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## Nicolás Maduro's Impunity is a Foregone Conclusion: a Case for Replacing the Treaty-Based Rule of Law Model With Universal Jurisdiction

Alec Waid

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# NICOLÁS MADURO’S IMPUNITY IS A FOREGONE CONCLUSION: A CASE FOR REPLACING THE TREATY-BASED RULE OF LAW MODEL WITH UNIVERSAL JURISDICTION

Alec Waid\*

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## I. INTRODUCTION

*“I told myself, either we leave, or we die.”*<sup>1</sup>

Those are the chilling words of a man named Euligio Baez.<sup>2</sup> Euligio is a thirty-three-year old indigenous Warao from Delta Amacuro in Venezuela.<sup>3</sup> Euligio is one of many fathers that have been forced to flee from his home in Venezuela—in this case, his ancestral land—because he no longer believed his children would survive under the reigning president, Nicolás Maduro.<sup>4</sup> Euligio’s reason for leaving was largely the withholding of healthcare resources by the Venezuelan government.<sup>5</sup> Other Venezuelans are being forced out of their homes through more direct, violent government action. An article published by the United Nations discusses Juan Carlos’ story.<sup>6</sup> Juan Carlos was a three-year communications employee at a government-owned business in Venezuela.<sup>7</sup> Innocuously, Jose gave an interview in which the reporter uncovered administrative irregularities at his office.<sup>8</sup> Shortly thereafter, government officials and colleagues treated him as if he “was worthless and they threatened to kill [him], forcing

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<sup>1</sup> Paola Sarta, *Death threats and disease drive more Venezuelans to flee*, UNHCR: THE UN REFUGEE AGENCY (May 21, 2019) <https://www.unhcr.org/en-us/news/latest/2019/5/5cd92d344/death-threats-disease-drive-venezuelans-flee.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

[him] to resign.”<sup>9</sup> Before long, he was attacked and tortured near his home.<sup>10</sup> He later found out that one of his closest patients had been hired to kill him for inadvertently revealing government information in the interview.<sup>11</sup> Juan Carlos, too, was forced to flee his home in Venezuela.<sup>12</sup>

Latin America is currently facing one of the largest refugee displacement events in its history.<sup>13</sup> The phenomenon is a product of citizens fleeing in fear of organized crime groups running uncontrolled in their home countries.<sup>14</sup> The crisis is causing legal, political, and logistical issues at the borders of other countries in the region, which struggle with how to handle the large volume of refugees. Venezuela is one of the primary culprits. Venezuelan officials are unabashedly refusing to prosecute, and remain in the pockets of, the organized crime groups forcing citizens out of their homes.<sup>15</sup> To respond, many countries have imposed heavy sanctions on the Venezuelan government to no avail. In fact, individual efforts to compel Venezuela to enforce its laws have only caused necessary resources to be withheld from the Venezuelan people.<sup>16</sup>

Consequently, Latin American leaders urged the International Criminal Court (ICC) Chief Prosecutor to open an inquiry regarding the prosecution of those contributing to the crisis in Venezuela.<sup>17</sup> However, the international tribunal is greatly limited

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Robert Muggah, et. al, *The Stunning Scale of Latin America's Migration Crisis*, AMERICAS QUARTERLY (June 20, 2018) <https://www.americasquarterly.org/content/stunning-scale-latin-americas-migration-crisis>.

<sup>14</sup> Dr. Jiri Valenta, *Venezuela: A Mafia State*, (August 1, 2019) <https://besacenter.org/perspectives-papers/venezuela-mafia-state/>.

<sup>15</sup> Holly K. Sonneland, *Explainer: The Case against Venezuela in the ICC*, AMERICAS SOCIETY COUNCIL OF THE AMERICAS (October 4, 2018) <https://www.as-coa.org/articles/explainer-case-against-venezuela-icc>.

<sup>16</sup> *See e.g.*, CONGRESSIONAL RESEARCH SERVICE, VENEZUELA: OVERVIEW OF U.S. SANCTIONS, Version 28 (Updated February 21, 2020) <https://fas.org/sgp/crs/row/IF10715.pdf>.

<sup>17</sup> Maximilian Heath & Aislinn Laing, *Argentina's Macri to Report Venezuela to ICC over Human Rights*, REUTERS (August 20, 2018)

in its ability to hold Venezuelan officials, or any other world leaders, accountable for violations of international law. The ICC has become, in essence, an international organization whose work is limited by, and dependent on, the consent and good-faith acting of its members—hardly an operational state for a court of law.

This paper will begin by delving into the factual grounds for the ICC's investigation, the history of the Maduro Regime in Venezuela, and the Latin American displacement crisis. Part III will analyze the Rome Statute, its shortcomings in the context of the Venezuelan investigation, and previous cases before the ICC. It will also address the issues posed by relying on the law of treaties, specifically the options of invalidation and termination, for enforcing international criminal law. Part III will argue that, given the challenges discussed in Part II, the Venezuelan preliminary examination is not likely to lead to effective prosecution of Maduro or other complicit government agents. Finally, Part IV will propose changes to the treaty-based rule of law model on which our current system of international criminal law is built. Ultimately, however, this paper will argue for the use of universal jurisdiction statutes, in lieu of relying on international tribunals, to put an end to the Latin American displacement crisis and, at long last, establish an effective and non-negotiable international rule of law.

## II. VENEZUELA AND THE LATIN AMERICAN DISPLACEMENT CRISIS

The persisting displacement crisis currently ongoing in Latin America is largely a product of millions of Venezuelans fleeing their homes, fearful for their lives. As a response, the Office of the Prosecutor for the International Criminal Court has opened a preliminary examination with hopes to address what Maduro and his agents have been doing to drive these people from their homes and country.<sup>18</sup>

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<https://www.reuters.com/article/us-argentina-macri-venezuela/argentinas-macri-to-report-venezuela-to-icc-over-human-rights-idUSKCN1L51FG>.

<sup>18</sup> “Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on opening Preliminary Examinations into the situations in the

A. *Venezuela's Role in the Crisis*

Since 2015, more than three million Venezuelans have been forced out of their homes and country to seek asylum elsewhere as refugees.<sup>19</sup> The Venezuelan people are escaping a land where they are constantly victimized by organized crime groups and are forced to rely on a government complicit in their victimization.<sup>20</sup> Essentially, Venezuelans are left with two options: (1) stay home and fall victim to organized crime with no avenue for protection or recourse, or (2) uproot their lives with the hope that neighboring countries accommodate them and their families.<sup>21</sup>

This displacement crisis is second in the world only to the exodus of refugees from Syria.<sup>22</sup> Unfortunately, Venezuelans may not be afforded the same protections given to those fleeing Syria, and other groups of refugees.<sup>23</sup> Since Venezuelans are not fleeing from an armed conflict, they do not fall within the traditional classification set forth by the Cartagena Declaration on Refugees.<sup>24</sup> In 1984, however, the scope of those who fall under the protections of the declaration was expanded:

[T]he term refugee includes] persons who have fled their country because their lives, security or

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Philippines and in Venezuela” (February 8, 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>, [hereinafter OTP Statement].

