Re-thinking International Criminal Law: Re-connecting Theory with Practice in the Search for Justice and Peace

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I. Introduction

There is a disjuncture between the theory and practice of international criminal law (ICL). ICL supports a paradox, whereby it encompasses a peace and security project and a shared moral discourse located in post-sovereign space, yet remains incarcerated within a state-centric image of international law and politics. The expansion of ICL in the last two decades has been dramatic, reflecting the increasing interconnectedness of a globalised world in which localised activities can have global ramifications, and global events can have local consequences. Yet despite the rhetoric that ICL represents a way to create justice and peace at the global level, ICL retains deference to state sovereignty that sits uncomfortably with how ICL is often portrayed and perceived. This article examines the ways in which a system of international criminal justice has been constructed within legal and political discourse, and assesses how changes taking place within global society affect the theory and practice of ICL. The result is intended to open space beyond traditional depictions of international law and politics, and offer the opportunity to think and behave in spaces beyond the arbitrarily imposed boundaries of the sovereign state.

In this article, ICL is used to describe a body of international law that, drawing upon aspects of international law — particularly International Humanitarian Law (IHL) and the International Law of Human Rights (ILHR) — and domestic criminal law, imposes criminal liability directly upon individuals without the necessary imposition of national legal systems. This definition of ICL encompasses four categories of crimes generally considered *jus cogens*, that is, inderogable: genocide, crimes against humanity, war crimes, and the crime of aggression.[1]

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1 M C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems* 63; M C Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in M C Bassiouni (ed),

Some jurists use the term in a broader sense to include the international aspects of national criminal law;[2] however, the interpretation preferred here includes only those crimes capable of being prosecuted under international law before international courts. The main characteristic of these offences is their highly political nature: these are crimes which are normally committed in connection with or in response to the exercise of state power, and which necessarily have ramifications beyond a single sovereign state.[3] Thus, 'transnational' crimes such as narcotics trafficking, piracy, slavery or terrorism are here excluded,[4] although it may be the case that these crimes will fulfil the prerequisites of core crimes, particularly crimes against humanity or war crimes, depending on the circumstances of the individual case.

This article begins by tracing constructions of international law and criminal law, highlighting how efforts to reimagine international law and politics with reference to ideals of 'humanity' have facilitated space for incorporating systems of criminal law within the strictures of international relations. Building on this dialogue, the second section describes how ontologies of 'humanity' have legitimised a peace and security project as the justificatory premise for a system of ICL. The third section elaborates further the meaning of these themes, noting the relevance of a new security agenda and a shared moral discourse taking place in post-sovereign space. Section Four observes that despite the changed nature of global politics, ICL remains incarcerated within power structures grounded in the primacy of the state. Noting this disjuncture between the theory and practice of ICL, Section Five suggests 'primacy' as one way to reconnect the practice of ICL with its theory as a system of law encompassing values transcending sovereign boundaries.

International Criminal Law: Crimes (2nd ed, 1999) vol 1, 41.

2 See M C Bassiouni, *Introduction to International Criminal Law* (2003), ch 3; K Kittichaisaree, *International Criminal Law* (2001), 3.

3 See J Spiropoulos, 'Draft code of offences against the peace and security of mankind' UN Doc A/CN.4/25 (26 April 1950) [34], reprinted in *Yearbook of the International Law Commission* (1950) vol 2, 259; and Bassiouni, above n 1, 69.

4 Although the term 'transnational crime' is often confused with 'international crime', the two are analytically distinct. Whereas a 'transnational' element exists whenever the commission of an act affects the interests of more than one state, includes the citizens of more than one state, or involves means and methods which transcend national boundaries, an 'international' element exists only where the conduct in question rises to the level where it constitutes an offence against the world community *delicto jus gentium*: M C Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 *Case Western Reserve Journal of International Law* 27, 28–29. See also B M Yarnold, 'Doctrinal Basis for the International Criminalization Process' (1994) 8 *Temple International and Comparative Law Journal* 85. As noted in the text, a further distinction can be made on the basis that international crimes are those acts criminalised under international law as such, including treaties and custom, while transnational crimes are those acts which happen to be criminalised by the laws of more than one state: see N Passas, *Transnational Crime* (1999) xiii.

II. International Law and Criminal law: Theorising Two Separate Traditions

ICL represents a particular response to 'wrongdoing' at the international level. Historically, while international treaties between states may have provided for the criminalisation of certain conduct at the international level,[5] it has been left to national courts to prosecute alleged perpetrators according to their own rules and procedures. Consequently, the emergence of ICL has resulted largely from the gradual incorporation within the international legal system of rules and legal constructs having their origins in domestic criminal law or national trial proceedings.[6] 'International' law and 'criminal' law, however, are not clearly delineated concepts, devoid of contradiction, incoherence and inconsistency. Rather, they are contingent notions that are socially, politically and historically constructed, reflecting shifts in the political role of law that require consideration of the manner in which the discourses of political power generate their own 'truths' and 'knowledges' about the 'proper' purposes and functions of a legal system. Aware of these contingencies, this section traces the constructions of these separate traditions in international law and criminal law as an entry point for considering ICL.

(a) Constructing international law

International legal scholarship in the modern era has drawn extensively on positivist approaches in conceptualising international law. Framing modernity within two broad philosophical themes — the post-Cartesian death of God and secular rationality based in scientific proof — the positivist tradition has

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5 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948), 78 UNTS 277, art 1 ('Genocide Convention'); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949), 75 UNTS 31, art 49 ('Geneva Convention I'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), 75 UNTS 81, art 50 ('Geneva Convention II'); Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135, art 129 ('Geneva Convention III'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949), 75 UNTS 287, art 146 ('Geneva Convention IV'), as updated by the two additional protocols, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (12 December 1977), 1125 UNTS 3 ('Additional Protocol I'); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (12 December 1977), 1125 UNTS 609 ('Additional Protocol II'); Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973), 1015 UNTS 243, art 4 ('Apartheid Convention'); Convention Against the Taking of Hostages (18 December 1979), 1316 UNTS 205, art 2 ('Convention Against the Taking of Hostages'); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), 1465 UNTS 85, art 4 ('Convention Against Torture'). See M C Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (1997).

6 A Cassese, *International Criminal Law* (2003) 19. See also Bassiouni, above n 2, 1–8.

constituted a foundational reality focused, according to many variants, on law as an emanation of state will (voluntarism), and law as objective reality distinct from moral concerns and law 'as it should be' (formalism). While international legal scholars have demonstrated convincingly in recent years that positivism is not so much a pre-conceived 'theory' of international relations, but a 'method' which may correspond to *one or more* theories of international law,[7] it remains true that international law in recent times has been marked by coherence and self-affirming logic concerning issues of power, sovereignty, and interest. Thus while Simma and Paulus, for example, are able to claim that an enlightened positivism is identical neither with formalism nor with voluntarism, that so-called soft law is an important device for the attribution of meaning to rules, and that moral and political considerations are not alien to law but part of it, they emphasise that formal sources, particularly treaty and custom, remain the core of international legal discourse.[8] Relying on this image of international law constructed around the sovereign state, scholars and practitioners have reinforced certain foundational truths: sovereign states are the most important actors in the international system, and must therefore be the primary subjects of international law; each state is independent, equal and autonomous, and must not intervene in the domestic affairs of another state; states must consent to international law for it to be binding upon them.

Incarcerated within this framework, international law can be no more than a tool for facilitating interactions between states, with occasional reference to moral imperatives seen as little more than rhetoric, with no significant normative implications.[9] Rather, international law seeks merely to promote international order, aiming to provide confident relationships among states, to build reliable expectations, and to establish frameworks for ongoing interactions. According to this view, the content of international law should only be invoked to protect one state and its interests against violation by another, and never to interfere in a state's internal affairs. This 'liberalist' account of international relations signifies a commitment to the paramountcy of state sovereignty parallel to the centrality of individualism in traditional liberal theory,[10] and is reflected in the constitutional axioms of statehood, namely independence, equality, autonomy, non-intervention and respect for state commitment to its national interest, as the state sees it.[11] These values are given effect in principles of international law-making, particularly the notion that international law cannot bind a state unless it has consented to it, as

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7 B Simma and A L Paulus, 'Symposium on Method: The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302, 307.

8 Ibid 308.

9 L Henkin, *International Law: Politics and Values* (1995) 105–6.

10 Ibid 104–5. See also J Feinberg, *The Moral Limits of the Criminal Law* (1984–85) vol 3, chs 18 and 19 analogising individual liberty to state sovereignty.

11 Henkin, above n 9, 100–1.

well as shaping the content of the law, in that it consists primarily of rules of prohibition and abstention.[12]

Yet despite the dominance of this positivist-instrumentalist image of international law, international legal theory is imbued with an oft-silenced metaphysical discourse located within natural law philosophy. Emerging with the early Christians, the natural law tradition in international law has maintained that the authority of the law resides in higher moral imperatives, over and above the consent of states.[13] Expunged from the ontological heart of international legal theory as Cartesian rationalism accelerated the modern search for a secular foundation of meaning, natural law theories have been reinvigorated in a contemporary setting. Drawing on theories of human dignity rather than the traditional *Realpolitik* of international relations, efforts have been made to construct a moral philosophy of international law that places human (rather than state) values at the centre of the international legal system.[14] Thus IHL operates to regulate the behaviour of combatants engaged in warfare, with the two-fold aim of regulating the rights and duties of belligerents in the conduct of operations, and protecting the 'victims' of armed conflict: the wounded, sick, shipwrecked, prisoners of war, and civilians. With precursors throughout the ancient world, the contemporary IHL discourse emerged during the late 19th and early 20th centuries with the adoption by states of a number of major international treaties and other documents codifying and developing the rules of warfare.[15] Many of these rules have been considered by the ICJ as so fundamental to the respect of the human person and 'elementary considerations of humanity' that they place obligations on states 'which are essentially of an *erga omnes* character.'[16]

These tentative movements towards reorienting the international system have been realised in the form of an international law of human rights. Like IHL, the

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12 See *'SS Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (Ser A) No 10, 18.

