
Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law

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Abstract

Ever since the adoption of the Rome Statute, the debate over third party jurisdiction triggered by US opposition to the International Criminal Court (ICC) has been raging without any obvious outcome in sight. This article takes a look at one of the latest academic formulations of the evolving US stance which suggests that, to the extent that the ICC will adjudicate what are effectively inter-state matters, it should defer to state sovereignty. The article finds both the legal underpinning and the political rationale to that argument unconvincing as such. As sometimes happens, however, the argument is less interesting for what it says, as for what it reveals about evolving attitudes to the structure of international law. Indeed, it is suggested that part of the current misunderstanding over the ICC is traceable to a fundamental tension within international law between neo-Grotian and neo-Kantian trends. A better understanding of that tension can serve to reconstruct a narrative of the dialectics of individual and state responsibility under international law over the past half-century. The American stance is reassessed in this light, and some of the implications for the future of the ICC and what may yet turn out to be a revolution in international law are outlined.

1 Introduction

Ever since the curtain fell on the stage of the Rome conference, the issue of the jurisdiction of the International Criminal Court (ICC) over nationals of non-party states has been officially one of the main reasons for US opposition to the Court as it

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stands.¹ The ink had hardly dried on the treaty when Ambassador Scheffer, in his speech to the plenary, was already presenting this aspect of the Statute as one of the key reasons why the US would not ratify it. However, because it has been intuitively felt that universal membership is essential for the ICC, and because the Rome Statute is largely considered as a key event for the future of international law, a vigorous transatlantic debate has since been gathering momentum on whether the Statute was justified in granting the ICC ‘non-party jurisdiction’ (or, perhaps more to the point, on whether the US was justified in opposing it). Of the many issues that might be thought to require urgent attention, it is Article 12 of the Rome Statute that has so far attracted most comments.²

This essay proposes to reflect on some of the latest developments in that emblematic debate, in an effort to understand the evolving US stance and how it sheds light on the changing structure of international law. Its main hypothesis will be that, although the argument is plagued by misconceptions, it is nonetheless extremely revealing of a number of emerging fault-lines in the international order that have so far remained under-examined. The existence of such fault-lines can help us better understand what exactly is at stake with the creation of the ICC, and how its creation has the potential for introducing a revolutionary paradigmatic change in our conceptions of international law.

Before one goes on to examine these latest developments, it may be necessary to briefly remind the reader of the structure of the debate that preceded them. The thrust of the US argument has been that the ICC Statute is illegal because it contemplates the

¹ Ambassador David Scheffer has described the non-party jurisdiction problem as the ‘single most fundamental flaw in the Rome Treaty’. See Scheffer, ‘International Criminal Court: The Challenge of Jurisdiction’, address at the Annual Meeting of the American Society of International Law, 26 March 1999, www.igc.apc.org/icc/html/scheffer9904.html.

² Rome Statute for an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, www.un.org/law/icc/index.htm. According to Article 12, the ICC will have jurisdiction if the person suspected of the relevant international crimes is either a national of or committed his/her crime on the territory of a state party. The complex genealogy of that debate can be traced from the *American Journal of International Law* to this journal and a flurry of other articles by distinguished authors, making the literature on Article 12 a burgeoning sub-field in its own right. See Scheffer, ‘The United States and the International Criminal Court’, 93 *AJIL* (1999) 12; Wedgwood, ‘The International Criminal Court: An American View’, 10 *EJIL* (1999) 93; Hafner *et al.*, ‘A Response to the American View as Presented by Ruth Wedgwood’, 10 *EJIL* (1999) 108; Zwanenburg, ‘The Statute for an ICC and the US: Peacekeepers Under Fire?’, 10 *EJIL* (1999) 124; Brown, ‘US Objections to the Statute of the International Criminal Court: A Brief Response’, 31 *New York University Journal of International Law and Policy* (1999) 855; David, ‘Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law’, 20 *Michigan Journal of International Law* (1999) 337; Scharf, ‘The Politics Behind the US Opposition to the International Criminal Court’, 5 *New England International and Comparative Law Annual* (1999) (also available at www.nesl.edu/annual/vol5/scharf.htm); La Haye, ‘The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction’, 46 *Netherlands International Law Review* (1999) 1; King and Theofrastous, ‘From Nuremberg to Rome: A Step Backward for US Foreign Policy’, 31 *Case Western Reserve Journal of International Law* (1999) 47. A. Frye (ed.), *Toward an International Criminal Court?, Three Options Presented as Presidential Speeches* (1999); and J. J. Angat, *A Pragmatic and Philosophical Justification for the International Criminal Court (ICC): A Response to US Objections* (1999).

possibility that the ICC may judge nationals of non-party states. This was a somewhat perilous stance in view of the fact that, as Michael Scharf has observed, the US had itself supported such jurisdiction for the crime of genocide.³ But, more importantly, the argument that the Rome Statute is radically flawed because it violates the *pacta tertiis* rule (which prohibits the creation of obligations for non-state parties) is based on a confusion between the notions of obligation and interest. Clearly, the Rome Statute does not create any *obligations* for non-state parties. Their diligence in prosecuting their nationals, *le cas échéant*, will merely be judged as a fact entering into the Court's evaluation of whether a given case is receivable or not under the standard of complementarity contained in Article 17 of the Statute.⁴ As for mere interests, these clearly do not provide a ground for saying that the Statute infringes international law. Indeed there has sometimes been a distinct lack of persistence in the manner in which the US has continued to make this point about the 'illegality' of the ICC that suggested that the argument was not really taken seriously even by those who made it. Ruth Wedgwood⁵ has since attempted to argue that US concerns were really about the indeterminacy of international humanitarian law. But this argument does not really stand up to examination. If the law was judged determinate enough to create international criminal tribunals for the Yugoslavs and the Rwandese, it is difficult to see why, a few years of refinement later, it would not be appropriate for the rest of the world. More importantly, it is precisely to assuage such fears that the threshold of what constitutes a war crime was raised in the Statute so as to include only those crimes resulting from 'a policy or a plan or as part of a large-scale commission of such crimes'.⁶ This is not to mention that — largely thanks to American insistence — the crimes entering in the ICC's jurisdiction will be defined down to the smallest detail, through the inclusion of 'elements of crimes' provisions, ensuring that the law is as determinate as is reasonably compatible with its generality.

The more the various shades of the US argument unfolded, therefore, the deeper the divergences between participants in the Rome process appeared. In the end, there seemed to be no escaping the fact that, at least superficially, the US opposition resulted from a different weighing of the institutional characteristics of the ICC than that of the other participants, in particular of the safeguards against 'politically motivated' prosecutions.⁷ As Ambassador Scheffer put it: 'we could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible . . . even if some of our closest allies reached their own level of satisfaction with the final treaty.'⁸ Since for the like-minded states any further institutional concession would have amounted to forfeiting the idea of a permanent international

³ Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position', 64 *Law and Contemporary Problems* (forthcoming, 2001).

⁴ See Hafner, *supra* note 2, at 118–119.

⁵ Wedgwood, *supra* note 2.

⁶ Article 8(1) of the Rome Statute.

⁷ These include the basic buffer of complementarity, the three judges preliminary chamber, and what promises to be an exceedingly prudent process of selecting a prosecutor.

