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# *International Criminal Law vs State Sovereignty: Another Round?*

Robert Cryer\*

Broomhall, Bruce. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. Oxford: Oxford University Press, 2003. Pp. viii, 215. £60.

Lattimer, Mark and Philippe Sands (eds). *Justice for Crimes Against Humanity*. Oxford: Hart, 2003. Pp. xv, 512. £55.

Nadya Sadat, Leila. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. New York: Transnational, 2002. Pp. xviii, 566. \$125.

Sands, Phillippe (ed.). *From Nuremberg to the Hague: The Future of International Criminal Justice*. Cambridge: Cambridge University Press, 2003. Pp. xiii, 192. £40.

Ward, Ian. *Justice. Humanity and the New World Order*. Aldershot: Ashgate, 2003. Pp. viii, 183. £50.

## **Abstract**

*This is a review of five recent works which deal with international criminal law. By an analysis of those works, the essay queries whether the relationship between international criminal law and state sovereignty is always accurately conceptualized. International criminal lawyers often see sovereignty as the enemy of international criminal law, though frequently failing to discuss in any depth the nature and malleability of sovereignty. Although international criminal law does involve some challenges to sovereignty, it also needs, and in some ways empowers, that sovereignty too. The works under review tend to pay less attention to the substantive aspects of international criminal law than its*

\* School of Law, University of Nottingham. Email: Robert.Cryer@nottingham.ac.uk. Thanks to Neil Boister for his comments on an earlier draft.

*institutional part. This is unfortunate, as some of the most interesting interactions between international criminal law and sovereignty occur at this level. The essay finishes with some broader reflections on how the works under review conceptualize the international legal order, regrets the absence at times of engagement with relevant constructivist scholarship but notes that the answer to the question of the precise relationship between international criminal law and sovereignty is unlikely to be agreed upon soon.*

## 1 Introduction

When sovereignty appears in international criminal law scholarship, it commonly comes clothed in hat and cape. A whiff of sulphur permeates the air. Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of *realpolitik*, thwarting international criminal justice at every turn.

Although this may sometimes be an adequate description of reality, the relationship between sovereignty and international criminal law is more complex, and we are beginning to see this coming through in more sophisticated international criminal law scholarship. Indeed the books reviewed here can be seen as belonging to the second wave of post-Cold War international criminal law scholarship.<sup>1</sup> They also represent a more highly developed, worldly-wise approach to international criminal law than some of the earlier literature in the field.<sup>2</sup>

Four of the five works under consideration have international criminal law as their primary focus. Two of them are monographs concentrating on the International Criminal Court and its relationship to international law more generally. The first of these, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* is by Bruce Broomhall, who is now a Professor at the University of Québec in Montréal. The second, longer, and more optimistic in outlook is *The International Criminal Court and the Transformation of International Law* by Leila Sadat, a Professor at Washington University. Two of the books are collections of essays edited by Philippe Sands, Professor at University College London. *From Nuremberg to the Hague* is a short work, consisting of five essays that derive from public lectures arranged by Matrix Chambers, and given at the Wiener Library in London. The larger collection, *Justice for Crimes against Humanity*, is edited with the Executive Director of Minority Rights International, Mark Lattimer, and covers both legal and personal views on international criminal law from a plethora of scholars and practitioners.

The final work, *Justice, Humanity and the New World Order*, by Ian Ward, Professor of Law at the University of Newcastle, is a disquisition on the role of sensibility in jurisprudence. It contains a section on international criminal law, which will be the focus of comment on that book here. Of the five, only Ward's is generally critical of

<sup>1</sup> For earlier efforts see, e.g., B. Ferencz, *The International Criminal Court, A Step Towards World Peace* (1980).

<sup>2</sup> As Bruce Broomhall says in *International Justice and the International Criminal Court* [hereinafter *International Justice*], at vii, 2, 'International justice can work; but to work in a legitimate and a politically, legally and financially viable way requires that problems be honestly addressed and the first steps taken towards defining solutions. . . Oversimplifications will not achieve these aims.'

international criminal law, but the fact that this issue is of interest at all in a more general theoretical work, alongside the fact that these books represent only part of the ever-increasing literature on international criminal law, shows that the topic is no longer the preserve of a small number of scholars publishing for a small audience.

Despite all their merits, however, the volumes assessed here also show that international criminal law scholarship has not yet fully come to grips with the interrelationship of international criminal law and sovereignty.

## 2 Sovereignty vs International Criminal Law: Are We Sure?

Let us turn, therefore, to this *bête-noire* of the international criminal lawyer. State sovereignty is often placed in the dock by such scholars,<sup>3</sup> the attitude of whom is accurately summarized by Ian Ward,<sup>4</sup> '[t]he overweening nation-state all too readily begat the horrors of nationalism. The jurisprudence of sovereignty, in turn, all too easily lent a spurious legitimacy to these horrors.' Often, those espousing such an opinion have a point (although nationalism is by no means the only guilty ideology). Sovereignty can also be used to pre-empt fuller debate on the advisability of developing the law. At Rome, for example, 'this would intrude on our sovereignty' was often used as a euphemism for 'we don't like this' *per se*. As we will see, though, there is more to the relationship between sovereignty and international criminal law than meets the eye. Before moving on to this, however, it is interesting to note the similarities and differences in the approach to sovereignty taken in the more traditionally doctrinal/legal works under review here.

### A Sovereignty and Malleability

Antonio Cassese, as noted by Bruce Broomhall in his extremely useful, if rather short, book, has made it clear that in his view 'either one supports the rule of law, or one supports state sovereignty. The two are not . . . compatible'.<sup>5</sup> Although Cassese has both the understanding of legal theory and the practical experience that makes such a view carry considerable weight, it is worth investigating the matter a little further.

To begin with issues of theory, as a number of the works here accept, there are two views of sovereignty. The first of these views is that of sovereignty as pre-legal, in which sovereignty represents a monolithic entity that is of clearly determinate content. This approach to sovereignty, although not absent in some of the debates in Rome, for example on the definitions of crimes, does not reflect how most states and scholars see sovereignty. Bodin's original, fairly absolutist, concept of sovereignty was empirically defended, so to raise such a concept of sovereignty to the normative level would be to derive an 'ought' from an 'is', or perhaps more accurately, a 'was'.

<sup>3</sup> See, e.g., King, 'Nuremberg and Sovereignty', 28 *Case Western Reserve Journal of International Law* (1996) 135.

<sup>4</sup> I. Ward, *Justice, Humanity and the New World Order* (2003), [hereinafter *Humanity*], at 18.

<sup>5</sup> *International Justice*, at 56. It must also be noted, however, that Cassese's approach to sovereignty is by no means simplistic or Manichean.

Indeed, those international lawyers accused of adopting an absolute concept of sovereignty rarely did any such thing.<sup>6</sup> The other idea is that sovereignty is a more flexible concept, with sovereignty being constituted by the international legal order, which defines the basic rights and duties of states, a view typically associated with Hans Kelsen<sup>7</sup> and apparent in such cases as the *Wimbledon* case in the Permanent Court of International Justice (PCIJ).<sup>8</sup>

The works considered here, understandably, tend to take the latter view of sovereignty and the international legal order. To take the view that sovereignty is pretty much absolute and unchangeable tends to lead to a dim view of the prospects of international criminal law.<sup>9</sup> Thus Andrew Clapham, in an excellent chapter in *Justice for Crimes against Humanity*<sup>10</sup> tells us ‘Sovereignty as such is a changing notion which adjusts to the developing nature of international law . . . in the end the debate turns on what one chooses to understand by the term sovereignty and who should be protected . . . the rule that there should be no interference in state sovereignty simply begs the question: what are the rights and duties associated with sovereignty?’ (at 305, 312, 313).

