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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

An Analysis of Lockean Philosophy in the Historical and Modern Context of the Development of, and the Jurisdictional Restraints Imposed by, the ICC Statute

Daniel N. Clay*

International political theory presents numerous visions of the state of war and the state of peace, yet international law is silent as to their philosophical underpinnings.¹ Instead, one must rely upon theoretical perspectives which not only *may* have played a role in the creation of the laws of nations but also the history and development of the International Criminal Court ('ICC'). To this end, this analysis traces the historical development of the ICC, its jurisdictional limitations, and its possible philosophical underpinnings, including the works of: Thomas Hobbes, Immanuel Kant, and John Locke; ultimately concluding that Locke provides the most complete, implicit support for the ICC and international criminal law in general.

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¹ Michael W. Doyle and Geoffrey S. Carlson, "Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke", in *Columbia Journal of Transnational Law*, 2008, vol. 46, no. 3, p. 648.

9.1. Introduction

The ‘grandfather’ of the ICC, Gustave Moynier (1826–1910), was not a utopian idealist. Instead, as a realist, Moynier recognised the demand of *Realpolitik*² and, as a result, introduced the first international humanitarian framework during the Geneva International Conference of 1863, which would later evolve into a proposal for the establishment of a permanent, international criminal tribunal.³ However, at the time, due to prevailing implicit Hobbesian political philosophy emphasising ‘sovereignty’ above all else, the proposal was rejected and not fully revived until the international *ad hoc* tribunals following World War II (that is, the Nuremberg and Tokyo Tribunals).⁴

Following the success of the post-World War II *ad hoc* tribunals and the creation of stable international bodies such as the United Nations,⁵ the prevailing political philosophy began to implicitly shift towards a Lockean perspective, in which States surrendered a portion of their sovereignty in exchange for dispute resolution and accountability mechanisms such as the ICC – a singular adjudicator – in a peace-oriented manner.⁶ However, now that the ICC is finally sitting, history may be repeating itself as politics and ‘sovereignty’ concerns in the form of ‘personal jurisdiction’ and ‘territorial jurisdiction’ have undermined the Court’s ultimate, implicit Lockean philosophical goal – “the peace and preservation of all mankind”.⁷

² “Realpolitik”, in Merriam-Webster Dictionary:

[P]olitics based on practical and material factors rather than on theoretical or ethical objectives.

³ Mark Kersten, “Where it all Began – Tracing the Birth of the ICC”, in *Justice In Conflict*, 10 January 2013; Resolutions of the Geneva International Conference, 26–29 October 1863 (www.legal-tools.org/doc/aec5e5/); Gustave Moynier and Louis Appia, *La Guerre et la Charité*, Librairie Cherbuliez, Paris, 1867; Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court”, in *International Review of the Red Cross*, 1998, no. 322.

⁴ Kersten, 2013, see *supra* note 3.

⁵ Compared to the largely ineffective League of Nations following World War I: see US Office of the Historian, “The League of Nations, 1920”, available on its web site.

⁶ This implicit shift represents a sharp contrast to the pre-World War II Hobbesian method of dispute resolution in which a state’s sovereignty prevailed above all else.

⁷ John Locke, “State of Nature”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. 2, para. 7 (www.legal-tools.org/doc/bd4102/).

Specifically, in practice, the Court's jurisdictional limitations implicitly embody Hobbesian-styled sovereignty by permitting State-level criminal justice systems (deemed 'willing and able') to investigate and prosecute a case in place of the Court.⁸ Thus, instead of a single body adjudicating violations of international humanitarian law, the Rome Statute allows for 196 possible adjudicating authorities – a clear nod to Kantian liberalism in which liberal States can and should be trusted to conduct their own investigations,⁹ while violating a central Lockean principle requiring a 'common judge' (one authority) for all adjudications.

As a result of the ICC's deviation from implicit Lockean philosophical principles in favour of Kantian and Hobbesian jurisdictional restraints, the Court – which fully adjudicating less than ten defendants since 2002¹⁰ – is a hostage to its own weak statutory foundation. Thus, the Court is at a functional and philosophical crossroads, in which it may follow one of two paths: (1) the Court may continue its divesture of power and authority, thereby supporting a return to a post-Moynier, implicitly Hobbesian-based *ad hoc* tribunal system; or (2) the Court may embrace the Lockean principle that a 'common judge' (authority) is necessary to prevent a return to an international 'state of war'.¹¹

9.2. The Three Primary Philosophical Foundations of the International Criminal Court and Related Obstacles

9.2.1. The 'State of Nature'

To contextualise both the evolution and the modern role of the ICC, one must first understand the philosophical foundations that led to its creation; specifically, the nature of international relations in the absence of man-made legal order ('positive law') or any enforcement mechanisms therein. As detailed below, understanding relationships in this so-called 'state of

⁸ International Criminal Court, "How the Court Works: Jurisdiction", available on its web site:

The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not are unwilling or unable to do so genuinely.

⁹ United States Department of State, "Lists for Independent States and Dependencies and Areas of Special Sovereignty: Independent States in the World", available on its web site. This figure includes the 195 independent states in the world and the International Criminal Court.

¹⁰ International Criminal Court, "Reparation/Compensation Stage", available on its web site.

¹¹ John Locke, "Of the State of War", in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. 3 (www.legal-tools.org/doc/bd4102/).

nature’ is a largely philosophical exercise as it is ‘unknowable’, yet it necessarily implicates the true nature of humankind, and thus the development of positive international law.

More specifically, the ‘state of nature’ describes life under a condition of ‘absolute freedom’ in which all positive law ceases to exist;¹² as a result, each individual – or State, as we will see – is accountable only to his or her instincts, physical needs, and individual sense of morality, without any recourse by traditional legal authorities at the State or international level. Thus, the ‘state of nature’ represents the truest denotation of ‘anarchy’.¹³ Whether this definition is in fact merely the sixteenth century socio-political theory of the absence of government, or the more sinister modern connotation of ‘chaos’, is subject to interpretation.¹⁴

In deciphering both domestic and international relations in the ‘state of nature’, philosophers generally fall along a spectrum between the theories of Thomas Hobbes, Immanuel Kant, and John Locke. Specifically, whereas Hobbes envisioned the ‘state of nature’ as a never-ending war between all, necessitating the formation of a powerful and sovereign State un-beholden to the international community, Kant envisioned a similar state of war, but called upon the international community to form ‘peace organisations’ to prevent future wars. In sharp contrast to Hobbes and Kant, Locke argued the ‘state of nature’ was governed by a higher, natural law which dictated peace and co-operation among the world’s inhabitants (to an extent); however, this peace and co-operation was subject to a check by an ultimate, single sovereign.¹⁵ Yet, despite their differing views, Hobbes, Kant, and Locke each called for the creation of positive law (be it at the State level or the international level) to promote and maintain

¹² Amer N. Shatara, “On the Hypothetical State of Nature of Hobbes and Kant; Same Premise, Different Conclusions”, in *European Scientific Journal*, 2016, vol. 12, no. 23, pp. 209–10. See, on p. 210:

The state of nature is the condition under which individuals lived prior to the existence of society.

¹³ “Anarchy”, in Bryan A. Garner (ed.), *Black’s Law Dictionary*, 10th edition, Thomson West, St. Paul, 2014, p. 104 (“[a]bsence of government; lawlessness”). This term is used as derived from its sixteenth century definition (above), not its more modern definition of a “sociopolitical theory holding that the only legitimate form of government is one under which individuals govern themselves voluntarily, free from any collective power structure” (*ibid.*).

¹⁴ *Ibid.*

¹⁵ *Infra* Sections 9.2.2.–9.2.4. In so providing, Locke is laying the foundation for international bodies such as the UN as well as the ICC.

peace – providing humanity an escape from the state of nature, whether defined by war or natural law.

Following the creation of the State and its corresponding positive law, Hobbes, Kant, and Locke again divide with regard to the issue of ‘sovereignty’ and international relations.¹⁶ Specifically, Hobbes and Kant note that, while liberal States should strive for peace, they must retain their sovereignty; thus, States should only be bound by mutual, self-interested contracts (peace treaties) to the degree they still retain independence and the right of self-defence. To the contrary, Locke advocates for States to surrender a portion of their sovereignty to a higher authority (a ‘common judge’) to resolve disputes and, in turn, ensure peace and the “protection of the innocent”.¹⁷ To date, as discussed below, it is the latter Lockean philosophy which theoretically legitimises the ICC – a form of world governance dismissed by both Hobbes and Kant – in that the ICC represents a single, ultimate sovereign.