13 See M E O'Connell, *The Power and Purpose of International Law* (2008) ch 1; J Finnis, *Natural Law and Natural Rights* (1980) 28–29; and M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed, 2000).

14 See F Teson, *A Philosophy of International Law* (1998) and A Buchanan, *Justice, Legitimacy and Self-Determination* (2004).

15 See, eg, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864), 129 CTS 361 (no longer in force), revised as Geneva Convention I; and Instructions for the Government of Armies of the United States in the Field (1863) (Lieber Code). See also F Kalshoven and L Zegveld**,** *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2001) 12–14.

16 *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22.
The concept of obligations *erga omnes* was first enunciated in obiter dicta in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, [33–34]. The Court characterised obligations *erga omnes* as obligations of a State towards the international community as a whole, noting [at 33] that 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.' The Court went on to state [at 34] that such obligations derive, for example, from 'the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'

conceptual beginnings of ILHR are to be found in natural law philosophies, which start with the assumption that there are natural laws which confer particular rights upon individual human beings. At their core, 'human rights' embrace a certain universe of values surrounding the notion of 'human dignity,' drawing their content from diverse sources — fundamental moral or ethical precepts discerned through rational thought; religious ideals; or some understanding of social consensus.[17] Whatever their content or source, 'human rights' are considered *inherent*; they are not granted by a temporal authority, but are to be recognised and upheld by it to maintain legitimacy. In their modern manifestation, the idea of 'human rights' has its origins in an uneasy coalescence of Christian values and Enlightenment ideals, although as Lillich and others have contended, non-Western philosophical and intellectual traditions 'also lay claim to precepts of universal and inherent human rights.'[18] Numerous 'human rights' are now elaborated in a wide range of positive legal instruments imposing obligations on states,[19] representing a major derogation by the international system from its commitment to basic state values. While certain scholars have contended that ILHR remains essentially contained within the State system and its axioms and traditions,[20] nonetheless, the increased significance of the individual in discourses of global politics has facilitated space beyond the positivist-instrumentalist image of international law in which to consider other systems of meaning, including systems of criminal law.

(b) Constructing criminal law

The criminal law is conventionally defined as a set of legal norms for determining the conditions under which individuals may be held liable to punishment. Yet this positivist conception of the criminal law as objectively verifiable and institutionally certain shrouds the contradictions and inconsistencies that permeate it, ignoring the reality that crime is a construct of particular legal and social systems, reflecting temporally and geographically parochial imperatives. The positivistic search for a *general* characteristic that can be said to offer a normative account of the 'true' image of criminal law is confounded once it is realised that the modern criminal law encompasses an extraordinary range of conduct, such that it is highly

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17 R B Lillich et al, *International Human Rights: Problems of Law, Policy and Practice* (4th ed, 2006) 2. On the philosophical background of rights, see, eg, A Dershowitz *Rights from Wrongs: A Secular Theory of the Origins of Rights* (2004); P Jones, *Rights* (1994); and J Waldron (ed), *Theories of Rights* (1984).

18 Lillich et al, above n 17.

19 International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3; Convention on the Rights of the Child (20 November 1989), 1577 UNTS 3; Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979), 1249 UNTS 13; Convention on the Rights of Persons With Disabilities (30 March 2007), 189 UNTS 137.

20 D Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 113. Kennedy argues that although human rights vocabulary expresses relentless suspicion of the state, in the end rights are enforced, granted, recognised, implemented, their violations remedied, by the state.

problematic to suggest that there is anything particularly *general* about the nature of crime itself, or that the criminal law reflects a general normative project. Nonetheless, the quest for a definition or theory of criminal law persists,[21] evidencing a tension between 'moralistic' and 'instrumentalist' conceptions of the criminal law.

The conventional account of criminal law derives from the liberalism of JS Mill and associated literature applying Mill's 'principle of liberty' to the limits of the criminal law.[22] Mill argued from a utilitarian ethic that the justifying purpose of any social rule or institution must be the maximisation of happiness, leading naturally to a view of the criminal law as devoted to minimising human suffering through the prevention of harmful conduct by the most efficient means possible.[23] Mill argued, however, that the content of the criminal law should be circumscribed according to the 'harm principle,' according to which the coercive powers of the state should only be invoked as a means of preventing harm to others, and never to control non-harmful behaviour or to prevent self-harm.[24] In the context of criminal justice, the harm principle has been refined by the liberal precept that an individual's harmful conduct should only be subject to punishment where he or she is genuinely responsible for it.[25]

While the harm principle captures some strong intuitions about the proper limits of state power, the test of harm to others is notoriously difficult to apply,[26] and it exists uneasily alongside a different view which rests heavily on a moralistic understanding of the criminal law. On this view, the criminal law does, and should, engage in a legal entrenchment of certain fundamental moral precepts. The offender who contravenes the law is regarded as culpable and deserving of punishment, with conviction viewed as an institutionalised equivalent of the expression of moral condemnation. This view of criminal law was revived in the 1960s by Devlin in response to his perceived encroachment of the harm principle as the organising principle for criminalisation.[27] Moore has given this image further impetus, arguing that the criminal law is essentially a formalised description of the requirements of retributive justice. While the importance of retributivist ideas among public attitudes to criminal justice is clearly apparent, like instrumentalist accounts, there are many examples which sit unhappily with this conception of the criminal law, particularly laws which deal with trivial conduct or penalise conduct irrespective of fault.

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21 N Lacey and C Wells, *Reconstructing Criminal Law* (3rd ed, 2003) 3.
22 J S Mill, *On Liberty* (1859).
23 See H Gross, *A Theory of Criminal Justice* (1979).
24 Mill, above n 22.
25 See H L A Hart, *Punishment and Responsibility* (1968) ch 1. See also J Feinberg, *Moral Limits of the Criminal Law* (1984–85) vol 1.
26 Efforts to sketch more inclusionary instrumentalist models of criminal justice include Feinberg, above n 25, vol 1; and J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).
27 P Devlin, *The Enforcement of Morals* (1965).

Norrie has noted that, paradoxically, instrumentalist and moralist conceptions of the criminal law often emphasise and marginalise the same areas of law, albeit for different reasons.[28] It is unsurprising, then, that an important concern of modern scholars has been to explore the extent to which insights underlying both perspectives can be accommodated within an integrated or pluralist conception of criminal justice. Lacey, for instance, has suggested that the criminal law ought to protect a principle of 'welfare', grounded in those values, needs and interests which a society has decided are fundamental to its collective social functioning.[29] However, notwithstanding the plausibility of aspects of instrumentalist, moralist and pluralist depictions of the criminal law, the complexity of actual criminal laws prompt reservations about the desirability of developing a 'grand theory' or 'metanarrative.' Rather, these alternative images are better understood as fragments of social meaning, located within a particular time and space, rather than a 'general theory' of the criminal law.[30]

III. Justifying ICL: Negotiating a Permanent System of International Criminal justice

The previous section noted how efforts to reimagine international law and politics with reference to ideals of 'humanity' have facilitated space for incorporating systems of criminal law within the strictures of international relations. As a system of law reflecting this fragmentation of the hitherto dominant image of the international system, ICL represents a refreshing synthesis of understanding. The manner in which these disciplinary techniques of political power have generated particular images of international and criminal law has significant implications for a system of international criminal justice. In this discursive context, this section turns to consider the ways in which a discipline of ICL has been constructed. In particular, this section considers the construction of an instrumentalist 'peace and security' project in ICL, as well as the significance of moralist ontologies of 'humanity' as a legitimating premise for a system of international criminal justice.

(a) Peace and security

Within contemporary discourse, ICL is frequently justified as a mechanism for creating and maintaining international peace and security.[31] This 'peace and security' project is heavily bound up with the 'Nuremberg legacy' and later attempts to legitimise the role of the Security Council in establishing the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR).[32] Seeking to perpetuate the principles of the Nuremberg and Tokyo trials

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28 A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993) ch 2.