⁸ Scheffer, *supra* note 2, at 17.

criminal court by transforming it into an ad hoc structure at the disposal of states, the debate had thus reached a deadlock.

As a result, one might have thought that the argument would have been left there, and signs could be seen that the academic debate was starting to abate. A lingering suspicion remained that there might be something more to the US position than its legal case suggested, and it was something of a mystery why certain safeguards were judged perfectly acceptable by some countries and not by others. Indeed, as has been amply remarked, the non-party jurisdiction argument cannot be a self-standing argument because the problem could presumably be solved as far as the US is concerned by simply ratifying the Statute (and if the US were really committed to ratifying it, then delays in that ratification procedure would not make the non-party jurisdiction problem such an important one in the meantime). The US opposition to ICC non-party jurisdiction was therefore basically the opposition of a state that had decided not to join the ICC for reasons other than non-party jurisdiction. In the meantime, the US position remained unchanged, a depressing if not altogether surprising testimony of the incapacity of sound legal argumentation to resolve major political differences.

An arguably more sophisticated interpretation of the American argument written by Madeline Morris⁹ has since emerged however which, because it suggests a deeper source to the misunderstandings at stake, makes it worth at least partly reopening the Pandora's box. Madeline Morris (who otherwise supports the ICC) sets out to correct a number of 'misconceptions'¹⁰ about international crimes, by displacing the debate on non-party jurisdiction away from the law of treaties, where it was admittedly in a difficult pass, and transferring it to the customary international law of jurisdiction. Her starting assumption is that the ICC will not only hear cases of individual responsibility but also, to the extent that it takes into account official acts of the state, adjudicate precisely the kind of '*bona fide* legal disputes between states'¹¹ which states have been 'notoriously reluctant to submit . . . to binding third party adjudication'.¹² She thus argues that, because the 'jurisdictional structure of the ICC is based on a view of the ICC as a criminal court, *tout court*',¹³ it confers upon the ICC an 'exorbitant jurisdiction under international law'.¹⁴ As a result, the ICC's jurisdictional structure 'cannot be satisfactorily' justified¹⁵ because it violates states' right (or at least interest) to retain discretion as to how they address inter-state disputes.

⁹ Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 *Law and Contemporary Problems* (2001, forthcoming) 13 (on file with the author). The article is not meant to be read as the official US stance on the matter, but it certainly tries to make sense of it, and has repeatedly been cited with approval by Ambassador Scheffer. See, for example, Scheffer, *supra* note 3.

¹⁰ Morris, *supra* note 9.

¹¹ *Ibid.*, at 15.

¹² *Ibid.*, at 17.

¹³ *Ibid.*, at 15.

¹⁴ *Ibid.*, at 32.

¹⁵ *Ibid.*, at 17.

This article will seek to demonstrate that this argument, for all its inventiveness, is ultimately untenable legally. As sometimes happens, however, the debate has reached a critical size where it matters not so much for what it says as for what its very existence reveals. In the next part of the article, the argument that the ICC violates the international law of jurisdiction is briefly examined and rebutted. Reformulated as a policy argument that the ICC Statute is flawed because it has ignored a fundamental state interest, it is shown to run counter to what the majority of states at Rome have thought, but to be interesting in itself for precisely that reason. In the second part, a step back is taken from the specifics of the argument, and the debate on the proper role of the ICC shown to be revealing of a deeper tension in the international legal system on the status of sovereignty between Grotian and Kantian, statist and cosmopolitical visions of international law. It is suggested that this tension, whose insufficient formalization has led to a dialogue of the deaf, will have to be addressed sooner or later if one is to make any conceptual headway.

2 Some Misconceptions about Misconceptions

A A Flawed Legal Argument

Since apparently no American argument against the Rome Statute is complete without arguing for the ICC's illegality, it is necessary to deal briefly with the legal argument first, if only to show *ad absurdum* to what lengths one has to go to make such a claim. It should be made clear from the outset that, as Madeline Morris helpfully recognizes, the ICC's jurisdiction is, if anything, based on a delegation of territorial and not universal jurisdiction, despite confusing claims to the contrary.¹⁶ It shall be assumed here that there is no precedent for the delegation of territorial jurisdiction to an international court, and that the question is therefore whether such a delegation can be made notwithstanding the absence of explicit authorization.

The case that the ICC non-party jurisdiction infringes the international law of jurisdiction seems to rely on three contentions. First, it is argued that delegated territorial jurisdiction is a new form of jurisdiction that cannot be presumed legal and

¹⁶ One recent such claim is the one made by Michael Scharf that, to the extent that 'no one at the Rome Diplomatic Conference disputed that the core crimes within the ICC's jurisdiction ... were crimes of universal jurisdiction', and even though the Rome Statute anticipates a 'consent' regime as a 'politically expedient concession to the sovereignty of states in order to garner support for the Statute' (Scharf, *supra* note 3), the ICC's jurisdiction can only have a universal basis. This is misleading. Universal jurisdiction, despite a common textbook ambiguity, does not come 'attached' to certain crimes as much as attached to a particular entity (the state) as regards certain international crimes. It is states that can exercise universal jurisdiction rather than crimes that come equipped with it. Clearly, however, the ICC is not a state, and has neither territory, nationals nor interests for that matter, and cannot therefore have an inherent universal jurisdiction. Even if the ICC had jurisdiction over the whole world (e.g. because all states were party to it), its jurisdiction could not be called universal in any useful sense, since the notion would lack that element of extraneity that is inherent to it as a function of what states can do with their jurisdiction.

whose validity must be assessed on the basis of its compatibility with the ‘perceptible, if somewhat ill-defined, set of principles regarding the legitimate prosecutorial interests of states’.¹⁷ From the outset, the question seems badly framed. Indeed, the states in Rome have not created some radically new basis for jurisdiction by ratifying the ICC Statute (despite the clever use of the expression ‘delegated jurisdiction’ as if it were a basis in itself): rather, they have complemented their *territorial* jurisdiction by providing that if, *par malheur*, they should be unable or unwilling to exercise it, then the ICC should act as a substitute or as a ‘sovereign of last resort’.¹⁸ In addition, it is hard to see how Madeline Morris’s argument does not amount to a questionable overturning of the *Lotus* rule. The idea that the persistent practice of jurisconsults of listing specific recognized titles to jurisdiction has essentially reversed the assumption of legality cannot withstand analysis. There is a difference between a substantive, almost axiomatic rule of international law, and the way the rigor of a burden of proof rule can be softened formally by a practice of didactic presentation or diplomatic expediency. Even if states were in the habit of justifying claims to jurisdiction positively, one would still have to demonstrate that they did so out of a corresponding *opinio juris*. What is needed to show that a basis for jurisdiction is invalid, therefore, is that it violates an existing rule of international law (such as, for example, the rule against interference in the domestic affairs of sovereign states).