<sup>19</sup> Adam Taylor, *3 Million Venezuelans Have Fled Their Country, According to New U.N. Estimate*, THE WASHINGTON POST (November 8, 2018) [https://www.washingtonpost.com/world/2018/11/08/million-venezuelans-have-fled-their-country-according-new-un-estimate/?utm\\_term=.25695f370d89](https://www.washingtonpost.com/world/2018/11/08/million-venezuelans-have-fled-their-country-according-new-un-estimate/?utm_term=.25695f370d89).

<sup>20</sup> See Rachel Krygier, *Angry Venezuelans tell Maduro they'd rather clean America's toilets than stay in their country*, THE WASHINGTON POST (April 4, 2018) [https://www.washingtonpost.com/news/worldviews/wp/2018/04/04/angry-venezuelans-tell-maduro-theyd-rather-clean-americas-toilets-than-stay-in-their-country/?utm\\_term=.5a76f9abeff2](https://www.washingtonpost.com/news/worldviews/wp/2018/04/04/angry-venezuelans-tell-maduro-theyd-rather-clean-americas-toilets-than-stay-in-their-country/?utm_term=.5a76f9abeff2).

<sup>21</sup> See *id.*

<sup>22</sup> Oriana Van Praag, *Understanding the Venezuelan Refugee Crisis*, WILSON CENTER (September 13, 2019), <https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis>.

<sup>23</sup> Dany Bahar and Meagan Dooley, *Venezuela refugee crisis to become the largest and most underfunded in modern history*, BROOKINGS (December 9, 2019), <https://www.brookings.edu/blog/up-front/2019/12/09/venezuela-refugee-crisis-to-become-the-largest-and-most-underfunded-in-modern-history/>.

<sup>24</sup> Van Praag, *supra* note 22.

freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>25</sup>

Still, this change has led to litigation over the different interpretations of the language of the new provision, leaving refugees unsure of their fates. In response to the uncertainty, William Spindler, spokesman for the United Nations High Commissioner for Refugees, advocates for a more liberal interpretation of the declaration. Spindler argues that the Venezuelan refugees fall within the spirit of the Cartagena Declaration, and should therefore be treated just as other refugees are treated under international law.<sup>26</sup>

Nonetheless, the Cartagena Declaration is a regional agreement confined to Latin America.<sup>27</sup> The United States is not a signatory, and only sixteen countries have incorporated its provisions and spirit into their laws and practices.<sup>28</sup> What does this mean for the Venezuelan people who leave for a safer life? They cannot be sure that the country in which they end up will recognize them as refugees and allow them to stay.

As a direct result of this forced displacement, countries in Latin and North America have faced an overwhelming influx of Venezuelans seeking refuge. Colombia has hosted more than one million refugees, Peru is at more than half a million, and other neighbors have shared in the load as well.<sup>29</sup> Beyond those nations bordering Venezuela, the U.S. Citizenship and Immigration Services has reported an eighty-eight percent increase in

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<sup>25</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, § III, ¶ 3 (November 22, 1984), [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf).

<sup>26</sup> Van Praag, *supra* note 22.

<sup>27</sup> Liliana Lyra Jubilu, *et. al.*, *The Cartagena Declaration at 35 and Refugee Protection in Latin America*, E-INTERNATIONAL RELATIONS (November 22, 2019), <https://www.e-ir.info/2019/11/22/the-cartagena-declaration-at-35-and-refugee-protection-in-latin-america/>.

<sup>28</sup> *Id.*

<sup>29</sup> Taylor, *supra* note 19.

Venezuelan asylum applications—totaling 27,629 in 2017 alone.<sup>30</sup> The large impact the displacement is having at the United States border is significant in light of the fact that the U.S. has not incorporated as law the broad definition of a refugee set forth by the Cartagena Declaration. The legal inconsistency in the region has resulted in hundreds of thousands of refugees, including children, being held in American custody awaiting adjudication of their asylum claims.<sup>31</sup>

Given that the isolated responses to this problem are not sustainable considering the scale of the crisis, the UN High Commissioner for Refugees has called for an internationally coordinated response.<sup>32</sup> Acquiescing in the need for such a response, world leaders have begun calling for action against the Venezuelan government because of its unwillingness to take on the source of the displacement: organized crime within its borders.<sup>33</sup> Argentinian President Macri alleged that the rule of law is *virtually absent* in Venezuela, calling for officials to be prosecuted for human rights violations.<sup>34</sup> In response, the ICC Chief Prosecutor, Fatou Bensouda, opened a preliminary examination into the conduct of the Venezuelan government concerning its treatment of its people.<sup>35</sup> The matter remains open since its inception on February 8, 2018.<sup>36</sup>

### B. *The ICC Preliminary Examination*

In a statement released on February 8, 2018, ICC Chief Prosecutor Fatou Bensouda announced preliminary examinations into potential international crimes committed by the governments of Venezuela and the Philippines.<sup>37</sup> The announcement clarifies that the Office of the Prosecutor “undertakes this work with full

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<sup>30</sup> *Id.*

<sup>31</sup> Astrid Galvan, *By the numbers: Migration to the US-Mexico border*, ASSOCIATED PRESS, (June 25, 2019) <https://apnews.com/cbba8ede5436460ab4f792f981ee32e2>.

<sup>32</sup> *See* Van Praag, *supra* note 22.

<sup>33</sup> Heath & Laing, *supra* note 17.

<sup>34</sup> *Id.*

<sup>35</sup> OTP Statement, *supra* note 18.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*



independence and impartiality in accordance with its mandate,”<sup>38</sup> despite claims by Venezuelan President Maduro<sup>39</sup> and Philippine President Duterte that the examinations are politically driven.<sup>40</sup> Bensouda explains that these examinations are in response to “a number of communications and reports documenting alleged crimes potentially falling within the jurisdiction of the [ICC].”<sup>41</sup>

Specifically regarding Venezuela, the reports allege use of excessive force by State security forces to subdue opposing demonstrations, abusive detainment and ill-treatment of members of the opposition, and killing of civilians who oppose President Maduro’s regime.<sup>42</sup> Bensouda’s statement further refers to reports alleging extra-judicial killings of individuals of persons suspected of illegal drug activity by Philippine police forces in furtherance of the “war on drugs” campaign launched by President Duterte in 2016.<sup>43</sup>

In response to this report, Duterte announced his intent to withdraw the Philippines from the ICC on March 2018.<sup>44</sup> While President Maduro has not followed suit, his rhetoric since the inception of the preliminary examination of Venezuela has suggested a similar irreverence towards the jurisdiction of the ICC. Although the potential prosecution of Maduro and the Venezuelan Government faces its own issues, the unclear legitimacy and impacts of the Philippines’ withdraw from the ICC casts an even more grim shadow over the interests of the international community to address crimes driving the international refugee crisis. The next section will unpack the legal framework surrounding the preliminary investigations launched by the ICC,

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<sup>38</sup> *Id.*

<sup>39</sup> Although several countries (including the United States, Canada, and the United Kingdom) have expressly denounced Maduro as President and now recognize opposition leader Juan Guaidó as the interim leader, this paper will reference “President Maduro” for clarity and consistency purposes.