Similarly Bruce Broomhall accepts, at one point (at 59), that ‘the ‘terms and conditions’ imposed by the international community on those recognized as participants are variable over time. Qualities that are constitutive of sovereignty, and functional limits to which the exercise of sovereignty is subject, may occasionally appear or disappear, and certainly change their emphasis.’<sup>11</sup> However, he is by no means as certain as Clapham that change has occurred, asserting elsewhere, ‘the institution of sovereignty, at least in areas relevant to international criminal law, is in no danger of being replaced or of its importance being radically diminished in the foreseeable future’ (at 5).<sup>12</sup> It would appear thus that Broomhall is somewhat sceptical about the transformative nature of international criminal law in relation to notions of sovereignty (e.g. p. 2). We will return to this in a moment. What ‘his comments do, however, is give the impression that Broomhall’s vision of sovereignty is more static than that of some of the other books’.

It is certainly less dynamic than that of Leila Sadat, who takes the view in her *The International Criminal Court and the Transformation of International Law*<sup>13</sup> that

[t]he negotiation of the Rome Treaty has worked a quiet, albeit uneasy, revolution that has the potential to profoundly transform the landscape of international law. Yet no revolution would be complete without a counterrevolution, and many aspects of the Statute reflect the

<sup>6</sup> See, e.g., Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, 65 *Nordic Journal of International Law* (1996) 385.

<sup>7</sup> See, e.g., Kelsen, ‘Sovereignty and International Law’, 48 *Georgetown Law Journal* (1960) 627.

<sup>8</sup> *SS Wimbledon* (France, Italy, Japan and UK v Germany) PCIJ Rep. Series A No. 1., at 25.

<sup>9</sup> See, e.g., A. P. Rubin, *Ethics and Authority in International Law* (1997).

<sup>10</sup> M. Lattimer and P. Sands (eds), *Justice for Crimes against Humanity* (2003) [hereinafter *Justice*].

<sup>11</sup> See also *International Justice*, at 42–43.

<sup>12</sup> See *ibid.*, at 45.

<sup>13</sup> L. Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) [hereinafter *Transformation*].

constraints of classical international law that did not yield to the forces of innovation and revolution at Rome. This is not surprising, for if State sovereignty . . . is often blamed for the violent condition of world affairs, international governance is not necessarily looked upon as a superior alternative. (at 8)

Clapham and Sadat may have a point. A perfectly reasonable case can be made that the ICC does represent a new era in international law.<sup>14</sup> Or, as Ian Ward claims in *Justice* (at 73–95) globalization ‘demands that we should radically rethink our politics . . . [and] take a fresh look at the institutions which act as transmission belts for our sentiments and ideals, at the legal systems that are supposed to be an expression of them, and at the jurisprudential conceptions within which we clothe these same sentiments and ideals’.

But, as Frédéric Mégret has implied, the debate on the transformation of international law has been going on for a long time.<sup>15</sup> In the 20th century, there was a procession of claims that international law and society is undergoing fundamental changes. For example, in the 1960s there was Wolfgang Friedmann’s assertion that the international legal system was moving from an international law of coexistence to an international law of cooperation.<sup>16</sup> In the 1940s there was Phillip Jessup’s *A Modern International Law*<sup>17</sup> and Jorge Americano’s *The New Foundations of International Law*,<sup>18</sup> and in the pre-war era, there was Alfred Zimmermann’s distinction between the ‘old’ and the ‘new’ diplomacy, the latter represented by the League of Nations.<sup>19</sup> Perhaps the international system has traditionally been characterized by a continual tension in the international legal order between some elements of multilateralism and some of unilateralism. Or as Georg Schwarzenberger put it, states are like Schopenhauer’s hedgehogs, huddling together in the cold, but repelled by each other’s spines.<sup>20</sup> At the least, we should not be quick to assume that the international order has fundamentally changed, without looking at the evidence closely.

### ***B The International Criminal Court as a Threat to Sovereignty***

This alone would be reason to follow Broomhall and to express some doubt that the fundamentals of sovereignty or international law are likely to change. But there is also a question about whether the ICC is really that threatening to sovereignty in the first place. If it is not, then it can hardly be considered likely to transform it. Cherif Bassiouni, for example in his chapter on the ICC in *Justice*, asserts that

<sup>14</sup> For a discussion of this, see, e.g., Mégret, ‘Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law’, 13 *EJIL* (2001) 247. Here see also Lattimer and Sands, ‘Introduction’, in *Justice* at 3; Sands, ‘After Pinochet: The Role of Domestic Courts’, in P. Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003) [hereinafter *Nuremberg*], at 98–103.

<sup>15</sup> Mégret, *supra* note 14.

<sup>16</sup> W. Friedmann, *The Changing Structure of International Law* (1964).

<sup>17</sup> P. Jessup, *A Modern Law of Nations: An Introduction* (1948).

<sup>18</sup> J. Americano, *The New Foundations of International Law* (1947).

<sup>19</sup> A. Zimmermann, *The League of Nations and the Rule of Law 1918–1935* (1936), at Ch. IV.

<sup>20</sup> G. Schwarzenberger, *Power Politics: A Study of World Society* (3rd edn, 1964), at 12.

[i]t is not a supranational body, but an international body similar to existing ones . . . The ICC does no more than what each and every State can do under existing international law . . . The ICC is therefore an extension of national criminal jurisdiction . . . Consequently the ICC . . . [does not] . . . infring[e] on national sovereignty. (at p. 181)

It would appear, therefore, that there is no consensus on the extent to which the ICC represents a fundamental challenge to sovereignty, or requires a reappraisal of the nature of international law.

Queries can rightly be expressed about Bassiouni's exclusion of any supranational element in the ICC, but in relation to the law, Bassiouni has a strong point.<sup>21</sup> Although it is true that the International Criminal Court, being both permanent and having a broad jurisdictional reach is institutionally a huge innovation, the drafters at Rome were very careful to ground the developments they were making in pre-existing law. This was because it was certain by the late stages of the Rome conference, if not before, that some states were going to oppose the Rome Statute whatever the outcome. The drafters were fully aware that such states would seize any parts of the statute in advance of international law as a stick with which to beat the new court should the ICC ever seek to exercise its jurisdiction over them as non-parties.<sup>22</sup>

It is notable that this debate is also taking place amongst those who support the International Criminal Court. All the works specifically concentrating on international criminal law reviewed here contain defences of the ICC against the critiques levelled at it by the US that it violates pre-existing international law.<sup>23</sup> Interestingly, those authors who assert that the ICC is transformative of the nature of international law may weaken the claim that the ICC is consistent with pre-existing international law. For example, Sadat, in a work that is at once supportive of the ICC, enjoyable and perhaps deliberately provocative,<sup>24</sup> states that:

[a]nother aspect of establishing the ICC outside of the United Nations system is the possibility that the Rome Conference represented a Constitutional Moment in international law – a decision to equilibrate the constitutional, organic structure of international law, albeit *sotto voce*. . . . [various aspects of the Statute and its creation] . . . suggest an important shift in the substructure of international law upon which the Court's establishment is premised. Unable to effectuate the change explicitly, through formal amendment of the Charter, the international community, including not only States but global civil society, seized upon imaginative ways to bring about the shifts in constitutional structure necessary to permit international law to respond to the needs of international society and changing times.<sup>25</sup>

In applauding the Rome Statute for this, Sadat concedes too much to the critics of the ICC who say the ICC significantly alters the charter and international law generally.