9.2.2. Escaping the ‘State of Nature’ through Hobbesian State Sovereignty

As noted above, according to Realist philosopher Thomas Hobbes (1588–1679), the ‘state of nature’, humanity’s natural condition, was at best described as “nasty, brutish, and short”, in which its inhabitants were engaged in a never-ending “war of all against all”.¹⁸ Specifically, Hobbes noted:

Whether for gain, safety, or reputation, power-seeking individuals w[ould] thus ‘endeavor to destroy or subdue one another’ [...]. In such uncertain conditions, in which everyone [was] a potential aggressor, making war on others [was] a more advantageous strategy than peaceable behavior, and one need[ed] to learn that domination over others is necessary for one’s own continued survival.¹⁹

As such, Hobbes believed the only manner in which this ‘state of war’ would cease is for humankind to give their unquestioning obedience

¹⁶ *Infra* Sections 9.2.2.–9.2.4.

¹⁷ Locke, “Of the State of War”, 1690, see *supra* note 11.

¹⁸ Thomas Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, in *Leviathan*, Andrew Croom, London, 1651, p. 78 (www.legal-tools.org/doc/bcffb3/); Shatara, 2016, p. 211, see *supra* note 12.

¹⁹ *Ibid.*, quoting Hobbes, 1651, p. 76.

to a sovereign (the domestic State), which, through positive law, would control “every social and political issue” to avoid the “universal insecurity [...] [and] fear [of] violent death” accompanying the state of nature. Therein, an individual would be forced to surrender their “absolute freedom” and autonomy in exchange for order and security; thus vesting the State with powers once held by the individual, including the power to: (1) “prescribe [...] the rules”; (2) “decide all controversies which may arise”; and (3) “punish [...] every subject according to the law”.²⁰ In essence, the State would retain absolute freedom and autonomy, surrendered by its citizens.

In consideration of this exchange, the State was entrusted with two eternal precepts: (1) seek peace with other nations, and (2) ensure its natural right to defend itself.²¹ Specifically, a State, while having no duty to recognise or surrender its rights to another sovereign (as was required of the individual in the creation of the State), should “mak[e] [...] peace with other nations and [c]ommonwealths [,] [through a mutual transferring of rights (treaties)] [...] when it is for the public good”. However, implied in each agreement must be a condition of self-defence – the ultimate act of State sovereignty – because “covenants, without the sword, are but words, and no strength to secure a man at all”.²² Thus, for a State to fully realise

²⁰ Garrath Williams, “Thomas Hobbes: Moral and Political Philosophy”, in *Internet Encyclopedia of Philosophy*. Hobbes’s bleak view of the natural state of man and his subsequent writing were largely influenced by his surroundings – the English Civil War – in which King Charles I and his heir, King Charles II, were engaged in a series of armed conflicts to determine the absolute rule of the monarch versus the rights of people in the English Parliament. In supporting the monarch as an absolute sovereign for fear that division could result in the ‘state of nature’, Hobbes was undoubtedly impacted by his loyalist views and the violent uncertainty of the time; hence equating the ‘state of nature’ to a ‘civil war’. Thus, *Leviathan* should not merely be read as philosophical prose, but also a plea to the populace for peace and their investiture of their natural rights and liberties into a single sovereign.

²¹ Thomas Hobbes, “Of the First and Second Natural Laws, and Contract”, in *Leviathan*, Andrew Crooke, London, 1651, chap. XIV, pp. 79–82 (www.legal-tools.org/doc/bcffb3/). See John Rick, “Historical Context for *Leviathan*”, in *The Core Curriculum* (www.legal-tools.org/doc/5f5837/):

For Hobbes, it is the rationality of living within a political state that ultimately justifies [...] the legitimacy of sovereign authority [...] As Part I of the *Leviathan* argues, the inevitable dreadfulness of the state of nature renders it rational for individuals to relinquish most of their basic freedoms in order to obtain the valuable security provided by a political state, even one with absolute power.

²² Thomas Hobbes, “*Leviathan*”, in Austin Sarat (ed.), *The Social Organization of Law*, Oxford University Press, New York, 2004, p. 41; Thomas Hobbes, “Of the Rights of Sov-

these precepts, it must possess an absolute authority that is neither divided nor limited.

Absent the vesture of unquestionable sovereignty, Hobbes warns the State, weak and unable to protect its subjects, would collapse and the ‘state of war’ would again prevail, because:²³

[I]n all times kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours, which is a posture of war.²⁴

As a result, from a Hobbesian perspective, any perceived diminution in a State’s sovereignty, especially through the recognition of a ‘higher authority’ (a world government), would be a threat not only to the State as an entity and its citizenry, but the entire ordered international system predicated upon the agreements (or treaties) crafted among these self-interested sovereigns. However, in a Hobbesian world, such agreements “would be limited by national egoism and the degree to which material common interests overlap” (that is, aviation safety or mail delivery).²⁵ Absent the overlap of material common interests, there would be no need for, and no State would adhere to, an international law.²⁶ In short, according to Hobbesian philosophy, the State must seek peace, but not at the expense of its own sovereignty.

ereigns by Institutions”, in *Leviathan*, Andrew Crooke, London, 1651, chap. XVIII, pp. 107–11 (www.legal-tools.org/doc/bcffb3/); Hobbes, “Of the First and Second Natural Laws, and Of Contract”, 1651, chap. XIV, pp. 79–82, see *supra* note 21.

²³ Sharon A. Lloyd and Susanne Sreedhar, “Hobbes’s Moral and Political Philosophy”, in *Stanford Encyclopedia of Philosophy*, available on the Stanford Encyclopedia of Philosophy’s web site; André Munro, “State of Nature”, in *Encyclopedia Britannica*, 2016.

²⁴ Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, 1651, chap. XIII, p. 79, see *supra* note 18.

²⁵ Doyle and Carlson, 2008, p. 654, see *supra* note 1.

²⁶ *Ibid.*, p. 655:

The key message of Hobbesian Realism is that law is weak, but relevant. Any law that reflects the material, prestige, or security interests of a state would be complied with. Moreover, even when those interests dictate defection, states will be reluctant to acquire the reputation of faithlessness when they rely on cooperation for survival.

9.2.3. Escaping the ‘State of Nature’ through Kant’s Treaty Law of Liberal Republics

Building upon Hobbes, Immanuel Kant (1724–1804), a transcendental Idealist yielding a form of Realism at the empirical level, assumed there was a direct analogy between the state of nature amongst individuals and the one between States. According to Kant, both States and individuals live in constant insecurity in the ‘state of nature’ because of its lawless condition.²⁷ Specifically:

The state of peace among men living side by side is not the natural state (*status naturalis*); the natural state is one of war. This does not always mean open hostilities, but at least an unceasing threat of war. A state of peace, therefore, must be *established*, for in order to be secured against hostility it is not sufficient that hostilities simply be not committed; and, unless this security is pledged to each by his neighbor (a thing that can occur only in a civil state), each may treat his neighbor, from whom he demands this security, as an enemy.²⁸

In this theoretical perspective, “*States do not plead their case before a tribunal*, instead, war alone is their way of bringing suit. But by war and its favourable issue, in victory, right is not decided, and though by a treaty of peace this particular war is brought to an end, the state of war, of always finding a new pretext to hostilities, is not terminated”.²⁹ Instead Kant argues, *without foregoing sovereignty* and without material overlap, except security, States must form:

[A] league of a particular kind, which can be called a league of peace (*foedus pacificum*), and which would be distinguished from a treaty of peace (*pactum pacis*) by the fact that the latter terminates only one war, while the former seeks to make an end of all wars forever. This league does not tend to any dominion over the power of the state but only to the maintenance and security of the freedom of the state

²⁷ Arash Heydarian Pashkhanlou, “Kant’s Writing on the States of Nature and Coercion: The Domestic Analogy and the Level of Analysis”, in *E-International Relations Student*, 2009, available on E-International Relations’ web site.

²⁸ Immanuel Kant, “Section II: Containing the Definitive Articles for Perpetual Peace Among States”, in *Perpetual Peace: A Philosophical Sketch*, 1795 (www.legal-tools.org/doc/dc079a/).

