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# **The Creation and Expansion of the International Criminal Court: A Legal Explanation\***

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Abstract: International courts have proliferated in the international system in the past century, with one hundred judicial or quasi-judicial bodies currently in existence. While the supply of international courts has increased substantially, state level support for international courts varies across states, across courts, and over time. This paper focuses on the cross-sectional and temporal variation in state level support for a particular court, the International Criminal Court (ICC). The authors argue that domestic legal systems create different predispositions with respect to states' willingness to join adjudicatory bodies and the design of their commitments to international courts. Negotiators involved in the creation of the ICC pushed for rules and procedures that mimicked those of their domestic legal systems to help reduce uncertainty regarding the court's future behavior and decision-making processes. This interesting process of legal bargaining led to the creation of a *sui generis* court, one which represents a mixture of common law and civil law systems. The hybrid nature of the court's design enhanced the attractiveness of the court to civil and common law states, making them significantly more likely to sign and ratify the Rome Statute. Empirical models demonstrate that common and civil law states were fervent supporters of the ICC in preliminary negotiations and that they have shown higher levels of support for the Court since the ICC's inception in comparison to Islamic law or mixed law states.

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“Politics is driven by normative as well as material concerns (...); law is both a product of – and constitutive of – this multifaceted politics” (Wippman 2004: 155).

International courts have proliferated significantly in the international system, growing from only a handful of courts a century ago, to over one hundred judicial or quasi-judicial bodies today (Raustiala and Slaughter 2004; Romano 2006). The mounting presence of international courts reflects a more general dynamic process towards global legalization (Goldstein et al. 2001), the expansion of transnational law (Koh 1997), and a blurring distinction between public and private law (Cutler 1997). This two level legal game has been documented clearly in the case of the European Court of Justice (ECJ), where judgments rendered at the supranational level have altered the domestic law of European Union member states (Burley and Mattli 1993). It is also manifest in the proliferation of human rights courts, which go beyond the positivist tradition of giving standing to states only in international courts, and recognize the rights of individuals to bring cases forward.

The International Criminal Court (ICC), created by the Rome Statute in 1998, not only exemplifies the process of global legalization, it also points to the strong connection between domestic and international law. ICC negotiators pushed for rules and procedures that were familiar to them based on their domestic legal backgrounds, which resulted in the creation of a *sui generis* international court, an interesting compromise between common law and civil law principles. This design process was not only rational from the perspective of the court’s supporters, it also had unintended consequences, in that states considering whether to join the ICC at a later date would be influenced by the original design of the court. This nexus of domestic and international law is certainly not new; all international courts are created via interstate bargaining processes that reflect the political and legal preferences of their originators.

Yet scholars have not fully explained the interesting variation in state level support for international courts across space and time.

In this paper, we argue that states' domestic legal systems create different predispositions with respect to their willingness to join adjudicatory bodies and the design of their commitments to international courts. Advocates for a new international court seek to design a court with familiar legal rules and principles, anticipating that an initial commitment to the court will be durable and have long run consequences. States that choose to join an international court after its creation must determine if the adjudicator is capable of being fair and unbiased. States use information about the similarities between the court's design principles and their domestic legal rules to aid their decision about whether to recognize the court's jurisdiction. Applying this argument to the ICC, we argue that negotiators involved in the creation of the ICC pushed for rules and procedures that mimicked those of their domestic legal systems to help reduce uncertainty regarding the court's future decision-making processes. The hybrid nature of the court's design that emerged enhanced the attractiveness of the court to civil and common law states, making them significantly more likely to sign and ratify the Rome Statute. Empirical models suggest that common and civil law states were fervent supporters of the ICC in preliminary negotiations and that they have shown higher levels of support for the Court since the ICC's inception in comparison to Islamic law or mixed law states. We show that domestic legal systems influence the decisions of the originator states of new international courts as well as the decisions of states to join international courts after their creation.

The next two sections of the paper provide a brief historical overview of the creation of the ICC and an historical tracing of the creation and design principles of the ICC. This is followed by a theoretical argument that generalizes the qualitative evidence of the ICC's creation

to international courts more broadly, focusing on decisions by the *originators* of a new court and *joiners* to an existing court. Hypotheses linking domestic legal system types to ICC signature and ratification decisions are evaluated with quantitative evidence, through a large-N empirical analysis of state-level signature and ratification of the ICC (1998-2004). We conclude the paper by suggesting that future research on international courts would benefit from a more explicit focus on the domestic-international law nexus.

### **Negotiating the International Criminal Court**

The creation of the ICC was the culmination of years of preparatory work that began in 1989 with a request by the United Nations (UN) General Assembly to the International Law Commission (ILC) to address the issue of a permanent international criminal court. The 1990s provided a favorable era for establishing an international adjudicative body because the end of the Cold War constituted at the same time the finale of an international impasse and the start of an epoch of invigorated multilateralism. There were concerns about the need for a universal human rights court, spurred in part by the emerging use of ad hoc tribunals in the post Cold War era, most notably the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>1</sup>

The ILC, composed of legal scholars who studied the issue of an international court during the previous decades, submitted the working text for the Court to the Rome Conference. Representatives from 160 countries convened in Rome in June 1998 to excogitate the procedural and substantive details of the ICC (Schabas 2004). Some states, including some of the world's

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<sup>1</sup> The impetus for the creation of a universal criminal court dates back to the Nuremberg and Toyko trials following World War II. In 1948, the UN General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide. The UN created a body of legal experts called the International Law Commission (ILC) to assist in the further development of international criminal law (Schabas 2004, 8-9). The process for creating a new criminal court was jump-started in the late 1980s by several Caribbean states that were seeking assistance to combat drug trafficking crimes. It was also spurred on by a concern that the proliferation of new ad hoc tribunals would lead to divergent interpretations in international law and potentially led to inefficient forum shopping.

healthiest economies (Germany, Canada, Sweden) and regional powers (Argentina, Chile) stalwartly favored the creation of a strong ICC (Goodliffe and Hawkins 2008). Other states including China, the United States, and Israel, openly opposed an autonomous and powerful international criminal court. The process of lengthy and meticulous negotiations resulted in the final text of the Rome Statute, which was approved by 120 states voting in favor, 7 states voting against the Treaty, and 21 states abstaining from the vote (Schabas 2004, 18).<sup>2</sup> The International Criminal Court came into existence as an independent, permanent court with the ability to try persons accused of the most serious crimes against humanity. The ICC Statute requires that all State Parties accept the Court's jurisdiction over all crimes: genocide, crimes against humanity, war crimes, and aggression.<sup>3</sup> The Statute came into force on July 1, 2002, when 60 state parties had ratified the treaty, a figure that has grown to over 50% (105 countries) of all states today.

The level of state support for the ICC is an interesting puzzle given that joining the ICC has relatively high consequences in comparison with other international adjudicative bodies and given that states have not shown such extensive support for other international courts. For example, only 1/3 of countries recognize the compulsory jurisdiction of the International Court of Justice, despite the fact that the court that has been in existence for many decades and has established a fairly clear adjudication record (Powell and Mitchell 2007). In contrast to the International Court of Justice, reservations are not permitted when states join the ICC.<sup>4</sup> Unlike other international courts that give standing to states only, the ICC allows for an independent

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<sup>2</sup> The final vote in Rome was confidential. As a result, there exists uncertainty as to which states voted against the treaty. Nevertheless, the United States, Israel, China, Iraq, Libya, and Yemen are widely reported to have voted against the treaty.

<sup>3</sup> Rome Statute, Article 5.

<sup>4</sup> This stipulation is, of course, subject to the seven year opt-out for war crimes (Article 124 of the Rome Statute).

prosecutor and the UN Security Council to initiate the Court's proceedings.<sup>5</sup> The scope of the ICC's jurisdiction is also quite large in comparison with other international courts.<sup>6</sup>

States brought a variety of political, economic, institutional and legal preferences to the ICC bargaining table. The process of establishing international level rules in Rome was in part a *political* process. Issues such as the role of the UN Security Council, the nature and level of independence granted to the Court's Prosecutor, and the scope of the Court's jurisdiction continued to provide a cause of disquiet and incessant disagreement between the negotiating states (Goodliffe and Hawkins 2008). However, because the ICC is a court of law, *legal* factors were equally as important as political factors. Many of the states' representatives during negotiations were lawyers, not only international lawyers, but also individuals practicing domestic law as well. For example, the U.S. government administration lawyers "subjected the ILC (*International Law Commission*) drafts to extensive internal review and analysis" (Scheffer 1999, 12). As a result, legal arguments shaped the discussion: "In Rome, where many of the delegates were lawyers (many of the decision-makers in national governments were also lawyers), legal argument dominated most issues; even when law manifestly could not dictate a particular resolution, ideas about law shaped the arguments raised" (Wippman 2004, 159).

Many of the existing explanations for the creation of the International Criminal Court focus on how *political* factors, such as the power and regime type of the negotiating states, influenced the creation and ultimate design of the court. The most powerful state present at the negotiating table, the United States, is often portrayed as a spoiler in the negotiations due to its

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<sup>5</sup> Article 15 of the Rome Statute provides that the prosecutor "may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Thus, the prosecutor may investigate crimes within the scope of the ICC jurisdiction based on the referral of State Parties, victims, the UN Security Council, NGOs or any other reliable source.