<sup>21</sup> This is not to say that the ICC does not reflect a shift in attitudes. It does.

<sup>22</sup> The US has used international legal arguments to claim that the ICC is flawed, see, e.g., Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective', 41 *Virginia Journal of International Law* (2000–2001) 186.

<sup>23</sup> See *International Justice*, at Ch. 9; Booth, 'Prospects and Issues for the International Criminal Court: Lessons from Yugoslavia', in *Nuremberg*, at 186–191; *Transformation*, at 280–281.

<sup>24</sup> *Transformation*, at xi.

<sup>25</sup> At 79. See also *Transformation*, at 103.

It is more prudent, as James Crawford is in his contribution to the short but substantial *Nuremberg*, to note that the ICC reflects the fact that international law may have changed slightly (with a greater focus on international criminal law), although not really at the institutional level.<sup>26</sup>

### *C International Criminal Law and Sovereignty*

As has already been noted, the relationship between international criminal law and state sovereignty is complex, and perhaps often misunderstood.<sup>27</sup> We must accept that international criminal law does affect state sovereignty (the law on crimes against humanity and genocide in particular) by prohibiting behaviour perhaps previously outside of the purview of international law. Or, as Bruce Broomhall comments, the idea that certain acts ‘undermine the international community’s interest in peace and security and, by their exceptional gravity, “shock the conscience of mankind”’,<sup>28</sup> and thus are not the concern of one state alone. The obligations undertaken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes (or lack thereof) to external oversight also have implications for sovereignty.

However the prevention of international crimes cannot occur without sovereignty. Violations of international criminal law were frequent, for example in Somalia, where there was no government that could control the various factions. It is the same in cases such as Sierra Leone, where rebel forces were fighting a government that is weak and does not control much territory.<sup>29</sup> The state (and its powers) have a protective role that cannot be ignored here, at the very least unless and until the UN or another body chooses to take it over.<sup>30</sup>

Turning more specifically to the ICC, it also bears recalling that creating that body was an exercise of sovereignty. No other entities than states had the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf. In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in that way. Non-party states have not had their sovereignty limited in any additional way by this concession

<sup>26</sup> Crawford, ‘The Making of the Rome Statute’, in *Nuremberg*, 109, at 115–117.

<sup>27</sup> See, e.g., Bennouna, ‘Sovereignty vs. Suffering: Re-examining Sovereignty and Human Rights Through the Lens of Iraq’, 13 *EJIL* (2002) 243.

<sup>28</sup> *International Justice*, at 10, see also at 44–51.

<sup>29</sup> See Jennings, ‘Sovereignty and International Law’, in G. Kreijen *et al.* (eds), *State, Sovereignty and International Governance* (2002) 27, at 30–31.

<sup>30</sup> See, e.g., J. E. Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Criminal Law* (2004) at 5–6.

made by states parties, who have locked themselves into a regime that can take over part of the protective role of the state, by prosecuting offences if the state later becomes unwilling or unable to do so.

Admittedly, the rights of the ICC to do so are hedged with conditions protecting sovereignty, most notably, complementarity. Most of the works reviewed here discuss complementarity, and tend to do so well.<sup>31</sup> However, although some of the authors accept that complementarity was intended to limit the power of the ICC (or, the ‘international’) over states,<sup>32</sup> the idea behind complementarity can also be seen as a use of state sovereignty for international ends. As Sir Robert Jennings has written in another context,

the classical international lawyer’s call for a surrender of sovereignty was erroneous. What was and is most urgently needed is not a surrender of sovereignty but a transformation and augmentation of it into new directions by harnessing it, through proper legal devices, to the making of collective decisions, and the taking of effective collective action, over international political problems.<sup>33</sup>

The reason for this is that to be effective, international law needs developed domestic structures like courts and police services.<sup>34</sup> Although Jennings’ comments were not written with the ICC expressly in mind, it is an excellent explanation of complementarity.<sup>35</sup> States have decided that international crimes ought to be repressed, and have determined that the most effective way of doing this is by encouraging national efforts at prosecution, i.e., using state sovereignty. Indeed, Philippe Sands, in his contribution to *From Nuremberg to the Hague* identifies this as one of the advantages of complementarity (at 76–77), as it ‘recognises that national courts will often be the best placed to deal with international crimes’, and provides them with an incentive to act.

The exercise of legislative and adjudicative jurisdiction is an important part of state sovereignty. What the ICC does is provide a mechanism where states are actually encouraged to use their sovereignty in this way.<sup>36</sup> This effect is not necessarily limited to states parties.<sup>37</sup> Still, the extent to which the ICC can provide such an incentive is not helped by what a number of the authors here accept: that the cooperation regime for the ICC is not strong, owing to an unwillingness of states to go too far in relation to their perceived sovereign prerogatives.<sup>38</sup>

<sup>31</sup> See *International Justice*, pp. 86–93, Sands, *supra* note 14, at 74–81.

<sup>32</sup> E.g., Sands, *supra* note 14, at 75; *Transformation*, at 123–128.

<sup>33</sup> Jennings, *supra* note 29, at 42.

<sup>34</sup> *Ibid.*, at 37, 41.

<sup>35</sup> And, perhaps more generally of international criminal law, as Broomhall points out, international criminal law had a political project. It is simply one that many people (this author included) support. See *International Justice*, at 192.

<sup>36</sup> Clapham, ‘Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the International Criminal Court’, in *Nuremberg*, at 64. Broomhall’s discussion of this point is particularly good, see *International Justice*, at 86–93.

<sup>37</sup> See Aceves and Hoffman, ‘Pursuing Crimes against Humanity in the United States: The Need for a Comprehensive Liability Regime’, in *Justice*, at 240.

<sup>38</sup> E.g., *Transformation*, at 254, *International Justice*, at 151.



The above point can perhaps be generalized a little more. International criminal law may have the effect of limiting sovereignty through its substantive norms (although we will return to this matter later), but it also empowers states in relation to jurisdiction. This should come as no surprise, as can be seen from the double-structured nature of the argumentation in the *Lotus* case, and the commentary it inspired.<sup>39</sup> To assert jurisdiction over an action is to exercise a form of sovereignty over it, and where the jurisdiction being asserted is extraterritorial, this may cause consternation in the state where the offence occurred. What is at issue is who is to be empowered to exercise sovereignty, the *locus delicti* alone, or other states?

International criminal law has traditionally adopted a broad view of extraterritorial jurisdiction. For example, passive personality jurisdiction is generally frowned upon in international law, yet it is unquestionably available in relation to international crimes.<sup>40</sup> The broadest jurisdiction granted to states in international law, universal jurisdiction, is granted by international criminal law. As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders, through the assertion of such a broad form of jurisdiction. Although most international criminal lawyers would accept that in the case of international crimes this is right, it also shows that sovereignty is not always the enemy. Without sovereignty there are no courts, and without courts there are no prosecutions.