²⁹ *Ibid.* (emphasis added).

itself and of other states in league with it, *without there being any need for them to submit to civil laws and their compulsion, as men in a state of nature must submit.*³⁰

Kant does *not* propose a global government because he deems such an entity a ‘Leviathan’ and considers its unchecked sovereignty as unnecessary to maintain ordered governance;³¹ instead, he considers that peace can *only* be achieved through peace treaties and organisations among *liberal* States – defined by three conditions: (1) represented, republican government, (2) a principled respect for human rights, and (3) social and economic interdependence.³² In his view:

It is self-enforced international law, enforced by a mutual restraint and respect among liberal republics that is produced by the domestic institutions, and the interests and ideas of the citizenry those institutions reflect.³³

In short, the framework of international law is secured by ‘Perpetual Peace’ – “[merely] a peace treaty among [‘]qualifying[’] liberal nations” – to the exclusion of non-liberal States in which the ‘state of war’ still prevails.³⁴

³⁰ *Ibid.* (emphasis added).

³¹ Garrett Wallace Brown, “State Sovereignty, Federation and Kantian Cosmopolitanism”, in *European Journal of International Relations*, 2005, vol. 11, no. 4, pp. 495–522. See, at p. 599:

Kant wants to challenge the natural law doctrine supporting state sovereignty while also dismissing arguments advocating the creation of a world state. In this regard, Kant’s international theory tries to navigate a middle passage between the idea that states can act as the ultimate protector of human freedom, while also aware of the fact that states are often the primary violators of this very freedom.

³² Specifically, Kantian cosmopolitanism provides a normative ethical global order without the existence of a world government. Instead, the combination of treaty-law is an effective deterrent to aggression by non-liberal states.

³³ Doyle and Carlson, 2008, p. 657, see *supra* note 1.

³⁴ *Ibid.*, see in particular p. 656. To this end, Kant notes an important trend in world politics: the tendencies of liberal states to be peace-prone among themselves and war-prone in their relations with non-liberal states. As such, for peace to prevail, absent a true Leviathan, *three conditions* must be met:

1. Representative, republican government, which includes an elected legislative, separation of powers and the rule of law. Kant argued that together those institutional features lead to caution because the government is responsible to its citizens. This does not guarantee peace, but selects for popular wars.
2. A principled respect for human rights all human beings can claim. This should produce a commitment to respect the rights of fellow liberal republics because

To this end, modern social science data adds value to Kant's arguments in that it suggests liberal democracies do not engage in warfare with one another.³⁵ Thus, for Kant, liberal republics could protect themselves from the hostilities of non-liberal republics without the need of a so-called 'world government'; instead, multilateral peace treaties (that is, organisations such as the North Atlantic Treaty Organisation) are enough to secure liberal States on an international level.³⁶

9.2.4. Escaping the 'State of Nature' through a Lockean Recognition of a Common Judge

Contrary to the bleak 'state of war' described by Realists Hobbes and Kant, John Locke (1632–1704), an unquestionable Idealist, argued the

they represent free citizens who constrain their state and thus those states represent individuals' rights who deserve our respect. It also produces a distrust of non-republics because if they cannot trust their own citizens to rule, why should we trust them?

3. Social and economic interdependence; trade and social interaction generally engender a mix of conflict and co-operation. A foreign economic policy of free trade tends to produce material benefits superior to optimum tariffs (if other states will retaliate for tariffs, as they usually do). Liberalism produces additional material incentives to bolster co-operation because, among fellow liberals, economic interdependence should not be subject to security-motivated restrictions ('Trading with the Enemy' acts) and, consequently, will be more extensive, varied, and robust.

³⁵ John R. Oneal and Bruce Russett, "The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885–1992", in *World Politics*, 1999, vol. 52, no. 1, pp. 1–2.

³⁶ However, according to Kant, when liberal states act collectively to maintain peace, they are bound by at least six articles of perpetual peace (set out in Immanuel Kant, "Section II: Containing the Definitive Articles for Perpetual Peace Among States", 1795, see *supra* note 28):

1. No treaty of peace shall be held valid in which there is tacitly reserved matter for a future war;
2. No independent states, large or small, shall come under the dominion of another state by inheritance, exchange, purchase, or donation;
3. Standing armies (*miles perpetuus*) shall in time be totally abolished;
4. National debts shall not be contracted with a view to the external friction of states;
5. No state shall by force interfere with the Constitution or government of another state; and
6. No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible: such are the employment of assassins (*percussores*), poisoners (*venefici*), breach of capitulation, and incitement to treason (*perduellio*) in the opposing state.

‘state of nature’ was not a state of ‘anarchy’ at all, but was instead governed by a ‘natural law’ in which the ability of warring parties to lay down their arms for the sake of “true love of mankind and society, and from the charity [...] owe[d] to one another” was innate.³⁷ To this end, the ‘natural law’ restrained individuals from invading the rights of others and encouraged mutual support for the basic protections of life, liberty, and property.³⁸

However, Locke concedes that conflict still arose in the ‘state of nature’ as the ‘natural law’ was not subject to a singular moral interpretation nor did it sufficiently protect property interests, thus:

mak[ing] [the individual] willing to quit this condition [(the state of nature)], however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in a society with others who are already united [...] for the mutual preservation of [...] property [...] [because] [f]irst, there wants an established, settled known law [(positive law)]. Received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them [...]. Secondly, in the state of nature there wants a known and indifferent judge, with authority to determine all differences according to established law.³⁹

³⁷ John Locke, “Political or Civil Society”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. VII, para. 93 (www.legal-tools.org/doc/bd4102/). See Roscoe Pound, *The Formative Era of American Law*, Little, Brown and Company, Boston, 1936, pp. 15–16:

This natural law was variously conceived: sometimes as a vaguely outline ideal order of society, sometimes as a body of moral ideals to which conduct should be constrained to conform, sometimes as a body of ideal legal precept [...] [b]ut whatever meaning was given to the ideal or the body of ideals, the interpretation and application of existing rules were to be guided by it, and lawmaking, judicial reasoning, and doctrinal writings were to be governed by it.

³⁸ Gregory Bassham, *The Philosophy Book: For Vedas to the New Atheists, 250 Milestones in the History of Philosophy*, Sterling Publishing Company Inc., Toronto, 2016, p. 232. These basic protections were later incorporated in the American Declaration of Independence as ‘inalienable rights’, but have seen been universally recognised as ‘human rights’.

³⁹ John Locke, “Of the Ends of Political Society and Government”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. IX, para. 123 (www.legal-tools.org/doc/bd4102/).

In so stating, Locke acknowledges an inevitable need for positive law to govern all humankind.⁴⁰ However, even with the creation of positive law, absent a singular interpretation, a ‘state of war’ may still exist due to private judgments regarding the law and its application. As such, “by consent [to the law], each man incurs an obligation to submit to public judgment and thereby puts an end to the continual controversies that result when each has an equal right to a judge”.⁴¹ Thus, according to Locke, “the peaceful resolution of controversies requires both a common law and a common judge to execute the law”.⁴²

In application, Locke “envision[ed] a basis for international norms derived from natural law and conventions that regulate conflict and cooperation among independent societies in a broader international society”.⁴³ Specifically, as derived from his writing on domestic relations, Locke’s perceived international regulatory scheme consists of two parts: (1) the positive law (that is, treaties, accords, and so on), and (2) an “indifferent judge, with authority to determine all differences according to established law”; therein requiring sovereigns (States) to relinquish their absolute sovereignty.⁴⁴ To this end, Locke notes:

Men living together according to reason without a common superior on earth, with authority to judge between them, is

⁴⁰ Michael J. Sandel, *Justice: What’s the Right Thing to Do?*, Farra, Straus, and Girox, New York, 2009, p. 140 (citing John Locke, “The Beginning of Political Societies”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. VIII, p. 38 (www.legal-tools.org/doc/bd4102/)). For those resistant to obligations of society and its positive law, Locke declare the use of any social good (that is, a highway) to be implicit consent to the surrender of his or her ‘absolute freedom’. *Ibid.* Unfortunately, Locke provides very little insight into international precepts of the commonwealth because “[i]nternational relations were not the primary focus of his [Locke’s] work, and foreign affairs is treated less systematically by Locke than other modern political philosophers”. Lee Ward, “Locke on the Moral Basis of International Relations”, in *American Journal of Political Science*, 2006, vol. 50, no. 3, pp. 691–705. However, Locke does speak of sovereignty, self-defence, and national interests in which, when applied broadly speaks to the relationships between States. *Ibid.*

⁴¹ Ruth W. Grant, *John Locke’s Liberalism*, University of Chicago Press, Chicago, 1991, p. 74.

⁴² *Ibid.*

⁴³ Mareike Oldemeinen, “John Locke and the Possibility of a ‘Global Commonwealth’”, in *E-International Relations*, 2011, available on E-International Relations’ web site.