<sup>6</sup> If the UN Security Council refers a situation to the ICC, its jurisdiction covers the territory of all states in the world, both State Parties and non-parties to the Rome Statute. If the situation is referred by a State Party or initiated by the Prosecutor, the ICC jurisdiction can cover the territory of a non-state Party if that state consents to the ICC's adjudicative powers.

staunch opposition to a strong, independent criminal court. Wippman (2004) describes the objections of the US towards the Court: “Bolton and others fear that the ICC represents a dangerous attempt to substitute law for politics in international affairs” (p. 179). In the negotiations in Rome, the U.S. objected to the ICC on multiple grounds: 1) the ICC could expose U.S. citizens to being sanctioned for crimes not recognized by U.S. law, 2) the ICC threatens U.S. sovereignty to prosecute its own criminals, 3) the ICC undermines the ability of the U.S. government to fight the war on terror, and 4) the ICC is subject to abuse because it is not controlled by a system of careful checks and balances (Weller 2002, 697-698).

In response to American and permanent Security Council member opposition, a group of “like-minded states” formed a coalition in support of the ICC. By the start of the Rome negotiations, the like-minded coalition constituted over 37% of the 160 participating states (Schabas 2004, 15-16). An explanation of ICC formation viewed through the lens of relative power would focus on the balance of power that emerged primarily between the U.S. and members of the like-minded group and the compromises that were ultimately struck between these groups.

Insight into the domestic characteristics of the negotiating states provides another compelling *political* explanation of the emergence of the ICC. Danner and Simmons (2008) developed an interesting credible commitment theory to explain state decisions to join the ICC. They argue that two factors interact to produce high or low levels of support for the ICC: the level of domestic accountability and the recent history of domestic violence (e.g. civil war). Governments that have recently committed atrocities against domestic civilians may find the ICC an attractive commitment because it can tie their hands in the future. Whether this hand-tying strategy works is dependent on the level of domestic accountability inside the state, where a high



level of accountability implies freedom of press, functioning democratic institutions, and a commitment to the rule of law. High credibility states without violent histories can commit to the ICC fairly easily because they anticipate that criminal cases are not likely to go to the international court. Low credibility states with recent domestic violence also find a commitment to the ICC attractive because it allows these governments to send a credible signal about their future commitment to civil peace. The theoretical argument and empirical findings produce a surprising expectation: “peaceful democracies and civil-strife ridden non-democracies tend to display nearly the same ratification propensity” (Danner and Simmons 2008, 21).

While an emphasis on political factors, such as domestic accountability, gives us quite a bit of leverage for understanding the creation and expansion of the ICC, we think scholars have given short shrift to *legal* factors, especially the interaction between domestic and international law in the ICC negotiations. The degree of legal regulation enclosed in the procedural provisions of the Rome Statute reflects the legalistic character of negotiations. The amount of procedures outlined in the Rome Statute is truly unprecedented: “The ICC statute contains a full procedural scheme devoting three of its 13 parts to purely procedural issues” (MacCarrick 2005, 39).<sup>7</sup>

In character, the Rome Treaty resembles to a large degree national laws establishing domestic criminal courts, replete in detailed legal rules. It not only establishes a novel international adjudicative body, but “it is also a criminal code, embodying a highly articulated set of rules on criminal procedure” (Arsanjani and Reisman 2005, 389). These rules are not unique; they have been drawn from domestic legal systems. When examining the creation of an international legal institution, it is crucial to consider that international law-making does not take place in a vacuum, but “against a backdrop of existing legal norms and institutions, which

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<sup>7</sup> This fact distinguishes the ICC from the *ad hoc* Tribunals established for the former Yugoslavia and Rwanda.

condition and limit the range of options viewed by the participants in the process as possible, and which simultaneously shape the process itself” (Wippman 2004, 158).

Thus, not all bargaining outcomes expressed in the Rome Statute came into being as a result of political determinants. The structure and procedures of the ICC were to a large extent determined by preexisting laws, which reflect criminal codes of domestic legal systems. Lawyers who were negotiating the Rome Treaty came to the bargaining table with specific ideas about international law and legal institutions stemming from their domestic legal training as civil, common, or Islamic lawyers (Benedetti 2007).

To consider the influence of legal factors on the creation and expansion of the ICC, we focus our attention on the world’s three major legal families: civil law, common law, and Islamic law.<sup>8</sup> The primary substantive and procedural differences between the civil, common and Islamic legal traditions are summarized in Table 1.<sup>9</sup> Civil law is based on a system of written codes and stems from the laws of the Roman Empire. The defining characteristics of the civil law system include the doctrine of good faith (*bona fides*), a high degree of formalism in legal procedures, and an inquisitorial approach to litigation. Examples of civil law states include France, Spain, Italy, and Germany. Common law originated on the British Isles as a result of the Norman invasion of England in the 11<sup>th</sup> century. The main characteristics of the common law system are the presence of the doctrine of the precedent (*stare decisis*), an adversarial approach

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<sup>8</sup> Many legal scholars propose divergent classifications of legal systems, families, or traditions of the world (David and Brierley, 1985; H. Patrick Glenn, 2000; Joireman, 2001; La Porta et al. (1999). The ‘legal origin’ variable developed by La Porta et al. (1999) has the following categories: English, Socialist, French, German, and Scandinavian. We focus our attention on major legal families because some of the same legal practices and principles are present in multiple legal origin categories as identified by La Porta et al. (1999). For example, there is a great deal of legal overlap between states with French or German legal origins because the procedural and substantive concepts in both systems stem from Roman (civil) law. Also, La Porta et al.’s omission of the Islamic legal system constitutes one of major shortcomings of that categorization, since Islamic law is considered by the majority of legal scholars as one of the most important legal traditions of the world.

<sup>9</sup> Below, we elaborate on how these procedural and substantive differences mattered for the ICC negotiations. The key distinction was between the adversarial approach to criminal law in common law systems and the inquisitorial approach to litigation in civil law systems.

to litigation, and the absence of a comprehensive statutory regulation. This legal system is present in the United Kingdom, the United States, New Zealand, and Australia. The Islamic legal tradition stems from the revelations to the Prophet Muhammad, making it inescapably connected to the Islamic religion. The sources of Islamic law are primarily religious (the Koran, the *sunna*). Islamic law is characterized by a strong commitment to contractual compliance (*pacta sunt servanda*), a lack of contracting freedom, and little or no right to appeal. Examples of states belonging to this legal family include Saudi Arabia, Kuwait, and Lebanon.<sup>10</sup>

Legal training within each domestic legal tradition determines in part lawyers' understanding of basic legal concepts. It is only natural to expect legal experts to draw upon their legal background in drafting a state's international commitments: "In comparative law, there are many situations where the same legal term has different meanings, or where different legal terms have the same legal effect. This can often cause confusion to both lawyers and their clients. This confusion most often occurs when civil lawyers have to deal with common law, or *vice versa*, when common law lawyers deal with civil law issues" (Pejovic 2001:817). Because of a unique blend of legal traditions present at the Rome negotiations, the ICC was given an unprecedented legal structure, one that reconciles domestic legal traditions. In the next section, we discuss the hybrid features of the International Criminal Court that emerged in negotiations between states with very distinctive political and legal preferences.

### **The Legal Structure of the ICC**

In order to find a common ground between a majority of the negotiating states, the ICC drafters included provisions in the Rome Statute characteristic to both common law and civil law.

Several legal scholars describe the ICC as a true compromise between common and civil legal

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<sup>10</sup> Some countries have what we call mixed law systems in which civil, common, and Islamic law traditions are mixed with one another or with a state's customary law tradition (e.g. Confucianism). These states constitute less than 10% of all countries in the world; examples include Botswana, Brunei, Cameroon, China, Israel, and Japan.

traditions, which makes the court truly unique (Christensen 2002, Kress 2003, Tochilovsky 2002, Hunt 2004, Politi and Gioa 2006). Prior to the establishment of the ICC, the procedural rules of most international adjudicative bodies resembled either common law or civil law. For example, the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) were heavily reliant on the adversarial procedure present in common law states.<sup>11</sup> The International Court of Justice, on the other hand, clearly follows the legal logic of the civil law tradition (Powell and Mitchell 2007). The drafters of the Rome Statute tried to avoid jargon specific to either legal family, which resulted in a set of procedural laws that reflected a compromise between the two legal traditions (Kress 2003). However, this compromise was not easy to achieve: “The pace of work at the Ad Hoc and the Preparatory Committees was extremely slow, as delegates engaged in lengthy descriptions of the benefits and advantages of each national system, apparently having lost sight of the purpose and the negotiating nature of the meetings” (Fernández de Gurmendi 1999, 220)

We focus our discussion on four design features of the ICC that illustrate the ultimate hybrid nature of the court: the nature of the trial, the position of the ICC judges during proceedings, admission of guilt of the accused, and appeal proceedings.