In dealing with universal jurisdiction, however, we also have to take into account the claims that universal jurisdiction is, albeit notionally available to all, in practice a tool of the powerful. This was one of the bases upon which the President of the ICJ, Gilbert Guillaume, opined that to accept universal jurisdiction *in absentia* would 'be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'.'<sup>41</sup> Guillaume's point might be countered with a claim that all states remain, in spite of modern imbalances of power, equally sovereign,<sup>42</sup> thus legally with equal jurisdictional authority. However, as a number of the authors recognize, international criminal law operates in a political, as well as a legal sphere, so practical opportunities to exercise that jurisdiction are not equally distributed.<sup>43</sup> Perhaps most astringently in relation to national jurisdiction, Broomhall asserts that

<sup>39</sup> *S.S. Lotus, France v Turkey*, PCIJ Series A No. 10 (1927). See Spiermann, 'The *Lotus* and the Double Structure of International Legal Argument', in L. Boisson de Chazournes and P. Sands (eds) *International Law. The International Court of Justice and Nuclear Weapons* (1999) 131.

<sup>40</sup> See, e.g., Rohrig, *Brunner and Heinze* (1950) 17 ILR 393.

<sup>41</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), ICJ List 121, 14 February 2002, Separate Opinion of President Guillaume, para. 15.

<sup>42</sup> See, e.g., Consard, 'Sovereign Equality – The Wimbledon Sails On', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2002) 117.

<sup>43</sup> See, e.g., Overy, 'The Nuremberg Trials: International Law in the Making', in *Nuremberg*, at 29, Lattimer and Sands, *supra* note 14, at 13–17.

It would be one thing for France to prosecute a former Head of State of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States. If regular enforcement – the rule of law – is to become even a clearly *emergent* reality, then supporters of universal jurisdiction will have to propose credible means of addressing the complex decisions and (sometimes political) value-judgements faced by those operating in real-world situations. (at 126)

Mark Lattimer and Phillippe Sands, in the very useful introductory chapter of *Justice*, go further, and also note that it is by no means solely at the national level that political considerations enter the equation

Outside the courtroom at least, international criminal justice cannot be immune from strategic influences. It is plain that global and regional politics renders the commitment of some states to international justice more decisive than that of others. This leads to some uncomfortable conclusions: for example, one could speculate that if the Tribunal *had* issued indictments against NATO personnel over incidents in the Kosovo war, it might have seriously undermined Western support for the Tribunal and possibly compromised the whole project of international criminal justice, including the International Criminal Court. (p.17)

This takes us to the fact that sovereign equality is a legal rather than empirical concept. It also takes us to the crux of Broomhall's argument that the rule of law, insofar as it requires 'consistent, impartial practice . . . raises profound difficulties, at least as the international system exists and is likely to develop' (at 54). He is right that the nature of the international system does not provide an easy welcome for entirely consistent practice, although the situation in relation to selective enforcement may have improved somewhat recently. After all, Belgium, the defendant state in the *Arrest Warrant* case, is no example of a superpower arbitrarily throwing its weight around.

### 3 Substantive International Criminal Law: What Are We Trying to Do?

With the exception of Sadat's *Transformation*, there is a tendency in the works under review here to downgrade detailed discussion of issues of substantive international criminal law to a secondary level. For example, in Lattimer and Sands' *Justice*, only Eric David discusses the substantive aspects of international criminal law in any depth (and that discussion is limited to a 10-page chapter).<sup>44</sup> This is unfortunate, as precisely what international criminal law is trying to prevent and punish is a hugely important question, as it provides an insight into what values the law is trying to promote.<sup>45</sup>

The complexity of international criminal law's relationship with sovereignty comes through not only in the procedural or institutional aspects of international criminal law. It is also present in substantive international criminal law. Indeed, in at least one instance, substantive international criminal law supports state sovereignty. As David Luban has noted, although crimes against humanity limit states' freedom of

<sup>44</sup> There is also a fairly short, albeit sophisticated section on the extent of criminal liability in the chapter by Clapham in *Nuremberg*, at 50–62.

<sup>45</sup> There is a very useful section in *International Justice* on this point, however, at 41–51.

action in relation to their own nationals (thus limiting their sovereignty), aggression has a sovereignty-protecting role. The prohibition of aggression protects states by criminalizing armed violations of their sovereignty.<sup>46</sup>

International criminal law certainly has its 'schizophrenias',<sup>47</sup> such as the distinction between national and international armed conflicts. As Mark Lattimer and Phillipe Sands put it in *Justice* 'the gaps in that protection are sufficiently large to allow much blood to flow in between' (at 11). Sovereignty has a lot to do with what is, or is not, considered to be part of international criminal law, as the distinction between international and non-international conflicts shows. The boundaries of international criminal law are not apolitical. International criminal law has areas of blindness. One of these areas is famine, which is traditionally seen not as a problem of criminal law, or perhaps even law at all, but one of development aid.<sup>48</sup> However, as Alex de Waal has reported "'to starve" is transitive, it is something people do to each other'.<sup>49</sup> Despite an upturn in interest in using criminal law, and the fact that some humanly created famines may come under the definitions of crimes against humanity and genocide, international criminal law proscriptions remain inadequate to respond even to famines that are the result of intentional human decision-making.<sup>50</sup> As Ian Ward tells us in *Humanity*, 'Law, it should always be remembered, is as potent in its absence as its presence' (at 86).

The fact that international criminal law is not a body of law that has fallen from on high fully formed, but is the outcome of political contestation seems to have been recognized by a number of the works under consideration. Broomhall, for example, quite accurately notes that '[b]ecause the judgement of states, individually and collectively, is subject to diverse extra-legal influences, the process of international criminalization will always be less orderly than its conceptual formulation' (at 39). This is absolutely correct, the modern discussion on whether or not terrorism is an international crime, for example, reflects contestation over where (at the national or international level) such actions ought to be punished, and in other situations, whether criminal law is the appropriate model to adopt.

This political contestation over the substance of international criminal law was clearly in evidence in Rome. As Broomhall notes, the decision in relation to the ICC that the crimes had to be spelt out in considerable detail was not solely because of an abstract commitment to a systematic presentation of international criminal law, but 'also resulted from the awareness of governments that they were designing an institution that could possibly bring indictments against even their highest-ranking officials' (at 31).

<sup>46</sup> Luban, 'The Legacies of Nuremberg', 54 *Social Research* (1987) 779, at 787–790.

<sup>47</sup> To use Steven Ratner's phrase in his 'The Schizophrenias of International Criminal Law', 33 *Texas International Law Journal* (1998) 237.

<sup>48</sup> See Marcus, 'Famine Crimes in International Law', 97 *AJIL* (2004) 245, at 245–246.

<sup>49</sup> A. de Waal, *Famine that Kills: Darfur, Sudan* (rev. edn, 2005), at xii.

<sup>50</sup> For a brave attempt at showing that international criminal law does cover such activity, see Marcus, *supra* note 48.