<sup>40</sup> “FULL TEXT: Duterte’s statement on Int’l Criminal Court Withdrawal” RAPPLER (March 14, 2018) <https://www.rappler.com/nation/198171-full-text-philippines-rodriago-duterte-statement-international-criminal-court-withdrawal>, [hereinafter Duterte’s Statement].

<sup>41</sup> OTP Statement, *supra* note 18.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Duterte’s Statement *supra* note 40.

Duterte's withdrawal from the Rome Statute, and the consequent future of the current international criminal law system.

### III. THE ICC LEGAL FRAMEWORK: A PATCHWORK OF COMPETING DOCTRINES

The legal framework governing international prosecution through the ICC is outlined in the Rome Statute of 1998, and subject to provisions set forth by the UN Charter.<sup>45</sup> Because this prosecutorial framework is derived exclusively from a treaty, its function is subject to the international law of treaties—including the vague and flexible doctrines of withdrawal, termination, and invalidation. In response to Prosecutor Bensouda's preliminary examination, Philippine President Duterte announced his intent to withdraw the Philippines from the Rome Statute; in making this announcement, Duterte renounced any existing obligations under the treaty, asserting that the Philippines' ratification of the treaty was fraudulent.<sup>46</sup>

#### A. *The Rome Statute*

The ICC was created through the Rome Statute with the mission to “put an end to impunity for the perpetrators of [crimes of concern to the international community].”<sup>47</sup> In furtherance of this mission, the treaty's preamble affirms that these crimes “must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”<sup>48</sup> Moreover, the Rome Statute was established in the spirit of minimizing any military or political intervention into the affairs of any state in addressing international

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<sup>45</sup> “History of the ICC”, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://iccnow.org/?mod=icchistory>.

<sup>46</sup> Duterte's Statement, *supra* note 40.

<sup>47</sup> Rome Statute of the International Criminal Court, at Preamble, [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>48</sup> *Id.*

criminal activity.<sup>49</sup> A plain reading of this preamble makes the intentions behind the ICC very clear: to provide a way by which international crimes may be prosecuted, insulated from political pressures and without the collateral damage inflicted by military action.

Before an official investigation or proceeding is initiated against a defendant at the ICC, the Office of the Prosecutor (OTP) may conduct a preliminary examination into a reported matter.<sup>50</sup> The purpose of a preliminary examination is to determine whether: (1) the OTP's information provides a reasonable basis to believe that a crime within the ICC's jurisdiction has been or is being committed; (2) the case under examination may be brought under Article 17 of the Rome Statute; and (3) substantial reasons exist indicating that an investigation would serve interests of justice considering the gravity of the offense(s) and the interests of the victim(s).<sup>51</sup> Despite the procedural and substantive bars to investigation, which may tend to protect the accused, the OTP has indicated that the third consideration, creates a presumption that investigations and prosecutions will proceed.<sup>52</sup>

Despite this presumption, the jurisdiction of the ICC is limited by the doctrine of complementarity.<sup>53</sup> This doctrine requires a finding that the State which has local jurisdiction over a crime is either unwilling or unable to investigate and prosecute before the ICC can assert jurisdiction.<sup>54</sup> So, the complementarity requirement may be met where the judicial systems of a country is effectively inactive or demonstrably unwilling to investigate and prosecute—in these circumstances, the Rome Statute requires the ICC to

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<sup>49</sup> *Id.* (“Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.”).

<sup>50</sup> Rome Statute, *supra* note 47, at art. 15; *see generally* The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, (November 2013), <http://www.legal-tools.org/doc/acb906/> [hereinafter *OTP Policy Paper*].

<sup>51</sup> Ayumary M. Fitzgerald, Crimes Against Humanity in Venezuela: Can the ICC Bring Justice to Venezuelan Victims?, 26 U. MIAMI. INT'L & COMP. L. REV. 127 (2018) (citing *id.*).

<sup>52</sup> *OTP Policy Paper*, *supra* note 50, at ¶ 71.

<sup>53</sup> *See generally* Rome Statute, *supra* note 47, at art. 17.

<sup>54</sup> *Id.* at § 1(a).

intervene.<sup>55</sup> It is only once these requirements are met that investigation or further proceedings against an accused may move forward under the Rome Statute.

*B. The Law of Treaties: Withdrawal, Termination, and Invalidity*

Considering provisions of the Rome Statute, the prospect of prosecuting crimes of international concern seems sufficiently straightforward and effective. However, that has proven not to be the case. With regards to domestic prosecution, there is little question that an accused is subject to investigation, jurisdiction, and prosecution as a function of sovereignty. However, there is no international equivalent to that sovereign relationship. Nonetheless, the ratification of treaties is an exercise of sovereignty and therefore accused persons are subject to the jurisdictional powers—like that of the ICC—*consented* to by their sovereigns in the form of treaties—like the Rome Statute.<sup>56</sup> So, problem solved? Not quite. Distinct from the power of sovereignty, treaties are subject to other political and legal limitations which may allow alleged perpetrators—like Presidents Maduro and Duterte—to avoid the jurisdictional power of the ICC and skirt the rule of law. This paper focuses on one of those limitations: the option to escape the obligations under a treaty through withdrawal, termination, or invalidation.

Under Article 127 of the Rome Statute, a state party has the option to withdraw so long as it provides proper notice.<sup>57</sup> Withdrawal will take effect one year after the UN Secretary-General receives notification, and at that point the withdrawn state will be free from all obligations arising from the Rome Statute.<sup>58</sup> However, withdrawal from the Rome Statute “shall not affect any

<sup>55</sup> Fitzgerald, *supra* note 51, at 135.

<sup>56</sup> See Martinez, Jenny S., *With U.N. Treaties, There Are Two Ways to Look at Sovereignty*, NEW YORK TIMES (December 6, 2012) <https://www.nytimes.com/roomfordebate/2012/12/06/have-treaties-gone-out-of-style-with-un-treaties-there-are-two-ways-to-look-at-sovereignty?module=inline> (“Sovereignty is also the power to make law . . . . The United States best preserves its sovereignty when it leads the international community, not when it hides.”).

<sup>57</sup> Rome Statute, *supra* note 47, at art. 127.