### The Nature of the Trial

Civil law and common law systems differ sharply with respect to the nature of the trial. In the common law adversarial approach to litigation, the trial constitutes a contest between two parties who have to prove their case to the court. Litigating parties conduct ‘one-sided’ investigations, which means, *inter alia*, that the prosecution has no legal obligation to actively

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<sup>11</sup> The first President of the ICTY, Judge McDonald, brought with her a complete set of common law-based procedural rules proposed for the Court, which had been prepared by a special committee of the American Bar Association (Tochilovsky 2003, Bassiouni 1996).

look for exonerating evidence.<sup>12</sup> In contrast, in civil law systems, which take an inquisitorial approach to litigation, the trial is not seen as a duel between two adversaries: “the State has an obligation to investigate both incriminating and exonerating circumstances equally. The defense plays an active role in the State’s investigation” (Tochilovsky 2002, 269).<sup>13</sup>

The Preparatory Committee helped to reconcile competing civil law and common law perspectives on the nature of the trial: “At the final session of the Preparatory Committee in April 1998, a group of delegations from both civil and common law traditions achieved a major breakthrough. The group met informally and managed to simplify and restructure in a substantial way articles pertaining to proceedings of the pretrial” (Fernández de Gurmendi 1999, 223). Some features of the court, such as disclosure obligations, stem directly from common law.<sup>14</sup> There are also features adapted from the civil law, such as the duty of the Prosecutor to investigate both incriminating and exonerating circumstances equally in order to find the truth, which mirrors inquisitorial procedures in civil law systems (Article 54 of the Rome Statute).

#### Position of the Judges during Proceedings

Civil (inquisitorial) and common (adversarial) approaches to litigation differ sharply in the way that they regulate the position of a judge during the proceedings. In the strictest version of the adversarial approach, “the judge is conceived of as a mere arbiter of the issues raised by the parties and has to form his or her decision exclusively on the basis of evidence and elements submitted by the latter” (Politi and Gioia 2006, 112). In an inquisitorial system, the judge is very active during the proceedings and endeavors to ascertain the facts while concurrently

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<sup>12</sup> In most common law states, when exonerating evidence is found, it must, however, be presented to the defense.

<sup>13</sup> In practice, what this means is that according to the inquisitorial approach to litigation, the public prosecutor is obliged to present to the court not only evidence that may lead to the conviction of the defendant but also evidence that may lead to his exculpation. In contrast to the adversarial system, in an effort to make the trial less like a contest between two adversaries, the civil law-based inquisitorial system requires a judge to take an active part in the trial, with a role that is both protective and directive.

<sup>14</sup> Disclosure obligations refer to a process that may constitute a part of legal proceedings, whereby parties inform (disclose) to other parties the existence of any relevant documents that are, or have been, in their control.

representing the interests of the state in a trial. Far from being a passive recipient of information, a civil law judge bears the primary responsibility of supervising the assembling of necessary evidence. He or she is, therefore, an autonomous power searching for the truth.

The “proper” position of the judge during proceedings was a source of strong contention between civil and common law negotiators at Rome:

Delegations coming from the common law traditions felt that any judicial intervention during an investigation apart from the traditional warrant issuance function, could affect the independence of the Prosecutor. The contrary position was argued by delegates from countries with a civil law tradition who claimed that justice required the existence of at least some degree of judicial supervision and intervention so that the accused was guaranteed sufficient means to prepare his or her defense and that power was not abused by the Prosecutor (Guariglia 1999, 228).

The ultimate compromise created a position for ICC judges that is very similar to civil law judges; they are “vested with autonomous powers, most notably relating to the collection of evidence, namely in the exercise of their function and responsibility to protect the rights and interests of the defense” (Politi and Gioia 2006, 112). ICC judges have the power to request evidence in addition to that already collected prior to the trial (article 64.6 d of the Statute), and the Trial Chamber can require “a more complete presentation of the alleged facts” (rule 69).

#### Admission of Guilt of the Accused

The ICC rules governing an admission of guilt by the accused provide another example of a truly hybrid civil-common regulation. In common law, admission of guilt by the accused leads to conviction and the end of the trial if it was voluntary, unequivocal, and informed. In civil law, such a situation does not necessarily mean that the accused will be convicted; the judge can always decide not to convict the accused based on different or additional evidence (Bosly 2004). This was another point of contention between the common and civil law delegates. During the lengthy process of ICC negotiations “it soon became evident that the concept of the guilty plea

was the ‘test case’ for the Preparatory Committee’s ability and willingness to arrive at solutions which accommodated concepts from both the common law and the civil law legal systems” (Behrens 1999, 241). Civil and common law delegations worked out a solution that avoided using the familiar terminology of either common or civil legal traditions, and thus “the proposal achieved immediate support” (Behrens, 242). Article 65.2 of the Rome Statute reflects this ultimate compromise; the Chamber may convict the accused based on his/her admission of guilt and end the trial; however, the Chamber is not required to do so.

### Appeal Proceedings

A unique solution was adopted by the Rome Statute in the context of appeal proceedings. Most legal scholars hold that appeal proceedings are typical of the inquisitorial rather than of the accusatorial systems. In the latter, the right to appeal is allowed only under narrow terms, and “the relevant proceedings are conceived of more as a revision of first instance proceedings, aimed at identifying and remedying failures of the proceedings in first instance, rather than as a ‘second’ proceeding bearing on the very same facts as examined in the first instance phase” (Politi and Gioia 2006, 115). The ICC again embodies solutions promoted by both common and civil legal traditions. The right of appeal is recognized on a wide basis, but the appeal proceedings are not considered to be a new trial on the same facts.

### Islamic Law and the ICC

As the above section shows, the writers of the Rome Statute relied on both civil (inquisitorial) and common (adversarial) approaches to litigation. What about the third major legal tradition of the world, Islamic law? The acute differences between Islamic law and western legal systems constituted a large obstacle at the Rome conference. Much like in the bargaining processes that created other international judicial bodies, Islamic law was largely neglected in the

ICC negotiations. First of all, since the Islamic legal tradition is the least widespread among the three major legal systems of the world, Islamic law states constituted by far the smallest group amongst the negotiators.<sup>15</sup> Thus, their bargaining power in comparison with civil or common law states was much smaller.

Furthermore, relations between Islamic law states and international institutions, especially international courts, have been on shaky ground due to the inherent link between Islamic law and the Islamic faith (Brower and Sharpe 2003, Roach 2005). Wippman (2004) describes the attitude of the Arab states towards the Court as “hostile” (p. 162), arguing that Islamic states “feared that the ICC would be used as a tool of Western interests and that their nationals and government officials might some day be subject to ICC investigation and prosecution” (p.162). The fact that Muslim judges are unlikely to sit on the Court continuously further complicates matters for Islamic law states, who fear that non-Islamic judges “may not be familiar with or sensitive to the *Shari’a* principles and that, consequently, justice may not be carried out as it should be” (Abtahi 2005, 646). Problematic is also the reality that under strict Islamic principles, Muslim may not be judged by non-Muslim judges (Abtahi 2005). Moreover, some Islamic law states, such as Saudi Arabia, Bahrain, Kuwait, Oman, and Yemen, self-identify as “Arab Islamic states”. This term is meant to convey the inherent bond between *sharia*, or Islamic law, state rule, the monarch, and citizens. The direct incorporation of *sharia* into a state’s political affairs is expressed, for example, in the constitution of Sudan, where Article 4 asserts that God holds supreme authority “over both sovereignty and the state” (Roach 2005, 146). This stipulation sets *sharia* above all man-made laws, including international law. Unlike Western legal systems, there is no division between state-level decision-making and the Islamic religion in Islamic law. This implies that

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<sup>15</sup> In 1998, the year that the Rome Statute was signed, the distribution of domestic legal families was as follows: 51% civil law states, 25% common law states, 14% Islamic law states, and 10% mixed law states.



judges operating in Islamic domestic legal systems use *sharia* to “determine which criminal penalties to impose on Muslims accused of violating sharia codes” (Roach 2005, 153). The ICC would have the power to subject citizens of an Islamic state to secular international laws, which gives the ICC jurisdictional power that goes directly against the Islamic faith.

Generally speaking, domestic criminal laws in most Islamic states stand in sharp contrast to international criminal law. M. Cherif Bassiouni, the chairman of the drafting Committee at the Rome Conference, described Islamic criminal law in the following way: “Arab Islamic states have generally failed to adopt a ‘progressive codification of Islamic criminal justice (procedure and administration), which could sift through and distill the law and practices of Islam and adapt it to a contemporary framework which would keep faith with the past, while setting the foundations for the future.’” (1982, 42; cited in Roach 2005, 154) In short, Islamic criminal law is fundamentally different from western legal traditions and international criminal law, and these stark differences ultimately minimized the impact of the Islamic legal tradition on the structure and procedures of the ICC.

### **A Theoretical Model of International Courts**

It is fairly clear that negotiating states were influenced by their domestic legal backgrounds and their training in criminal legal procedures when negotiating the design of the International Criminal Court. This interesting intersection of domestic and international law occurs frequently when international courts are formed. The initial negotiators of new courts design institutions in ways that are optimal from both a *political* and *legal* standpoint. Later joiners to the court are influenced by the court’s principles and rules as well, viewing some international courts as more capable and fair adjudicators than other international courts. In this section, we develop a

theoretical argument linking domestic law and international courts. While we focus on the ICC empirically, our theoretical argument can be generalized to other international courts as well.

Our theory distinguishes between the motives of states creating a new court (the originators) and the decisions made by states to join existing international courts (the joiners). The originators are able to negotiate the design of an international court's rules, while the joiners must condition their decision to accept the court's jurisdiction based on the existing rules and practices of the court. Domestic legal systems influence the decisions of both originator and joiner states, although the theoretical mechanisms operating in the two stages are distinct.