⁴⁴ John Locke, “The Purposes of Political Society and Government”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. IX, paras. 123–25 (www.legal-tools.org/doc/bd4102/).

properly the state of Nature. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and it is the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow-subject [...]. Want of a common judge with authority puts all men in a state of Nature [...].⁴⁵

Further:

To avoid this state of war (wherein there is no appeal but to Heaven [...] where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature. For where there is an authority, a power on earth from which relief can be had be appeal, there the continuance of the war is excluded, and the controversy is decided by that power".⁴⁶

Therefore, Lockean philosophy dictates: to prevent the 'state of war', the State must surrender some of its sovereignty to a 'higher authority' ('common judge') empowered to hear disputes and prevent conflicts between both liberal republics and non-liberal governments (therein breaking from Kant). Specifically, for Locke, the idea of legal supremacy replaces sovereignty as the central organising principle of legitimate government,⁴⁷ because "once war arises, it is difficult to put an end to it unless there is a common judge between contending parties".⁴⁸

⁴⁵ Locke, 1690, chap. III, para. 19, see *supra* note 11.

⁴⁶ *Ibid.*, para. 16.

⁴⁷ Ward, 2006, pp. 691–705, see *supra* note 40:

While the supreme power is a delegated authority given by society and held in trust [...] Unlike the individual person, the supreme power of the independent commonwealth is incapable of surrendering its natural executive power, at least in any significant sense, to a higher institutional authority [...] [however] legal supremacy, as Locke conceives of it, implicitly undermines the idea of sovereignty by offering no theoretical or moral obstacle to natural law authorization for the defensive use of force broadly conceived to include not only repulsing aggression, but even permitting a form of conquest and occupation.

To the contrary, through a piece-meal interpretation, "Locke attains on the whole[,] a sound theory of sovereignty which is the single supreme and yet limited legal authority in the state", see Raghuveer Singh, "John Locke and the Idea of Sovereignty", in *Indian Journal of Political Science*, 1959, vol. 20, no. 4, p. 329. Specifically, to those who oppose Locke's 'common judge' based upon notions of sovereignty, Locke implores:

9.3. All Roads Lead to Rome: The Development of International Law Prior to the Rome Statute

9.3.1. The First Attempt to Establish an International Criminal Court

Much to the dismay of Idealist philosophers such as Locke, conceptually, the Hobbesian and, to an extent, Kantian emphasis on ‘State sovereignty’ is merely a reflection of millennia of international relations. As a result, and reflecting upon the “international state of nature” as articulated by Kant, international contracts (treaties) governing warfare were rare prior to the nineteenth century.⁴⁹ Instead, it was not until the Geneva International Diplomatic Conference of 1863, that Gustave Moynier, co-founder of the Red Cross, with the help of fellow philanthropist, Henry Durant,⁵⁰

Consider what civil society is for. It is set up to avoid and remedy the drawbacks of the state of nature that inevitably follow from every man’s being judge in his own case, by setting up a known authority to which every member of that society can appeal when he has been harmed or is involved in a dispute – an authority that everyone in the society ought to obey. *So any people who don’t have such an authority to appeal to for the settlement of their disputes are still in the state of nature.*

See Locke, 1690, chap. VII, para. 90, see *supra* note 37 (internal citations omitted) (emphasis added).

⁴⁸ Peter A. Anstey, *The Philosophy of John Locke: New Perspectives*, Routledge, London, 2004, p. 77; Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002 (‘ICC Statute’) (www.legal-tools.org/doc/7b9af9/). Specifically, the ‘Preamble’ of the Rome Statute provides in relevant part:

The State Parties to this Statute [...] [are:] [m]indful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity[;] [...] [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevent of such crimes[; and] [...] [r]esolved to guarantee lasting respect for the enforcement of international justice.

⁴⁹ See Grant Niemann, *Foundations of International Criminal Law*, LexisNexis Butterworths, New York, 2014, p. 3. See also, p. 1:

The Laws of War date back to ancient Greece and possibly even earlier [...] the 6th Century warrior Sun Tzu may have [even] ‘influenced’ the development [...] when he famously proclaimed ‘[t]here is no instance of a country having benefited from prolonged warfare’.

⁵⁰ Kersten, 2013, see *supra* note 3: Durant’s manifest, *A Memory of Solferino* (1859), detailing “Dunant’s feelings towards the dying soldiers on the French battlefields and enshrining[ing] his vision for an international organisation”, to alleviate such suffering was the original inspiration for Moynier (who had previously “spent his days pursuing his passion for the law and philanthropy[,] [...] producing numerous books, pamphlets and folders of correspondence on various topics ranging from the laws of war to geography in the Congo Basin”).

and several influential benefactors “dedicated to the alleviation of suffering for wounded combatants in the spirit of universal brotherhood”,⁵¹ proposed the first international humanitarian framework;⁵² which would, in turn, evolve and set the stage for the creation of international tribunals such as the ICC.

Specifically, during the Geneva Conference, of the sixteen States represented, twelve⁵³ ultimately agreed to the First Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, providing: “relief to the wounded without any distinction as to nationality; neutrality (inviolability) of medical personnel and medical establishments and units; [and] the distinctive sign of the red cross on a white ground”.⁵⁴ While, upon first blush, the Convention seemingly marked a shift in the law of nations to an implicit Kantian perspective (that is, peace through treaties and treaty organisations), Kant believed that treaties and treaty organisations were to be made to *prevent* all wars – not to expound the rules governing wartime actions. As such, Hobbesian sovereignty concerns continued to prevail, even among men such as Moynier.

As noted in Moynier’s 1870 Commentary on the Convention:

He considered whether an international court should be created to enforce it. However, he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that ‘a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but, in this respect, the Geneva Convention shares an imperfection that is inherent in all internation-

⁵¹ *Ibid.*

⁵² The humanitarian law dictates the rules and laws of war, especially in relation to the treatment and protection of civilians and non-combatants. It is this law that morphed into the ‘international criminal law’ which is adjudicated by the International Criminal Court, but still retains its humanitarian roots (that is, war crimes, crimes against humanity, and so on).

⁵³ Baden, Belgium, Denmark, France, Hesse, Italy, Netherlands, Portugal, Prussia, Spain, Switzerland, and Württemberg, see International Committee of the Red Cross, “Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864”, available on the International Committee of the Red Cross web site.

⁵⁴ Hall, 1998, see *supra* note 3.

al treaties'. Nevertheless, he believed that public criticism of violations of the Geneva Convention would be sufficient, 'because public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down [...]. The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other.'⁵⁵

Thus, Moynier sought merely to regulate war via an implicit Hobbesian approach to international governance. Specifically, instead of establishing a world court (Lockean model) or a preventative treaty body (Kantian model), Moynier, and the Convention by implication, favoured a Hobbesian model that rejected Lockean and Kantian threats to sovereignty and, instead, favoured the court of "public opinion" along with the uncertain hope that the States would, pursuant to their sovereign power, "enact legislation imposing serious penalties for violations".⁵⁶ As a result, parties to the Convention merely agreed to police themselves during times of war – a proposition that would prove to be an abysmal failure.

The short-sightedness of Moynier's implicit Hobbesian philosophy would be revealed when the Franco-Prussian War (1870–71) began over rival claims in connection with the Grand Duchy of Luxembourg.⁵⁷ Both France and Prussia were signatories to the Convention, yet largely due to ignorance of the covenants and nationalistic-inspired malice (attributable in considerable part to public opinion and the press), during the course of the war, the provisions of the Convention were largely abandoned.⁵⁸ Instead, "French medics refused to treat the enemy and civilians painted the Red Cross on bedsheets at random to protect their homes. The Germans – reacting to the poor behaviour of the French – kidnapped French doctors and accused them of espionage"; yet there were no prosecutions following

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* Kant would have likely rejected such an agreement. Specifically, while Kant emphasises state sovereignty, he believed that treaties and treaty organisations were made to prevent all wars – not to expound the rules governing wartime actions.

⁵⁷ Kersten, 2013, see *supra* note 3; Hall, 1998, see *supra* note 3.