<sup>58</sup> *Id.*

cooperation with the Court in connection with *criminal investigations and proceedings* . . . which were commenced prior to the date on which the withdrawal became effective . . . .”<sup>59</sup> While the provisions of the Rome Statute make obligations relating to investigations and proceedings continual through withdrawal, it makes no mention of preliminary examinations. Although this distinction may seem to be a play on semantics, it has legal effect because other parts of the Rome Statute make clear distinctions between preliminary examinations, investigations, and proceedings.<sup>60</sup> For example, Article 15, § 6 states: “If, after the *preliminary examination* . . . the Prosecutor concludes that the information provided does not constitute a reasonable basis for *investigation*, he or she shall inform those who provided the information [accordingly].”<sup>61</sup> Furthermore, Article 59 outlines arrest *proceedings* resulting from a conclusive *investigation*<sup>62</sup> and Article 60 describes initial *proceedings* before the ICC upon a surrender or arrest.<sup>63</sup> So, by way of structural analysis, criminal investigations and proceedings, are not initiated until at least after a preliminary examination gives way to an investigation, and that investigation has reached the conclusion to arrest and prosecute. Because withdrawal does not have an impact on preliminary examinations, only proceedings and investigations under the terms of the Rome Statute, it may be used as a tool for state parties to rush the prosecutor through their preliminary examination in an attempt to protect its citizens from being held accountable for their crimes or to preemptively avoid investigations and proceedings entirely.

In addition to the Rome Statute’s withdrawal option, international law provides alternative functions allowing states to circumvent obligations under their treaties.<sup>64</sup> The Vienna Convention on the Law of Treaties (the “Convention”), adopted in

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<sup>59</sup> *Id.* at § 2 (emphasis added).

<sup>60</sup> *Id.* at art. 15, § 6 (emphasis added).

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.* at art. 59 (emphasis added).

<sup>63</sup> Rome Statute, *supra* note 47, at art. 60 (emphasis added).

<sup>64</sup> See generally Helfer, Laurence R., *Terminating Treaties*.  
[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=faculty_scholarship).

1969, represents a codification of customary international law regarding treaties.<sup>65</sup> The Convention, among other things, defines the circumstances under which a state may invalidate or terminate the operation of a treaty. For instance, a state may assert that their consent to a treaty was invalid and hence end all obligations they may have under that treaty.<sup>66</sup> Consent to a treaty may be invalid, among other reasons, if such consent is given (1) in violation of the state's internal law;<sup>67</sup> (2) in erroneous reliance on an assumed fact or situation which was essential to its consent;<sup>68</sup> or (3) in light of the fraudulent conduct of another State.<sup>69</sup> In order for a violation of a state's internal law to invalidate a treaty, it must have been manifest and concerning a rule of internal law of fundamental importance.<sup>70</sup> In addition to invalidation, Article 60 of the Convention allows for party states to terminate the operation of a treaty if the terms of the treaty are breached.<sup>71</sup> Parties affected by a material breach<sup>72</sup> of a treaty can invoke Article 60 as grounds for suspending or terminating the operation of the treaty.<sup>73</sup>

Of course, political leaders hold the power to withdraw from, terminate, or invalidate treaties. With this power, there is an assumption that they share in the international interest to see perpetrators of international crimes held accountable. In most circumstances, this assumption would hold true. But when the political leaders of a country are responsible for these crimes, they have every reason to use these procedural tools to gain impunity. Consequently, given that the international prosecutorial regime is treaty-based, and both the Rome Statute and the law of treaties provides for so many opportunities to avoid treaty-based

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<sup>65</sup> Vienna Convention on the Law of Treaties (May 23, 1969), <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. [hereinafter "VCLT"].

<sup>66</sup> *Id.* at art. 48. (noting that invalidation of a treaty, therefore terminating its operation, shall not impair other obligations under international law).

<sup>67</sup> *Id.* at art. 46.

<sup>68</sup> *Id.* at art. 48.

<sup>69</sup> *Id.* at art. 49.

<sup>70</sup> *Id.* at art. 46.

<sup>71</sup> VCLT, *supra* note 65, at art. 60.

<sup>72</sup> *Id.* (A "material breach" is defined as the violation of a provision essential to the accomplishment of the object or purpose of the treaty.).

<sup>73</sup> *Id.*

obligations, the international rule of law is reduced to an option for state leaders.

C. *Duterte's Withdrawal and International Reactions*

With the recent addition of the Philippines, only four nations<sup>74</sup> have ever threatened to withdraw from the Rome Statute. In October 2017, Burundi became the only nation to make good on this threat.<sup>75</sup> On March 13, 2018, President Duterte released a statement announcing his intent to withdraw and provided his argument for the immediate termination of any Philippine obligations under the Rome Statute—including the obligation to answer for the allegations currently under investigation by the OTP.<sup>76</sup> Duterte began his statement by laying out an argument for the invalidation of the Rome Statute because, he argued, Philippine consent was given in violation of their internal laws regarding due process of law.<sup>77</sup> He continued to justify the Philippines' official withdrawal from the Rome Statute, adding that the terms should be immediately terminated because of fraudulent pretenses of their consent.<sup>78</sup>

The Constitution of the Philippines requires due process of law like most constitutions.<sup>79</sup> This guarantee to due process includes the right of the accused to be heard as well as the requirement that, for a person to be charged with a criminal offense, there be a law that identifies the act as criminal.<sup>80</sup> The law in the Philippines particularly requires that a penal law be published in the Official Gazette soon after being signed into law to be enforceable—treaties are also subject to this requirement under Philippine law.<sup>81</sup> Duterte argued that, because the Rome Statute was never published in the Official Gazette after being ratified, its provisions are not Philippine law, and therefore the ICC cannot bring Philippine

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<sup>74</sup> South Africa, Gambia, and Burundi.

<sup>75</sup> Michael Plachta, *The Philippines' Withdrawal from the ICC Rome Statute: Background and Context*, 34 No. 3 INT'L ENFORCEMENT L. REP. 118 (2018).

<sup>76</sup> Duterte's Statement, *supra* note 40.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (referencing the Latin phrase “*nullen crimen sine lege*”).

<sup>81</sup> *Id.*

citizens within its jurisdiction.<sup>82</sup> He further supported this assertion by arguing that the language of Bensouda's statement regarding the preliminary examination violates the presumption of innocence, a legal right also guaranteed by their constitution.<sup>83</sup> These assertions, taken *arguendo* as true, suggest that the Philippines has a claim for invalid consent under Article 46 of the Convention.

Following more discussion of whether the ICC has subject matter jurisdiction given the elements of the alleged crimes, President Duterte explained his bases for withdrawal from the Rome Statute.<sup>84</sup> He began, however, by asserting that the Article 127 clause mandating a year-long delay in withdrawal effectiveness is not applicable because of what he argues to be fraudulent pretenses in the Philippines' entry into the treaty.<sup>85</sup> According to Duterte's statement, the state consented to the Rome Statute under the expectations that the ICC would promote the presumption of innocence, respect the requirements of the domestic law of its parties, and not be utilized as a political tool.<sup>86</sup> Essentially, Duterte made it clear that he did not recognize the legitimacy of the ICC and effectively withdrew the Philippines from the Rome Statute with no intention to recognize any existing obligations to the international tribunal.