Secondly, it is contended that the delegation of jurisdiction to the ICC is incompatible with the principle that ‘legal relations that are based on mutual consent (or acquiescence) may not be altered by one party to the detriment of the other’.¹⁹ Even assuming that the delegated territorial jurisdiction was a new basis for jurisdiction and that the state parties to the Rome treaty had to demonstrate positively the legality of that delegation, that would still be a hard case to make. In order to substantiate that claim, Madeline Morris is led to develop, by analogy with the law of assignments, a conception of territorial jurisdiction as something that, through customary international law, rests on the consent of other states, such that these states’ consent would be required if the exercise of the right to prosecute were substantially altered. This effectively amounts to making jurisdiction over non-nationals a ‘right’ of the state purporting to try a non-national that is granted (or at least needs to be recognized) by other states. But territorial jurisdiction is not a right conceded by other states through customary international law, as much as an inherent feature of statehood, which precedes the customary international law that legitimizes it. There is no consent *per se* to the exercise of jurisdiction by a sovereign state over its own territory; that is its right as a sovereign. There may be a consent to other sovereigns being sovereigns, but that is just another way of saying that there is a consent to the existence of the international system as it has existed since Westphalia. This is why customary international law deals only with the existence and

¹⁷ Morris, *supra* note 9, at 60.

¹⁸ See Marquardt, ‘Law Without Borders: The Constitutionality of an International Criminal Court’, 33 *Columbia Journal of Transnational Law* (1995) 97, at 105.

¹⁹ Morris, *supra* note 9, at 63.

establishment of territorial jurisdiction, not the technical modalities of its use (otherwise it would cease to be territorial jurisdiction). It follows that states may exercise their sovereign jurisdiction in whatever way they want, as long as they remain within the bounds of what is meant by territorial jurisdiction, namely, as long as they exercise their jurisdiction over their territory, no more, no less. For the rest, a state may decide not to use its territorial jurisdiction, or conversely it may decide to guarantee itself against the temptation of not using it. If several states want to pool their resources, or if they want to safeguard themselves against their own future failures (e.g. in case of inability or unwillingness), that is fully their right — indeed it is certainly more their right than a hypothetical third state's right to the *status quo* of the international legal order. Territorial jurisdiction is indeed, whatever the claims to the contrary, ultimately a 'form of negotiable instrument'.²⁰

Thirdly, the cornerstone of Madeline Morris' argumentation is that, in some cases, the ICC will effectively adjudicate inter-state disputes, and this is said to justify a right for non-party states to prevent proceedings that might concern them as such. Even if all of the above arguments were rejected, that would still hardly be convincing. To be sure, there is an interesting emerging issue of *litis pendens* between different international courts that will have to be resolved in due course, and which is a consequence of the multiplication of international tribunals. For example, whether an individual is accused of genocide, crimes against humanity or war crimes, the prosecutor will have to show that his crime was committed, respectively, 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group',²¹ 'as part of a widespread or systematic attack'²² or 'in particular when committed as a part of a plan or policy or as part of a large-scale commission'.²³ In all cases, a contextual element enters into the very definition of the crime. That contextual element is not strictly restricted to the acts of the accused per se and, crimes against humanity and war crimes being what they are, is likely to involve the state (or at least some aspiring or proto-sovereign actor). But this is still a long way, even in the cases where two states are involved (hardly likely to be the majority), and where the prosecutor's action is triggered by the action of one of them (ultimately irrelevant because the decision to go ahead will be the preliminary chamber's), from saying that the ICC will adjudicate inter-state disputes, be it *lato sensu*. Even if the accused were the head of state, it is difficult to see how the conduct of the state could be, to use the International Court of Justice's *expression consacrée*, the 'very subject matter'²⁴ of the ICC's decision,

²⁰ Madeline Morris (who has been quoted approvingly on this point by Ambassador Scheffer, *supra* note 2) suggests that, in the same way it would not be open to France to delegate its territorial jurisdiction to Libya, it is not permissible to do so to a supranational body (Morris, *supra* note 9, at 57–58). Apart from the rhetorical trick of suggesting that delegating jurisdiction to the ICC is anything like delegating jurisdiction to Libya, there is nothing obvious in the contention that France could not delegate its territorial jurisdiction to Libya if it so wished.

²¹ Article 6 of the ICC Statute.

²² *Ibid*, at Article 7.

²³ *Ibid*, at Article 8.

²⁴ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports (1986).

above and beyond the determination of individual guilt. As Otto Triffterer put it, the finding that an individual is guilty of committing a crime in the context of a state policy implies at most an *obiter dictum* as to state responsibility, and it will often fall short of that,²⁵ state conduct being more akin to a factual than a legal element. The ICC only has jurisdiction to try individuals and it cannot adjudicate on (as distinct from qualify) something over which it does not have jurisdiction. The legal part of the Morris argument, therefore, is either irrelevant (no case will involve adjudication of inter-state matters *stricto sensu*) or unreasonable (many cases may involve *consideration* of official policy, but then the American problem with the ICC is not so much that it is based on a criminal conception *tout court*, but that it be criminal *at all*).

B A Revealing Political Disagreement

In ultimate analysis, therefore, there is nothing that can *legally* prevent the states who have ratified the ICC Statute from doing so on the conditions on which they did. One may want, however, to restate the argument as simply one of policy: even though the ICC will not actually and in any true legal way work as an adjudicator of inter-state legal disputes, it will, in the course of its judicial activities, touch upon issues relating to official acts against the background of what might be inter-state rivalries. Clearly, for instance, if Milosevic were convicted of genocide by the International Criminal Tribunal for the Former Yugoslavia, it is difficult to see how this might not have at least a marginal probative incidence in the case brought by Bosnia Herzegovina against the Yugoslav Republic and currently pending before the International Court of Justice on precisely the same issue (although the ICJ would not be bound).²⁶ Even the *obiter dictum* about state responsibility may be more than states are willing to accept. This might arguably warrant, as a matter of *policy*, that non-party states' nationals not be indictable by the ICC in certain limited sensitive cases, even though it would be perfectly legal for party states to agree otherwise. This comes close, in fact, to what might be a 'reasonable' US position²⁷ as articulated, for example, in Theodor Meron's notorious proposal²⁸ that the Rome Statute be amended so that the ICC would require the consent of non-party states in cases where acts were committed by 'officials or agents of a state in the course of official duties' and where these duties were 'acknowledged by the state as such'.²⁹ Indeed, there is a sense in which the Meron proposal captured some of the contemporary mood, as evidenced, for instance, by the ephemeral proposal by Chile to submit its dispute with Spain over who should judge Pinochet to arbitration. Both are typical of a kind of attempt that may become more

²⁵ Triffterer, 'Prosecution of States for Crimes of State', 67 *International Review of Penal Law* (1996) 341, at 346.

²⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1993).

²⁷ For a suggestion in that direction, see Orentlicher, 'Politics by Other Means: The Law of the ICC', 32 *Cornell Journal of International Law* (1999) 489.

²⁸ Meron, 'The Court We Want', *Washington Post*, 13 October 1998, at 15, www.agora.stm.it/npwj/WP1098.htm.

²⁹ *Ibid.*

frequent in the future, as some states seek to control what they see as the ‘apprentice sorcerers’ of international criminal justice by bringing back issues of responsibility on the familiar terrain of inter-state disputes where they can be treated, as it were, *entre gens de bonne compagnie*.