29 N Lacey, *State Punishment: Political Principles and Community Values* (1988).

30 See Lacey and Wells, above n 21, 10.

31 B Broomhall, *International Justice and the International Criminal Court* (2003) 45–46.

32 M Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (2008) chs 1 and 2. On the Nuremberg legacy see, eg,

in the aftermath of the Second World War, the UN General Assembly directed the International Law Commission (ILC) in 1946 to formulate the principles recognised in the Charter and judgment of the Nuremberg Tribunal in the context of a 'general codification of offences against the peace and security of mankind,'[33] as well as requesting the ILC in 1948 to 'study the desirability and possibility of establishing an international judicial organ' for the trial of persons charged with international crimes.[34] Although the notion of crimes affecting international peace arose after the First World War,[35] it was not until their elaboration in the Nuremberg and Tokyo charters that the concept was given normative force.[36] In both instances, however, 'crimes against peace' were treated as conceptually distinct from 'conventional war crimes' and 'crimes against humanity.' Whereas crimes against peace referred to proscriptions on the waging of war as an activity that was inherently contrary to peace, war crimes and crimes against humanity were focussed on conduct considered to be in 'complete disregard of the elementary dictates of humanity.'[37] Nonetheless, in its explanatory observations on a draft code the ILC confirmed the connection between these crimes and international peace and security, considering the term 'peace and security of mankind' a correlative to the expression 'international peace and security' contained in the UN Charter.[38]

This connection was solidified in the work of the ILC on the question of an international criminal jurisdiction. During its second session in 1950, the ILC sought to identify contemporary opinion on the question of universal repression of international crimes. Finding that the international legal order did not recognise the legitimacy of war waged for the purpose of redressing a real or alleged wrong,[39] the ILC noted that there are other crimes besides the crime of war (aggression) that

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C Tomuschat, 'The Legacy of Nuremberg' (2006) 4(4) *Journal of International Criminal Justice* 830; M C Bassiouni, 'The Nuremberg Legacy: Historical Assessment Fifty Years Later' in B Cooper (ed), *War Crimes: The Legacy of Nuremberg* (1999) 291; and M Lippman, 'Nuremberg: Forty Five Years Later' (1991) 7 *Connecticut Journal of International Law* 1.

33 Affirmation of the Principles of International Law Recognized by the Charter of the Nüremberg Tribunal, GA Res 95 (I) (1946) pt 2, 1144.

34 Study by the International Law Commission of the question of an international criminal jurisdiction, GA Res 260 B (III) (1948).

35 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities: Report presented to the preliminary peace conference (29 March 1919) ch 1, reprinted in (1920) 14(1) *American Journal of International Law* 95.

36 Charter of the International Military Tribunal (8 August 1945), 82 UNTS 279, art 6(a) ('Nuremberg Charter'); and Charter of the International Military Tribunal for the Far East (19 January 1946), TIAS 1589, art 5(a) ('Tokyo Charter').

37 Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30 September – 1 October 1946, reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, *Nuremberg, 14 November 1945 – 1 October 1946,* vol 1, 227 (Parker J).

38 Spiropoulos, above n 3, 258.

39 R J Alfaro, 'Questions of International Criminal Jurisdiction' UN Doc A/CN.4/15, [94], reprinted in *Yearbook of the International Law Commission* (1950) vol 2, 13.

affect the community of states and hence should be subject to international jurisdiction, including war crimes, crimes against humanity and genocide.[40] According to the ILC, the establishment of an international criminal jurisdiction for these crimes would be received by the 'peoples of this earth as a new ray of hope in their quest for peace and security.'[41] Later, the 1953 Committee on International Criminal Jurisdiction, established by the UN General Assembly, contended that a permanent international criminal court would strengthen world opinion, thereby promoting better international relations.[42]

Several decades later, the 'peace and security' project was re-invoked as a paradigm legitimising the role of the Security Council in establishing the ICTY and ICTR as *ad hoc* tribunals.[43] Consistent with the positivist-instrumentalist image of international law, the statute of an international tribunal would ordinarily be adopted by states on the basis of consent in the form of a treaty. However, in the context of the former Yugoslavia, the treaty approach had several disadvantages, particularly regarding the time required for elaboration, negotiation and ratification. Accordingly, the Secretary-General recommended the establishment of an international tribunal by a decision of the Security Council on the basis of Chapter VII of the UN Charter, which confers on the Security Council the powers necessary for the maintenance of international peace and security.[44] This approach had the advantage of being expeditious and immediately effective, as all states are bound to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.[45] Although controversial,[46] similar reasoning accompanied the establishment of the ICTR on the basis of Chapter VII.[47] The perceived connection between international crimes and international peace and

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40 Ibid [95–101].

41 Ibid [120].

42 Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc A/2645 (1954) [27].

43 See M P Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (1997); Futamura, above n 32, 26–28.

44 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993) [22].

45 Ibid [23]. The ICTY was accordingly established on this basis: Statute of the International Tribunal for the Former Yugoslavia, SC Res 827, Annex at 20, UN Doc. S/Res/827 (1993) ('ICTY Statute'). This determination was affirmed in *Prosecutor v Dusko Tadic*, Case No IT-94-1, 2 October 1995 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), [9–40] ('*Tadic (Interlocutory Appeal)*').

46 Legality was challenged, and affirmed, in *Tadic (Interlocutory Appeal)*, *Prosecutor v Kanyabashi*, Case No ICTR-96-15-T, 18 June 1997 (Decision on Defence Motion on Jurisdiction), and *Prosecutor v Milosevic* Case No. IT-99-37-PT, 8 November 2001 (Decision on Preliminary Motions).

47 Statute of the International Tribunal for Rwanda, SC Res 955 (1994) ('ICTR Statute'). See Preliminary report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), UN Doc S/1994/1125 (4 October 1994) [138].

security is also reiterated in the Rome Statute Preamble, which recognises that 'such grave crimes threaten the peace, security and well-being of the world.'[48]

The 'peace and security' project represents an instrumentalist image of international criminal justice, according to which ICL operates to facilitate order and stability between states within the international system. According to this perspective, ICL is devoted to preventing 'harm' to the community of states, with the prospect of punishment deemed to have a deterrent effect on political leaders and the provision of justice regarded as facilitating reconciliation and lasting peace between communities and states. In this sense, the notion of 'harm' refers principally to behaviour compromising international solidarity or the axioms of statehood. While scholars have warned against utilising domestic analogy in the field of international criminal justice,[49] the manner in which the narratives of global political power have constructed this instrumentalist depiction of ICL illustrates how similar conceptions of domestic criminal law have been incorporated within international law and politics. However, while the common interest in upholding the 'peace and security' project has been a frequent justificatory premise for a system of international criminal justice, this image has been legitimised by reference to moralist ideals of 'humanity' within the international system.[50]

(b) Ontologies of 'humanity'

The perception that notions of 'humanity' reside at the ontological heart of ICL — that is, that ideas of 'humanity' provide a sense of meaning to a system of ICL — stems from the belief that states 'constitute only an intermediate level of political organisation in what is actually a more general and genuine moral community comprising all humanity.'[51] For Bassiouni and Wise, the idea of the world as a 'community of mankind' expresses a sense of common humanity, postulating certain universal objects and moral imperatives that operate to abrogate previously sanctified doctrines of statehood.[52] Central to this belief in the ultimate reality of a *civitas maxima* is the concept of *jus cogens*, that is, peremptory norms from which no derogation is permitted. Franck, for instance, has articulated the idea that there are certain fundamental rules forming conditions on membership in the international community that, contrary to the ordinary practices of international law, are not themselves subject to the specific consent of states, except in the very

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48 Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 90, Preamble ('Rome Statute').

49 See I Tallgren, 'Sense and Sensibility of International Criminal Law' (2002) 13 *European Journal of International Law* 561 and M A Drumbl, 'A Hard Look at the Soft Theory of International Criminal Law' in L N Sadat and M P Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honour of M Cherif Bassiouni* (2008) 1.

50 G Simpson, *Law, War and Crime* (2007) 45.

51 M C Bassiouni and E M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) 28.

52 Ibid 29.

act of accepting membership in the community itself.[53] This was a pivotal concept at Nuremberg, where reaffirming respect for humanity was seen as an essential element in preserving peace and security, and justified overriding previously sacrosanct doctrines of immunity and sovereignty. The characterisation of rules criminalising genocide, war crimes and crimes against humanity as *jus cogens* expresses a sense of human solidarity, imposing on states obligations *erga omnes*, that is, obligations owed to the community of states as a whole.[54] Thus by marking the point at which sovereignty gives way to the prerogatives of the international community, ICL's affirmation of the humanity theme provides moral vindication for the preservation of international order.

The idea that notions of 'humanity' provide a legitimising premise for a system of ICL is reflected in negotiations that have accompanied the establishment of international criminal tribunals, including the ICC, as well as in the elaboration of the categories of international crimes. The notion captures something of the idea that there is certain behaviour which affects people generally and not just citizens of a particular state. While inherently amorphous, Vernon has identified three manifestations of the concept in legal and political discourse,[55] particularly as concerns 'crimes against humanity' as a category of international crime. In the first instance, the appeal to 'humanity' is essentially a response to a jurisdictional vacuum, in the way that 'crimes against humanity' were incorporated into the Nuremberg and Tokyo charters to capture particularly heinous behaviour yet to be proscribed under international law.[56] In the second instance, humanity represents a synonym for 'humaneness,' so crimes against humanity are rendered morally persuasive because of the violent *inhumanity* they seek to condemn. The third variation suggests that humanity itself should be thought of as the *victim* of international crimes — it is not that humaneness, as a moral quality, is lost or denied: it is that damage is done to humanity imagined as an entity of some kind. In all these accounts, depictions of *in*humanity represent an attempt to capture great evil in terms of typical judicial modalities. On this basis it might be suggested that the idea of 'humanity' transposes Moore's moralist vision of domestic criminal law as a formalised description of the requirements of retributive justice, so that ICL shares with domestic criminal law a retributivist agenda.

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53 T M Franck, *Fairness in the International Legal and Institutional System* (1993) 57–61.

54 According to Bassiouni, legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of 'obedience to superior orders' (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under 'states of emergency,' and universal jurisdiction over perpetrators of such crimes: Bassiouni, above n 1, 65–6.

55 R Vernon, 'What is Crime Against Humanity?' (2002) 10(3) *Journal of Political Philosophy* 231, 233–41. See also D Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85, 90–91, and L May, *Crimes Against Humanity: A Normative Account* (2005).