Needless to say, President Duterte's statement was not met with agreeable responses from the international community. President O-Gon Kwon, of the Assembly of State Parties, warned that the Philippines' withdrawal poses a threat to the international fight against impunity and encouraged Duterte to voice his concerns in an effort to foster a dialogue with the UN General Assembly.<sup>87</sup> Other international groups argue that Duterte is wrong to think that he is no longer bound to answer to the ICC.<sup>88</sup> Amnesty International and the Human Rights Watch, for example, have argued that the ICC Prosecutor can, and should still, pursue

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Plachta, *supra* note 75.

<sup>88</sup> *Id.*



an aggressive prosecution of Philippine government officials responsible for the alleged crimes.<sup>89</sup>

Duterte also faced criticism for his statement from within the Philippines. The Philippine Coalition for the International Criminal Court denounced the withdrawal and argued that the state is still subject to the one-year delay of withdrawal under Article 127 of the Rome Statute.<sup>90</sup> Moreover, a Philippine law firm known as CenterLaw provided a more in-depth criticism to Duterte's argument that the Rome Statute is invalid and immediately terminated.<sup>91</sup> They argued that the publication requirement referenced by Duterte regarding whether the treaty is effective law in the Philippines is an outdated and irrelevant relic of the law, and therefore the argument that the treaty violates domestic law fails.<sup>92</sup> On the other hand, reactions to Duterte's announcement have not all been negative. Some analysts have been sympathetic to the President's claims that the court is being used as a weapon by his political adversaries, constituting a breach of the treaty's terms, thus justifying termination of obligations therein.<sup>93</sup>

The ICC responded with disdain to Duterte's withdrawal.<sup>94</sup> In a juxtaposing statement, the ICC expressed its desire to see the Philippines remain a party to the Rome Statute while also resolutely calling bluff on Duterte's assertion that all obligations are lifted upon withdrawal.<sup>95</sup> The statement argues that "withdrawal has no impact on on-going proceedings or *any matter which was already under consideration by the Court* prior to the date on which withdrawal became effective."<sup>96</sup> Note, this statement

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (citing Lian Buan, *Duterte can't void ratification of Rome Statute over non-publication*, CENTERLAW, March 15, 2018, <https://www.rappler.com/nation/198223-centerlaw-response-duterte-rome-statute-international-criminalcourt>).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law. Press Release: 20 March 2018. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>. [hereinafter ICC Response].

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (emphasis added).

adds language absent from Article 127 of the Rome Statute in an attempt to rope the Philippines into further obligations contrary to (or at least not expressly provided by) the terms of the treaty.<sup>97</sup> Ironically and possibly inadvertently, before concluding its statement, the ICC bolsters Duterte's argument by making a clear distinction between the preliminary examination, investigation, and the start of the proceedings.<sup>98</sup> The statement also takes for granted that the withdrawal would become effective one-year from Duterte's announcement.<sup>99</sup> In fact, the ICC addresses the question of withdrawal and its temporal effectiveness but makes no mention of Duterte's fraudulent consent claims—including claims that the investigation has political motivations or a presumption of guilt.<sup>100</sup> The ICC's unwillingness or inability to address Duterte's claims of invalidation or termination suggests that it does not have an answer.

International reactions set aside, President Duterte's announcement brings to light the many barriers the international prosecutorial framework faces in fighting impunity. These opportunities to dodge accountability are a direct result of the treaty-based nature of the international prosecutorial system, and thus may pose a serious problem for the effort to address the Latin American displacement crisis.

#### IV. THE IMPENDING FAILURE OF THE VENEZUELAN EXAMINATION

President Maduro has not attempted to withdraw from or terminate Venezuela's obligations under the ICC; however, the dialogue opened by Duterte casts a bleak shadow over the prospects of addressing the crimes in Venezuela. Although the

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<sup>97</sup> See Rome Statute, *supra* note 47, at art. 127 ("Its withdrawal shall not affect any cooperation with the Court in connection with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate . . .").

<sup>98</sup> *ICC Response*, *supra* note 94. "Should, at the conclusion of the preliminary examination process, the Prosecutor decide to proceed with an investigation, authorization from a Pre-Trial Chamber of the Court would be required."

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Venezuelan matter faces legal challenges of its own,<sup>101</sup> giving light to the options of withdrawal, termination, and invalidation offered by international law may provide the fail-safe that Maduro and his inner circle need to escape legal accountability.

Aside from the prospects of invalidation offered by the law of treaties, the law provides a number of challenges protecting President Maduro from prosecution. First, it is well-settled by customary international law that sitting heads of state and high-ranking government officials are protected through sovereign immunity from the jurisdiction of international and foreign courts.<sup>102</sup> Albeit, the Rome Statute provides expressly that such immunities that exist outside of the ICC shall not bar the Court from exercising jurisdiction.<sup>103</sup> However, some states may be hesitant to break international legal norms for the sake of a treaty provision; in fact, the Convention suggests that peremptory norms of international law preempt the operation of a treaty if they are in conflict.<sup>104</sup> Despite questions as to whether Maduro is indeed a legitimate head of state, he is technically the elected leader of Venezuela. Therefore, there is a presumption that problems of immunity apply to him and his senior officials.

Venezuela may also have an argument, similar to the Philippines, for the invalidation of their consent to the Rome Statute. The Constitution of the Bolivarian Republic of Venezuela guarantees the right to due process of law, the right to be heard in proceedings *of any kind*, and the right to be presumed innocent until proven otherwise.<sup>105</sup> One unique provision that could prove troublesome to Venezuela's consent to the Rome Statute is found in Article 49, § 4:

Every person has the right to be judged by his or her natural judges of ordinary or special competence,

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<sup>101</sup> Holly K. Sonneland, *Explainer: The Case against Venezuela in the ICC*, Americas Society/Council of the Americas, (October 4, 2018), <https://www.as-coa.org/articles/explainer-case-against-venezuela-icc>.

<sup>102</sup> Alexander Rosemberg, *The Long Road to the Hague Started Yesterday*, CARACAS CHRONICLES, Feb. 9, 2018.

<sup>103</sup> Rome Statute, *supra* note 47, at art. 27.

<sup>104</sup> VCLT, *supra* note 65, at art. 53.

<sup>105</sup> THE CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 20, 1999, art. 49.

with the guarantees established in this Constitution and by law. No person shall be put on trial without knowing the identity of the party judging him or her, *nor be adjudged by exceptional courts or commissions created for such purpose.*<sup>106</sup>

On its face, this provision seems to protect Venezuelan citizens from the jurisdiction of any foreign or international tribunals. Furthermore, Article 13 of Venezuela's constitution provides the following concerning ratification of treaties:

The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, *insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution . . . .*<sup>107</sup>

While this provision seems to bolster treaties regarding human rights (e.g., the Rome Statute), it is actually limited only to those treaties that provide rights not provided by the Venezuelan Constitution. To that point, the Venezuelan Constitution provides for every protection—and more—than those guaranteed by the Rome Statute.<sup>108</sup> Therefore, Article 23 would preclude the legal recourse provided by the Rome Statute from being guaranteed to citizens of Venezuela.