Madeline Morris’ presentation of the background to that argument is in the beginning hardly contentious. It is entirely true that states have traditionally been reluctant to subscribe to compulsory international adjudication, as evidenced by the jurisdictional provision of most international courts. But the examples chosen to support the case that such safeguards should be extended to the ICC are somewhat self-defeating: it is precisely because the ICC is about international crimes and not diplomatic disputes, that the international community thinks that they should be dealt with by a specific regime. It is because crimes are crimes and the international community considers them to ‘threaten the peace, security and well-being of the world’³⁰ and is therefore ‘determined to put an end to impunity for the perpetrators’,³¹ that non-party states are to be denied a more traditional control on what gets adjudicated. Henceforth, all the arguments in favour of diplomacy over adjudication are precisely those that a large part of the international community does not want to hear any more when it comes to war crimes, crimes against humanity and genocide. Indeed, the states assembled in Rome did not miss the point that the ICC might interfere with inter-state matters against their own best interest and habitual practice. Rather, they decided that its crime-sanctioning character should be upheld over and above its potential for inter-state nuisance. The ICC is a self-consciously innovative venture which unashamedly upholds the primacy of *jus cogens* above that of comity. Madeline Morris comes close to recognizing this when she suggests, in a passage where the varnish of law becomes rather thin, that ‘[p]erhaps . . . some states wished to use ICC jurisdiction to effectuate a change in interstate power relations by moving an important category of interstate disputes out of the diplomatic realm and into that of compulsory jurisdiction’³² or that ‘some participants in the ICC negotiations may have wished to expand the power of international institutions, including courts, without regard to the resultant redistribution of power among particular states’.³³ That is indeed the point about the Rome Statute and it is not the result of some misconceived or hidden plot but a deliberate attempt to replace *le droit du plus fort* by *la force du droit*. Nor, to say the least, is the value of a new international institution to be judged, in the mind of the drafters of the Rome Statute, by its capacity to replicate the prevailing balance of power.

One may of course want to challenge its wisdom on such grounds, but one cannot simply suggest that this aspect of the Court’s jurisdiction was a result of an oversight. It is a fact that 120 states have expressed their confidence in the vision of the international system propounded by the Rome Statute, and that, of the 20 that have

³⁰ Third paragraph of the Preamble to the ICC Statute.

³¹ Fifth paragraph of the Preamble.

³² Morris, *supra* note 9, at 30.

³³ *Ibid.*, at 30.

opposed it, only the US grounds its opposition to the court on the issue of non-party jurisdiction. Hence the barely veiled hints of moral blackmail in the US position³⁴ are bound to meet a deaf ear: clearly the whole point of the Statute, for the parties to it, is that no human rights intervention, for example, is worth a large-scale commission of war crimes.

In wanting to show how wrong states in Rome were in neglecting a legitimate state interest, therefore, the non-party jurisdiction argument ends up merely showing how much the US disagrees with the rest of the democratic world on how different the ICC is/should be from everything that preceded it in the international legal order (and also, it should be said, on how much the US disagrees with the other opponents of the ICC on why the ICC is flawed). The debate, however, at least has the merit, if it can be redeemed from its sometimes unfortunate legalistic presentation, of clarifying to protagonists what it is they agree to disagree about. Indeed, there is no denying that a very real tension arises which is damaging to the international legal order. Nor is there anything trivial about that disagreement, be it only because one of its protagonists is the world's superpower. In fact, for all the apparent urge to ratify the Statute, the US standpoint may, when the day of reckoning comes, turn out to represent a larger part of the international community than catches the eye at first (notice, for example, the distinct toning down of calls to try Milosevic). For good or bad, sympathetic or hostile reasons, international lawyers disagree about the proper significance of the ICC. This ongoing debate about what international law should be, becomes part of what international law is. Too often, it has only given rise to grand generalizations or moral anathema. How can it be made sense of?

3 The ICC at the Crossroads of International Law

*A Of International Lawyers and Defunct Thinkers:*³⁵ *Grotius Versus Kant*

In a recent article, one author suggested that the US's 'sinister . . . refusal to submit to a higher authority'³⁶ amounted to no less than a 'repudiation of Grotius' and the commitment to international law that he supposedly stood for. It is characteristic that an author so ambiguous and foundational as Grotius should be enlisted for the support of whatever cause seems at any one time to be most associated with the fate of international law. But it is doubtful whether the ICC has much to do with Grotius. Even if one does not take too stringently the warning that 'it is absurd to read Grotius

³⁴ 'The consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States'. Scheffer, *supra* note 2, at 19.

³⁵ The expression is of course borrowed from Keynes, but it is remarkable how well it suits international law doctrine.

³⁶ David, *supra* note 2, at 409.

as if he were speaking to us directly about the problems of our own time',³⁷ it probably takes more than an appeal to the *temperamenta belli* in the midst of the Thirty Years War to make a fully fledged ICC supporter.³⁸ Indeed, the 'Grotian tradition'³⁹ in international law and relations, as an admittedly reworked and much expanded twentieth-century version of what Grotius himself wrote,⁴⁰ although it recognizes (contra the Hobbesian/realist tradition) the role of the individual as a subject of international law, ultimately emphasizes the axiological primacy of the state and international order, over the claims of individuals and cosmopolitical justice. This primacy, in turn, fundamentally structures the jurisdictional and substantive range of international law in a moderate and conservative direction.⁴¹

From a jurisdictional point of view, to begin with, the Grotian tradition is noteworthy for stressing the need for a self-regulation of the international stage either through state responsibility mechanisms⁴² or, when it comes to individual criminal responsibility, by making states the enforcement arm of international law. Hence Grotius is notorious for propounding the *aut dedere aut judicare* principle as a means of dealing with international crimes,⁴³ a mechanism deeply embedded in a decentralized conception of international society, and that has turned out to be just as foolproof in theory as it is permeable to political inertia in practice.⁴⁴ In fact, for all we know, Grotius might well have sided with those such as Madeline Morris who oppose the ICC in thinking that it amounts to an excessive centralization and systematization in favour of justice, and who believe that non-party states should be able to maintain their relations at a state-to-state level if they choose to in those extreme cases where individual criminal responsibility threatens to disturb the inter-sovereign order. In an odd way, Grotius' characteristic unwillingness to decide once and for all in favour of the *civitas maxima* over the *civitas inter gentes* is exactly what the US stance is about.

Indeed, even from a substantive point of view, the Grotian tradition would probably

³⁷ Bull, 'The Importance of Grotius', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 85.

³⁸ This last subsection is an elaboration on earlier work. See Mégret, 'The International Criminal Court and State Sovereignty: "The 'Problem of an International Criminal Law' Re-examined", in J. Carey, J. Pritchard and W. Dunlop (eds), *International Humanitarian Law: Challenges Ahead* (forthcoming).

³⁹ Bull, 'The Grotian Conception of International Society', in H. Butterfield and M. Wight (eds), *Diplomatic Investigations* (1966) 51–73.

⁴⁰ As Benedict Kingsbury and Adam Roberts put it: 'The text has in some measure evolved away from its author, while retaining an oscillary link to the system around which he sought to construct it.' Kingsbury and Roberts, 'Introduction', in Bull, Kingsbury and Roberts, *supra* note 37, at 5.

⁴¹ See, for example, Hersch Lauterpacht's characteristic comment that the Grotian tradition 'has served more often as the bulwark of the existing order than as a lever of progress'. Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYIL* (1959) 1, at 4. See also Claire Cutler's comment that Grotius' solutions 'however revolutionary for his time, imply a certain static thinking and are far from revolutionary in modern terms'. Cutler, 'The "Grotian Tradition" in International Relations', 17 *Review of International Studies* (1991) 41, at 48.