56 Nuremberg Charter, Art 6(c); Tokyo Charter, Art 5(c).

The notion that 'inhumanity' could ground criminal responsibility was propounded for the first time in 1915 on the occasion of mass killings of Armenians in the Ottoman Empire,[57] receiving subsequent reference after the First World War,[58] and during the Second World War.[59] Robert Jackson, chief prosecutor at Nuremberg, stated at the opening of the Nuremberg trial that 'the wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilisation cannot survive their being repeated.'[60] Joe Keenan, chief prosecutor at Tokyo, reiterated this sentiment at the opening of the Tokyo trial, pronouncing that 'They [the Japanese] declared war on civilization.'[61] Notions of 'humanity' also permeated discourse accompanying the establishment of the two *ad hoc* tribunals and the negotiation of the Rome Statute. For example, after the adoption of the ICTY Statute Russia stated that the entire international community 'will be passing sentence upon those who are grossly violating … our concepts of morality and humanity,'[62] while Venezuela noted that humanity was suffering in too many corners of the world, not only in the former Yugoslavia.[63] After the establishment of the ICTR, France said that the situation in Rwanda was 'repugnant to the conscience of humanity.'[64] Similar views were given renewed emphasis at Rome, with the Rome Statute Preamble intended to express the consciousness that international crime shatters the bonds of the international communion. After the adoption of the Statute, a number of states reiterated the 'humanity' theme. For instance, Bangladesh stated that the court represented a giant leap forward in the establishment of justice and human rights worldwide,[65] while Jordan commented that the world needed an international court 'to try the authors of the abominable crimes wronging mankind.'[66]

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57 Declaration of 28 May 1915 of the Governments of France, Great Britain and Russia, dispatch of US Ambassador in France, Sharp, to the US Secretary of State, Bryan, of 28 May 1915, in *Papers Relating to the Foreign Relations of the United States, 1915, Supplement* (1928) 981.

58 Commission on the Responsibility of the Authors of the War, above n 35, 121–3.

59 Declaration of the Four Nations on General Security, signed at Moscow 30 October 1943, 9 *US Department of State Bulletin* 308, Statement on Atrocities (entered into force 30 October 1943).

60 Opening Statement of the Prosecutor, Nuremberg, 21 November 1945, reprinted in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946,* vol 2, 99.

61 Opening Statement of the Prosecutor, Tokyo, 4 June 1946, reprinted in R J Pritchard and S M Zaide (eds), *The Tokyo War Crimes Trial*, 27 vols (1981–1987), 384.

62 Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, UN Doc S/PV.3217 (25 May 1993) 28.

63 Ibid 4.

64 Security Council, 49th Year, 3453rd Meeting, 8 November 1994, UN Doc S/PV.3453, 3.

65 Summary Record of the 9th Meeting: 6th Committee, held at Headquarters, New York, on Wednesday, 21 October 1998, UN Doc A/C.6/53/SR.9, [26].

66 Summary Record of the 12th Meeting: 6th Committee, held at Headquarters, New York, on Thursday, 22 October 1998, UN Doc A/C.6/53/SR.11, [53].

Whether and to what extent this concept of 'humanity' incorporates protections for individual rights is subject to debate,[67] although it is certainly the case that rights language permeates depictions of international crimes. In the case of war crimes, criminalising violations of IHL is intended to minimise human suffering, positing that at least the most important rights, such as life and bodily integrity, are to remain inviolate. For crimes against humanity, criminalisation aims to protect the rights of individuals to their personal security, while for genocide, criminalisation seeks to protect the right of certain groups to exist as a physical and social entity, and, as a corollary, the dignity of the individual as a member of the group.[68] However, this does not mean that every violation of human rights, or even serious violation, is directly punishable under ICL. Rather, only those violations grave enough to represent a fundamental attack on 'humanity' may be subject to the intervention of ICL. Nonetheless, as Werle has noted, the emergence of 'humanity' as the core of ICL has contributed significantly to strengthening protection for individual human rights.[69]

The link between ontologies of 'humanity' and the 'peace and security' project is established for each category of crime through the context of systematic or large-scale use of force perpetrated by a collective, typically a state, an agent of a state or a rebel group.[70] Thus for crimes against humanity, the threat to international peace and security consists of a widespread or systematic attack on a civilian population, thereby calling into question the very notion of humanity and presenting a fundamental challenge to order and stability within the international system.[71] In the case of genocide, the disruption of peace and security resides in an (intentional) attack on the physical or social existence of a particular group,[72] whose

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67 See, eg, O Lagodny, *Zeitschrift fur die gesamte Strafrechtswissenschaft* (2001) cited in G Werle, *Principles of International Criminal Law* (2005) fn 29, who sees the justification for ICL in a victim-oriented retributive concept embedded in human rights; A Altman and C H Wellmann, 'A Defense of International Criminal Law,' (2004) 115 *Ethics* 35 arguing that the best justification for a system of ICL rests on an appreciation of the scope and limits of state sovereignty, on the one hand, and the moral importance of human rights, on the other; and T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.

68 G Werle, *Principles of International Criminal Law* (2005) 192–3.

69 Ibid 42. See also F Pocar, 'The Rome Statute of the International Criminal Court and Human Rights' in M Politi and G Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 67.

70 Werle, above n 68, 29.

71 See *Prosecutor v Erdemovic*, ICTY (Appeals), Judgment 7 October 1997, Separate Opinion of Kirk, McDonald and Vorah JJ, [21].

> [R]ules proscribing crimes against humanity address the perpetrators conduct not only towards the immediate victim but also towards the whole of humankind … It is therefore the concept of humanity as a victim which essentially characterizes crimes against humanity. Because of their heinousness and magnitude they constitute an egregious attack on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.

72 Werle, above n 68, 192, and E Fronza, 'Genocide in the Rome Statute' in F Lattanzi

extermination 'results in great losses to humanity in the form of cultural and other contributions represented by these groups.'[73] For war crimes, the context of organised violence consists of an armed conflict, with criminalisation of violations of IHL intended to minimise human suffering as much as possible, thereby limiting the disruption to peace and security, and facilitating reconciliation after hostilities cease.[74] In each situation, criminalisation represents an attempt to describe great 'evil' and condemn certain conduct as morally reprehensible and deserving of punishment. In this way the 'humanity' theme has legitimised the 'peace and security' project as the justificatory premise for a system of international criminal justice, so that ICL is depicted as encompassing an instrumentalist purpose (maintenance of international peace and security) as well as a moralist agenda (protection of 'humanity').

IV. Reconsidering Global Order: the New Security Agenda and a Shared Moral Discourse

The elaboration of the 'humanity' theme to legitimise the 'peace and security' project as the rationale for a system of ICL reflects efforts to go beyond a simple ritualised representation of statehood and power as objective 'reality' in the narratives of global politics. Within this revitalised discourse scholars have highlighted how changes associated with 'globalisation' are shaping the content of these themes within the global arena. In this respect, 'globalisation' is said to represent a gradual and ongoing expansion of interaction processes, forms of organisation, and forms of cooperation outside the traditional spaces defined by sovereignty.[75] Thus globalisation is analytically distinct from growing interconnectedness between sovereign states, instead denoting a significant shift in the scale of social organisation,[76] with traditional boundaries comprehended as fading dimensions in socio-spatial transformation rather than fixed physical lines.[77] Yet at the same time, it is noted that globalisation incorporates contradictory processes involving diversification, separatism, autarchy, and the reassertion of identity claims.[78] This section considers the ways in which increasing connectedness and fragmentation across global society are shaping the meaning of the security project and moralist notions of 'humanity' within the international system.

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and W A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999) vol 1, 118.

73 Resolution on the Crime of Genocide, GA Res 96(1) (1946).

74 See Werle, above n 68, 29.

75 V D Cha, 'Globalization and the Study of International Security' (2000) 37(3) *Journal of Peace Research* 392.

76 Ibid.

77 A Paasi, 'Boundaries as Social Processes: Territoriality in the World of Flows' (1998) 3(1) *Geopolitics* 69, 70.

78 I Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (1997) 2.

(a) The new security agenda

Since the end of the Cold War an enormous literature has emerged on the changing dynamics of the global security landscape.[79] Central to these arguments has been the belief that the old agenda of major power rivalry has become obsolete. According to this view, as globalisation collapses time and space, a wide range of new security challenges emerge. Thus it is argued that the state as the referent object of security should be reconceived to include individuals, collectivities (minorities, ethnic groups, and indigenous peoples), and humanity (people generally and not just citizens of a particular state).[80] Further, it is argued that the concept of 'security' needs to be broadened and expanded away from the traditionalist conception as the absence of external military threats to the state to include a much wider range of threats whose origins lie in environmental destruction, economic vulnerability and the breakdown of social cohesion.[81] Moreover, it is contended that given the global character of the new security dynamic, a global response is required that includes international institutions, NGOs and civil society, as well as states, as relevant actors.[82] On this view, rethinking security is vital, given that in many cases these new security threats derive not from state strength, military power, and geopolitical ambition, but from state weaknesses and the way in which domestic instability and internal violence can spill into the international arena.[83]

Central to this new security discourse is the perception that the dynamics of contemporary global politics have sharpened the politics of identity as a source of conflict. While the causes of this intensification are contested, they are very often

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79 See, eg, S Smith, 'The Contested Concept of Security' in K Booth (ed), *Critical Security Studies and World Politics* (2005) 27; and S Dalby, 'Contesting an Essential Concept: Reading Dilemmas in Contemporary Security Discourse' in K Krause and M C Williams (eds), *Critical Security Studies: Concepts and Cases* (1997) 3.