Taking these interpretations of the Venezuelan Constitution as true, Venezuelan consent to the Rome Statute would have been “expressed in violation of a provision of its internal law regarding competence to conclude treaties . . . .”<sup>109</sup> Ultimately, this argument only represents one route through which Venezuela may take

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<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Id.* at art. 23 (emphasis added).

<sup>108</sup> *See id.* at art. 44 (guaranteeing personal liberty and declaring it inviolable); art. 43 (“the right to life is inviolable”); art. 57 (“Everyone has the right to express freely his or her thoughts, ideas or opinions orally, in writing or by any form of expression and to use for such purpose any means of communication and diffusion, and no censorship shall be established.”).

<sup>109</sup> VCLT, *supra* note 65, at art. 46.

advantage of the optional rule of law established by the treaty-based system of international criminal justice. But Maduro is hardly the only state leader contributing to the regional and global displacement crisis. If these systemic faults are not addressed and remedied, or if alternative prosecutorial methods are not pursued, the world will see no improvement.

## V. THE UNCERTAIN FUTURE OF INTERNATIONAL CRIMINAL LAW

Given the problems discussed above, the international community must seek a solution if it wants to advance its fight against international criminal impunity. These solutions, however, must not be political or military in nature—they must be legal solutions. Some solutions could further this goal while retaining the reliance on the law of treaties. However, real ground will only be gained when the international community reevaluates modern norms of international law and eliminates the optional rule of law inherent in the law of treaties.

### A. *The Urgent Need for Effective Legal Channels*

Sanctions and military action cause more harm than good to the communities affected by forced displacement.<sup>110</sup> For example, the citizens of Burundi—the only country to successfully withdraw from the ICC—were severely impacted by the imposition of sanctions responding to international crimes in their country.<sup>111</sup> In fact, the Global Policy Forum argued that “[t]he imposition of economic sanctions worsens an already grim situation, raising serious moral and ethical questions.”<sup>112</sup> After realizing the dangerous effects of sanctions against Burundi, world leaders

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<sup>110</sup> See generally Marc Bossuyt, *The Adverse Consequences of Economic Sanctions* ¶ 5-8 (June 21, 2000) (unpublished paper on file with Global Policy Forum).

<sup>111</sup> *Id.* at ¶ 74 (“To quote one study: ‘Across the various sectors reviewed [poverty, health, agriculture, water, sanitation, education, democracy], the pattern is consistent: serious problems predating sanctions [against Burundi] were exacerbated by the imposition of sanctions, which themselves had numerous effects on civilian populations . . . .’”).

<sup>112</sup> *Id.*

eventually began revoking their sanctions and urging other states to do the same.<sup>113</sup>

Despite the global awakening regarding sanctions in the late 1990s, geo-political powerhouses, including the United States, have already begun issuing aggressive sanctions against Venezuela in light of its alleged violations of international law.<sup>114</sup> This is concerning because the living conditions in Venezuela have already been terrible enough to push more than three million civilians to flee the country<sup>115</sup>—sanctions may only worsen these conditions.

Aside from political and economic sanctions, states often resort to military intervention in response to crimes of international concern, causing tragic collateral losses.<sup>116</sup> For example, as a result of the Obama Administration's military response to the ISIS-driven refugee crisis in the Middle East, approximately 3,400 civilians were killed as collateral damage.<sup>117</sup> This collateral loss is not isolated to the Obama Administration. According to the United Nations, there was a sixty-seven percent increase in civilian deaths in Afghanistan as a result of military action in the first half of 2017 compared to the first half of 2016.<sup>118</sup> While military action may seem to be an effective solution to addressing bad actors across the globe, it cannot be the go-to solution to address international crime because of the damage it causes to innocent civilians. Human rights lawyer Noura Erakat explains the problem with our reliance on military "solutions": "The victims of state-led attacks are considered collateral damage, or unfortunate but necessary killings. This framework effectively diminishes the value of their

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<sup>113</sup> See *id.* at ¶ 83-85.

<sup>114</sup> See U.S. Dep't of State, Bureau of Economic Growth, Energy, and the Environment, *Venezuela-Related Sanctions* (2015).

<sup>115</sup> Taylor, *supra* note 19.

<sup>116</sup> See *Operation Just Cause: the Invasion of Panama, December 1989*, ARMY HERITAGE AND EDUCATION CENTER (Nov. 17, 2008), [https://www.army.mil/article/14302/operation\\_just\\_cause\\_the\\_invasion\\_of\\_panama\\_december\\_1989](https://www.army.mil/article/14302/operation_just_cause_the_invasion_of_panama_december_1989).

<sup>117</sup> Steven Feldstein, *How U.S. Policies are Worsening the Global Refugee Crisis*, CARNEGIE ENDOWMENT FOR INT'L PEACE (October 16, 2017), <https://carnegieendowment.org/2017/10/16/how-u.s.-policies-are-worsening-global-refugee-crisis-pub-73480>.

<sup>118</sup> *Id.*

lives making it much easier for the world to tolerate excruciatingly high death tolls and absolve the states that caused them.”<sup>119</sup>

Because political, economic, and military action have all proven to be ineffective and dangerous methods to address international criminal activity—particularly when the perpetrators are state actors—the international community must seek effective legal remedies. While this mission is unmistakably the stated charge of the International Criminal Court, the preceding discussion demonstrates its shortcomings and fatal flaws. The remainder of this paper will explore amendments to the current ICC system and consider alternatives to the international tribunal that may work to ensure the eradication of international criminal impunity.

*B. Attempts at Salvage: Improvements to the Treaty-Based Rule of Law Model*

In seeking solutions to ensure international crimes do not go unprosecuted, and in the spirit of supporting the existing establishments, I turn first to amendments to the current international criminal justice system. That is, first, I consider solutions that allow for the preservation of the current treaty-based rule of law model of international prosecution.

First, the parties to the Rome Statute should consider amending the treaty by incorporating more precise language. Article 127 should be amended to stop parties from withdrawing to protect their leaders or citizens from prosecution. Changes to Article 127 should be clear that withdrawal shall not affect a State’s *obligation to cooperate in or answer for the consequences of any preliminary examination*, investigation, or proceeding regarding any matter based on activity carried out while the State was still party to the Rome Statute. While this change would not preclude a state’s claim of invalidation, it would accomplish three important goals: (1) states would not be able to easily circumvent obligations under the treaty if the prosecutor is still in the preliminary examination stage; (2) withdrawal could not be used as a tool to rush the

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<sup>119</sup> Noura Erakat, *Military “Solutions” Force Others to Live With Terror*, N.Y. TIMES: THE OPINION PAGES (July 15, 2016, 7:46 PM), <https://www.nytimes.com/roomfordebate/2016/07/15/can-we-just-live-with-terrorism/military-solutions-force-others-to-live-with-terror>.

prosecutor through the preliminary examination stage; and (3) obligations of citizens of a state to cooperate with proceedings and answer for crimes would clearly continue following withdrawal. Making these points of law clear in the treaty would also preclude claims of misrepresentation of material terms, which may be used by states to invalidate the treaty if they are later investigated.