⁵⁸ Kersten, 2013, see *supra* note 3.

the end of the war.⁵⁹ As a result, the war exposed the weaknesses in both the Convention and Moynier's implicit Hobbesian belief that public opinion and/or the domestic laws of each sovereign would be a sufficient enforcement mechanism.⁶⁰

In response, Moynier began to slowly relinquish his Hobbesian-styled assumptions regarding the need for State sovereignty "that is neither divided nor limited", in favour of an implicitly, mixed Kantian⁶¹ and Lockean⁶² perspective on the creation of an international tribunal, believing:

an international institution was necessary to replace national courts. Since the States had been reluctant to pass the criminal legislation which he believed that they were morally obligated, as parties to the Geneva Convention, to enact in order to *prevent* violations, he argued that the creation of international criminal law was necessary, [...] [also] it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they could at any moment be subjected to pressure. An international institution composed of judges from both belligerent and neutral States, or exclusively neutral States, would, theoretically at least, offer better guarantees of impartiality, and this would encourage belligerents to use it.⁶³

However, in his conclusion, Moynier did implicitly provide a limited Hobbesian-styled reassurance to States, specifically,

he argued that the *governments themselves had nothing to fear from such a court* since they would not be directly implicated in the violations. Indeed, 'it would be absurd to imagine a superior order in contempt of international obliga-

⁵⁹ *Ibid.*

⁶⁰ Hall, 1998, see *supra* note 3:

Moynier was forced to recognize that 'a purely moral sanction' was inadequate 'to check unbridled passions'. Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation.

⁶¹ Moynier, similar to Kant, called for an international treaty-based institution that would prevent violations of international law, instead of merely acting as a response mechanism.

⁶² Moynier, similar to Locke, called upon states to surrender some of their sovereignty in favour of an ultimate, international sovereign.

⁶³ Hall, 1998, see *supra* note 3 (emphasis added).

tions formally recognized.’ The executive function of carrying out sentences, however, should be left to States.⁶⁴

Thus, at the 3 January 1872 meeting of the International Committee of the Red Cross, Moynier presented one of the first Lockean-styled (with limited, implicit Kantian objectives)⁶⁵ treaty-based proposals for the establishment of a permanent international tribunal,⁶⁶ modelled after the arbitral tribunal established by the 1871 Treaty of Washington;⁶⁷ which provided a means of amicable settlement between the United States and Great Britain for Britain’s role in supporting the Southern rebellion during the American Civil War.⁶⁸ Specifically, Moynier’s proposal consisted of ten articles, in relevant part:

The tribunal would have been [...] a permanent institution, which would be activated automatically⁶⁹ in the case of any war between the parties (Article 1). The President of the Swiss Confederation was to choose by lot three adjudicators [...] from neutral States party and the belligerents were to choose the other two (Art. 2, para. 1). If there were more than two belligerents, those that were allied would select a single adjudicator [...]. There would be no permanent seat for the tribunal, but the five adjudicators would meet as quickly as possible at the location chosen provisionally by the President of the Swiss Confederation (Art. 2, para. 2). The judges would decide among themselves the place where they would sit (Art. 3, para. 1), thus permitting the tribunal

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*:

Moynier was not discouraged by the failure of other proposals to establish international criminal courts because they were designed to enforce ill-defined customary law, rather than a convention.

⁶⁷ *Ibid.*

⁶⁸ Allan Nevins, “Washington, Treaty of”, in *Dictionary of American History*. The treaty was especially significant in that it provided:

[An] [a]greement on three rules of international law for the guidance of the Geneva tribunal in interpreting certain terms used in the treaty. The most important of these rules asserted that ‘due diligence’ to maintain absolute neutrality ‘ought to be exercised by neutral governments’ in exact proportion to the risks to which belligerents were exposed by breaches.

⁶⁹ A Kantian-styled preventive measure to prevent and/or immediately effect the cessation of war.

to sit at the place most convenient to the defendants and witnesses.

The proposal left it to the adjudicators each time the tribunal was convened to decide upon the details of the tribunal's organization and the procedure to be followed (Art. 3, para. 1). Certain aspects of the procedure were to be the same, however, in all cases. The tribunal would conduct an adversarial hearing (Art. 4, para. 3) and it would reach its decision in each case by a verdict of guilty or not guilty (Art. 5, para. 1). The complainant State would perform the role of prosecutor. If the guilt of the accused was established (suggesting that the burden of proof remained on the complainant), the court would hand down a sentence, in accordance with international law, which would be spelled out in a new treaty separate from the Geneva Convention (Art. 5, para. 2).⁷⁰

In response, Moynier received significant criticism from many well-established experts in the international legal community, most of whom exhorted Hobbesian-styled concerns regarding State sovereignty.⁷¹ As a result, States, "unwilling to yield their sovereign prerogatives and unprepared to relate any of their powers to an international enforcement institution",⁷² refused to publicly support or even attempt Moynier's proposal.⁷³ Ultimately defeated, Moynier noted "[i]t is doubtful that the court can be achieved in a satisfactory manner due to the obstacles in international law, which seem too difficult to overcome".⁷⁴

9.3.2. The Second Attempt to Establish an International Criminal Court

Nearly thirty years after Moynier's proposal, the Hague Conventions of 1899 and 1907 convened and marked a shift in international perspec-

⁷⁰ Hall, 1998, see *supra* note 3:

In addition to imposing punishment, the court could award victims compensation, but only if the complainant government sought compensation (art. 7, para. 1) [...] The government of the offender would be responsible for implementing the award (art. 7, para. 2).

⁷¹ *Ibid.*

⁷² Kersten, 2013, see *supra* note 3.

⁷³ Hall, 1998, see *supra* note 3.

⁷⁴ Kersten, 2013, see *supra* note 3.

tives.⁷⁵ Beginning with a Lockean-styled recitation of the natural law, via the Martens Clause,⁷⁶ the Convention with Respect to the Laws and Customs of War on Land was established, detailing the treatment of prisoners of war and the wounded as well as forbidding the use of poisons, killing of enemy combatants who have surrendered, looting of towns, attacking or bombarding undefended towns or habitation, and so on.⁷⁷ However, similar to Moynier's Geneva Conference, these obligations were only imposed upon States in general, and therefore, did not impose individual criminal accountability for transgressions of the "rules of war"⁷⁸ – yet another example of Hobbesian-styled sovereignty prevailing in international law. As a result, the horrors of World War I ensued shortly thereafter, including the Armenian genocide, chemical warfare, looting, the attack of undefended towns, and so on⁷⁹

Due in large part to the atrocities of World War I, but now seemingly immune to the Hobbesian-styled sovereignty concerns that extinguished Moynier's proposal, during the 1918 armistice through the negotiations of the Paris Peace Conference in 1919, "the first call in modern times for having war crime trials came from *civil society*, not from governments".⁸⁰ Specifically, under pressure from both the public and the press, both the United States and the British governments were outwardly supportive of a treaty that would establish permanent international criminal tribunal that would sit in The Hague.⁸¹ In other words, at least two States abandoned the prevailing Hobbesian-styled sovereignty concerns of

⁷⁵ Errol P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Edward Elgar Publishing Limited, Northampton, Massachusetts, 2010, p. 3.

⁷⁶ *Ibid.*:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience (the Martens Clause).

⁷⁷ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 (www.legal-tools.org/doc/7879ac/).

⁷⁸ Mendes, 2010, p. 3, see *supra* note 75.

⁷⁹ *Ibid.*, p. 4.

⁸⁰ Niemann, 2014, p. 123, see *supra* note 49 (emphasis added).

⁸¹ *Ibid.*, pp. 123–24.

the time in favour of a Lockean-styled ‘common judge’. However, because of internal relationships and remaining Hobbesian-styled sovereignty concerns by other States, such a tribunal was never instigated.⁸²

Instead, the Treaty of Versailles quelled public demand by providing a ‘special tribunal’ to try Kaiser Wilhelm for “the supreme offence against international morality and the sanity of treaties”.⁸³ However, due to clever drafting, the Treaty of Versailles “ensured that the Kaiser would never be tried for international crimes and ordinary soldiers with be dealt with (if at all) by national courts”.⁸⁴ As a result, not only did the trials which did occur amount to nothing more than a sham, but the international community also missed yet another opportunity to install a Lockean-styled international criminal court.⁸⁵

However, in lieu of an international criminal court, the Paris Peace Conference resulted in the creation of the League of Nations and with it, the Permanent Court of International Justice (‘World Court’).⁸⁶ The Court was tasked with the implicitly Kantian goal of “retaining peace” by asserting jurisdiction

in all or any of the classes of legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or ex-

⁸² *Ibid.*, p. 124.

⁸³ Leila Sadat, “The International Criminal Court”, in William A. Schabas (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge University Press, Cambridge, 2016, p. 137.

⁸⁴ Niemann, 2014, p. 125, see *supra* note 49. Not only was the Kaiser related to the British Royal Family, but “the American members of the Commission on the Responsibility of the Authors of the War expressed reservations about the legality and the appropriateness of such an exercise”, see Sadat, 2016, pp. 137–38, *supra* note 83.

