accomplish these feats is a small price to pay if the end result is a system that both proponents of sovereignty and the international rule of law will support. And an even smaller price to pay for a system that is capable of and designed to eradicate international crime in a State-centric world of international law.