#### The Originators: Decisions to Create a New International Court

International courts are created through lengthy and detailed negotiations. It is not surprising that major powers, such as the United States and the United Kingdom, play a significant role in these processes. The victors of major wars seek to construct new international orders after victory (Ikenberry 2001), which often includes the establishment of new global courts, like the Permanent Court of International Justice (PCIJ) following World War I, and the International Court of Justice (ICJ) following World War II. However, unlike other international institutions that often provide direct benefits to major power originators (e.g. regional free trade agreements), international courts are distinctive because they can mitigate power asymmetries in interstate bargaining. Weaker countries have more to gain from a system of effective international courts than major powers because international courts help to level the playing field in world politics (Scott and Carr 1987; Bilder 1998). Empirical evidence supports this conjecture; as states' capabilities increase, they are significantly more likely to renege on optional clause declarations to the World Court, with the United States' departure from the ICJ in 1986 being one of the most prominent examples of this behavior (Powell and Mitchell 2007).

As noted earlier, states have political and legal preferences that they bring to the bargaining table when creating a new court. States that are strongly committed to the court's creation have incentives to lock-in their own country's future commitments to the court (Moravcsik 2000). Negotiators may tie their country's future hands by designing a court with sound design principles and enforcement mechanisms. They may also tie their country's hands by raising the reputational costs for reneging on the court's future judgments. If the originators are supportive of the court, they have incentives to create procedures and rules for the court's operation that will benefit their country in future litigation cases, or at a minimum, ensure that the adjudicator's behavior will be reasonably predictable.

If states can anticipate high degrees of future enforcement, they have incentives to negotiate intensely to secure the best deal possible: "though a long shadow of the future may make *enforcing* an international agreement easier, it can also give states an incentive to *bargain harder*, delaying agreement in hopes of getting a better deal" (Fearon 1998, 270). International courts do have not the same types of enforcement mechanisms as domestic courts, although they are able to raise the reputational costs for noncompliance and they have institutional resources at their disposal for helping parties to carry out judgments. The UN Secretary General, for example, often provides assistance to parties in the process of compliance with ICJ judgments. The UN played a significant role in the process of monitoring the transfer of the Bakassi peninsula from Nigeria to Cameroon following the 2002 ICJ ruling (Mitchell and Hensel 2007).<sup>16</sup> These compliance mechanisms seem to have some teeth as well; 93% of PCIJ and ICJ rulings over territorial, maritime, or river issues have been carried out by all disputants (Mitchell and Hensel 2007, 735).

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<sup>16</sup> The final transfer of Bakassi territory was completed in August 2006.

If our basic assumption about a long shadow of the future for international courts is apt, then it is reasonable to argue that states' legal preferences will enter into their calculations as originators of the court. There are strong incentives for a state (or group of states) to push for an institutional design that mimics the legal procedures employed domestically inside the state. Uncertainty about how the court will identify cases to be heard and how it will rule on particular cases is mitigated if the court's rules and procedures are familiar. This is especially important since international courts have in the past diverged in their interpretation of international law. Discrepancy in interpretation of legal rules, albeit disheartening, is inherently connected with the proliferation of international tribunals. Judge Guillaume of the ICJ has expressed his concern numerous times about the emerging possibility of "forum shopping" that can possibly "generate unwanted confusion" and "distort the operation of justice" (Koskenniemi and Leino 2002, 554). A vivid example is provided by the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadić case (1999), where the Court deviated from the "effective control" criterion that the ICJ used in the 1986 Nicaragua case to determine the responsibility of a state for acts of a military group. If states have the ability to forum shop in the process of dispute settlement, then the original negotiators of a new court have incentives to lock-in an institutional design that will benefit their state in the future.

To reduce uncertainty about the interpretation of international law, states attempt to design international courts in a way that resembles their domestic legal systems. States can use their domestic legal systems as clues about the court's future proceedings and judgments. Jouannet calls this a process of "selling...each national legal model in order to influence the establishment of international norms and institutions" (2006, 300). Civil lawyers approach drafting and interpretation of multinational agreements as they would a civil code (Koch 2003).

Similarly, common law lawyers promote designing of international agreements in the spirit of their domestic legal system (Jouannet 2006). This was evident during the ICC negotiations, where civil law and common law negotiators pushed strongly for familiar rules and procedures relating to the nature of the trial, the position of the ICC judges during proceedings, admission of guilt of the accused, and appeal proceedings. States can be more comfortable with the role international courts will play in future litigation situations if they are familiar with the court's rules and procedures and more confident about the types of decisions the court will render.

As our discussion of the ICC structure shows, the Court constitutes a true hybrid of civil and common legal procedures. States representing these two domestic legal systems were represented in large numbers throughout the negotiating process. As the primary designers of the ICC, civil and common law states have invested a lot of effort to mold the structure of the Court to their expectations. Much like major powers who seek to lock in an international order following victory in major war (Ikenberry 2001), states who participate in the conception of a new international court invest an incredible amount of sunk costs into the court's creation and design. The high sunk costs and fulfilled expectations regarding the structure of the ICC imply that both civil and common law states are most supportive of the Court. Islamic law states were largely underrepresented throughout the negotiating process, thus their investment in the ICC is much smaller than that of "western" law states. The unfriendly relationship between Islamic law and international criminal law reduces Islamic law states' support for the ICC.

Once the originators of a new international court have locked in a particular institutional design, they face greater costs for reneging in their commitment to the court in comparison with later joiners. The United States' departure from the ICJ in 1986 was viewed along these lines, with international law scholars and pundits describing the broader negative consequences for the

entire system of international law that this decision invoked. Thus, the originators of a new court may face greater international and domestic audience costs for failing to support the court at some later date, which creates a system whereby most originators are defenders of the status quo.

### The Joiners: Decisions to Join an Existing Court

In contrast to the originators of international courts, potential joiners to an international court must accept the court's standing rules and procedures, which are not negotiable.<sup>17</sup> Joiners must weigh the domestic and international costs and benefits of joining an international court. As a general rule, we assume that states prefer working with courts that they view as fair and unbiased.<sup>18</sup> We also assume that states can send signals to other states about their "type" on various international issues through an international court, such as a commitment to the peaceful settlement of interstate disputes or the promotion of ethical human rights standards. While such signals are aptly described as cheap talk (Crawford and Sobel 1982; Farrell 1987; Farrell and Gibbons 1989; Farrell and Rabin 1996; Kim 1996; Matthews 1989),<sup>19</sup> they can be conveyed meaningfully through an adjudicator to other states with similar legal preferences (Powell and Mitchell 2007).

In the context of the ICC, states that wish to present themselves as true proponents of the human rights agenda want to send strong signals to the whole international community regarding their stance on human rights violations. Both state leaders and nongovernmental organizations (NGOs) consider the ICC as an important part of the newly championed human security agenda. Unfortunately, signals concerning support for human rights are often hard to convey because

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<sup>17</sup> Some courts, such as the International Court of Justice, allow states to place reservations on their declarations, although the basic procedures and rules governing the court's operation are not negotiable.

<sup>18</sup> This does not imply that an international adjudicator is unbiased towards all disputants, only that states coming before the court have some assurances that they can trust that particular adjudicator to be fair towards them.

<sup>19</sup> Cheap talk can be defined as a "statement that may convey information even though the statement is costless, nonbinding, and nonverifiable" (Baird, Gertner, and Picker 1994, 303).

they are mostly seen as cheap talk. The credibility of states' signals concerning human rights is especially problematic because of extremely weak international enforcement mechanisms, lack of immediate benefits stemming from compliance, and large past defection rates.<sup>20</sup> However, a commitment to the ICC is a more consequential act than joining a human rights treaty because it allows for an independent prosecutor to bring criminals to justice in situations where state governments are unable or unwilling to do so.

We portray the ICC as an adjudicative institution that can influence the behavior of states by correlating strategies, creating focal points, signaling information, and providing a forum through which states can convey private information (McAdams 2005, 1049; Garrett and Weingast 1993; Ginsberg and McAdams 2004; Powell and Mitchell 2007). First, the ICC is able to correlate states' strategies by providing legal focal points. By becoming a party to the Rome Statute, a state expresses an *ex ante* willingness to correlate its behavior with other state parties to the Statute. In the case of a trial, the resulting decision of the Court makes a particular international law-based outcome a new focal point. Acceptance of the ICC jurisdiction's via signature and ratification of the Rome Statute expresses a state's belief about the adjudicator's fairness and creates "self-fulfilling expectations" that the judgment will correlate their equilibrium behavior (McAdams 2005, 1078). Furthermore, acceptance of the ICC jurisdiction fulfills the requirement of identifying in advance the signal that will serve as the focal basis for coordinating, which is "necessary to produce ex post compliance with the endorsed outcome rather than its opposite and rather than with some competing expression" (McAdams 2005, 1078). The strength of the ICC in correlating the parties' strategies rests in its commitment to punishing "the most serious crimes" and its "respect for and the enforcement of international

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<sup>20</sup> On average, 83% of states have ratified and at least minimally violated the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) since it became binding in 1987 (Powell and Staton 2008).

justice” (Preamble, the Rome Statute). This declared fairness of the ICC is not unique; other international adjudicative bodies such as the ICJ, the ECJ, and the European Court of Human Rights rest on their commitment to the international rule of law.