⁸⁵ Niemann, 2014, p. 125, see *supra* note 49.

⁸⁶ The Covenant of the League of Nations, 28 June 1919, Article 14 (www.legal-tools.org/doc/106a5f/):

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

tent of the reparation to be made for the breach of an international obligation.⁸⁷

While the jurisdiction of the World Court was largely optional – applying only to States – resulting in primarily advisory opinions, the Court did retain compulsory jurisdiction over certain matters for signatories of the Optional Clause of the League of Nations as well as approximately thirty international conventions.⁸⁸ Thus, whilst retaining Hobbesian-styled sovereignty for non-signatories, the creation of the World Court marked a significant shift in international relations and its philosophical underpinnings by: (1) adopting a quasi-Lockean-styled single adjudicator that (2) was tasked with the Kantian-goal of preventing war, instead of merely responding to its aftermath.

9.3.3. The Third, and Successful, Attempt to Establish an International Criminal Court

Despite the signatories to the World Court signalling an openness to diminished Hobbesian-styled sovereignty – as would be required by any Lockean-style tribunal – it would not be until the conclusion of World War II that the concept of an international criminal court, applicable to individual offenders, would receive any sustained political momentum.⁸⁹ Specifically, “[i]n the aftermath of the slaughter and genocidal horrors of

⁸⁷ Statute of the Permanent Court of International Justice, 16 December 1920, Article 36 (www.legal-tools.org/doc/a0bb78/):

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

⁸⁸ Manley O. Hudson, “The Work and the Jurisdiction of the Permanent Court of International Justice”, in *Proceedings of the Academy of Political Science in the City of New York*, 1923, vol. 10, no. 3, pp. 115–23.

⁸⁹ Sadat, 2016, p. 138, see *supra* note 83.

World War II, the victorious Allies finally seemed to realise the importance of linking justice with sustainable peace in the future”.⁹⁰ As a result, in the Moscow Declaration of 1943, the Allies announced a renewed determination to try those who initiated the war and committed war crimes – ultimately culminating in the Charter of International Military Tribunals (‘Nuremberg Charter’) on 8 August 1945, establishing the ‘Nuremberg Trials’ and setting the stage for the ‘Tokyo Trials’.⁹¹ Thus, “[w]hile the Nuremberg and Tokyo Trials were *ad hoc* tribunals,⁹² in the immediate aftermath of these trials, the idea of a permanent international criminal court seemed feasible”.⁹³

To this end, following the war, the newly created United Nations⁹⁴ – a Kantian-style body created through a treaty with the ultimate goal of preventing war instead of merely responding to it (with limited State sovereignty surrendered) – adopted a series of conventions based upon the Nuremberg Charter. One such convention, adopted in 1948, designed as a response mechanism when the United Nations could not prevent a war, was the Convention on the Prevention and Punishment of Genocide and an accompanying resolution which:

[I]nvited the International Law Commission⁹⁵ to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes”. Thus instructed, the International Law Commission embarked upon a fifty-year long odyssey, voting initially in 1950 to support the desirability and feasibility

⁹⁰ Mendes, 2010, p. 4, see *supra* note 75.

⁹¹ *Ibid.*; Sadat, 2016, p. 138, see *supra* note 83.

⁹² Thus retaining little-to-no deterrent value – as would be required under any Kantian court, to prevent war.

⁹³ Niemann, 2014, p. 134, see *supra* note 49.

⁹⁴ The United Nations ultimately replacing the inherently flawed, weak, and ineffectual League of Nations. However, it did not supersede the World Court, instead under Article 93 of the UN Charter, all UN members are automatically parties to the statute of the World Court (www.legal-tools.org/doc/6b3cd5/).

⁹⁵ On 21 November 1947, the UN General Assembly passed Resolution 174 (www.legal-tools.org/doc/c2a5c3/), establishing the ‘International Law Commission’ in order to fulfil the obligations of the Charter on the UN to initiate studies and make recommendations for the purpose of “encouraging the progressive development of international law and its codification”. Attached to the resolution was the Statute of the International Law Commission, which defined its purposes as the promotion of the codification of international law and solving of problems within both public and private international law.

of creating an international criminal court, only to have the question of the court's establishment taken away from it [...]. Although [...] a successor Committee did produce drafts of a statute for a new international criminal court, their work was shelved as the Cold War made it impossible to achieve consensus.⁹⁶

Despite the stalemate, in the interim, significant progress was made towards a Lockean-styled common judge model, a fact that would become clear following (1) the end of the Cold War in 1989; (2) the successful creation of the *ad hoc* International Criminal Tribunal for the former Yugoslavia and the *ad hoc* International Criminal Tribunal for Rwanda in the early 1990s; and (3) the resumption of drafting by the International Law Commission. To this end, in 1994 the International Law Commission adopted a final draft statute that would service as the basic text upon which the establishment of the ICC would ultimately be debated at Rome Conference.⁹⁷

When the Rome Conference ultimately commenced on 15 June 1998, it faced the seemingly impossible challenge of achieving a consensus among the 160 countries convened, each conflicted by the desire to retain Hobbesian-style sovereignty and the aspiration to achieve a lasting peace and the “protection of the innocent” in-line with Lockean philosophical principles.⁹⁸ Yet, to this end, self-interested concerns of Hobbesian-style sovereignty initially prevailed during the Rome Conference as one of the first underlying principles established during negotiations was the creation of a new legal concept: the complementary principle (or doctrine of complementary jurisdiction)⁹⁹ which provides that the ICC may be competent to investigate and try a case only if ability or will to do so is lacking in relevant national jurisdictions.¹⁰⁰

⁹⁶ Sadat, 2016, p. 140, see *supra* note 83 (citing Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN General Assembly Resolution 260B(III)) (www.legal-tools.org/doc/49794f/):

The idea of legal supremacy replaces sovereignty as the central organizing principle of legitimate government, in order to ensure the ‘safety of the innocent’.

⁹⁷ *Ibid.*

⁹⁸ Ward, 2006, pp. 691–705, see *supra* note 40.

⁹⁹ Sadat, 2016, p. 142, see *supra* note 83.

¹⁰⁰ Oscar Solera, “Complementary Jurisdiction and International Criminal Justice”, in *International Review of the Red Cross*, March 2002, vol. 84, no. 845, p. 184 (www.legal-tools.org/doc/b069c4/):

Specifically, for States seeking to fulfil their implicit Hobbesian requirement that a State “seek peace” while retaining its own independence, the retention of this sovereignty was so important in each State’s “posturing for war”,¹⁰¹ that the doctrine of complementary jurisdiction was ultimately included twice in the Preamble of the Rome Statute; once implicitly: “[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the *national level*”, and once explicitly: “Emphasizing that the ICC established under *this Statute shall be complementary to national criminal jurisdictions*”.¹⁰² Further, the doctrine was explicitly restated in Article I of the Rome Statute:

An ICC (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its *jurisdiction* over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdictions*.¹⁰³

This did still not satisfy the theoretically most Lockean of all the States at the Rome Conference – the United States – which viewed even complementary jurisdiction as jeopardising its own sovereignty.¹⁰⁴ Instead,

States continue to play the central role [in investigations]. But [*only*] if they fail or find it impossible to assume that role, or show disinterest or bad faith, the [International Criminal Court] will step in to ensure that justice is done (emphasis added).

¹⁰¹ Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, 1651, chap. XIII, p. 79, see *supra* note 18.

¹⁰² ICC Statute, Preamble, see *supra* note 48.

¹⁰³ *Ibid.*, Article 1 (emphasis added). Specifically, the ICC must decline jurisdiction where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; or
- (d) The case is not of sufficient gravity to justify further action by the Court.

¹⁰⁴ As one observer notes in Foundations of American Government, “Foundations of American Government”, in *American Government Online Textbook*, 2017:

The single most important influence that shaped the founding of the United States comes from John Locke, a 17th century Englishman who redefined the nature of government. Although he agreed with Hobbes regarding the self-interested nature of hu-

negotiators from the United States “were not convinced that their military personnel could still avoid being hauled before the ICC”; this was largely due to Article 17 under which the ICC could break complementary jurisdiction where a State was “genuinely unwilling or unable to carry out its own investigations and prosecutions”.¹⁰⁵ Thus, the United States, whose own government was established nearly singularly under Lockean idealism,¹⁰⁶ rejected the possibility in its entirety and the promise of peace

mans, he was much more optimistic about their ability to use reason to avoid tyranny. In his *Second Treaties of Government*, Locke identified the basis of a legitimate government. According to Locke, a ruler gains authority through the consent of the governed. The duty of that government is to protect the natural rights of the people, which Locke believed to include life, liberty, and property. If the government should fail to protect these rights, its citizens would have the right to overthrow that government. This idea deeply influenced Thomas Jefferson as he drafted the Declaration of Independence.