80 See, eg, K Booth, 'Security and Emancipation,' (1991) 17(4) *Review of International Studies* 313 (arguing that it is individuals who are the ultimate referent of security); K Krause and M C Williams, 'From Strategy to Security: Foundations of Critical Security Studies: Concepts and Cases' in Krause and Williams (eds), *Critical Security Studies: Concepts and Cases* (1997) 33 (stressing the need to move from a focus on the military dimension of state behaviour to focus on individuals, community and identity); S N MacFarlane and Y F Khong, *Human Security and the UN: A Critical History* (2006).

81 See, eg, T Homer-Dixon, 'Environmental Scarcities and Violent Conflict: Evidence from Cases,' (1994) 19(1) *International Security* 5; P F Diehl and N P Gleditsch (eds), *Environmental Conflict* (2001); T Meron, 'International Economics and National Security,' (1991) 69(5) *Foreign Affairs* 74; A Tickner, *Gender and International Relations: Feminist Perspectives on Achieving Global Security* (1992); A Hurrell, *On Global Order: Values and the Constitution of International Society* (2007) 175.

82 See K Booth and P Vale, 'Critical Security Studies and Regional Insecurity: The Case of Southern Africa' in K Krause and M C Williams (eds), *Critical Security Studies: Concepts and Cases* (1997) 329; and P Wapner, 'The Normative Promise of Nonstate Actors: A Theoretical Account of Global Civil Society' in P K Wapner and L E J Ruiz (eds), *Principled World Politics: The Challenge of Normative International Relations* (2000) 261.

83 Hurrell, above n 81; and Futamura, above n 32, 20–22.

related to dislocations associated with globalisation.[84] Thus Cha argues that the processes of globalisation carry implicit universalizing tendencies, which in combination with the 'borderlessness' of the globalisation phenomenon elicits a cultural pluralist response.[85] While it might be said that all conflict involves a clash of identities, it is suggested that 'identity' in the modern era has been disaggregated from notions of the state, with the new identity politics about the claim to power on the basis of labels and the reinvention of historical memory in the context of the failure or corrosion of other sources of political legitimacy, including the state.[86] Accordingly, as global interactions intensify, and the tendencies towards homogenisation become more apparent, identity is ignited as a source of conflict as cultural groupings reassert claims to national or ethnic identities, individual cultures, and smaller forms of political association. In this way fragmentation is coupled with globalisation, with opposing tendencies of disintegration, separatism and heterogeneity becoming part of a discourse that challenges the hegemony of statist world politics.

The pervasiveness of identity politics as the basis for contemporary violence has significant implications for the methods and means of aggression. Kaldor argues that while the new warfare tends to avoid battle, it is aimed at creating fear, insecurity and the perpetuation of hatred of the 'other.'[87] Accordingly, the goal is to control the population by removing everyone of a different identity, leading to extreme and conspicuous atrocity. As Kaldor elaborates, the techniques of population displacement include systematic murder of those with different labels, as in Rwanda; ethnic cleansing, that is, forcible population expulsion as in Bosnia-Herzegovina or the Transcaucasus; and rendering an area uninhabitable, either through destroying civilian infrastructure such as hospitals, economically through forced famines or sieges as in Sudan, or psychologically by desecrating whatever has social meaning for a group.[88] Thus non-combatants have become the primary target of war, so that while at the beginning of the twentieth century 85-90 percent of war casualties were military, now approximately 80 per cent are civilian.[89] In this way behaviour that is proscribed according to IHL, and criminalised under ICL either as genocide, war crimes or crimes against humanity, has become an essential component of contemporary violence.

Significantly for ICL, these new wars are said to take place in a globalised context where, increasingly, local decisions have global repercussions and global

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84 Hurrell, above n 81, 141.

85 Cha, above n 75, 394–5. See also R Falk, 'State of Siege: Will Globalization Win Out?' (1997) 73:1 *International Affairs*, 131–2 who contends that the rejecting of these globalizing tendencies is associated with and expressed by the resurgence of identity politics in various extremist configurations; James Mittelman, 'The Globalization Challenge: Surviving at the Margins' (1994) 15:3 *Third World Quarterly* 427; and O Waever et al, *Identity, Migration and the New Security Agenda in Europe* (1993).

86 M Kaldor, *New and Old Wars* (2nd ed, 2006) 81.

87 Ibid 103–5.

88 Ibid 105–6.

89 Ibid 107.

events have local implications. Thus while these new forms of violence are essentially domestic, their international dimensions are 'usually germane and often telling.'[90] Population displacement as a result of violence often causes extensive transboundary migration,[91] while external assistance becomes crucial as local economies collapse.[92] At the same time, neighbouring states may become embroiled at the military level, with their territory used to ship arms to insurgent groups, or as bases from which attacks can be launched, while neighbouring military forces may become involved or even spark conflict.[93] Internal conflict may also disrupt access to strategic resources such as oil, and threaten the political stability of strategically important areas, as in the Middle East. Moreover, internal conflict can undermine regional and international organisations, as in Darfur where ongoing instability has damaged the standing of both the African Union and the UN.[94] In themselves, many of these phenomena are not new;[95] what is different is their amplification as a result of increasing global interconnectedness. Instantaneous communication and transportation, exchanges of information and technology, and flows of capital magnify the transboundary implications of violence, empowering insurgent groups, facilitating migration, and intensifying economic vulnerabilities to foreign conflicts. In a global era, the security agenda central to the normative ideals of ICL has been globalised.

(b) A shared moral discourse

Contrasting sharply with the fragmentation of the new security agenda has been the emergence of a shared moral discourse within global society. Traditionally, international theory has relegated morality to epiphenomenal status within the international system. Thus for classical Realists such as Morgenthau, the appeal to moral principles in the international sphere has no universal meaning.[96] Yet as the processes of globalisation have created a denser and more integrated network of shared institutions and practices, social expectations of global justice have become more firmly established, helping to undermine traditionalist arguments denying the relevance of morality within the international sphere. This has been particularly visible in references to 'moralist' ontologies of 'humanity' in the construction of

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90 R Alley, *Internal Conflict and the International Community: Wars Without End?* (2004) 1.

91 M E Brown, 'The Causes and Regional Dimensions of Internal Conflict' in M E Brown (ed), *The International Dimensions of Internal Conflict* (1996) 571, 592.

92 Kaldor, above n 86, 109–10.

93 Brown, above n 91, 593–4.

94 Ibid.

95 See E Anderson and J Singer, '"New Wars" and Rumours of "New Wars"' (2002) 28(2) *International Interactions* 165; and S Kalyvas, '"New" and "Old" Civil Wars: A Valid Distinction?' (2001) 54 *World Politics* 99.

96 H Morgenthau, *American Foreign Policy* (1951), 35. See also E H Carr, *The Twenty-Years Crisis' 1919-1939* (2001) 80. According to Carr, the inability to provide any absolute and disinterested standard for conduct in international affairs meant that international law and morality are necessarily revealed as the 'transparent disguises of selfish vested interests.'

ICL, that is, to the idea that the notions of 'humanity' which provide meaning to ICL represent a moral agenda. This discussion has been folded within a broader discourse focussing on concepts of human rights and democracy.[97] Increasingly, these debates transcend the state, gradually breaching the constitutional axioms of statehood and rendering sovereignty both conditional and contingent.

The human rights discourse has been part of the globalisation of a set of values which, riding on the triumphs of modernity, have claimed universality, despite the particularity of the human traditions from which they come.[98] Once created, human rights language has provided both institutional platforms and normative handholds for weaker actors (both states and non-state groups) to press their interests.[99] The expansion of this shared moral discourse has occurred with the elaboration of an international law of human rights, the institutionalised application of human rights and pro-democracy conditionality to economic interaction or political cooperation, the move towards coercive humanitarian intervention on the part of the UN and other international organisations, and the shift towards individual criminal responsibility at the international level for grave human rights violations.[100] Increasingly, the language of human rights is promoting dialogue and interaction between national legal orders and 'international constitutionalism' in political spaces beyond the sphere of the sovereign state.[101] In this respect, the characterisation of the core crimes of ICL as *jus cogens* can be seen as an indication of how these crimes inhabit the 'constitutional' level of the international system.[102]

Corresponding to the widening of human rights culture, democracy as a norm, and the promotion of democracy as an activity, has become deeply embedded within international society. While this expansion has an internal logic as a way to protect ideals of 'humanity' and human rights on a sustainable basis, it has also been driven by political factors. During the Cold War, Western governments tended to view political change, including democratisation, as destabilising,

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97 Hurrell, above n 81, 143; and M C Bassiouni, 'The Philosophy and Policy of International Criminal Justice,' in L C Vohrah et al (eds), *Man's Inhumanity to Man* (2003) 65, 73.

98 A Langlois, 'Human Rights: The Globalisation and Fragmentation of Moral Discourse' (2002) 28 *Review of International Studies* 479, 481.

99 Hurrell, above n 81, 144.

100 Ibid 146–7.

101 The term 'international constitutionalism' expresses the notion that the core principles of international law address and limit all forms of political power. This idea is often associated with German international law scholarship. In particular, Christian Tomuschat has argued that rules of international law fulfil a constitutional function to 'safeguard international peace, security and justice in relations between States, and human rights as well as the rule of law domestically in side States for the benefit of human beings, who, in substance, are the ultimate addressees of international law:' C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*s Cours* 11; and B – O Bryde, 'International Democratic Constitutionalism' in R St J MacDonald and D M Johnston (eds), *Towards World Constitutionalism* (2005).