Indeed he goes further, noting the, perhaps ‘promiscuous’,<sup>51</sup> use of legal concepts, sometimes for ulterior purposes, mentioning in relation to the *nullum crimen sine lege* principle that it offered ‘a means both of limiting exposure to the obligations imposed by the Statute and of fostering codification and development of the law ... [as well as reflecting] ... a desire to forestall any repetition of the criticisms aimed at the Nuremberg Tribunal, which had already been taken into account in the establishment of the ICTY and ICTR’ (at 30). Indeed, and it is notable that the approach taken to the ambit of criminal responsibility differs quite significantly between ‘safe’ and ‘unsafe’ tribunals, i.e., those which could exercise jurisdiction over their creators and those that cannot.<sup>52</sup> It is a pity that on this, as on a number of points, Broomhall makes highly perspicuous assessments, but does not really expand upon them as much as might be hoped. This is one of the few flaws in what is a sophisticated and well-rounded work.

Broomhall is not the only one to note the interplay of substantive norms and state interests at Rome. Sadat also is fully aware that

there might be a fundamental incompatibility between the political agendas of States and the process of codifying, in a progressive manner, the customary international law of war and crimes against humanity. Thus, the codification process was fated to produce a text that represented a set of political compromises, rather than a new set of progressive norms criminalizing behaviour on a broad scale.<sup>53</sup>

Like Broomhall, Sadat also highlights the interplay between legal argumentation on how specific the substantive criminal law provisions in the Rome Statute had to be and the extent to which states were prepared to allow the ICC to judge their own nationals (see, e.g., at 174–182). Despite this, Sadat, consistent with her idea that the ICC has probably altered international society, at times takes a very broad view of the normative impact of the drafting process at Rome. She is not alone in this, for example, Lattimer and Sands assert that the Rome Statute ‘provides the most comprehensive, definitive and authoritative list of war crimes and crimes against humanity attracting individual criminal liability’.<sup>54</sup> But Sadat perhaps goes the furthest, asserting that the definition process at Rome was a ‘quasi-legislative event that produced a criminal code for the world’ (at 263). This is part of an argument that the Rome Statute provides a ground floor for definitions of crimes. This would provide a defence against those who claim that if the Security Council were to make the law applicable to conflicts in non-party states (as it has now done in relation to Darfur, Sudan, in Resolution 1593) there could be a violation of the *nullum crimen* principle.<sup>55</sup>

<sup>51</sup> See T. L. H. McCormack, ‘Crimes Against Humanity’ in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2003) 179, at 200.

<sup>52</sup> See R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), Chs 5–6.

<sup>53</sup> *Transformation*, at 261. See also *International Justice*, at 18 and 131.

<sup>54</sup> *Justice*, at 5. Crawford, in his contribution to *Nuremberg*, is more circumspect, describing the Rome Statute (at 152) as a limited code of international criminal law. Aceves and Hoffmann, in *Justice*, however, in relation to crimes against humanity, treat the Rome Statute’s provision on crimes against humanity as the most authoritative interpretation of crimes against humanity in international criminal law’ (at 245).

<sup>55</sup> Sadat clearly is concerned with such an argument, see *Transformation*, at 169.

It is easy to agree with the conclusion that the Rome Statute reflects a minimum content of international criminal law. There are very few norms in the Rome Statute that were not already clearly established and, indeed, if the Rome Statute can be criticized for anything, it is for diluting some war crimes prohibitions and raising the bar for the prosecution of crimes against humanity.<sup>56</sup> There are probably only two areas in which the Rome Statute can seriously be thought to be in advance of the law in existence in 1998. The first of these is the criminalization of the recruitment of child soldiers, the second being the inclusion of gender (and perhaps culture) as prohibited grounds of discrimination in crimes against humanity.<sup>57</sup> It would be difficult to argue now that these are not established in international criminal law. As the Canadian implementing legislation for the Rome Statute makes clear, 'crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law'.<sup>58</sup> But there are also problems with getting to this result the way that Sadat does.

Sadat's argument is that the Rome Statute involved a reconfiguration of the sources of international law, or, in her words

the prescriptive jurisdiction of the international community and the adjudicative jurisdiction of the Court are premised on transformative redefinitions of those principles in current international law. Indeed, through a rather astonishing mutation, jurisdictional principles concerning which State may exercise its authority over particular cases have been transformed into norms establishing the circumstances under which the international community may prescribe rules of international criminal law and punish those who breach such rules (at 103).

This is difficult to reconcile at times with other statements in the work: Sadat also asserts that 'the definitions of crimes are for purposes of the ICC Statute only, and do not embody progressive developments that may be considered new formulations of customary international law (some would even argue that they do not even embody current international law)'.<sup>59</sup> Despite this, it is unclear why the argument that the Rome Statute definitions are at least a minimal definition of custom cannot be made on perfectly traditional principles relating to the interrelationship of treaties and custom. It is true that the crimes are said, in Articles 6(1), 7(1) and 8(2) to be defined 'for the purpose of this Statute', but Article 10 of the Rome Statute provides that 'nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

As far back as the *North Sea Continental Shelf* case it was accepted that the drafting process of treaties, and treaties themselves, can have a developmental role in

<sup>56</sup> See Cryer, *supra* note 52, at 268–283.

<sup>57</sup> Both of which were eminently appropriate innovations (if that is what they were) in Rome.

<sup>58</sup> Crimes Against Humanity and War Crimes Act 2000 c. 24, Section 4(4).

<sup>59</sup> *Transformation*, at 169. See also at 146, '[t]he Statute adopted by the Diplomatic Conference is a montage of historically-based texts, massaged during difficult political negotiations, that improved the existing law in some respects but left it either unchanged or more restrictive in other cases' and at 141, where Sadat notes that the substantive law 'is oriented towards the prosecution of "major" war criminals, not their subordinates or other lesser offenders. This is consistent with the approach taken in establishing international criminal tribunals since Nuremberg'.

custom.<sup>60</sup> There is no reason not to believe that this happened here. The drafters at Rome were for the most part very careful to stay within the bounds of established custom. As we have seen, there were only a very small number of cases where the drafters stepped even arguably beyond the pre-existing law. Rome was not seen as the place for large steps forward in the law, but as a place for creating a court to enforce some of the law. This is, for the most part, the way in which the ICTY has taken the Rome Statute, its most important statement on the point being a comment of the Trial Chamber in the *Kupreškić* case:

In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.<sup>61</sup>

In the *Norman Child Soldiers* decision of the Special Court of Sierra Leone, a decision which dealt with one of the few crimes that could be argued to be new in the Rome Statute (and in which the Appeals Chamber agreed with the Security Council, in determining that in fact it was not),<sup>62</sup> even the dissenter Judge Robertson was prepared to accept that the crime crystallized at the negotiations in Rome.<sup>63</sup> This is perfectly consistent with the traditional rules relating to treaties as evidence of customary international law, and there is thus no need to go further and assert that there has been a transformation in the nature of the international law making procedure, albeit one which ended up with what was in some ways, as Sadat put it, a 'lowest common denominator' (at 267) list of crimes. A list which, Broomhall argues, is now being treated as a '*de facto* criminal code' (at 29).

## 4 Where Are We Going?

So, where does this leave us? Is the international criminal law system always to be ineffective owing to the interplay of the limitations of the ICC's procedure, the lacunae in substantive criminal law and sovereignty? Or are we to move on to a more rule of law-based international criminal justice system? It is quite possible that, as Lattimer and Sands worry in *Justice*, 'international politics, rather than judicial innovation ... [are] ... likely to remain the key driver' (at 13) of international criminal law. As Timothy

<sup>60</sup> *North Sea Continental Shelf* cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v the Netherlands), ICJ Reports (1969) 3, paras 60–82.