Next, because so many of the above-described issues stem from modern customary law regarding treaties, it is time to reevaluate the law of treaties in the context of treaties governing international prosecution. Even if the Rome Statute allowed for the ICC to file charges against and prosecute Venezuela for its crimes against the Venezuelan people, Maduro may have an argument (similar to Duterte) for the invalidation or termination of the treaty. To combat this argument, the international community should consider changes to international customary law by amending the Vienna Convention on the Law of Treaties.

For example, the goal of the Convention was to standardize the governance of treaties to maintain peace and security.<sup>120</sup> However, the preceding discussion makes it evident that not all treaties should necessarily be governed in the same fashion.<sup>121</sup> There are certainly reasons that agreements delineating the business between two or more states should be subject to invalidation or termination.<sup>122</sup> This option makes sense for most treaties because they provide for certain affirmative obligations that, if left unfulfilled, would have little-to-no impact on the world outside of the parties to the contract. For example, if the United States were to impose a tariff on goods and services exported to Mexico and Canada, it would be in violation of the North America Free Trade Agreement (NAFTA).<sup>123</sup> This would be grounds for Mexico and Canada to terminate their agreement with the United States under Article 60 of the Convention.<sup>124</sup> While this termination may have

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<sup>120</sup> VCLT, *supra* note 65.

<sup>121</sup> See discussion *supra* Part III.

<sup>122</sup> See Dr. Walid Abdulrahim, *The Law of Treaties*, <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/11-the-law-of-treaties> (last visited March 1, 2019).

<sup>123</sup> *Mexico-Trade Agreements*, INTERNATIONAL TRADE ADMINISTRATION (last updated Oct. 17, 2019), <https://www.export.gov/article?id=Mexico-Trade-Agreements>.

<sup>124</sup> VCLT, *supra* note 65.



significant economic impacts on the North American economy, there would be little impact on other countries or on the greater rule of law.

On the other hand, an agreement like the Rome Statute deals in issues far more important than tariffs: it attempts to establish and promulgate an international rule of law.<sup>125</sup> According to the U.N., “[w]ithout the rule of law, impunity reigns.”<sup>126</sup> If international criminals are left to their own whims, people everywhere are at risk of facing oppression and violence.<sup>127</sup> The only thing standing between the international community and the effects of impunity is the Rome Statute. However, as demonstrated above, parties can avoid accountability simply through claims of invalid consent or justified termination under modern customary international law. Therefore, given the current provisions of the Vienna Convention, the rule of law could be turned upside down if any party to the Rome Statute is successful in their argument to withdraw from, invalidate, or terminate the treaty.

Because the Rome Statute is necessary to the maintenance of the rule of international criminal law, it should not be governed in the same way other more traditional treaties are governed. Accordingly, the U.N. should change the Convention to recognize that treaties regarding international criminal law are exempt from provisions regarding invalidation and termination. If the preferred course is to stick to the treaty-based rule of law model for international prosecutions, these amendments are necessary to make clear that abiding by the Rome Statute is by no means optional or negotiable.

Even so, these changes may not fix the problems faced by the current international criminal justice system. Amendments to the Rome Statute and the Vienna Convention certainly foreclose some arguments against enforcing the law against perpetrators of international crimes. Nonetheless, because the framework would still be based in treaty it would still require consent by the

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<sup>125</sup> Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. CHRONICLE (December 2012), <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

defendant's country. By definition, requiring consent to enforce the law against anyone makes the rule of law optional. There should be no option whatsoever when dealing with crimes including genocide, torture, and other egregious human rights abuses.

*C. It's Time to Throw in the Towel: Replacing the Current Model with the Use of Universal Jurisdiction Statutes.*

Considering the substantial changes—and inevitable pitfalls—required to avoid impunity, while also preserving the treaty-based rule of law model of international prosecutions, it seems preferable to abandon the current framework altogether. Allowing for states with universal jurisdiction statutes to take advantage of those prosecutorial powers is a solution worthy of serious concern.

The doctrine of universal jurisdiction asserts that a nation can prosecute an individual even when the crime was committed outside the nation's borders, and the person and crime have no special connection to the prosecuting state. Permitting the exercise of universal jurisdiction would allow for the prosecution of international crimes without being subject to the same risks posed by the reliance on treaties. The only thing required to effectuate a prosecution under these statutes is custody of the accused.

This doctrine has historically been applied to the prosecution of *hostis humani generi*, or enemies of the human race.<sup>128</sup> That designation, originally applied to pirates as early as the 1600s, effectively opened the door for nations to prosecute individuals with no connection to their nation because of the heinous nature of the crime.<sup>129</sup> However, a justification for this early form of universal jurisdiction was based in the fact that piracy was committed largely in international waters, territories over which no nation held jurisdiction.<sup>130</sup>

Nevertheless, scholars have called for the extension of this designation to include terrorists, hijackers, and other unlawful enemy combatants.<sup>131</sup> Courts have also accepted this doctrinal

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<sup>128</sup> ALFRED P. RUBIN, *THE LAW OF PIRACY* 17 (2d ed. 1998).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> John Yoo, *John Yoo: Obama, Drones and Thomas Aquinas*, WALL STREET JOURNAL (Jun. 7, 2012, 6:58 PM),

extension.<sup>132</sup> In the affirmation of a civil suit against agents of the Government of Paraguay for torture of a Paraguayan citizen, the Second Circuit reasoned, “[i]ndeed, for the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”<sup>133</sup> The International Criminal Tribunal for the Former Yugoslavia further extended this principle to criminal prosecution in *Prosecutor v. Furundzija*.<sup>134</sup> The tribunal held, as a matter of customary international law, that a conviction for torture was a proper exercise of universal jurisdiction because the crime of torture fell under the doctrine of *jus cogens*.<sup>135</sup> If perpetrators of the crimes identified by the Rome Statute—like the crimes committed by Maduro and his officials—were designated as *hostis humani generis* or *jus cogens*, they may be subject to universal jurisdiction. This would avoid issues faced in the current treaty-based prosecution of these crimes.

More recent than the era of piracy, there has been a movement to enact and utilize universal jurisdiction statutes. At the close of World War II, states asserted universal jurisdiction over Nazis solely based on the heinous nature of their crimes.<sup>136</sup> This mechanism was utilized by the Israeli Supreme Court in its prosecution of Adolf Eichmann in 1962,<sup>137</sup> but the expansion of prosecutions in national courts did not occur until the 1990s.<sup>138</sup> One of the most significant successes of the universal jurisdiction doctrine came in Spain when Judge Garzón exercised universal

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<https://www.wsj.com/articles/SB10001424052702303665904577452271794312802?ns=prod/accounts-wsj>.

<sup>132</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

<sup>133</sup> *Id.*

<sup>134</sup> *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-PT, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

<sup>135</sup> Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES (May 29, 2015), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml>.

<sup>136</sup> Mugambi Jouet, Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond, 35 GA. J. INT'L & COMP. L. 495, 500 (2007).