102 Broomhall, above n 31, 42.

carrying with it significant counter-hegemonic potential. However, following the wave of democratic transitions that transpired in Southern Europe and Latin America in the 1970s, democratisation came to be viewed as easier and less problematic than previously believed, and with the collapse of the Soviet Union and the end of the Cold War, democracy became the preferred form of government within Western foreign policy circles.[103] At the same time, the perceived link between democracy and peace emerged as an influential paradigm within the academic community, claiming that democracies rarely resort to force between themselves, while other types of relations are much more conflict-prone.[104] While clearly problematic, particularly as concerns the existence of alternative causal logics, democratic ideals reside very near the core of contemporary political debate, with claims to legal, moral and political legitimacy frequently framed in democratic terms across domestic and international levels.

The claim that human rights and democracy represent a universal ethic has been extensively criticised as a totalitising metanarrative, grounded in the Western Enlightenment project and liberal philosophy, that fails to acknowledge legitimate difference and political diversity.[105] While this is not the place to engage extensively with these criticisms, Hurrell makes three points worth noting.[106] Firstly, international society has seen the hardening of an impressive normative structure and agreed standards built around the commitment to universality which proclaim the significance of all human beings and the curtailment of absolute sovereignty. Secondly, discourses of democracy and human rights involve a widely shared common language, and an inclusive moral vocabulary implying a general acceptance of certain general principles and processes, and from which groups have been reluctant to exempt themselves. Thirdly, this consensus may be said to reflect a shared and widespread apprehension in the face of cruelty, barbarism, and oppression, and a shared awareness of the reality of human suffering. This is not to claim that human rights and democracy are necessarily universal or should necessarily be universalised. Rather, it is to show that whereas previously questions of morality were considered epiphenomenal within the international system, now there is a shared moral discourse sitting alongside a new security agenda which goes to the normative core of a system of ICL that has been legitimised according to moralist notions of 'humanity.'

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103 Hurrell, above n 81, 152.

104 See, eg, M Doyle, 'Kant, Liberal Legacies and Foreign Affairs' (1983) 12(3) *Philosophy and Public Affairs* 205 (Pt 1); M Doyle, 'Kant, Liberal Legacies and Foreign Affairs' (1983) 12(4) *Philosophy and Public Affairs* 323 (Pt 2); and M Brown, S Lynn-Jones, and S Miller (eds), *Debating the Democratic Peace* (1996).

105 See, eg, C Brown, 'Universal Human Rights: A Critique' in T Dunne and N J Wheeler (eds), *Human Rights in Global Politics* (1999) 103; A Pollis and P Schwab, *Human Rights: Cultural and Ideological Perspectives* (1979), 1–18; and J Fudge and H Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) 1 *Social and Legal Studies* 45.

106 Hurrell, above n 81, 162–3.

V. ICL in Practice: Assessing Manifestations of International Criminal Justice

For a discipline of ICL built around an instrumentalist notion of security and a moralist concept of 'humanity', the shifting meaning of these themes has certain implications. In particular, it would seem sensible, given these changes, to locate ICL within post-sovereign political space so that it can be given the best chance to fulfil the purpose and function for which it has been constructed. The following section assesses existing manifestations of international criminal justice to establish whether the practice of ICL corresponds to the way in which it has been elaborated in the discourses of global politics. For this purpose it investigates the complementarity and jurisdiction regimes of the ICC, as well as examining the ways in which states have assumed, and international law has promoted, a role for national courts in adjudicating international crimes.

(a) The International Criminal Court

The ICC exists at the pinnacle of the international criminal justice system, and seeks to reaffirm the commitment of the international community to ontologies of 'humanity' as the normative basis for constructing international peace and security. Born of compromise, the court is an amalgam of normative commitments, political interests, and organisational dynamics that limit its operations in many ways that its champions sought to avoid.[107] These limitations are clearly articulated in the Rome Statute's admissibility and jurisdiction requirements giving national courts precedence over the ICC. According to the Statute, the ICC is to be 'complementary' to national criminal jurisdictions,[108] and unlike the prior *ad hoc* tribunals, the ICC does not have the power to remove cases from national courts or to prosecute where national authorities are already investigating a case. Even where a situation passes these admissibility requirements, the ICC can only assert jurisdiction where a crime is committed on the territory of a state party or by a national of a state party.[109]

Though referrals from the UN Security Council, acting under Chapter VII of the UN Charter, may occasionally broaden the Court's jurisdiction,[110] the ICC remains embedded within an international system concerned with protecting state values.[111]

(i) The complementarity regime

The ICC's complementarity regime is one of the foundational features of the Court, reflecting the general view among states that it should complement rather than

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107 W W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 53, 54.

108 Rome Statute, Arts 1 and 17.

109 Ibid Art 12.

110 Rome Statute, Art 13(b)

111 See Simpson, above n 50, 38–40.

supplant the activities of national courts.[112] The elaboration of the precise relationship in this regard was both politically sensitive and legally complex.[113] During the Ad Hoc and PrepCom sessions,[114] several delegations stressed that 'complementarity' should create a strong presumption in favour of national jurisdictions. In particular, these delegations argued that states have a vital interest in remaining responsible and accountable for prosecuting violations of their laws.[115] These delegations noted further that there were a range of practical considerations justifying a presumption in favour of national jurisdictions, including the limited resources of the Court contrasted with national systems.[116] Other delegations contended that although national courts should retain concurrent jurisdiction, the ICC should always have primacy. These delegations expressed concern that complementarity would render the Court meaningless by undermining its authority,[117] maintaining that while attempts should be made to minimise the risk of the Court dealing with a matter that could be dealt with adequately at the national level, it was preferable to the risk that sympathetic national authorities would fail to prosecute perpetrators.[118]

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112 S A Williams, 'Issues of Admissibility' in O Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) 383, 384; and J T Holmes, 'The Principle of Complementarity' in R S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (1999) 41, 41.

113 Holmes, above n 112.

114 The UN General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court in 1994 to consider the major substantive issues arising from the ILC's draft statute for an international criminal court (Resolution on the establishment of an international criminal court, GA Res 49/53 (1994)), which had been successfully completed that year (Report of the ILC on the work of its forty-sixth session (2 May – 22 July 1994), UN Doc A/49/10, [91], reprinted in *Yearbook of the International Law Commission* (1994) vol 2, part 2, 26). The Committee met twice in 1995, and reported back to the General Assembly. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference (Resolution on the establishment of an international criminal court, GA Res 50/46 (1995). The Preparatory Committee (or PrepCom), which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text. At its fifty-first session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, 'to finalise and adopt a convention on the establishment of an international criminal court' (Resolution on the establishment of an international criminal court, GA Res 51/207 (1997)).

115 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995, UN Doc A/50/22, [31]; and Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol 1 (Proceedings of the Preparatory Committee during March-April and August 1996), 13 September 1996, UN Doc A/51/22, [155].

116 Ad Hoc Committee, above n 115, [31], and PrepCom, above n 115, [155].

117 Ad Hoc Committee, above n 115, [32], and PrepCom, above n 115. [157].

118 PrepCom, above n 115, [157].

The eventual compromise resulted in a Court constrained within articulations of the sovereignty theme that has dominated international law and politics. According to the Statute, national prosecution of international crimes takes precedence over international prosecutions, except where the state concerned is genuinely unwilling or unable to investigate or prosecute, or where proceedings are for the purpose of shielding the person from criminal responsibility.[119] For Cassese, the chief merits of this system lie both in its substantial respect for national judicial systems, and in the indirect but powerful incentive to their becoming 'more operational and effective.'[120] While there are weaknesses in this scheme concerning pardons and amnesties,[121] for the purposes of this article it is enough to note that this deferral to state authority encapsulates the perspective that the ultimate aim of the Statute is not to effect that crimes be tried by the ICC, but to provide a source of norms and legal standards that provide states with the basis to effectively investigate and prosecute international crimes themselves,[122] continuing an old pattern of subordinating international jurisdictions to the sovereign power of states.[123]

(ii) The jurisdiction regime

Even where a situation passes the admissibility requirements, the exercise of jurisdiction by the ICC remains circumscribed. There was general agreement among states that a consent element was required as a precondition to the exercise of jurisdiction.[124] Some delegations were in favour of keeping to a minimum the number of states whose consent would be needed, and argued that this requirement should be limited to the territorial or custodial state.[125] Other delegations believed that this requirement should be extended to additional states which could have a significant interest in a case, including the state of nationality of the victim and the accused, and the target state of the crime.[126] More contentious, however, was whether the court would have 'inherent' jurisdiction with respect to the crimes elaborated in the Statute. Some delegations objected to the inclusion of this concept, arguing that it was incompatible with state sovereignty, and inconsistent with the principle of complementarity.[127] Other delegations argued that inherent jurisdiction could not be viewed as such, since it would stem from an act of

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119 Rome Statute, Preamble, art 1, art 17.
120 Cassese, above n 6, 353.
121 M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869, 940–46; and Holmes, above n 112, 76–77.
122 Werle, above n 68, 75.
123 See El Zeidy, above n 121. Schiff argues that the ICTY and ICTR are merely aberrations from this pattern: Benjamin N Schiff, *Building the International Criminal Court* (2008) 81.
124 Williams, above n 112, 341; and P Kirsch and J T Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1993) 93 *American Journal of International Law* 2, 8.
125 Ad Hoc Committee, above n 115, [122], and PrepCom, above n 115, [103–4].
126 Ad Hoc Committee, above n 115, [127], and PrepCom, above n 115, [103–5]
127 Ad Hoc Committee, above n 115, [118], and PrepCom, above n 115, [92].

sovereignty, namely acceptance of the Statute,[128] while international crimes were of interest to the international community as a whole.[129]

The scheme eventually agreed upon incorporates the concept of inherent jurisdiction with respect to crimes enumerated in the Statute. However, pursuant to Article 12, the Court may only exercise its jurisdiction if the territorial state or state of nationality is party to the Statute, the state in question has agreed to the exercise of jurisdiction, or following a referral from the UN Security Council acting under Chapter VII of the UN Charter. Together, the jurisdiction and complementarity regimes of the ICC represent a political compromise reflecting a particular image of international law and politics grounded in the primacy of the state. Despite efforts to reimagine international law and politics with reference to ideals of 'humanity', the state remains resilient, with the centrality of the sovereignty theme during the negotiating process, and the eventual deferral to national judicial systems, signifying an ongoing commitment to the constitutional axioms of statehood, particularly notions of consent, independence and non-intervention.