⁴² See, in particular, Cornelius Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1919).

⁴³ See H. Grotius, *De Jure Belli Ac Pacis*, Book II (1925), chapter XXI.

⁴⁴ See Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *EJIL* (1998) 2.

emphasize those international occurrences of violence that threaten peaceful state co-existence. All other things being equal, for example, it would probably be more interested with the issue of *jus ad bellum* (aggression) than *jus in bello*, more interested with violence arising out of international than domestic conflicts and, despite the odd appeal to rape being prohibited both in times of war and in times of peace, more interested with violence committed by the sovereign in times of war (international humanitarian law) than in time of peace (human rights).

To be precise, it is in fact the shadow of quite a different thinker that looms behind the creation of the ICC and some of its more radical implications for the future of the international legal order: that of none other than Kant, particularly the Kant of the *Idea for a Universal History with Cosmopolitan Intent*.⁴⁵ The key difference between the Grotian tradition and the Kantian tradition in international theory, according to Martin Wight's famous distinction,⁴⁶ is that, whilst the first views the international society of states as an unimprovable *via media*, the second views international society as the 'chrysalis for the community of mankind'⁴⁷ which is 'latent, half glimpsed and groping for its necessary fulfilment'.⁴⁸ In the process of explicating the content of the 'revolutionist' tradition in international relations, Martin Wight was at pains to identify what a Kantian global legal system might be like.⁴⁹ Following and developing Hedley Bull's subsequent insights,⁵⁰ it is submitted here that probably no international legal institution better approximates the Kantian ideal-typical vision of a cosmopolitan-federation-of-states-in-the-making than the creation of a permanent international criminal court. This is so not least because the ICC, of all the various schemes for perpetual peace,⁵¹ seems to be the one 'global' institution that most seeks to avoid the Dantesque spectre of 'that tomb, a universal autocracy'⁵² which Kant thought was the only thing worse than war. Indeed, although Kant did not allude to the creation of an ICC as such any more than Grotius did, many features of the Rome

⁴⁵ Immanuel Kant, *Idea for a Universal History with Cosmopolitan Intent* (1784).

⁴⁶ Martin Wight, Gabriele Wight and Brian Porter (eds), *International Theory, The Three Traditions* (1991).

⁴⁷ Wight, 'Western Values in International Relations', in Butterfield and Wight, *supra* note 39, at 95.

⁴⁸ *Ibid.*, at 93. See also Hurrell, 'Kant and the Kantian Paradigm in International Relations', 16 *Review of International Studies* (1990) 183.

⁴⁹ Wight, *supra* note 46, particularly at 235 where Martin Wight seems to think that the most ideal typically revolutionist tradition in international law is the Marxist one.

⁵⁰ Hedley Bull, *The Anarchical Society* (1977).

⁵¹ The idea that international criminal justice is a means to pacify international relations and thus fits into a broader and much older tradition that goes as far back as the Abbé de St Pierre has been long recognized. See, for example, B. Ferencz, *An International Criminal Court — A Step Toward World Peace* (1980).

⁵² Immanuel Kant, *Religion Within the Limits of Reason*, reproduced in A.W. Wood and G. Di Giovanni (eds), *Religion and Rational Theology* (1996) 55. For a recent book almost entirely dedicated to exorcising the 'spectre', see Agnès Lejbowicz, *Philosophie du droit international* (1999).

Statute would seem to be premised on precisely such a cosmopolitical outlook,⁵³ or at least, significantly, on the categorical imperative to act as if a cosmopolis were realizable.⁵⁴ For all the talk and outcry about Article 124 on war crimes,⁵⁵ for example, the ICC is much more about repressing crimes committed by the sovereign against its own nationals, or at least against people under its own suzerainty than it is about the Hague laws or even war crimes arising in international conflicts, not to mention aggression. A rising threshold for war crimes, the fact that they tend to occur in internal conflicts or at least during the break-up of previously unitary states and essentially consist in the targeting of civilians, and the fact that crimes against humanity no longer require a nexus with war, are gradually contributing to a blurring of the distinction between war crimes and crimes against humanity.⁵⁶ Most war crimes that the ICC Statute contemplates, in fact, will be simultaneously qualifiable as crimes against humanity. When both qualifications compete, and although nothing will prevent prosecuting lawyers from playing on some idiosyncratic differences between the two to maximize their chance of obtaining a conviction, the qualification of crimes against humanity will be more criminologically coherent and specific: what the international community is increasingly interested in is suppressing massive violence against human beings (not to mention the eradication of entire groups) whatever the context, not terror bombing of 'civilians' as a specific war tactic (which will tend to be subsumed in the latter category anyhow). As the experience of the International Criminal Tribunal for Rwanda shows, the fact that the targeting of civilians sometimes occur against the background of a conflict is at best a useful hint, often an irrelevant one, because what is at stake is much more totalitarian/genocidal projects, than field commanders losing their sense of proportion. The ICC, in short, has a lot more to do with human rights law than with international humanitarian law, and as such seems deeply embedded in a cosmopolitical outlook rather than geared to minimizing the undesirable side effects of sovereign co-existence. The odd reference to the ICC (or the ad hoc tribunals) as a 'war crimes tribunal', in this context, is a testimony to our inability to see the ICC for what it is in a global system that has very little to do with Nuremberg, and where the pervasiveness of violence at an intra-state level has ceased in most cases to make the concept of war (as the specific form of inter-state violence is known) a valid structural pointer for the application of international law.

⁵³ A number of authors have explicitly recognized the intellectual affinity between international criminal justice and the concept of perpetual peace. See, in particular, J. Habermas, *Kant's Idea of Perpetual Peace: With the Benefit of 200 Years' Hindsight* (1996).

⁵⁴ As Kant put it, the question is not 'whether perpetual peace is really possible or not, or whether we are not perhaps mistaken in our theoretical judgment if we assume that it is. On the contrary, we must simply act as if it could really come about (which is perhaps impossible), and turn our efforts towards realizing it'. *The Metaphysics of Morals*, reproduced in Hans Reiss (ed.), *Kant, Political Writings* (1991) 174.

⁵⁵ According to Article 124 of the Rome Statute, a state 'may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to [war crimes] when a crime is alleged to have been committed by its nationals or on its territory'.

⁵⁶ Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', 37 *Columbia Journal of Transnational Law* (1999) 767.