<sup>137</sup> See *Eichmann Supreme Court Judgment: 50 Years On, Its Significance Today*. AMNESTY INTERNATIONAL PUBLICATIONS, June 2012. <https://www.amnesty.org/download/Documents/24000/ior530132012en.pdf>.

<sup>138</sup> Jouet, *supra* note 136, at 501.

jurisdiction over Chilean dictator, Augusto Pinochet.<sup>139</sup> Even so, this use of universal jurisdiction was based in treaty in that the Torture Convention precluded Pinochet's claim to immunity and forced his extradition.<sup>140</sup>

Despite the success and prospects of the universal jurisdiction doctrine, states buckled to political pressure and began to narrow their statutes since their introduction.<sup>141</sup> For instance Belgium, who since 1993 had one of the most effective and broad universal jurisdiction statutes, significantly limited their law to only allow for prosecutions which (1) involve someone with substantial ties to Belgium or (2) are compelled by treaty.<sup>142</sup> This change was largely influenced from pressure by U.S. Secretary of Defense Donald Rumsfeld who openly opposed any notion of an international criminal justice system.<sup>143</sup> Specifically, Secretary Rumsfeld threatened that, if Belgium did not repeal its universal jurisdiction statute, it would lose its status as the host to NATO's headquarters.<sup>144</sup> This pressure came shortly after U.S. officials were brought up on charges for international crimes in Belgian courts.<sup>145</sup> The United States' response to Belgium's law is telling; it shows that even Rumsfeld believed in the efficacy of universal jurisdiction, so much so that he pressured Belgium to repeal their statute to protect American officials.

Overall, the brief successes of universal jurisdiction statutes and the aggressive, guilty-minded response from the United States indicate something about the doctrine—it might just work. If the norms of customary international law shift to allow for perpetrators of international crimes to be brought under the universal jurisdiction of domestic courts, the international fight against

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<sup>139</sup> *Id.* at 501-502

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 503.

<sup>142</sup> *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH (August 1, 2003), <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Craig S. Smith, *Belgium Resists Pressure from U.S. to Repeal War Crimes Law*, NY TIMES (June 14, 2003), <https://www.nytimes.com/2003/06/14/world/belgium-resists-pressure-from-us-to-repeal-war-crimes-law.html>.

impunity may become a success story. This shift would, however, include abandoning the long-standing reliance on the law of treaties to govern international criminal justice. It would also require the international community to accept the notion that commission of certain crimes justifies requiring nothing more (e.g. sovereign or actual connections to a state) to assert jurisdiction over an individual.

## VI. CONCLUSION

*“No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it.”*<sup>146</sup>

The Maduro regime in Venezuela presents perhaps the perfect storm for the international fight against impunity: a state-protected criminal organization against which the Rome Statute is likely ineffective. All evidence points to the fact that the regime has committed and been complicit in a number of international crimes against its own people. Maduro has militarized the police force which has in turn murdered Venezuelans for exercising their right to protest. Moreover, he has used his influence to protect organized crime groups in Venezuela from prosecution. This feedback loop of violence and impunity has forced millions of Venezuelans to flee the country, contributing to one of the largest displacement crises in world history. Notwithstanding the evidence and atrocity of his crimes, Maduro may be effectively shielded from accountability under the current legal framework notwithstanding the preliminary examinations launched by the Chief Prosecutor of the ICC.<sup>147</sup>

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<sup>146</sup> Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), <https://millercenter.org/the-presidency/presidential-speeches/december-7-1903-third-annual-message>.

<sup>147</sup> Note, on March 26, 2020, Nicolás Maduro and other Venezuelan officials were charged in the Southern District of New York for narco-terrorism conspiracy, cocaine importation conspiracy, possession of machineguns and destructive devices, and conspiracy to possess machineguns and destructive devices. Superseding Indictment, United States v. Nicolás Maduro Moros, et. al., S2 11 Cr. 205 (S.D.N.Y. 2020). Although any prospect of Maduro being prosecuted should be lauded, the United States is not seeking to hold Maduro

The Rome Statute and the development of the ICC represent major steps in the international fight against criminal impunity. However, given that the ICC has its basis in a treaty, its success (or failure) is determined by the same standards of any other treaty. The flagship doctrinal document regarding treaties, the Vienna Convention on the Law of Treaties, provides mechanisms for withdrawal, termination, and invalidation of treaties; these options do not exist under any domestic frameworks with the goal to maintain law and order. This means that, with the right argument, a member-state can opt out of the rule of law as it pertains to international criminal law. Contrary to President Theodore Roosevelt's assertion restated above, under the current legal framework, some people are above the law and we cannot make them obey it without their permission.

As history has shown, political and military responses to crimes by world leaders like Maduro are not just ineffective, they are counterintuitive and harmful. Therefore, legal solutions must be sought to see that these crimes are addressed effectively. There are amendments to the current treaty-based rule of law model that may bring the current legal framework closer to ending to impunity. By incorporating more precise language into the Rome Statute, the UN could preclude states from withdrawing after the start of a preliminary examination to avoid the initiation of proceedings. Moreover, changes in the Vienna Convention of the Law of Treaties could foster a more effective international rule of law. The international community could consider changing international customary law as it relates to treaties, by narrowing or eliminating the circumstances which may give rise to withdrawal, termination, and invalidation. This shift would recognize that treaties imposing a criminal rule of law are different than traditional treaties and should be so governed.

However, a solution to this problem already exists which would eliminate the need to create a new doctrine of treaty law:

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accountable for his international crimes—only U.S. domestic crimes. Thus, while this may mean Maduro has to answer for some of his actions, such a solution would not apply to world leaders committing crimes of international proportions against their citizens without direct involvement with crimes in another country. Making use of universal jurisdiction statutes to domestically prosecute international crimes would fill this void.

universal jurisdiction statutes. The international community should depart from the treaty-based rule of law system if it is serious about ensuring individuals who commit international crimes answer for those crimes. Promoting the use of universal jurisdiction statutes would provide this assurance. Unfortunately, this doctrine almost saw the attention it needed, but was suppressed because of political motivations and fear that the prosecutorial mechanism would be effective. Instead of attempting to create a new criminal justice system reliant on the law of treaties, promoting use of universal jurisdiction would use pre-existing systems to see that international crimes are effectively prosecuted. Rather than reinventing the wheel, this method would let the tried-and-true wheels do their jobs in furthering the fight against international impunity.

Used effectively, universal jurisdiction statutes would finally get at the root of the Latin American Displacement Crisis. Maduro, complicit government officials, and organized crime leaders could be brought under the jurisdiction of another court system, prosecuted, and ultimately held accountable for their crimes. Then, instead of relying on other countries in the Americas to continue to take on the overwhelming load of refugees fleeing Venezuela and other countries, those refugees may, one day, be able to return safely to their homes. While this goal may seem distant or unattainable, it is possible if the international legal community takes a critical look the current system and accepts that the rule of law cannot be based in treaty.