Secondly, the ICC can promote interstate cooperation by revealing private information to the disputing parties. If the parties believe the adjudicator is unbiased, they “will view his rulings as signals of his beliefs and update their beliefs accordingly” (McAdams 2005, 1070). The degree of reputability of the ICC as an international adjudicator is quite high. First, the ICC, just as its predecessors the ICTY and ICTR, or concurrent adjudicative organs like the ICJ or the ECJ, constitutes an embodiment of the international rule of law (Weller 2002, Wippman 2004). Second, the ICC came into existence as a result of lengthy negotiations between a large percentage of the world’s states (161 states in total). This fact by itself gives the ICC the purchase of an *a priori* respected adjudicator. Third, its meticulously constructed rules and procedures of functioning, as well as the selection of judges, correspond to its proclaimed neutrality, which warrants its unquestionable commitment to international law.

McAdams (2005) expressive theory provides interesting insights into the role of an adjudicator, although we make some modifications to the theory following upon the work of Powell and Mitchell (2007). First, we propose that some states have stronger incentives to ask for an adjudicator’s assistance. In the case of the ICC, a request for the Court’s assistance is expressed *a priori* by a state through signature and ratification of the Rome Statute. McAdam’s (2005) theory rests on the assumption that the adjudicator is unbiased. As explained above, the rules and procedures of the ICC constitute a hybrid of the civil (inquisitorial) and common (adversarial) systems. Islamic law, on the other hand, is simply absent from the structure of the ICC. This fact, we argue, creates a significant bias in favor of both civil and common law states.



The hybrid nature of the ICC encourages both civil and common law states to support the Court *a priori* by becoming state parties. Because there may be several ways through which the players can achieve Pareto-optimal outcomes, the parties must be able to create uniform expectations. In other words, “the parties must agree on what each will regard as cooperative and defective behavior” (McAdams 2005, 1081). Because the ICC procedures closely resemble Western legal systems, both civil and common states will be likely to correlate their equilibrium behavior naturally. The costs of coordination are reduced since these states and the adjudicator share the same belief about permitted and forbidden criminal behavior. Also, both civil and common law states will be more likely to help the ICC carry out its rulings since they view the ICC rulings with legitimacy.<sup>21</sup> Common and civil law states employ the same principles as the Court domestically. This not only enhances their approval of the ICC, but augments their view of the Court as an embodiment of the international rule of law.

Second, McAdam’s expressive theory of adjudication does not take into consideration how the effectiveness of cheap talk can depend on the similarities of states’ preferences. Cheap talk promotes cooperation in bargaining settings more easily if two parties have common interests (Crawford and Sobel 1982). Similarly, the act of becoming a party to the Rome Statute works best for legally compatible states. Civil and common legal systems, although distinct in numerous areas, share many similarities. Both are ‘western legal systems’, both uphold the

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<sup>21</sup> Article 86 of the Rome Statute requires that State Parties cooperate with the ICC in its investigation and prosecution.

doctrine of freedom of contracting,<sup>22</sup> both grant to an individual an extensive right to appeal his/her case to a higher court, and both draw a sharp dividing line between law and religion.<sup>23</sup>

Not only do civil and common legal traditions share numerous similarities, they have become increasingly similar over time (Shapiro 1986; Shahabuddeen 1996; Markesinis 2000). The jurisprudence of courts of last resorts in civil law states, where the doctrine of the precedent is *de jure* prohibited, has developed over time in the direction of a powerful inclination to adhere to its previous decisions. Also, highest courts in some common law systems have come to accept that they are not constrained by their previous judgments, but within sharply-defined boundaries they might depart from them (Shahabuddeen 1996). Moreover, statute law has recently become a much more important source of law in certain common law countries. For example, the amount of enacted law in the United Kingdom has recently increased as a result of the integration of British law with the European legal culture (Markesinis 2000). These changing processes within the civil and common legal systems have brought the two legal orders closer together (although see Legrand 1996, 1997).<sup>24</sup>

These developments suggest that the acceptance of the ICC's jurisdiction should work best as a form of cheap talk between both civil and common law states. These two legal families are similar in many ways and they have become alike in recent years. Islamic law, with its strict

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<sup>22</sup> In Western legal thought, freedom of contracts has been, together with the principle of the autonomy of the will, considered as one of the major contract-related concepts (Powell 2006). The freedom of contracting principle states that "one is perfectly free to enter into a contract with whomsoever one wishes" (Mohammed, 1988:126). It stems from the *laissez faire* economic school of thought, which holds that the market performs best when it is left to its own devices.

<sup>23</sup> Islamic law stands in sharp contrast to civil and common legal traditions. In Islamic law, "no contract which derogates from any principle of the *Sharia* may be validly concluded" (Rayner, 1991:91), which is a contradiction to the freedom of contracting doctrine.<sup>23</sup> Beyond contracting restrictions, Islamic law also allows for the right of appeal in very few circumstances. The close connection between Islamic law and Islam limit the possibilities for Islamic law countries to cooperate through the ICC and other western designed courts (Al-Azmeh, 1988, Lippman et al., 1988).

<sup>24</sup> Other developments include gradual introduction of the good faith doctrine to the common law systems (examples: the United States Uniform Commercial Code, section 1-304, the US Restatement (Second) of Contracts, in Great Britain, the European Consumer Protection Directive of 1994 transplanted good faith directly into the body of British contract law).

adherence to *sharia*, remains unique and piercingly different from the “western legal traditions.” This suggests that civil and common law states are better equipped to use their acceptance of the ICC jurisdiction as cheap talk about their commitments to good human rights practices. Signature and ratification of the Rome Statute does not benefit Islamic law states in the same way that it does civil and common law states. States with mixed law systems should also be less accepting of the ICC given the difficulties they have reconciling their domestic legal traditions with the rules and procedures of the criminal court.

In conclusion, domestic legal systems give us considerable purchase for understanding the motives of originators and joiners of international courts. As applied to the International Criminal Court, it should be clear that we have similar theoretical expectations linking domestic legal systems and signature and ratification decisions by originators and joiners, even though the theoretical mechanisms at each stage are distinct. We evaluate our theoretical argument by testing the following two hypotheses:

H1: States with western legal systems (civil and common) are more likely to sign the Rome Statute than states with Islamic law systems.

H2: States with western legal systems (civil and common) are more likely to ratify the Rome Statute than states with Islamic law systems.

We evaluate these hypotheses for all state-years, as well as separating out the originators and joiners of the ICC in our analyses. Our quantitative evidence focuses on the ICC, although as noted above, the theoretical argument can be generalized to other international courts as well.

### **Empirical Evidence: Signature and Ratification of the ICC**

The temporal domain of this study is 1998 – 2004, since the Rome Statute was opened for signature and ratification in 1998. The basic unit of analysis in our empirical models is the state-year. The ICC Statute allows state parties to withdraw from the Court if they provide a one-year

notice (Article 127(1)), but so far no state has done so. Our main goal is to explain the variation in states' decisions to sign and/or ratify the Rome Statute, which is why we employ logit models for signature and/or ratification. To distinguish between the decisions of the court's originators and joiners, we coded the 161 states involved in the Rome negotiations as originators. The theoretical processes that lead to the creation and expansion of the court are distinct, but we anticipate that civil and common law states will be significantly more likely to sign and/or ratify the Rome Statute no matter if they are originators or joiners.

#### Signature/Ratification of the Rome Statute

We code two dependent variables: signature and ratification (or accession) to the Rome Statute. Signature is not legally binding, but it indicates a state's readiness to participate in discussions relating to the formation of the ICC and a pledge not to actively undercut the ICC (Danner and Simmons 2008, Swaine 2003). As such, the act of signing the Rome Statute alone does not commit a state to the ICC's jurisdiction. Signature, although not legally binding, carries an important message to the international community, and shapes other states' perception of the signing state; it has an "expressive value" (Danner and Simmons 2008, 21). It is an excellent example of why commitment to the ICC is a form of cheap talk. Ratification (or accession) carries more weight since it is legally binding, which makes the commitment more difficult and costly to reverse. We expect common and civil law states to sign and ratify the Rome Statute more frequently than Islamic or mixed law states, although the relationship should be strongest in the ratification stage given the legal ramifications of this act.

#### Domestic Legal Systems

In order to capture the impact of divergent domestic legal systems on the propensity of states to sign and ratify the Rome Statute, we construct four mutually exclusive dichotomous

variables: civil law, common law, Islamic law, and mixed legal system.<sup>25</sup> The analyses are estimated with Islamic law as the reference category. Information about domestic legal systems has been gathered using the CIA Fact Book, which describes major characteristics of legal traditions of each state in the international system, and several other subsidiary legal sources.<sup>26</sup> The appendix provides a list of countries grouped by domestic legal type, as well as the dates of their signature and/or ratification of the Rome Statute.

### Control Variables

We include three control variables in our analyses: rule of law, capabilities, and regime type.<sup>27</sup> The first variable (rule of law) captures an additional dimension of the *legal* aspects of support for the ICC, while the latter variables (capabilities, regime type) capture the *political* aspects described earlier. The structural and procedural features of the ICC reflect a strong commitment to the rule of law. The independence of the Court and its Prosecutor from any type of direct political control reflects the outlook of highly legitimate domestic legal systems where the rule of law abides. Danner (2003, 515) rightly noticed that the legal features of the newly established Court transform the Court “from a political body festooned with the trappings of law to a legal institution with strong political undertones.”

The existing literature provides two opposing arguments regarding the relationship between domestic rule of law and states’ international behavior towards international courts. Some scholars suggest that states with high degree of respect for the rule of law domestically

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<sup>25</sup> As noted above, the mixed category captures the legal system of countries where two or more systems apply interactively or cumulatively.