¹⁰⁵ Mendes, 2010, p. 21, see *supra* note 755:

Such a fear would almost be a fantastical admission that the much lauded American justice system is not to be regarded as legitimate.

However, this provision was not without guiding language; specifically, see ICC Statute, Article 17(2), *supra* note 48:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Despite this guiding language, the United States sought the inclusion of a provision that would permit the UN Security Council, of which it is a permanent member, a veto over *any* prosecutions; a thinly veiled attempt to protect itself and its allies from investigation and prosecution, see Mendes, 2010, p. 16, *supra* note 75.

¹⁰⁶ Barbara Arneil, *John Locke and America: The Defense of English Colonialism*, Clarendon Press, Oxford, 1998. John Locke even acknowledged in his *Second Treatise on Govern-*

above all else – an ideal articulated in the preamble of the Rome Statute which implies “without a permanent institution dedicated to justice against impunity[,] the chances of sustainable peace [...] [are] greatly diminished”.¹⁰⁷ In other words, the existence of the ICC would be a general deterrent to war and war crimes that were not otherwise prevented by the Kantian-style United Nations.

In response to the Hobbesian-style objections by the United States, negotiators attempted to garner its support by adopting two more jurisdictionally restrictive covenants. First, negotiators adopted Article 5 which further attempted to balance national sovereignty and justice by limiting the ICC’s subject-matter jurisdiction to “the most serious of crimes of concern to the international community as a whole” (that is, genocide, crimes against humanity, war crimes, and the crime of aggression).¹⁰⁸ Second, negotiators adopted Article 12 which provided personal jurisdiction only when: (1) the crime occurred by a national of a State who has accepted the jurisdiction of the ICC, or (2) the crime occurred on the territory of a State who has accepted the jurisdiction of the ICC.¹⁰⁹ However, the United States was not swayed.¹¹⁰

ment, p. 1, that “thus, in the beginning all the World was America”, for Locke viewed America as the world’s second chance for paradise. See Arneil, 1998, p. 169:

[Most] scholars claim Locke to be a single and all powerful influence on the early American republic [...] [specifically,] the implications of civil man and his society [...] on the separation of legislative and executive powers within government, and on the conditions under which it may be dissolved.

¹⁰⁷ Mendes, 2010, p. 21, see *supra* note 75.

¹⁰⁸ *Ibid.*; ICC Statute, Article 5, see *supra* note 48.

¹⁰⁹ ICC Statute, Article 12, see *supra* note 48. Article 13 of the ICC Statute also permits the Security Council to make referrals of non-parties to the Statute. However, more specifically, the UN Security Council comprises ten elected member States and five permanent member States – China, the United States, France, the United Kingdom, and the Russian Federation – each with ultimate veto power over any Security Council resolutions or recommendations, including referrals to the ICC. Of these five States, only two acquiesced to the ICC’s jurisdiction (France and the United Kingdom). As such, while the Security Council has granted jurisdiction over non-ICC members on two previous occasions, such referrals are rare and place non-ICC member nations (China, the United States, and the Russian Federation) in an awkward position, often resulting in their abstention from such votes. Further, the ultimate veto power of non-ICC member nations is a *de facto* conflict of interests, ultimately ensuring that nationals of China, the United States, and the Russian Federation will never fall under the jurisdiction of the ICC, even in cases where such individuals have committed grave atrocities.

¹¹⁰ Instead,

Though its efforts are retained in Articles 1, 5, and 12, ultimately, the United States' abandonment of its historical Lockean foundation was in vain. On 17 July 1998, the Rome Statute was adopted with 120 States voting in favour, twenty-one abstaining, and only the United States, China, Libya, Iraq, Israel, Qatar and Yemen declaring their opposition. Therein the "Rome Conference [...] called upon the United Nations General Assembly to [...] draft the Elements of the Crime and the Rules of Procedure and Evidence which would give further definitions to the crimes listed in the ICC Statute".¹¹¹ On 1 July 2002, the Statute received its requisite number of ratifications and came into full-force and effect; the work of the Court began almost immediately.

9.4. The Conflict between Lockean Philosophy and the Jurisdictional Restraints Imposed by the Rome Statute

Arguably, because of its lengthy genesis and debate during the Rome Conference, the ICC Statute implicitly adopts Lockean ideals executed through Hobbesian and Kantian means. Specifically, the largely Lockean stylings of the Preamble of the Rome Statute emphasise the protection of the innocent:

The States Parties to this Statute,

the United States [...] had argued throughout the negotiations that the Statute should not permit any trials of individuals without the consent of their state of nationality unless the Security Council referred the case (thereby insulating nationals of the United States from prosecution before the Court).

Sadat, 2016, p. 140, see *supra* note 83. See also Doyle and Carlson, p. 664, see *supra* note 1:

Following the ICC's creation, the United States sought to secure bilateral agreements with other nations pledging that they would not surrender U.S. personnel to the court, which essentially meant that the other country would refuse to honor its ICC treaty obligations vis-à-vis the United States. Using quantitative analysis, [researchers] discovered a number of interesting patterns among nations in this context. First, states with a 'high rule of law' were not especially likely to sign onto the ICC relative to 'low rule of law' states. Yet if they had ratified the ICC treaty, the former were significantly more likely to decline to sign the bilateral agreements with the United States than the latter. Second, low rule of law states were actually more likely to sign the bilateral treaties with the U.S. if they had ratified the ICC than if they had not. And third, [researchers] conclude [...] that the states that refused to sign the U.S. bilateral agreements did so for one or two reasons: respect for the ICC itself and respect for their treaty compliance in general. In sum, a general respect for the rule of law impelled many states to rebuff U.S. requests.

¹¹¹ Mendes, 2010, p. 21, see *supra* note 75.

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished [...],

Determined to these ends and for the sake of present and future generations, to establish an independent permanent ICC [...] with jurisdiction over the most serious crimes of concern to the international community as a whole.¹¹²

In so noting, the Rome Statute then establishes in Articles 5 (aggression),¹¹³ 6 (genocide),¹¹⁴ 7 (crimes against humanity),¹¹⁵ and 8 (war

¹¹² ICC Statute, Preamble, see *supra* note 48.

¹¹³ The Court's jurisdiction over the crime of aggression was conditioned upon the ratification of the Kampala Amendments by at least thirty States and agreement by a consensus or two-thirds majority of the parties to the Rome Statutes, but not before 2 January 2017. See Sadat, 2016, p. 145, *supra* note 83.

¹¹⁴ ICC Statute, Article 6, see *supra* note 48:

[...] '[G]enocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹¹⁵ *Ibid.*, Article 7:

1. [...] '[C]rime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;

crimes),¹¹⁶ the first half of Locke's regulatory scheme – the 'positive law'.¹¹⁷ Yet, the Court's ability to enforce this positive law to ensure peace "for the sake of present and future generations" is subject to Hobbesian jurisdictional limitations which undermine the implicit Lockean guiding principles ("protection of the innocent above all else") of the Court and fails to establish the second half of Locke's regulatory scheme – a 'common judge'.

Instead of a 'common judge', the Rome Statute provides for 'complementary jurisdiction' three times in order to protect "[n]ational sovereignty and the ability to conduct genuine domestic investigative and judi-

-
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹¹⁶ *Ibid.*, Article 8:

2. [...] '[W]ar crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages [...].

¹¹⁷ *Ibid.*, Articles 6–10. The 'positive law' expounded by the ICC Statute was extremely limited, to a degree well below the standard articulated by Locke. Specifically, see Sadat, 2016, p. 145, *supra* note 83:

[A]lthough the negotiators of the Rome Statute contemplated adding many crimes to the Court's jurisdiction including terrorism, drug trafficking, hostage-taking, and aggression, it was ultimately decided that it would be preferable to begin with universal 'core crimes' defined in treaties or found in the customary international law.

cial proceedings in civil conflicts”.¹¹⁸ As noted by the Court, this doctrine “seeks to complement, not replace, national courts”.¹¹⁹ Thus, instead of a single body adjudicating violations of international humanitarian law, the Rome Statute of the ICC allows for 196 possible adjudicating authorities (each State).¹²⁰ This lack of a ‘common judge’ is only furthered by Hobbesian-style ‘territorial jurisdiction’ limitations which protects sovereignty at the expense of the ICC’s ability to intervene in even the most serious and obvious of cases. Specifically, Article 12 of the Rome Statute gives the Court jurisdiction only if (1) the defined crime occurred by a national of a State who has accepted the jurisdiction of the Court, (2) the defined crime occurred on the territory of a State who has accepted the jurisdiction of the ICC; thus, limiting the role of Court.