As a jurisdictional move, moreover, the ICC marks a frustration with the limits of the decentralized system, and a desire to upgrade the international community's criminal sanctioning resources to some form of compulsory, centralized and Archimedean mechanism. This stems from a realization that, whilst international law's 'lawness' may in general be compatible with a surprising range of violations, the same is unlikely to be true for norms whose very 'criminal' character is dependent on the intensity of criminal repression.⁵⁷ Hence, *a contrario*, the ambivalence of the concept of the state's criminal responsibility, the absence of compulsory jurisdiction for the ICJ, and the repeated failures of the *aut dedere aut judicare* principle, all seem to make the existing enforcement mechanisms hopelessly out of place with the emerging consensus on the need to systematically repress breaches of the international public order — if there is to be an international public order at all. It would be a mistake, moreover, to see this centralization as a purely instrumental, corrective device to state inertia. The ICC's very supranationality is also perceived as a good in itself, as evidenced by multiple declarations of participants in the Rome drafting process. This is so because the ICC promises to make a select few international criminals answer for their crimes before a panel of judges representing the entire legal community and according to procedural standards and substantive definitions that are the result of a massive effort of synthesis of the world's legal cultures, towards, perhaps, the emergence of a '*droit commun de l'humanité*'.⁵⁸ As such, the ICC brings a qualitative difference to the repression of international crimes because it offers the prospect of an international criminal justice rendered more explicitly and durably in the name of the international community than an Eichmann trial in Israel, a Pinochet trial in Spain or a Hissen Habré trial in Senegal could ever be. The ICC, in short, is at the same time cause and consequence of the international community's aspiration to see itself as something more than the sum of its constituent state parts.

B State Versus Individual Responsibility: The Dynamics of International Justice Reconsidered

This analysis can open the way and provide the conceptual framework for a reassessment of the role of the ICC in the global legal order. The ICC is the ultimate (and perhaps for the first time totally unavoidable) manifestation of an increasing split between traditional inter-state law and an emerging cosmopolitan legal order. The true dividing line today in our understanding of the unravelling destiny of international law as a historical enterprise, it is submitted, is between the genuinely Grotian and the aspiring Kantians. This, in turn, can allow us to better understand the genesis of the *équivoques* over the ICC, and why some states act as if they were suddenly waking to the fact that international criminal justice threatens to overturn the last pillars of Westphalia. Although the outcome of the debate cannot be

⁵⁷ See, in particular, Andrews, 'Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory', 11 *Emory International Law Review* (1997) 471.

⁵⁸ Mireille Delmas Marty, *Pour un droit commun* (1994).

prejudged, the dialectics of the two conceptions over the past 50 years can be reformulated into some kind of general narrative. The aim of that narrative is not to provide an historically accurate description of how debates actually occurred, but to construct an explanation that makes sense of our understanding of previously insufficiently related issues from the point of view of the history of ideas and the sociology of law.

First comes the shock of the Second World War. The atrocities of the war serve as a revelation to the international community of itself and of its underlying humanity. This is the raw and unprocessed sociological given from which all else springs, and, although the Cold War brings the cosmopolitan conscience of the world to an abysmal low, enough of that initial insight remains that the debate can eventually be taken up where it was left when the war ended. The general and imperious call is for safeguards against the repeat of genocide, crimes against humanity and war crimes. From the outset, however, there are fundamental ambiguities involved. The revolutionary notion of individual criminal responsibility under international law has been solemnly affirmed at Nuremberg but it is, for the time being, set aside by sovereignty-conscious states through neglect and inertia. The most obvious and benign route, to begin with, is the eminently 'Grotian' device of improved international state responsibility mechanisms. Even if it could be enforced more systematically (which it is not precisely in the cases where it would be the most important), however, international responsibility does not seem to do justice (at least on its own) to the nature of some of the violations committed (i.e. crimes). Hence the idea, for all the seemingly insuperable difficulties it raises, of a criminal responsibility of the state. The criminalization of state responsibility thus emerges as a response to the diffuse perception that 'il n'y a pas grand chose en commun, sinon la qualification juridique aujourd'hui encore donnée en droit positif, entre une violation mineure d'un traité de commerce et d'un génocide'.⁵⁹

As soon as one talks about state criminal responsibility, however, a fundamental tension is introduced in the global legal order, and a dangerously unsettling period of systemic indeterminacy and soul-searching is inaugurated. There is a 'will to criminalize', but that will hovers indecisively between state and individual responsibility. Both, of course, to the extent that they attach to different legal *personae*, are not incompatible from a strictly legal point of view.⁶⁰ But both are also objectively competing for attention before our legal eyes in a way that is so obvious that it seems to have been barely noticed so far, despite all the evidence that they ultimately entail radically different conceptions of international law.

As it turns out, the state system seems so far very reluctant to fully take the qualitative step to criminalization.⁶¹ This is of course because of the very real aporia of

⁵⁹ 'there is little in common, apart for the legal qualification given today by positive law, between the violation of a minor trade convention and genocide.' Stern, 'Un mouvement vers plus d'éthique', in Société Française pour le Droit International, *La responsabilité dans le système international* (1991).

⁶⁰ See, in particular, ICTY, *Prosecutor v. Furundzija*, 10 December 1998, § 142.

⁶¹ See Professor Crawford's revealing First Report on State Responsibility, UN. Doc. A/CN.4/490 and Add.1-6 (1998).

the concept (only the state can transcend the state, but can the state transcend the state while continuing to be the state?). But, more profoundly, it may be the result of the difficulty of bringing to maturity a specific statist form of rule of law on its own, against the background of an international society that remains precariously anarchical. The debate does not stop, but it seems condemned to be just that: a debate about what we think international law is or should be. In view of the resurgence of genocide and massive violence, however, the demand for higher order norms and repression does not abate and none of the various preventive or monitoring mechanisms seem to be suited to the gravity of the stakes. Indeed, from a systemic perspective, the whole process of creation of the ICC can be seen as a way, by a growing majority of states, to circumvent the vexing question of ICJ compulsory jurisdiction, by ensuring that when it comes to crimes, at least as far as their territory and nationals are concerned, impunity is not tolerated.

From the point of view of the inter-state world, individual criminal responsibility thus appears at least initially as an attractive option, capable of relieving some of the tension brought to bear on the system, while keeping its essential elements in place. In the process of symbolic exchanges that defines the international legal order, it may be that the individual-as-subject-of-criminal-responsibility seemed an expendable concession to the clamour for accountability. This is all the more so since individual criminal responsibility always seems to be about 'others', and, in the absence of any apparent willingness by states to conform with their *aut dedere aut judicare* obligations (i.e. as if they *effectively* rather than rhetorically belonged to an international community), its triggering relies on a heavy international political machinery. Accordingly, individual criminal responsibility witnesses a stark — but carefully controlled — revival in the 1990s with the creation of the ad hoc international criminal tribunals. The international system is back to where it started with the Nuremberg verdict.

But individual criminal responsibility may yet turn out to be even more corrosive for the fundamentals of the inter-state system than a well-controlled criminal state responsibility might have been. In missing (presumably not accidentally) the historical opportunity of making the state symbolically and solemnly shoulder the weight of some of its misdeeds in a way commensurate with the level of horror ascribed to international crimes, the sovereign order may well have laid the basis for its own partial subversion by undermining even the pretence of the Leviathan as a moral being. To be sure, it is not the least of paradoxes of twentieth-century international legal history that the individual has acquired growing respectability as a subject of international law precisely as a result of the recognition of the individual's potential for evil on the international stage. At the same time, however, through individual criminal responsibility, it is soon the whole state apparatus which is targeted under another guise, thus threatening to dissolve the dense and unquestioning web of domestic allegiances for which sovereignty, if anything, stands for and relies on. Individual criminal responsibility may leave the state as a legal persona superficially unscathed, but it also has a tendency to make the sovereign transparent, especially when applied to matters traditionally considered to be essentially of

domestic concern. It thus contributes to the realization of Hedley Bull's prophecy that 'carried to its logical extreme' — surely something that the ICC purports to do — 'the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organized as a society of sovereign states'.⁶² Although the late 1980s and the 1990s, from *US v. Nicaragua*⁶³ to the recent spate of cases involving offences against the peace and security of mankind (although not as such),⁶⁴ seem paradoxically to have witnessed a revival of the search for state responsibility, these seem curiously out of place in a world where all the talk (and, sociologically speaking, the 'talk' matters) is about the judgments of Augusto Pinochet, Hissen Habré or Slobodan Milosevic.