<sup>26</sup> The following sources have been utilized: Glendon et al. 1994; Opolot 1980, Kritzer 2002, website created at the Law Faculty of the University of Ottawa: <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>.

<sup>27</sup> We estimated models with other control variables as well, most notably with domestic threat (a count of domestic terror incidents) and civil war. Domestic threat did not have a consistent effect on ICC signature or ratification. Countries that experience civil wars are significantly less likely to sign and ratify the Rome Statute. We tried the interactions proposed by Danner and Simmons (2008) between civil wars and regime type and find a similar pattern, namely that autocracies with recent civil wars are more likely to sign and ratify the Rome Statute than democracies with recent civil wars.

should be less likely to sign onto binding international agreements. Because states with high internal respect for the rule of law are more likely to comply with their international agreements, they enter only into international commitments that they can keep (Slaughter 1995, Simmons 1998, Simmons 2000b, Goldsmith and Posner 2005, Powell 2006, Kelley 2007).<sup>28</sup> Citizens in countries where the rule of law is respected internally expect the government to abide by the rule of law internationally. Defection from international commitments can damage states' reputation both internationally and domestically, which makes high rule of law states cautious about their international commitments.

An opposing argument suggests that high respect for the rule of law domestically should encourage a state to support legitimate adjudicative institutions and regimes internationally (Powell 2006). The Rome Statute rests on the principle of complementarity, which allows states who have jurisdiction over a case to first investigate the case themselves; in other words, the ICC is permitted to act only if a state fails to act. More specifically, according to Article 17 of the Statute, the ICC can exercise its jurisdiction over a case if “the state is unwilling or unable genuinely to carry out the investigation or prosecution.” It is reasonable to imagine that states with highly legitimate domestic legal systems do not foresee the ICC to ever exercise its jurisdiction over them. They probably think of themselves as never becoming “unwilling” or “unable” to handle a case domestically because they already have strong domestic adjudicative structures.<sup>29</sup> States with low internal respect for the rule of law, on the other hand, are plagued with highly deficient and corrupt judicial structures, making them more susceptible to Article 17.

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<sup>28</sup> This fits with Fearon's (1998) argument about bargaining hard for a good deal if enforcement of the future agreement is very likely.

<sup>29</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50<sup>th</sup> Session, Supp. No 22, para. 47, UN Doc. A/50/22 (1995).

This perspective suggests that states with high internal respect for the rule of law should be more likely to support the ICC.<sup>30</sup>

We measure domestic rule of law using the *International Country Risk Guide (ICRG) Law and Order* measure, which provides quantitative expert assessments of the strength of the law and order tradition in various countries. This variable ranges from 0 to 6. Low scores indicate deficient legal systems with recurrent use of extralegal activities including illegal means for settling disputes. High scores describe states with sound and legitimate legal systems. Several scholars have used ICRG scores to measure legal system quality and the rule of law (e.g. Kelley 2007), and to measure the domestic costs of legal enforcement of international human rights commitments (Goodliffe and Hawkins 2008, Powell and Staton 2008).

In addition to the rule of law, we also consider states' capabilities as an important factor predicting commitments to international courts. As noted earlier, some powerful states like the United States feared a strong ICC. One of the goals of the ICC is to curtail atrocities that often times result from war. Strong states are more likely than weak states to be subject to the ICC's investigations and judgments since they are more likely to engage in activities that fall under the ICC's jurisdiction. Strong states are likely to view the ICC as a threat to their sovereignty, while less powerful states see the ICC's impartial adjudication as a protection from human rights abuses and a supplement to their own judicial system, especially if they have insufficient resources to prosecute criminal behavior. For example, several Caribbean states lobbied the UN to move forward in the creation of an international criminal court because they had difficulties policing drug trafficking in their domestic courts. Weak states are also likely to support international courts because they are disadvantaged in interstate bargaining (Struett and Weldon

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<sup>30</sup> This argument contrasts with the theory advanced by Danner and Simmons (2007), who show that the support for the ICC is very strong among states with violent conflict in their past but without domestic accountability systems.

2006). To measure states' capabilities, we employ the SIPRI (Stockholm International Peace Research Institute) data on military expenditures in millions of US dollars, at constant (2005) prices and exchange rates.<sup>31</sup> This data covers a wide time span, coded through 2005.<sup>32</sup>

The final control variable that we employ captures the democratic legalist perspective, which asserts that democracies' respect for judicial processes, the rule of law, and consideration for constitutional constraints carries over into international relations (Simmons 1999). Democracies are likely to engage third parties in the resolution of disputes in binding ways such as adjudication or arbitration due to their trust in legal procedures (Raymond 1994). In the context of the ICC, as Kelley (2007) suggests, democracies should be more likely to support the Court since it has been created "to punish offenders of democracy itself: those who dictate viciously and who violently oppress the freedom of their people" (p.577). Democracies should be more likely to ratify the ICC once they have signed the treaty because they are more likely to keep the promises they make (Dixon 1994, Leeds 1999) due to their accountability to domestic audiences (Fearon 1994, Schultz 2001) and their ability to anchor international obligations in domestic law more firmly (Slaughter 1995, Morrow 2007). To measure each state's democracy level in a given year, we use the Polity IV data set (Jagers and Gurr 1995), which combines information from four institutional characteristics into a single democracy score ranging from 0 (least democratic) to 10 (most democratic).<sup>33</sup> We create a dummy variable to delineate democratic states (6 or higher) and non-democratic states (5 or lower).<sup>34</sup>

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<sup>31</sup> Data available at [http://www.sipri.org/contents/milap/milex/mex\\_database1.html](http://www.sipri.org/contents/milap/milex/mex_database1.html)

<sup>32</sup> The national capabilities index as developed by Singer, Bremer, and Stuckey (1972) (CINC) is presently available only until 2001, which would significantly limit the time span of our analyses. However, when we estimate models with CINC scores, we get virtually identical empirical results.

<sup>33</sup> This includes the competitiveness of political participation, the level of constraints on the chief executive, and the openness and competitiveness of chief executive recruitment.

<sup>34</sup> We tried other democracy measures as well, including the interval level Polity IV democracy score, the democracy minus autocracy scale from Polity IV, and the Freedom House scale of democracy. The results for the multivariate model are sensitive to the particular measure of regime type employed due to the multicollinearity



## Empirical Analyses

Table 2A reports the percentage of states representing each of the legal traditions for 1998, the year that the Rome Statute came up for signature, as well as the percentage of states that comprised the “like-minded” states that openly supported the creation of the ICC. Table 2B reports the percentages of states signing and ratifying the Rome Statute as of 2004, broken down into the originator and joiner groups of states. Our theoretical hypotheses find preliminary support; the percentage of civil law states that have signed (57%) or ratified (64%) the Rome Statute as of 2004 is higher than the percentage of civil law states in the system (53%). In addition, civil law states constitute by far the largest group of states that have signed and ratified the Rome Statute. The percentage of common law ratifying states (26%) is higher than the percentage of common law states in the system (24%). Islamic law states constitute a much smaller group among the signatories (11%) and the ratifying states (5%).

The group of like-minded states was led by civil law (65.4%) and common law (23.6%) states, which helps to explain the *sui generis* design that emerged in the negotiations at Rome.<sup>35</sup> When we separate the originator states from the joiner states, we see that civil law states provided the strongest signature support at the court’s inception stage (61.2%), while common law states comprised the largest group of later joiners (56.3%); a similar pattern emerges for ratification as well (civil law states are 69% of the originator ratifying states, common law states are 63.6% of the joiner ratifying states). While the court’s design was well-suited to both civil and common law countries, the former were more supportive at the creation stage.

Turning to multivariate analyses, Table 3 presents logit models for ICC signature and ICC ratification. In Models 1 and 2, we examine the effects of states’ domestic legal systems on

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between democracy, rule of law, and civil legal type. The results we present are fairly typical, whereby the inclusion of democracy diminishes the effect of legal variables in the signature but not the ratification stage.

<sup>35</sup> The chi-square test for independence is highly significant:  $F = 85.86$ ,  $p < .001$ .

their signature and ratification decisions. We estimate a simplified model due to the loss of over 50% of the cases (via list-wise case deletion) when control variables are added. Models 3 and 4 report the baseline models for all states with the control variables included, while Models 5 and 6 estimate the multivariate models for the group of originator states at Rome. The substantive effects for all variables are presented in Table 4; the predicted probabilities are generated with Clarify (King, Tomz, and Wittenberg 2000), setting each variable at its mean or mode while varying the variable of interest.

Hypotheses 1 and 2 find empirical support, as the coefficients for the civil law and common law dummy variables in Table 3 are both positive and highly significant in the signature (Model 1) and ratification equations (Models 2 and 4). This bolsters our expectation that states with common or civil law domestic legal systems would be more likely to sign onto and commit fully to the ICC. The results are weaker for ICC signature when we add the control variables due to the loss of cases, as well as a fairly high level of correlation between democracy, rule of law, and domestic legal systems (civil law, common law) in the set of reduced cases. When we take into account states' regime type, rule of law, and capabilities, the signature and ratification rates are very similar for both civil and common law states (signature .80 for civil law states and .80 for common law states; ratification .39 and .40 accordingly). This fits with our argument that the court was established as a civil law-common law hybrid court, enhancing its appeal to states with these domestic legal systems. Interestingly, the predicted probabilities for signature are much higher for all legal types when compared with ratification. States realize that signature of the ICC treaty can improve their image on the international arena, even if the initial commitment is not legally binding.<sup>36</sup>

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<sup>36</sup> We also estimated Cox proportional hazard models, which capture the time until a state signs and/or ratifies the Rome Statute. The results are extremely similar to the logit model results. We also considered the possibility for a

The true civil – common hybrid nature of the ICC makes both civil and common law states equally likely to support the Court. The ICC’s procedural underpinnings provide these states with clues about how the court will identify and rule on particular cases. Similarity between domestic structures of civil and common law states and the ICC also reduces uncertainty concerning interpretation of international norms. Since Islamic law is largely ignored in the ICC Statute, Islamic law states are indeed less likely to sign and ratify the Statute.