(b) National courts

This deferral to state authority reflects a broader trend in international law whereby states have assumed and international law has promoted a role for national courts in adjudicating international crimes. In the period after Nuremberg and Tokyo, states have considered it desirable to strengthen national criminal adjudication over international crimes by drafting multilateral treaties criminalising certain behaviours at the international level. However, it has become clear that national courts will only rarely prosecute their own nationals where war crimes are concerned, and even more rarely where crimes against humanity or genocide are concerned.[130] Responding to this culture of impunity, national courts have in certain circumstances been prepared to substitute themselves for national or territorial courts on the basis of 'universality.' More recently, states have engaged with the international community in establishing 'internationalised' criminal tribunals embedded within their domestic political order to prosecute perpetrators of serious crimes committed within their territory.

(i) The international treaty regime

Since the end of the Second World War, states have promulgated various international conventions on the prevention and punishment of certain crimes,[131]

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128 Ad Hoc Committee, above n 115, [118], and PrepCom, above n 115, [93].

129 PrepCom, above n 115, [93].

130 P Sands, 'International Law Transformed? From Pinochet to Congo…?' (2003) 16(1) *Leiden Journal of International Law* 37, 39.

131 In 1948 the UN General Assembly negotiated the Genocide Convention, confirming genocide as a crime under international law. The Four Geneva Conventions of 1949, as updated by the two Additional Protocols of 1977, obligate states party to provide effective penal sanctions for grave breaches of the Conventions, while the 1973 Apartheid Convention declared that apartheid was a crime against humanity. The 1979 Convention Against the Taking of Hostages criminalised the taking of hostages, while

imposing on themselves obligations of prosecution or extradition in a development characterised by the International Court of Justice as an 'extension of jurisdiction.'[132] The manner in which these treaties seek to achieve this goal is broadly similar.[133] With the exception of the Genocide Convention, which preferences territorial courts without expressly limiting the right of states to exercise a more extensive jurisdiction,[134] these conventions require states to exercise jurisdiction over crimes perpetrated on their territory or abroad when the alleged offender is on their territory, or extradite the offender to any other concerned state (the *aut dedere aut prosequi* principle).[135] This universalising approach was of particular significance in the *Pinochet Case* in the UK,[136] as well as in the case of Hissene Habré in Senegal,[137] and the *Munyeshyaka Case* in France.[138] While these instruments illustrate the commitment of the international community to prevent impunity by criminalising certain acts at the international level, it also demonstrates the ways in which states have sought to retain responsibility for prosecuting criminal activity.

(ii) Universal jurisdiction

The principle of universality has developed to empower any state to prosecute persons accused of international crimes, regardless of the place of commission or the nationality of the author or victim.[139] 'Universality' incorporates the view that

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the 1984 Convention Against Torture committed parties to taking effective measures to prevent and punish acts of torture. See above n 5.

132 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium) (Merits)* [2002] ICJ Rep. 121, Judgment of 14 February 2002, [59].

133 Sands, above n 130, 43.

134 According to the permissive approach developed in *Lotus*, jurisdiction is lawful unless prohibited by an identifiable rule of international law: *'SS Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (Ser A) No 10, 18.. Statements from the Spanish *Audencia Nacional* and the German *Bundesgerichtshof* suggest that it is not possible to derive a prohibition on universal jurisdiction, for example, from the Genocide Convention: *Pinochet*, Spain, Audiencia Nacional, Order No 1998/22605, 5 November 1998 (auto), Legal Grounds 3 and 4; *Pinochet*, Spain, Audiencia Nacional, Decision No 1999/28720, 24 September 1999, Legal Grounds 1 and 10–12; and *Jorgi*, Bundesgerichtschof, 30 April 1999.

135 See the Four Geneva Conventions of 1949, as updated by the two Additional Protocols of 1977: Geneva Convention I, art 49; Geneva Convention II, art 50; Geneva Convention III, art 129; and Geneva Convention IV, art 146; as well as the Convention Against the Taking of Hostages, art 8; and Convention Against Torture, art 7. The Apartheid Convention does not impose an obligation to prosecute or extradite those accused of perpetrating the crime of apartheid.

136 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147 (House of Lords).

137 *Hissene Habré,* Senegal, Penal Cour de Cassation, Arrêt n° 14, 20 March 2001 (Judgment) cited in Cassese, above n 6, 9.

138 *Munyeshayka* (case of the *Rwandan priest*), France, Cour de Cassation, 6 January 1998, (Judgment) *Bulletin crim*., 1998, 3–8 cited in Cassese, above n 6, 9.

139 See A H Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature' (2000) *Criminal Law Forum* 353; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003); S Macedo (ed), *Universal Jurisdiction:*

there are crimes of such gravity affecting the international community as a whole that they warrant universal prosecution and repression.[140] There are two iterations of the principle in contemporary discourse, both predicated on the notion that the judge asserting universal jurisdiction so acts in order to substitute for the defaulting territorial or national state. Universal jurisdiction based on the principle of the *forum deprehensionis* requires the presence of the accused on the territory of the prosecuting state, while universal jurisdiction *in absentia* places no preconditions on the exercise of jurisdiction.[141] Although 'universality' has been criticised for violating the principle of non-intervention,[142] it is increasingly invoked as a basis upon which states can prosecute international crimes and retain sovereign responsibility for promulgating criminal laws.[143]

National Courts and the Prosecution of Serious Crimes Under International Law (2004).

140 See the seminal case of *Adolf Eichman*, Israel, District Court of Jerusalem, judgment of 12 December 1961, in (1968) 36 *International Law Review* 18 and *Adolf Eichman*, Israel, Supreme Court, judgment of 29 May 1962, in (1968) 36 *International Law Review* 277). Eichmann, a Nazi lieutenant involved in facilitating and managing the logistics of mass deportation of Jews during the Second World War, was kidnapped in Argentina by Mossad in 1962 and brought to Israel to face charges of war crimes and crimes against humanity committed during the war. Dismissing challenges to the jurisdiction of the Israeli courts, the Israeli Supreme Court held:

> Not only did the crimes bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its foundations. The State of Israel therefore was entitled pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.

141 Cassese, above n 6, 285–91.

142 See H A Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86. For decisions rejecting this objection see *Scilingo*, Spain, Audiencia Nacional, Sentencia Num. 16/2005, 19 April 2005 (Judgment), [83]; *Pinochet*, Spain, Audencia Nacional, Order No 1998/22605, 5 November 1998 (auto), Legal Grounds 3 and 4; *Sokolovic*, Bundesgerichtshof, 3StR 372/00, 21 February 2001 (Judgment), unreported, pages 19–21 of original transcript quoted in Cassese, above n 6, 289 fn 63.

143 For examples of conditional universality see South Africa, Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002, Art 4.3; Uruguay, Proyecto de Ley sustitutivo de la Comision, Art 4; Canada, Crimes Against Humanity and War Crimes Act 2000, Art 8(b). For examples of absolute universality, see Belgium, Act Concerning the Punishment of Grave Breaches of Humanitarian Law (Act of 16 June 1993), Art 7, as modified by the Act of 10 February 1999 and the Act of 23 April 2003; Spain, Ley Orgánica 6/1985 del Poder Judicial of 1 July 1985, Art 23(4), although trials cannot be held *in absentia*; and Germany, Act to Introduce the Code of Crimes Against International Law of 26 June 2002, Art 1.1(1). See also D Vandermeersch, 'Prosecuting International Crimes in Belgium' (2005) 3:2 *Journal of International Criminal Justice* 400; and Hervé Ascensio, 'The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals:* Unconditional Universality is Back' (2006) 4:3 *Journal of International Criminal Justice* 586.

(iii) 'Internationalised' criminal tribunals

A recent addition to the international criminal order has been the establishment of 'internationalised' criminal tribunals, representing a particularly creative way for national courts to retain a role in adjudicating international crimes.[144] In Kosovo and East Timor, tribunals have been established as part of UN temporary administrations essentially as substitutes for domestic courts in the absence of an effective legal system,[145] while in Cambodia, the Extraordinary Chambers have been established within the existing court structure.[146] The Special Court for Sierra Leone (SCSL), however, was established as a new institution,[147] and as a treaty-based organ not anchored in the domestic system, is positioned within the international legal order. Situated in Freetown, and composed of a combination of domestic and international employees, however, the court remains embedded within the domestic political order. The Sierra Leonean government is responsible for appointing a total of three judges to the chambers of the court,[148] and unlike the *ad hoc* tribunals, the mandate of the SCSL conceives it as an institution that can contribute towards a national reform agenda.[149] While the court has rejected any interpretation of its mandate that may challenge its independence from the national jurisdiction of Sierra Leone,[150] it has remained mindful of the domestic context in which it operates.[151]

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144 See Simpson, above n 50, 52. There is an extensive literature on internationalised criminal tribunals. See, eg, CPR Romano, A Nollkaemper and J K Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004); and K Ambos and M Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003).