<sup>61</sup> *Prosecutor v Furundžija*, Judgement, IT-95-17/1-T, 10 Dec. 1998, para. 227. This was supported in *Prosecutor v Tadić*, Judgment, 15 July 1999, IT-94-1-A, para. 223, but did not go unchallenged, Judge Shahabuddeen reserved his position on the matter (Separate Opinion of Judge Shahabuddeen, para. 3).

<sup>62</sup> *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72, 31 May 2004, at paras 17–51.

<sup>63</sup> *Ibid.*, Dissenting Opinion of Judge Robertson.

McCormack states in his well-researched and thoughtful chapter in the same volume, inconsistencies in international criminal law enforcement are ‘most readily explicable on the basis of an “us” and “them” mentality’ (at 108), where states advocate the prosecution of ‘others’, whilst having ‘an aversion to accept the ugliness of what their own troops have done against the enemy they have come to dehumanise’.<sup>64</sup>

The respective works here are all moderately optimistic, although none could be considered naïve or utopian. Sadat’s work is perhaps the most upbeat, saying that ‘the repartition of competences between national and international jurisdictions incorporated in the Statute as a matter of prescriptive and adjudicative jurisdiction may presage a quasi-federal organization of international legal authority in the future’ (at 11). Further along, Sadat insists that

it is conceivable, perhaps, that we have reached a stage during which a quantum leap in our thinking and behaviour has become possible – enabling us to transform the prohibitions on the commission of genocide, war crimes, crimes against humanity and aggression into real tools to deter the cruel and powerful. The journey from the Hague to Rome was long and arduous; it is to be hoped that the journey back to the Hague will be shorter, less encumbered, and ultimately successful. Humanity deserves no less.

Broomhall, as we have already seen, has more doubts. His prognosis at times looks fairly bleak: ‘The required practice (and consistency of practice) called for by the accountability literature sits uneasily alongside some of the fundamental characteristics of the modern State system’ (at 58). This is amplified later in the work: ‘the role of States in making key decisions affecting the credibility of international criminal law remains a central fact of the emerging system of international justice, and this fact sits uneasily with any assertion that the international rule of law is gaining strength’.<sup>65</sup>

Broomhall also does not see much change in the international legal environment either. This is partially as he considers there to be an inextricable link between international criminal law, ‘the call for the reduction in sovereignty and . . . the call for increased use of force in support of international criminal law’ (at 56). But, as he notes (*ibid.*) states are unwilling to put the decision to use force outside of their control, in particular in support of international criminal law. Broomhall’s second proposition, about the link to force (which has links to Martti Koskenniemi’s point that ‘the “criminalization” of international politics, whatever else it may achieve, also strengthens the hand of those who are in a position to determine what acts count as “crimes” and who are able to send in the police’<sup>66</sup>), is perhaps more controversial. Although some (Antonio Cassese and Madeline Morris are both cited by Broomhall as examples (at 57)) have called for use of force in support of international criminal law (it is not entirely clear that the Cassese quote quite supports this), there are other

<sup>64</sup> *Justice*, at 142. McCormack considers this (*ibid.*) to be one of the strongest arguments in favour of having an international system for prosecution.

<sup>65</sup> *International Justice*, at 185. See also at 103 ‘Domestic trials will remain fraught with all the political, social, and resource difficulties that have always accompanied them, and the resulting imperfections will be slow to improve’.

<sup>66</sup> Koskenniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, 2 *Journal of International Criminal Justice* (2004) 810, at 825.

ways in which coercion can be brought to bear. It is not the threat of military force that persuaded many of the states in former Yugoslavia to cooperate with the ICTY, but economic incentives. Still, these instruments are also open to critique about their lack of transparency and equal application (*International Justice*, at 57).

However, Broomhall is not entirely downbeat, he identifies a metajudicial reason for hope. This is what he describes as a 'new legitimization environment' in which states operate (at 5), one in which they are increasingly under pressure from NGOs and their electorates to justify their decisions. According to Broomhall, 'it is in this context that the impact of the ICC and international criminal law are most likely to be felt'.<sup>67</sup>

Although Broomhall's views here are unquestionably sensible and thoughtful, there is an extent to which two issues could have been further separated out, and the second elaborated on more in the work. The first is the extent to which states which are subject to the Rome regime (be it by becoming parties, or by having personnel subject to its jurisdiction) are likely to begin to prosecute their own nationals to avoid the ICC stepping in. The second is the extent to which states may begin, by doing this, to inculcate the values of international criminal law and normalize the prosecution of international crimes. This may create a feeling that the investigation and prosecution of international crimes is, simply, the normal response to allegations of their commission. In other words states internalize the value of prosecution of international crimes without thought of the external reasons for doing so.<sup>68</sup> Broomhall is cognisant of the first possibility, accepting that

[S]tates have begun taking steps to amend national law to reflect the jurisdictional scope of the Rome Statute. Were this trend to extend widely, the resulting enhancement of the capacity of national law to prosecute international crimes, with any additional incentive provided by the jurisprudence of the ICC, could lay the foundations for a significant increase in the number and credibility of national proceedings against international crimes.<sup>69</sup>

He also at least alludes to the second:

the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability that leads to a convergence of perceived interests and of behaviour on the part of the States responsible for enforcing this law. The ICC and related developments may in fact contribute to the emergence of such a culture, although present signals are not uniformly positive (at 3).

Such a statement, in fact, puts Broomhall in a similar position to Amnesty International in 1998, when that organization stated that

[t]he true significance of the adoption of the Statute may well lie, not in the actual institution in its early years, which will face enormous obstacles, but in the revolution in moral and political

<sup>67</sup> *International Justice*, at 6. See also at 188.

<sup>68</sup> See, e.g., Koh, 'Why Do Nations Obey International Law?', 106 *Yale Law Journal* (1997) 2599.

<sup>69</sup> *International Justice*, at 93. Although he is more pessimistic when he qualifies himself by saying that despite the Rome Statute, '[d]omestic trials will remain fraught with all of the political, social and resource difficulties that have always accompanied them, and the resulting imperfections will be slow to improve' (at 102–103).



attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level.<sup>70</sup>

Perhaps the difference between Broomhall and Amnesty International is one of judgment, rather than evidence. However, it is unfortunate that although he seems prepared to concede that states are beginning to take such a view (see, e.g., at 106), Broomhall does not engage in any extended way with the most relevant international relations scholarship, particularly in the area of constructivism.<sup>71</sup> To be fair to Broomhall, IR theorists, including constructivists, have not dealt with international criminal law in any detail. However, such an engagement by Broomhall could have made for a richer finale to what is already an excellent work.

A constructivist account of the development of international criminal law would take very seriously the role of ideas about international criminal responsibility and the effect those have on states, especially how they perceive their interests and what values they internalize and act upon. The ideas in international criminal law include the appropriateness of the repression of certain identified conduct by prosecution, and that such offences affect everyone, threatening the international system as a whole. Such ideas were contained in the Resolutions that created the ICTY and ICTR (827 and 955 respectively), and those institutions acted as repositories and reminders of those ideals.