We anticipated that the theoretical mechanisms explaining the originators’ and joiners’ choices about whether to join the ICC would be distinct, although both would predict similar working hypotheses about civil and common law states showing more support for the ICC. In Models 5 and 6, we estimate the model for only those states that were present at the 1998 Rome negotiations (the originators). The results for the originators are very similar to the estimates for all states, although common law is now significant in the signature stage (Model 5) and mixed law is now significant in the ratification stage (Model 6). There are over 300 state-year cases for ICC joiners in total, although the amount of missing data makes it difficult to model the signature and ratification decisions of the joiner states. The descriptive statistics in Table 2B point to some very interesting distinctions to be explored in future research.<sup>37</sup>

The control variables produce results that are mostly in line with what we expect theoretically. States with high internal respect for the rule of law are more likely to ratify the Rome Statute (Models 4 and 6), although the signature results of the logit model are not statistically significant (Models 3 and 5). States with high domestic levels of respect for the

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selection effect in the signature and ratification process, estimating a Heckman selection model with the democracy variable in signature model (only) and the rule of law variable in the ratification stage (only). The Heckman model produced results identical to the separate logit models and the rho parameter was not statistically significant ( $p=0.74$ ). The hazard and Heckman model results are available from the authors upon request.

<sup>37</sup> For example, civil law states are more highly represented among the originator states in comparison to common law states, which constitute a majority of the joiner states.

principle of the rule of law are 2.5% more likely to sign the Rome Statute (Model 3) and 55% more likely to ratify the Statute (Model 4). These results show that states with a significant rule of law domestically do not foresee the ICC to ever exercise its jurisdiction over them, since they are very unlikely to become “unwilling” or “unable” to handle a case domestically. States with low internal respect for the rule of law, with their deficient and corrupt judiciaries, are less likely to ratify the ICC treaty. It is ratification of the Statute, not the act of signing that exposes their vulnerability to external jurisdiction for crimes against humanity.<sup>38</sup>

Our results for regime type, an important political factor, demonstrate that democratic states are significantly more likely to sign (Models 1 and 3) and ratify (Models 2 and 4) the Rome Statute than non-democratic countries. Democratic states are 31% more likely to sign the Rome Statute than non-democratic states (Model 3) and 117% more likely to ratify the Rome Statute (Model 4). Our findings sit well with the democratic legalist perspective that emphasizes that democratic nations’ respect for judicial processes and the rule of law carries over into international arena (Simmons 1999; Slaughter 1995).

Our models also show that strong states are less likely to ratify the Rome Statute than weak states (Model 4 and Model 6), although power seems to have no significant effect on the initial decision to accept the ICC. This meshes with empirical findings for the ICJ, where state capabilities do not influence the initial decision to recognize the court’s jurisdiction, but influence the likelihood of pulling out of the court (Powell and Mitchell 2007). The substantive effects of capabilities in the ICC ratification model are quite large. The state in the sample with the highest military spending, the United States, had only a 0.04 probability of ratifying the ICC. States with the lowest level of military expenditures in the sample were 875% more likely to

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<sup>38</sup> These results contradict to some extent the findings by Danner and Simmons (2008), who show that support for the ICC is very strong among states with violent conflict in their past, but without domestic accountability systems.

ratify the Rome Statute. This supports our claim that weak states have more to gain from international courts than strong states.<sup>39</sup>

The lack of major power commitment to the ICC is perhaps best illustrated by the United States' world-wide campaign against the Court, where countries are encouraged, if not pressured, to sign agreements not to surrender Americans to the Court. Furthermore, the U.S conditioned its peacekeeping missions and military aid on the conclusion of these bilateral nonsurrender agreements. In 2004, the U.S. Congress passed the Nethercutt Amendment, which authorizes the loss of Economic Support Funds (ESF) to all countries who have ratified the ICC Treaty, but who have not signed a bilateral nonsurrender agreement with the US. This act poses a significant threat of cuts in foreign assistance, including funds for cooperation in international security, terrorism, economic development, and human rights.

All of the empirical results discussed above support our general claim that states' domestic legal systems influence their decision-making processes about whether or not to join adjudicatory bodies. These results further support findings regarding the link between domestic legal structures and states' attitudes towards the International Court of Justice (Powell and Mitchell 2007). The rules and procedures of the ICJ clearly reflect the civil law tradition, which helps to explain why civil law states are much more likely than common and Islamic law states to support the ICJ. This can be seen empirically in Table 2C; civil law states have a higher percentage of ICJ optional clause declarations (61.9%) relative to the number of civil law states in the system (53.6%), a pattern that does not hold for any other legal family.

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<sup>39</sup> We also examined models that interacted domestic legal system type with military capabilities. In the signature model, there is a negative interaction, such that more powerful states are less inclined to sign the Rome Statute; this holds for all types of legal systems. In the ratification model, the interaction terms are positive, suggesting that increasing capabilities leads to a stronger inclination to ratify the Rome Statute. These results are available from the authors upon request.

Because the structure of the ICC successfully incorporates elements of both civil and common law, the court is able to garner support from a wider swathe of countries in comparison to the ICJ. There is an interesting selection process at work, whereby states are not equally predisposed to recognize the jurisdiction of international courts. The originators of an international court have incentives to lock in an institutional design that favors future judicial behavior, while later joiners to the court must decide if the adjudicator will be fair and balanced. These strategic choices help to explain the rich variation in states' decisions to join some international courts and not others, as well as the design of states' commitments to the courts.

### **Conclusion**

In this paper, we address an interesting puzzle in international relations – namely why some states chose to sign and ratify the Rome Statute, while other states refuse to do so. We offer a novel approach, which portrays the formation and continued existence of the International Criminal Court (ICC) as both a *political* and a *legal* phenomenon. The connection between domestic and international politics is well studied in the field of international relations, taking on a variety of names in the scholarly literature including second-image reversed (Gourevitch 1978), two level games (Putnam 1988), and transnational linkages (Keohane and Nye 1977). Many academic studies of the ICC illuminate two-level game processes at work, although they tend to focus on the *political* determinants of ICC creation and support, such as democracy and trade openness (Meernik 2004; Gilligan 2006; Danner and Simmons 2008, Goodliffe and Hawkins 2008). The lack of attention to domestic *legal* systems and their effect on international law and international relations is puzzling.

Our study fills this gap in the literature by considering the interrelationship between domestic law and international law in the context of international adjudicative institutions. We

argue that conflict management is an inherently *legal* phenomenon, in which states' legal rights are determined through *legal* processes. On the domestic legal side, we focus on the world's major domestic legal systems: common law, civil law, and Islamic law. On the international side, we examine the role of one of the most prominent international courts, the ICC.

We assert that states' support for the ICC depends on the characteristics of states' domestic legal structures. We show that civil law and common law states are more likely to sign and ratify the Rome Statute than Islamic law or mixed law states. The structure of the Court constitutes a true hybrid of civil and common law principles and procedures, thus states representing both of these legal traditions are likely to support the ICC. In contrast, Islamic law states are much less likely to either sign or ratify the Rome Statute, since Islamic law is largely distinct from western legal principles. Our results clearly demonstrate the necessity of taking into consideration domestic legal structures in studying international adjudicative bodies. We show that a two level *legal* game (Koh 1997:2641) operates when states create and join international courts and that the domestic-international law nexus must be further examined in *both* directions because states' domestic legal systems may create different predispositions with respect to their willingness to join adjudicatory bodies and the design of commitments made to these courts. International adjudication has both political and legal underpinnings.