It may yet turn out, in retrospect, that state responsibility for the gravest crimes was only and paradoxically likely to flourish in times of relative state irrelevance. In the meantime, prominent cases involving individual criminal responsibility under international law have probably done more than any for the belief in a universal rule of law. In a globalizing world beset by anomie and avid for symbols, it has the advantages of simplicity, ethical cogency and — something not to be underestimated in an age of ubiquitous communications — a remarkable media-friendliness. Little by little, it begins to emerge that maybe — just maybe — there is more to the famous Nuremberg *dictum* that 'crimes against international law are committed by men, not by abstract entities'⁶⁵ than an affirmation of individual criminal responsibility: the so far little noticed fact that, if it is indeed *individuals* who commit international crimes (and, for all Nuremberg's premonition, that fact has only become more clear both legally and as a matter of our world view in recent years), this also means that it is *not*, at least in any useful way, *abstract entities* that go on committing them simultaneously. Behind the superficial propositional simplicity of the *dictum*, lies a formidable dilemma whose implications have not even begun to be explored, and that may durably shape the face of the global legal order to come.

Individual criminal responsibility is also, as some states perhaps realise too late, something that is highly volatile. By the time it has been introduced in the international structures, it develops a weight of its own, that can be seized upon to affect international legal relations by such unlikely international actors as a Spanish judge, a human rights NGO or even a sympathetic state, thereby threatening to engulf the international legal order in a whirlwind of deconstruction.⁶⁶ It is as if, in the rush to define the nature of the international legal order, with the venerable International

⁶² Bull, *supra* note 50, at 152.

⁶³ ICJ Reports (1986) 113 (Decision of 27 June 1986).

⁶⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, ICJ Reports (1992) 3; *Legality of Use of Force*, ICJ Reports (1999) (forthcoming); *Armed Activities on the Territory of the Congo*, ICJ Reports (forthcoming); *Aerial Incident of 10 August 1999*, ICJ Reports (forthcoming).

⁶⁵ *The Trial of German Major War Criminals Sitting at Nuremberg, Judgment* (1946) 41–42.

⁶⁶ See Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation', 41 *HILJ* (2000) 129.

Law Commission going on as if nothing had changed,⁶⁷ individual criminal responsibility was on the brink of overthrowing the promise of state ‘higher order’ responsibility as the shiniest gem on the crown of international law. If one is serious about individual criminal responsibility as a concept, therefore, one will sooner or later have to draw all consequences from the fact that it has the ambition of becoming the preferred option for enforcement of what the community increasingly considers as its constitutive norms. As such, it at least has the potential to replace state responsibility as the ultimate linchpin of the global normative order. This does not mean, of course, that state responsibility will disappear, or that state responsibility may not yet flourish, or even that states may not eventually agree on a concept of crime of state. But it does imply that individual criminal responsibility under international law, as the *structural* paradigm of an emerging cosmopolitical order, may well become endowed with an axiological primacy (as evidenced in the Rome Statute) that is deeply foreign to traditional inter-state logic. With the emergence of norms protecting the individual whose enforcement relies on individual criminal responsibility, the state may not be able to escape the conclusion that it is quite simply being side-tracked as a mere instrument of crime.

Within a small club of heavily socialized post-Hobbesian states, this, it is submitted finally, is where the real debate is taking place between those who would turn the international legal order literally upside down, and those who, while ready to make a prudent move in the direction of individual criminal responsibility, want to make sure that they can continue presiding, if need be, over a more horizontal conception of international law.

Such were the terms of the debate that confronted the negotiators at Rome. As has already been seen, a rather large majority of the international community opted for the more Kantian-leaning version of the ICC. At the same time, there was always something intriguing about the US position: it was politically unclear, in particular, why exactly the US believed it has so much more to lose from an ICC operating according to international fair trial standards, than from potentially flawed decentralized prosecutions of its nationals which can already happen and will go on being a possibility. In light of the above, the answer to this question may be relatively simple, if slightly awkward. For reasons that remain to be explored, the US is subject to a very particular kind of fear: not so much that of its agents being tried for their erstwhile international crimes in the absolute, as their being tried by a supranational institution. It is this specific cosmopolitanization of the global legal order and what lies behind it — the prospect of a uniquely legitimate standpoint representing the international community at large and claiming to speak in the name of humanity — that the US opposes, perhaps because it is perceived as a slippery slope on which much of what international society stands for — order, stability, readily identifiable and predictable actors — threatens to be disrupted. Hence, the US position ends up on the

⁶⁷ See Rosenne, ‘State Responsibility and International Crimes: Further Reflection on Article 19 of the Draft Articles on State Responsibility’, 30 *New York University Journal of International Law and Policy* (1997–1998) 145, at 165.

Grotian end of the debate, and more on its Vattelian than Suarezian end at that. Madeline Morris' argument, in this context, is one of the most explicit attempts to reinstate the legitimacy of states' prerogatives against the perceived radicalism of the ICC.

4 Concluding Remarks: Towards a Paradigmatic Revolution in International Law?

It is often said that the validity of paradigms depends on their capacity to account significantly and parsimoniously for the phenomena that their very existence suggests for questioning. The multiplication of ad hoc variables in order to make the paradigm 'stick', on the contrary, betrays its crisis and degeneration as a heuristic device.⁶⁸ International law, as the law predominantly governing the relations between states is known, is, undeniably, such a paradigm. One can probably burden it with many variables to account for such seemingly counter-intuitive phenomena as, for example, the growth of human rights or the criminalization of norms.⁶⁹ But one should be open to the prospect that one day the term and the epistemology that comes with it may describe a reality so remote from its original matrix, that it can no longer be called inter-national in any scientifically useful way. It is here submitted that the creation and activities of the ICC might well one day precipitate a revolution of Westphalian proportions which, although it may not do away with the state system, would certainly rest its legitimacy on an entirely different footing. The attempt to challenge the ICC's legality and the desirability of its having jurisdiction over non-nationals without the consent of third party states reviewed in this article reflects at least a misunderstanding of the hermeneutics of that purported revolution.

One can discuss *ad infinitum* whether the global legal order is indeed moving away from international co-existence and towards cosmopolitan integration through transnational cooperation, or if this is yet another historical optical illusion, the likes of which have notoriously fooled more acute observers in the past. What the above discussion does hope to have demonstrated, however, is that no amount of reductionism can obscure the fact that *this is indeed ultimately what the debate is about*. The distinction between Grotian and Kantian trends in contemporary international law, in this context, would seem to offer a whole avenue of research for our understanding of international criminal justice, which at this stage raises more questions than answers. Although only some of these can be alluded to in this

⁶⁸ See generally T.S. Kuhn, *The Structure of Scientific Revolutions* (1962).