Due to the Court’s jurisdictional limitations, the Rome Statute calls upon every State to exercise its criminal jurisdiction over those responsible for international crimes. However, as predicted by Locke, the lack of recognition of a single judge has historically permitted impunity for great atrocities. Specifically, “[a]lthough almost two-thirds of all states have national legislation permitting their courts to exercise universal jurisdiction over certain conduct committed abroad amounting to one or more of the following crimes: war crimes, crimes against humanity, genocide, torture, extrajudicial executions or ‘disappearances’”, very few States have taken action under their respective statutory grants.¹²¹

¹¹⁸ Mendes, 2010, p. 21, see *supra* note 75.

¹¹⁹ International Criminal Court, “About”, available on the ICC web site.

¹²⁰ United States Department of State, “Independent States in the World”, see *supra* note 9.

¹²¹ Amnesty International, “Overcoming obstacles to implementing universal jurisdiction”, in *Universal Jurisdiction: The duty of states to enact and enforce legislation*, 2001 (www.legal-tools.org/doc/7fb02a/). See also Daniel N. Clay, “Protecting Due Process During Terrorism Adjudications: Redefining ‘Crimes Against Humanity’ and Eliminating the Doctrine of Complementary Jurisdiction in Favor of the International Criminal Court”, in *Arkansas Law Review*, 2018 (forthcoming):

In 2002, Germany began asserting jurisdiction over international cases involving at least some German connection – be it as a victim, offender, or a third party affected by genocide, war crimes, or crimes against humanity. In many respects, German ‘universal jurisdiction’, was predicated upon Spain’s historical allowance for its national courts (Audiencia Nacional) to pursue criminal cases outside of its territorial jurisdiction since 1985. Pursuant to Organic Law 6/1985 on the Judiciary (Ley Organica del Poder Judicial) Article 23, sect. 4, Spanish Criminal Courts could assert jurisdiction over “offenses of an international nature or with an international dimension”. This provision was broadly conceived to provide Spanish courts with “absolute jurisdiction, no

As a result, in application, complementary and territorial jurisdiction appear to be resulting in a patchwork of Hobbesian-style quasi-*ad hoc* tribunals (consisting of both ‘victor’s justice’ and ‘sham proceedings’) in which most States refuse to even exercise their respective deferred jurisdiction, without any response from the ICC under its Article 17(2) jurisdictional powers to intervene.¹²² Thus, depending on one’s perspective, international humanitarian law is either governed by 196 independent judges on the basis of complementary jurisdiction or, more accurately, zero judges on the basis of territorial jurisdiction – in direct opposition to the singular judge required by Locke. Therefore, according to Lockean philosophy, the international community remains in the ‘state of nature’.¹²³

links with Spain were required and no criteria of subsidiarity applied; furthermore, anybody could file a claim”. Spain justified this unparalleled jurisdiction as a ‘necessity’ following the Nuremberg Trials in which a “general consensus [...] formed [...] that acts of horror should [not] go unpunished, especially when they [cannot] be prosecuted in the country where they occurred. [However], [i]n response [to political pressures], Spanish lawmakers drafted, presented, and passed Organic Law 1/2014 [...] Spanish law now provides that that the country’s criminal courts may only assert jurisdiction when “in cases of genocide, crimes against humanity or war crimes, [...] the alleged perpetrator [must] be a Spanish national, a foreigner who habitually resides in Spain or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite [...] for crimes of torture and enforced disappearance if the alleged perpetrator is a Spanish citizen or, the victim is a Spanish citizen at the time the act was committed and the alleged perpetrator is on Spanish territory[, and] for crimes not covered by the law itself, Spain shall respect the rules of jurisdiction provided by treaties to which it is a party.

¹²² Since 2002, the court has only fully-adjudicated eight individuals (three convictions and five acquittals).

¹²³ This state of war is largely exemplified by the 2015 statement of the Chief Prosecutor of the International Criminal Court regarding ISIS, in which she noted:

The atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world. They also occur in the context of other crimes allegedly committed by other warring factions in Syria and Iraq. However, Syria and Iraq are not Parties to the Rome Statute, the founding treaty of the International Criminal Court (‘Court’ or ‘ICC’). Therefore, the Court has no territorial jurisdiction over crimes committed on their soil.

Therein declining action to prosecute members of ISIS until territorial or personal jurisdiction could be established. See “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, 8 April 2015 (www.legal-tools.org/doc/b1d672/).

9.5. Conclusion Regarding the Philosophical Future of the International Criminal Court

As a result of its inherent weakness and minimal number of prosecutions, the Court is at a crossroad in which it can either (1) continue its divesture of power and authority, thereby supporting a return to a post-Moynier, Kantian/Hobbesian-based *ad hoc* tribunal system; or (2) embrace the Lockean principle that a ‘common judge’ is necessary to prevent a return to the ‘state of nature’. Upon first blush, the quasi-Lockean Court appears to be suffering from a revival of Hobbesian-style sovereignty, pushing for a Hobbesian-based *ad hoc* tribunal system. To this end, in 2017, the African Union, representing thirty-four signatories to the Rome Statute passed a non-binding resolution to withdraw from the ICC based on accusation of undermining African sovereignty and selective prosecution of African leaders.¹²⁴ While the resolution only calls upon countries to consider how to implement the decision, in the meantime, the countries of the African Union are continuing to push for reforms of the Court and strengthening their own judicial mechanisms, because “if [this mass exodus] were to occur, it would constitute a [...] blow to the legitimacy and credibility of the ICC”.¹²⁵

Fortunately, the withdrawal of the African Union alone is not enough to facilitate a collapse of the Court; however, if the Court cannot recover its credibility as a fair and effective institution, more States may withdraw, citing Hobbesian-style sovereignty concerns or in solidarity with the African Union. In such a case, under pressure of non-ICC members (that is, the United States, China, and Russia), the United Nations Security Council may again utilise *ad hoc* tribunals, in which both Hobbesian sovereignty and Locke’s required positive law are preserved,¹²⁶ but Locke’s ‘common judge’ requirement is violated and thus the international community would returned to a Lockean ‘state of nature’.

However, notwithstanding the non-binding withdrawal of the African Union, this possibility is remote as Lockean idealism appears to be

¹²⁴ *BBC News*, “African Union backs mass withdrawal from ICC”, 1 February 2017.

¹²⁵ Mendes, 2010, p. 157, see *supra* note 75; Elias Meseret, “African Leaders Approve a Strategy for Mass Withdrawal From the ICC”, *Time*, 31 January 2017.

¹²⁶ For instance, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda both applied law (that is, genocide, crimes against humanity, and war crimes) that has since been codified in the ICC Statute.

slowly, but continuously expanding in other parts of the world, specifically:

[A]s awareness of the gravity of certain forms of conduct grows not only in domestic fora but also within the international community, States have realized that in certain circumstances their national apparatus or internal legislation is insufficient to deal with crimes that undermine the most essential principles of humanity. In order to preserve the ideal of justice, but above all to avoid impunity, *States have consequently come to accept the fact that their systems, being imperfect, are in need of new mechanisms to complement them. The idea of international jurisdiction is thus viewed as a way to reinforce efforts against impunity, always with preservation of the ideal of justice in mind.*¹²⁷

It is for this reason that States are generally trending away from the Kantian/Hobbesian protection of their sovereignty above all else. Instead, the evolution toward the Court, beginning with the negotiations of the Rome Statute, suggest civil society is progressing towards the preservation of peace through the recognition of a Lockean ‘common judge’ – the ICC.¹²⁸ While this recognition occurs at the expense of State sovereignty, as noted by Locke: “when all cannot be preserved, the safety of the innocent is to be preferred”.¹²⁹

¹²⁷ Solera, 2002, p. 149, see *supra* note 100 (emphasis added). This might also explain why the African Union’s resolution was not binding and only designed to begin discussions about what an exit from the ICC would entail. To this end, the African Union appears to be sending a message to the ICC without a well-defined plan to leave it.

¹²⁸ Niemann, 2014, p. 125, see *supra* note 49.

¹²⁹ Locke, 1690, chap. III, see *supra* note 11.

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