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**Table 1. Primary Differences between Civil, Common, and Islamic Legal Systems**

	Legal Characteristics									
Domestic Legal System	<i>Doctrine of the precedent</i>	<i>Bona fides (Good Faith)</i>	<i>Pacta Sunt Servanda (Keeping Promises)</i>	<i>Freedom of Contract</i>	<i>Usual Legal remedy in Contract Cases</i>	<i>Design of Contracts</i>	<i>Law and Religion</i>	<i>Formalism in Procedures</i>	<i>Type of Litigation</i>	<i>Appeal</i>
<b>Civil Law</b>	No	Yes	Medium	Yes	Specific performance	Not detailed	Separate	High	Inquisitorial	Yes
<b>Common Law</b>	Yes	No	Medium	Yes	Award for money damages	Very Detailed	Separate	Medium	Adversarial	Yes
<b>Islamic Law</b>	No	Yes	High	No	Specific performance or rescission (cancellation of a contract)	Detailed	Not Separate	Low	Not Formalized	No

**Table 2. Rome Statute Ratification and Signature Rates (N=194)**

**2A: Legal Type Frequency at Rome Negotiations**

	% of all states	% of all “like-minded” states
<u>Legal System</u>	<u>1998</u>	<u>1998</u>
Civil Law	53.6%	65.4%
Common Law	23.7%	23.6%
Islamic Law	12.9%	4.7%
Mixed Law	9.8%	6.3%

**2B: Legal Type Frequency for States Signing and Ratifying the Rome Statute as of 2004**

<u>Legal System</u>	% total	% Signature			% Ratification		
		All	Originators	Joiners	All	Originators	Joiners
Civil Law	53.6%	57.2%	61.2%	25.0%	64.3%	69.0%	27.3%
Common Law	23.7%	22.8%	18.6%	56.3%	25.5%	20.7%	63.6%
Islamic Law	12.9%	11.7%	12.4%	6.2%	5.1%	4.6%	9.1%
Mixed Law	9.8%	8.3%	7.8%	12.5%	5.1%	5.8%	0.0%

**2C: Legal Type Frequency for ICJ Optional Clause Declarations**

	% of all state years
<u>Legal System</u>	<u>2002</u>
Civil Law	61.9%
Common Law	20.6%
Islamic Law	6.6%
Mixed Law	9.5%



**Table 3: Signature and Ratification of the Rome Statute, 1998-2004**

<i>Explanatory Variables</i>	<u>Model 1:</u> Signature, All States N = 1,929	<u>Model 2:</u> Ratification, All States N = 1,929	<u>Model 3:</u> Signature, All States N = 823	<u>Model 4:</u> Ratification, All States N = 823	<u>Model 5:</u> Signature, Originators N = 796	<u>Model 6:</u> Ratification, Originators N = 796
<i>Civil Law System</i>	0.87*** (0.15)	1.65*** (0.21)	0.30 (0.26)	0.98*** (0.37)	0.30 (0.26)	1.20*** (0.40)
<i>Common Law System</i>	0.42*** (0.16)	1.51*** (0.22)	0.28 (0.28)	1.05*** (0.39)	0.51* (0.29)	1.32*** (0.42)
<i>Mixed Legal System</i>	0.14 (0.20)	0.70*** (0.27)	-0.17 (0.34)	0.69 (0.44)	-0.23 (0.35)	0.86* (0.47)
<i>Rule of Law</i>			0.03 (0.06)	0.12** (0.06)	-0.02 (0.06)	0.12* (0.06)
<i>Democracy</i>			0.97*** (0.22)	1.03*** (0.23)	1.19*** (0.22)	1.12*** (0.24)
<i>Capabilities</i>			-(0.00) (0.00)	-0.00*** (0.00)	-(0.00) (0.00)	-0.00*** (0.00)
<i>Constant</i>	0.20 (0.13)	-2.02*** (0.20)	0.04 (0.29)	-2.92*** (0.42)	0.15 (0.30)	-3.14*** (0.45)
	$\chi^2(3) =$ 48.22***	$\chi^2(3) =$ 81.95***	$\chi^2(6) =$ 55.07***	$\chi^2(6) =$ 64.23***	$\chi^2(6) =$ 67.99***	$\chi^2(6) =$ 71.73***

\*p < .10; \*\* p < .05, \*\*\* p < .01

**Table 4: Substantive Effects**

<u>Independent Variable</u>	<u>Predicted Probability (Signature)<sup>40</sup></u>			<u>Predicted Probability (Ratification)</u>		
	<u>All States (#1)</u>	<u>All States (#3)</u>	<u>Originators (#5)</u>	<u>All States (#2)</u>	<u>All States (#4)</u>	<u>Originators (#6)</u>
Civil Law System	0.74	0.80	0.82	0.41	0.39	0.40
Common Law System	0.65	0.80	0.85	0.38	0.40	0.43
Islamic Law System	0.55	0.75	0.77	0.12	0.20	0.18
Mixed Law System	0.58	0.72	0.73	0.21	0.32	0.32
Rule of Law (0 to 6)		0.79, 0.81	0.83, 0.82		0.29, 0.45	0.31, 0.46
Democracy (0 to 10)		0.61, 0.80	0.58, 0.82		0.18, 0.39	0.18, 0.40
Capabilities (0 to 528,888)		0.81, 0.62	0.83, 0.57		0.39, 0.04	0.41, 0.03

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<sup>40</sup> The numbers in parentheses refers to the model numbers in Table 3.

## APPENDIX

### Domestic Legal System Types and Signature/Ratification of the Rome Statute<sup>41</sup>

#### Common Law Countries

United States of America (2000/no), Canada (1998/2000), Bahamas (2000/no), Jamaica (2000/no), Trinidad and Tobago (1999/1999), Barbados (2000/2002), Dominica (2001a)<sup>42</sup>, Grenada, St. Lucia (1999/no), St. Vincent and Grenadines (2002a), Antigua & Barbuda (1998/2001), St. Kitts-Nevis (2006a), Belize, Guyana (2000/2004), United Kingdom (1998/2001), Ireland (1998/2002), Cyprus, Liberia (1998/2004), Sierra Leone (1998/2000), Ghana (1998/1999), Kenya (1998/2005), Uganda (1999/2002), Tanzania (2000/2002), Zambia (1998/2002), Zimbabwe (1998/no), Malawi (1999/2002), Lesotho (1998/2000), India, Bhutan, Bangladesh (1999/no), Myanmar, Nepal, Malaysia, Singapore, Philippines (2000/no), Australia (1998/2002), Papua New Guinea, New Zealand (1998/2000), Solomon Islands (1998/no), Kiribati, Tuvalu, Fiji (1999/1999), Tonga, Nauru (2000/2001), Marshall Islands (2000/2000), Palau, Federated States of Micronesia, Samoa (1998/2002)

#### Civil Law Countries

Cuba, Haiti (1999/no), Dominican Republic (2000/2005), Mexico (2000/2005), Guatemala, Honduras (1998/2002), El Salvador, Nicaragua, Costa Rica (1998/2001), Panama (1998/2002), Colombia (1998/2002), Venezuela (1998/2000), Suriname, Ecuador (1998/2002), Peru (2000/2001), Brazil (2000/2002), Bolivia (1998/2002), Paraguay (1998/2001), Chile(1998/no), Argentina (1999/2001), Uruguay (2000/2002), Netherlands (1998/2001), Belgium (1998/2000), Luxembourg (1998/2000), France (1998/2000), Monaco (1998/no), Liechtenstein (1998/2001), Switzerland (1998/2001), Spain (1998/2000), Andorra (1998/2001), Portugal (1998/2002), Germany (1998/2000), Poland (1999/2001), Austria (1999/2000), Hungary (1999/2001), Czech Republic (1999/no), Slovakia (1998/2002), Italy (1998/1999), San Marino (1998/1999), Albania (1998/2003), Macedonia (1998/2002), Croatia (1998/2001), Yugoslavia (2000/2001), Bosnia-Herzegovina (2000/2002), Slovenia (1998/2001), Greece (1998/2002), Bulgaria (1999/2002), Moldova (2000/no), Romania (1999/2002), Russia (2000/no), Estonia (1999/2002), Latvia (1999/2002), Lithuania (1998/2003), Ukraine (2000/no), Belarus, Armenia (1999/no), Georgia (1998/2003), Azerbaijan, Finland (1998/2000), Sweden (1998/2001), Norway (1998/2000), Denmark (1998/2001), Iceland (1998/2000), Cape Verde (2000/no), Sao Tome and Principe (2000/no), Guinea-Bissau (2000/no), Equatorial Guinea (2000/2003), Mali (1998/2000), Benin (1999/2002), Ivory Coast (2000/no), Burkina Faso (1998/2004), Togo, Senegal (1998/1999), Gabon (1998/2000), Central African Republic (1999/2001), Chad (/2006/no), Congo (1998/2004), Democratic Republic of the Congo (2000/2002), Burundi (1999/2004), Djibouti (1998/2002), Chad (/2006/no), Gabon (1998/2000), Ethiopia, Angola (1998/no), Mozambique (2000/no), Swaziland, Madagascar (1998/no), Mauritius (1998/2002), Turkey, Turkmenistan, Tajikistan (1998/2000), Kyrgyz Republic (1998/no), Uzbekistan (2000/no), Kazakhstan, Mongolia (2000/2002), Taiwan, North Korea, South Korea (2000/2002), Cambodia (2000/2002), Laos, Vietnam, Indonesia, East Timor (2002a)

#### Islamic Law Countries

Gambia (1998/2002), Nigeria (2000/2001), Namibia (1998/2002), Comoros (2000/2006), Morocco (2000/no), Algeria (2000/no), Tunisia, Mauritania, Libya, Sudan (2000/no), Iran (2000/no), Iraq, Egypt (2000/no), Syria (2000/no), Lebanon, Jordan (1998/2002), Saudi Arabia, Yemen (2000/no), Kuwait (2000/no), Bahrain (2000/no), Qatar, United Arab Emirates (2000/no), Oman (2000/no), Afghanistan (2003a), Pakistan, Maldives

#### Mixed Law Countries

Malta (1998/2002), Senegal (1998/1999), Niger (1998/2002), Cameroon (1998/no), Kenya (1999/2005), Rwanda, Somalia, Eritrea (1998/no), South Africa (1998/2000), Botswana (2000/2000), Seychelles (2000/no), Israel (2000/no), China, Japan, Myanmar, Sri Lanka, Thailand (2000/no), Brunei, Vanuatu

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<sup>41</sup> The first number in the parentheses is the date of signature; the second number is the date of ratification.

<sup>42</sup> This indicates accession to the Rome Treaty.