The way many states see themselves in relation to international criminal law, and the appropriate role of prosecution has changed over the last decade and a half. Constructivism would place emphasis on the fact that a number of states have begun to internalize those ideas and see their own identity as involving a commitment to the prosecution of international crimes. After a while, rhetoric has a habit of becoming at least partially reified. Or, as Edward P. Thompson said, 'the law may be rhetoric . . . it need not be empty rhetoric'.<sup>72</sup> International criminal law is perhaps particularly susceptible to such an analysis, given the suffusion of its own rhetoric with ideals of universality and crimes against humanity as a whole.<sup>73</sup> A constructivist account would build upon this to use the power of ideas and identity to explain how this led to the ICC.

Furthermore, the account would then expand on the role of the ICC in acting as a repository of those ideas, and persuading states, through the incentive to them to adopt domestic legislation, and oversight of prosecutions, to prosecute international crimes. Constructivist accounts could accept that at the beginning this might be on the basis that states would rather prosecute international crimes themselves than have the ICC do it. Later though, through the existence of the ICC as an embodiment

<sup>70</sup> Quoted in Pace and Thieroff, 'Participation of Non-Governmental Organisations', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 391, at 396.

<sup>71</sup> For an example see C. Reus-Smit (ed.), *The Politics of International Law* (2004). The standard work probably remains A. Wendt, *Social Theory of International Politics* (1999).

<sup>72</sup> E. P. Thompson, *Whigs and Hunters* (1990 (1975)), at 263.

<sup>73</sup> See Cryer, 'Human Rights and the Question of International Courts and Tribunals', in M. C. Davis, W. Dietrich, B. Scholdan and D. Sepp (eds), *International Intervention in the Post-Cold War World* (2003) 60, at 65–66.

of the ideals of international criminal law, and state interactions with it, states would internalize the ideals, and simply prosecute international crimes on the basis that they ought to be prosecuted *per se*, without regard to the concern that the ICC might otherwise do it. Admittedly, this is a skeletal, and perhaps caricatured, constructivist argument, but it shows how an engagement with such literature could have taken Broomhall further.

Although a realist could retort that the ICC was created as a cheap way of appearing to act against international crimes without having to create an effective regime that could limit the actions of the powerful, there is some evidence in favour of the constructivist view. Lattimer and Sands quite rightly, although not without caveat, point (at 9–10) to the possibility that perceived state interests have begun to shift, to take into account the importance of prosecuting crimes which ‘threaten the peace, security and well being of the world’.<sup>74</sup>

Having shifted to issues of theory, it is apposite to turn now to Professor Ward’s *Humanity*. This is a work that attempts to show how jurisprudence, and law more generally, took a long turn when it moved away from emotion and empathy. Perhaps understandably therefore, Ward seems sceptical of the coercive forms of international criminal law.<sup>75</sup> He has a very jaded view of the ICTY, for example, seeing it as an example of victor’s justice. He takes the view that unlike the US, which avoided the ICTY’s jurisdiction over the Kosovo conflict ‘in their different ways, all three communities . . . [being prosecuted] . . . were vanquished’ (at 130). Ward has a point about selectivity, however, he understates the fact that although the US has not accepted the Rome Statute, 100 states have, and thus have accepted that they ought to prosecute their own nationals, as well as showing they believe the law ought to be applied to others.

The second problem Ward identifies with prosecutions (at 131) is drawn from Hannah Arendt: that such trials are anticlimactic, as evil is banal, and ‘[f]lashy show trials of certain individuals . . . allow the rest of us to pretend that we are not ourselves in some way responsible’. Against this we might note Alain Finkielkraut’s contention that such trials are important as they reiterate the point that we always maintain moral responsibility for our actions: banality is no defence.<sup>76</sup> As to the contention that trials allow us to fool ourselves about our own responsibility, it might be noted that, as Karl Jaspers showed, there are many different types of guilt.<sup>77</sup> There is criminal guilt, political guilt (which is the responsibility of people for the acts of their governors), moral guilt (our moral responsibility for all our deeds) and finally metaphysical guilt, which arises as ‘[t]here exists a solidarity among men as human beings that makes each co-responsible for every wrong and injustice in the world, especially for crimes committed in his presence or with his knowledge’.<sup>78</sup>

<sup>74</sup> Rome Statute, preambular paragraph 3.

<sup>75</sup> As is Philip Allott, see his *The Health of Nations: Law and Society Beyond the State* (2002), at 64–66. There are clear links between Allott’s and Ward’s work, but here is not the place to trace them.

<sup>76</sup> A. Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* (1992).

<sup>77</sup> K. Jaspers, *The Question of German Guilt* (2000).

<sup>78</sup> *Ibid.*, at 26.

Ward's point appears to elide the first and last of the types of responsibility. In contrast Jaspers accepted that although there was a close connection between the forms of guilt, '[t]his differentiation of concepts of guilt is to preserve us from the superficiality of talk that flattens everything out on a single plane'.<sup>79</sup> One leads to criminal punishment, the other, for Jaspers, leads to a 'transformation of human self-consciousness . . . [and] . . . may lead to a new source of active life, but one linked with an indelible sense of guilt and humility'.<sup>80</sup>

It is by no means clear that the acceptance that some ought to bear criminal guilt must lead to a negation of the metaphysical guilt that we may all bear for crimes committed in particular with our knowledge, but which we did not prevent. Indeed, in the two cases where international criminal tribunals have been set up (Yugoslavia and Rwanda), the conflicts have remained in the public eye, and this has led to at times agonised reflection on what states, through the UN, ought to have done to prevent those offences.<sup>81</sup> It is arguable that the swing to accepting the emerging responsibility to intervene<sup>82</sup> (which also has interesting links to the concept of metaphysical guilt) has been assisted, if not catalysed, by the movement towards criminal repression of criminal guilt.<sup>83</sup> It is unfortunate that Ward does not engage with Jaspers directly, given that both have an affinity for Kant, and Jasper's conceptual framework remains of the most nuanced accounts of what we mean when we refer to guilt.

Ward's final argument against the over-use of international criminal law perhaps has more purchase:

[t]he forms of law relieve us of the deeper ethical problems, of shared responsibility for the fate of humanity. They also relieve us of the more material responsibilities too. The imprisoning of individual soldiers and politicians does not rebuild schools, hospitals and roads. It does not rebuild trust within devastated societies either. (at 131)

This may be true, but it is also the case that the money (and there is a lot of it) that has gone into the ICTY would not have been given to reconstruction. The funds paid to the ICC by its states parties are not taken from the development or reconstruction aid budgets. That is not to say that the Tribunals have been cheap or always cost-effective, or indeed that some of the money that has been allocated to them could not have been used constructively elsewhere, for example in rebuilding the Rwandan justice system. It is simply that the existence of those Tribunals has probably released more money from contributing states than otherwise would have been given in aid to the countries currently under their consideration.

<sup>79</sup> *Ibid.*, at 27.

<sup>80</sup> *Ibid.*, at 30. For Jaspers this occurs before God.

<sup>81</sup> See, e.g., Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, UN Doc. A/54/549; Report of the Independent Inquiry into The Actions of the United Nations During the 1994 Genocide in Rwanda, UN Doc. S/1999/1257.

<sup>82</sup> See the UN Secretary-General's Report, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005, para. 122.

<sup>83</sup> A constructivist account of international criminal law would have much to say about this.