⁶⁹ For example, Theodor Meron's fascinating insights in one recent article published in this journal may nonetheless seem to some typical of difficulty to see international criminal law's specifically revolutionary — as opposed to innovative — potential. Criminalization is considered, to a degree, as merely an adjunct phenomenon that does not necessarily question international law's deep structure. As a result, the author always stops short of examining whether a criminalized international law is still an international law, to borrow from one famous theorist, 'properly so called'. See Meron, 'Is International Law Moving Towards Criminalization?', 9 *EJIL* (1998) 18.

conclusion, it is suggested that they will form the theoretical substratum of many debates to come.

The first question concerns the compatibility of both strands in the global legal order. As a result of Theodor Meron's oft quoted but rarely discussed proposal, a kind of myth has emerged in some circles that if only the Rome Conference had had enough time (the argument was proposed in the closing days), the amendment could have been serenely examined, and would have solved most difficulties. This is ambiguous to say the least. If a state merely decides to take the blame for the crimes of its agents but there is no available mechanism to secure its international responsibility, then such a clause would simply provide a means of using state sovereignty to evade *any* responsibility. It is only if the Meron proposal was intended as, say, a lever to reform the compulsory jurisdiction clause of the International Court of Justice that the two could be seen as complementary. But there was no hint that this was the idea behind the proposal, and even if it had been it would probably still be out of tune with the times.

This does leave a few obscure corners, however, which are beyond the scope of international law. A second and intriguing question, in particular, is why the US and Europe should identify respectively with the Grotian and Kantian views, rather than the opposite or any other view. After all, nothing that has been said so far suggests why some states more than others should at a stage in history identify one tradition as more congenial to their interests. Clearly, some of this is as contingent as, say, the presidency of a Foreign Relations Committee, and has more to do with shifting power coalitions than with some unavoidable calculus of national interest. But other factors may play a role as well.

Although minimizing the radicalness of the ICC may have been a good promotional tactic for selling the concept to sovereignty-conscious states, an understanding of the 'structural' implications of the Grotian/Kantian debate may at least serve to detrialize both adherence and non-adherence to the Rome Statute. The Rome Statute, perhaps even more than the League of Nations or United Nations Charter because it is essentially about protecting individuals (rather than striking an awkward balance between human rights and state sovereignty), and perhaps even more than the Universal Bill of Rights because it is about enforcement (rather than some grand programmatic statement), comes as close as the international community has ever been to the realization of a cosmopolitical social contract, in that it proposes to put the sanctioning of certain international crimes that endanger the very survival of humanity above any contingent sovereign interests. In doing so, it offers the prospect of at least partly doing away with the ways of the past, and abandoning much of international law's specificity as a system of co-existence of equal entities, by bringing the global legal order a step closer in the direction of emulating domestic law, with its distinct hierarchy of norms and non-discretionary modes of sanction. Indeed, there is more than a passing affinity philosophically and historically between the creation of centralized criminal repression institutions and some aspects of state construction. It may be, therefore, that in such a configuration strong states, not to mention *the*

hegemon, have more to lose from joining an agreement that offers to protect weaker states than those for whom the agreement is primarily intended.⁷⁰

This is fair enough as far as it goes, but it only really explains why the hegemon might have more of an effort to make in relative terms, not why it might not be in its interest to join the ICC in the absolute. Indeed, in the final analysis, there may be no escaping the conclusion that there is some deeper 'cultural' divide emerging within the liberal democratic world. Europe, in particular, which is itself engaged in the creation of a cosmopolis of sorts, seems particularly prone historically, for better or for worst, to think of its destiny as dissolving ultimately in the destiny of the whole of humankind. The European construction, its reliance on a common human rights ethos and the accumulated experience of dissolving the more parochial forms of nationalism, although far from accomplished quests, suggest that the hope of providing a blueprint for the partial transcendence of the state now probably resides more resolutely than ever on the Old Continent. Through a strange Cunning of Reason, the cradle of the nation state may be increasingly called upon to become the testing ground of its *dépassement*. Under this view, the problem of the ICC's jurisdiction might be considered as the latest item on a list that includes, for example, the death penalty or anti-personnel mines, and which is persistently putting the US and Europeans at loggerheads on what constitutes the proper frontier of municipal and international law, sovereignty and human rights.

This raises a third and last question: if the present likelihood of reconciling opposite views is depressing, then what are the prospects for change? The problem, it is contended, is at least partly influenced by the fact that Leviathans are not individuals and are not or no longer speaking, as it were, in one voice. To the extent that the ICC is less about a social contract between states (something which was arguably in the making as early as the League of Nations) and more about protecting humanity as a transcendent entity,⁷¹ there is necessarily something historically transient and odd about its fate resting entirely in the hands of the state system. This is probably why the ICC has received an unprecedented amount of support from an international civil society that has keenly identified with the aspiration it embodies. Much will continue to rest on the efforts of individuals, NGOs and like-minded states to promote its cause. Only in this fashion may populations become convinced and convey to their governments the message that they value adherence to deontological principles of conduct more highly than narrow considerations of national interest, even if it means that one's nationals occasionally have to face up to the consequences of their acts before the conscience of humankind.

⁷⁰ What is true of the state of nature between individuals as identified by Hobbes — namely, that all parties to the social contract are of roughly equal strength in the pre-societal stage — may not, of course, hold true when moving to more integrated forms of global political organization between states. States act as demultipliers of inequality and, in the international arena, only the lives of some states are 'solitary, poor, nasty, brutish, and short'. See T. Hobbes, *Leviathan* (1651).

⁷¹ Carrillo Salcedo, 'La Cour pénale internationale: l'humanité trouve une place dans le droit international', 103 *Revue générale de droit international public* (1999) 23.

In the meantime, one of the greatest challenges will be to find modes of co-existence between those states who have chosen to press ahead with radical change and those who want to adopt a more ‘wait and see’ approach. It is probable that the dialogue between the two can hardly be formulated in cosmopolitical terms, because, as evidenced by opposition to the ICC, it cannot, at least yet, be founded on a universally shared conception of the common good. For want of a world consensus on the proper allocation of order and justice, prudence, that classical political virtue, may well provide the safest route in the meantime. Ultimately, however, this dialogue cannot be sustained forever without prospect for resolution, and the international community cannot endlessly move at different speeds without multiplying the risks for friction. Sooner or later, either convergence or diremption are inevitable. Which occurs will depend partly on how well the ICC fares in its first years, and whether it can build a capital of trust based on reasonableness, minimal diplomatic flair, and a sense of historical purpose.

But beyond this fine-tuning, the success of the ICC will above all depend on the larger evolution of the international stage, something on which its own existence can only hope to have a marginal influence. In a well-known article, Schwarzenberger once criticized projects for an international criminal court for sharing ‘the deficiency of taking for granted an essential condition of their realization, a *sine qua non* which cannot be easily attained: the transformation of the present system of world power politics in disguise into at least a world federation’.⁷² It is remarkable how much of that prescient insight remains. On the capacity of the ICC to embody a true evolving world consensus about the primacy of the cosmopolitical ethos over the international order will depend its ultimate success.

⁷² Schwarzenberger, ‘The Problem of an International Criminal Law’, 3 *Current Legal Problems* (1950) 263.