Against Ward, it can be argued that the individualization of guilt may help rebuild trust among communities. Haris Silajadzic, the Bosnian foreign minister during the war, told Tim Judah that the Tribunal ‘helps a cathartic process in societies on all sides. The message is that you cannot murder, kill or dislocate people without punishment’. However, he also noted ‘I am against reconciliation as seen from the Hague perspective. I never wronged anyone. I did nothing wrong. Reconciliation means we have to meet halfway, but that’s offensive. I was wronged and almost my entire family was killed. I care about justice and truth.’<sup>84</sup>

Ward’s suggestion that local courts ought to have prosecuted offences has been partially taken up by the ICTY, with the recent passing of cases to the Bosnian war crimes chamber under ICTY Rules of Procedure and Evidence 11*bis*.<sup>85</sup> But this procedure has involved the Bosnian chamber proving that it is capable of fair, impartial trials. As McCormack points out in *Justice*, the actions (or lack thereof) of national trials are why the ICC has been considered necessary (at 107). Ward underestimates these problems.

Ward is far more sanguine about the South African Truth and Reconciliation Commission (TRC) than about the ICTY. Ward sees more humanism in the TRC, and believes that it will help establish a culture of human rights by focusing on ‘participating in the pain of others’ (at 134). However, the South African TRC is more complex than this. As Alex Boraine, one of the members of the TRC notes in *Justice*, there is a lingering concern over impunity (at 337) and ‘[t]he South African experiment, with all its benefits, illustrates vividly the need for an international criminal court’ (at 347). Others have gone further, and claimed that the TRC was a flawed institution designed to serve the interests of a new political elite rather than the victims.<sup>86</sup> Either way, it is by no means clear that the TRC has led to reconciliation in South Africa, or contributed to the social justice it was intended to foster.

To take Ward’s own suggestion, and to look for assistance to literature, Aleksandr Solzenitsyn was deeply critical of claims that there should be reconciliation and amnesty: ‘Fie! What naturalism. Why keep talking about all that? And that is what they usually say today, those who did not themselves suffer, who were themselves the executioners, or who have washed their hands of it, or, who put on an innocent expression: Why rake over all that? Why rake over old wounds? (Their wounds!!)’<sup>87</sup> Ward’s response, that there are many more who would prefer restorative over retributive justice is problematic on two grounds. First, it responds to a normative claim with an empirical observation. Second, on its own terms, the assertion needs empirical support, but none is given.<sup>88</sup>

<sup>84</sup> Judah, ‘The Fog of Justice’, *New York Review of Books* (2004) LI(1), 23, at 25.

<sup>85</sup> *Prosecutor v Stankovic*, Decision on Referral of Case Under Rule 11*bis*, IT-96-23/2-PT, 17 May 2005; *Prosecutor v Rašević and Todović*, Decision on Referral of Case Pursuant to Rule 11*bis*, IT-97-25-PT, 8 July 2005.

<sup>86</sup> See R. A. Wilson, *The Politics of Truth and Reconciliation of Africa: Legitimising the Post-Apartheid State* (2001).

<sup>87</sup> A. Solzenitsyn, *The Gulag Archipelago* (1999), at 228.

<sup>88</sup> Wilson, for example, claims precisely the opposite, *supra* note 86, at chs 6–7.

The reason for Ward's support is that he has hope for humanity, and in the transformative power of empathy. I would like to agree. The only problem is that many people over literally millennia have shown themselves to be prone to the opposite side of human nature. Ward is aware of this, fearing early on that

[p]erhaps Hobbes was right, perhaps our lives are meant to be 'nasty, brutish and short'? Not only are we programmed for disappointment, we also appear to be programmed for self-destruction. How else can we explain the serial horrors of the countless holocausts of the last century? More pertinently perhaps, is there anything we can do to prevent their reoccurrence? (at 13)

Ward hopes that sensibility is the way. Others, such as Reinhold Niebuhr, would retort that people need to have their impulses controlled through strict rules, which international criminal law provides. Even if Ward has the better of the argument on human nature, international criminal law and prosecutions of international crimes may help inculcate the values that Ward seeks to foster. For example, as Jaspers said

What happened in Nuremberg . . . is a feeble, ambiguous harbinger of a new world order, the need of which mankind is beginning to feel. The new world order is not at hand by any means . . . but it has come to seem possible to thinking humanity; it has appeared on the horizon as a barely perceptible dawn, while in case of failure the menace of self-destruction of mankind looms as a fearful menace before our eyes. . . . our salvation on the world depends on the world order which – although not established in Nuremberg – is suggested by Nuremberg.<sup>89</sup>

Indeed, there may be empirical reasons for the argument that resort to criminal law is not a first, but a last resort, and that having tried trusting humanity, we have come to seek to limit its destructive urges. As Leila Sadat puts it, the ICC was created as states, having tried all the other methods of repressing such offences, decided to 'give justice a chance' (at 72). Before we abandon the exercise we need to see that prosecution is not the least worst option. As Sadat notes, the system of international criminal law is in its infancy, and it needs time before the evidence is in and we can simply dismiss prosecution as a means of dealing with international crimes (at 75).

## 5 Conclusion

As should be clear from the above, there is plenty to engage with in all the works under review. All have much to say in their favour. Latimer and Sands' *Justice* has a number of extremely well thought-through chapters,<sup>90</sup> although as might be expected from a fairly lengthy edited collection, the variety of views on offer means that it is difficult to draw an overall 'message' from the work over and above the idea that international criminal law is basically a good thing.

Although Sands' *Nuremberg* is short, and the chapters tend to show their provenance in public lectures, there is considerable analysis in them, which makes them worth careful reading. It is not simply an introductory work, even if some expansion

<sup>89</sup> Jaspers, *supra* note 77, at 54.

<sup>90</sup> And, it is fair to say, a greater number than is often the case in the curate's-egg world of the international criminal law edited collection.

of the ideas it contains would have been welcome. The same can be said about Broomhall's *International Justice*. This is the work of a serious and talented scholar, who also has an excellent feel for the subject. The only serious criticism that can be made of the work is that, as we have had cause to note already, the number of thoughts and issues packed into a fairly short work mean that some ideas are not as fully developed as they could have been.

Sadat's work is both longer and more wide-ranging, dealing with almost all aspects of the ICC, procedural and substantive, in addition to attempting to use the creation of the ICC to argue for an alteration in the international legal order. It is interesting to compare the visions of Sadat and Broomhall, which are in some ways similar. Both hope for a better future for international criminal law. What distinguishes them is the extent to which they believe the ICC represents a change in the international legal system. Sadat is optimistic with caveats, Broomhall is cautious, but willing to take a glance toward the clouds. Ward, in a more general manner, looks further and hopes for more, little short of a transformation of society through a rejuvenated set of human sensibilities. Our hearts may be with Ward and Sadat, but our heads are with Broomhall and those who have yet to be convinced of human perfectability through institutions or love.

In some ways this maps on to the ambivalent role that sovereignty plays in international criminal law. An excess of sovereignty and state power can lead to international crimes, as in the Holocaust, but so can a lack of sovereign authority, as in Somalia or Sierra Leone. Ironically, we act through state sovereignty in order to restrict actions justified in the name of state sovereignty.<sup>91</sup> Sovereigns need limitation, but then maybe we all do. Either way, as it is hoped has been shown, whatever human nature, sovereignty is still part of the society in which we find ourselves, and its relationship to international criminal law is multifaceted and not easily reducible to shibboleths on either side. And so it is likely to stay.

<sup>91</sup> I owe this felicitous formulation to Neil Boister.