145 See H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46; F M Lorenz, 'The Rule of Law in Kosovo: Problems and Prospects' (2000) 11 *Criminal Law Forum* 127; B Kondoch, 'The United Nations Administration of East Timor' (2001) 6 *Journal of Conflict and Security Law* 245.

146 Law on the establishment of Extraordinary Chambers in the courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, 2 January 2001, Art 2. See E Meijer, 'The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal' in Romano, above n 144, 207–31; and H Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5 *Melbourne Journal of International Law* (2004) 462.

147 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), 2178 UNTS 138 ('Sierra Leone Agreement'). See J Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2005) 28:3 *Fordham International Law Journal* 616; and S Beresford, 'The Special Court for Sierra Leone: An Initial Comment' (2001) 14 *Leiden Journal of International Law* 365.

148 Sierra Leone Agreement, Annex, Art 2(2) ('SCSL Statute').

149 See War Crimes Studies Centre, *Interim Report on the Special Court for Sierra Leone* (2005) 32–34.

150 See *Prosecutor v Taylor*, Case No SCSL-2003-01-I, SCSL, A.Ch., 31 May 2004

VI. Rethinking ICL: Reconnecting Theory with Practice

The ongoing incarceration of ICL within power structures grounded in the primacy of the state no longer makes sense. As previous sections have noted, ICL draws on constructions of international and criminal law, encompassing an instrumentalist purpose (maintenance of international peace and security) and a moralist agenda (the protection of 'humanity'). Changes associated with increasing interaction and connectedness across global society have given rise to a new security agenda and a shared moral discourse that are increasingly taking place in space beyond the realm of the sovereign state. Given the changed nature of global politics, ongoing deference to a traditionalist state-centric image of the international system raises important questions about the nature of the relationship between international tribunals, particularly the ICC, and national jurisdictions. The challenge is to rethink ICL in ways that enable us to explore the possibilities for something other than traditional ways of depicting international law and politics. This concluding section suggests 'primacy' as one way to reconnect the practice of ICL with its theory as a system of law encompassing values transcending sovereign boundaries.

(a) The concept of primacy

The concept of primacy describes a relationship between institutions according to which one is given pre-eminence in its relations with the other. In relation to ICL, it incorporates the view that wherever there is conflict in the exercise of jurisdiction between international tribunals and national courts with respect to international crimes, primacy belongs to the former.[152] The notion captures the perspective firstly, that international crime being a matter of international law, an international tribunal is the most appropriate forum for the exercise of jurisdiction; secondly, that international crimes transcend sovereign boundaries, both in terms of their impact on international peace and security, and their contravention of a shared morality; thirdly, that perpetrators of international crimes tend to be state officials in positions of power who should be accountable not only to their domestic constituents, but also to the international community; fourthly, that sovereign states may be unwilling or unable to prosecute perpetrators impartially, particularly state officials; and fifthly, that primacy is the best way to ensure uniformity in the legal process.[153] 'Primacy' in this sense is not intended to denote 'exclusivity' but rather

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(Decision on Immunity from Jurisdiction); *Prosecutor v Fofana*, Case No SCSL-2004-14-AR72(E), SCSL, A. Ch., 25 May 2004 (Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations); and *Prosecutor v Kallon and Kamara*, Cases No SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), SCSL, A. Ch., 13 March 2004 (Decision on Challenge to Jurisdiction: Lome Accord Amnesty).

151 See War Crimes Studies Centre, above n 149, 38.

152 See B S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383; and A Karibi-White, 'The Twin *Ad Hoc* Tribunals and Primacy Over National Courts' (1999) 9 *Criminal Law Forum* 55.

153 See J N Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 162.

to encapsulate a concurrent relationship between international tribunals and national courts, according to which national courts may exercise jurisdiction over international crimes, but that an international tribunal such as the ICC may assert primacy where it is appropriate to do so.

Investing an international tribunal with primary jurisdiction for the prosecution of international crimes is not without precedent. When created as *ad hoc* responses to crises in the Balkans and Rwanda, the ICTY and ICTR were endowed with primacy in relation to national courts.[154] The term 'primacy' was used in an attempt to convey a complicated notion of jurisdictional hierarchy in which states were encouraged to assume a substantial portion of responsibility for the prosecution of the apparently large number of perpetrators of international crimes, while at the same time preserving the inherent supremacy of the tribunals which may have needed to be asserted for various reasons in particular cases.[155] While it is frequently claimed that primacy was a means to remedy flawed or non-existent national proceedings,[156] in most deferral situations, the tribunals have applied primacy as a way of bringing within their competence proceedings that were closely related and otherwise involved factual or legal questions which may have implications for the Prosecutor's investigations.[157] As well as illustrating the

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154 ICTY Statute, Art 9(2) and ICTR Statute, Art 8(2). SCSL Statute, Art 8 also gives the SCSL primacy, although only in relation to the national courts of Sierra Leone. Primacy is governed by Rules 9, 10 and 11 of the ICTY, ICTR and SCSL Rules of Procedure and Evidence*:* UN Docs IT/32/Rev.41 (2008), ITR/3/REV.17 (2008) and (2008) (as amended). The ICTY RPEs require either flawed national proceedings, or factual or legal questions closely related to investigations or prosecutions before the Tribunal before primacy can be asserted. Although initially identical, the ICTR RPEs were later amended to allow practically unfettered discretion. The SCSL RPEs mirror the amended ICTR RPEs. See A Zahar and G Sluiter, *International Criminal Law* (2007) 450–1.

155 V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995) 126.

156 Cassese, above n 6, 349; D Shraga and R Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 *European Journal of International Law* 360, 371; and WA Schabas, *The UN International Criminal Tribunal, The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 126. For Schabas, primacy was a way of resolving 'conflicts with national jurisdictions that might shelter an offender from genuine prosecution.'

157 M El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-visiting Rule 11*bis* of the Ad Hoc Tribunals' (2008) 57 *International and Comparative Law Quarterly* 403, 407. Only one deferral procedure has raised inadequate national proceedings, and even then the ICTY Trial Chamber relied on the related proceedings criterion: *Prosecutor v Mrksic, Slijvancanin and Radic*, Case No IT-95-13-R61, 10 December 1998 (Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal). In that case, the ICTY prosector argued that a refusal to cooperate indicated that proceedings in the state concerned, the Federal Republic of Yugoslavia (FRY), were not independent and impartial and were designed to shield the accused from criminal responsibility. The Trial Chamber, however, did not venture into a review of the quality of proceedings in the FRY, satisfying itself that the proceedings were closely related to proceedings of

inherent sensitivity of adverse findings with respect to national court proceedings, this broader understanding of primacy makes sense, given flawed national proceedings already fall within general exceptions to the *ne bis in idem* rule as a basis for re-trying alleged perpetrators.

The promise of an expanded international criminal jurisdiction as one way to move ICL beyond the state structure into a realm of post-sovereign political space brings with it challenges as well as opportunities. Undoubtedly, there will be political concerns as states resist the challenge to their sovereignty. In the case of the *ad hoc* tribunals, doubts about the application of primacy arose almost immediately after their statutes were adopted. Yugoslavia dismissed the ICTY as invasive of its sovereignty,[158] while four powerful members of the Security Council who created it made statements purporting to limit the scope of its primacy.[159] In relation to the ICTR, neighbouring states protested primacy as an unreasonable demand on their sovereignty,[160] while the resistance of certain states to the creation of the ICC further evidences the political sensitivity of an international jurisdiction. Legal challenges will also arise, as they did before the *ad hoc* tribunals. In the *Tadic Case*, however, both ICTY chambers dismissed arguments that the transfer of proceedings from the German courts was a violation of the domestic jurisdiction of states and their sovereignty, stating that in cases involving crimes which are universal in nature, the sovereign rights of states cannot take precedence over the right of the international community to prosecute perpetrators.[161]

Despite these misgivings, the primacy of the *ad hoc* tribunals has retained its mandatory legal force, at the same time as the tribunals have been able to establish cooperative relationships with national jurisdictions. For the most part, the states of the former Yugoslavia have cooperated with the ICTY, and in this respect the arrest of Radovan Karadzic by Serbia in July 2008 and his subsequent transferral to the ICTY is a prominent example. Likewise, the states surrounding Rwanda who initially protested the primacy of the ICTR have relented, with most cooperating diligently.[162] Moreover, the ICTY and ICTR Prosecutors have at times entrusted national courts with responsibility, whilst taking upon themselves a coordinating and supervising role in national prosecutions of international crimes, particularly as

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the ICTY.

158 Letter Dated 19 May 1993 From the Charge D'Affaires of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations Addressed to the Secretary-General, [6] and [10], UN Doc A/48/170-S/25801 (1993); Maogoto, above n 153, 162.

159 Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, UN Doc S/PV.3217. The four states were France, Great Britain, Russia, and the United States. These statements, however, have minimal legal effect, and the ICTY has asserted primacy as a mandatory obligation on states: see n 161 below.

160 Maogoto, above n 153, 208.

161 *Prosecutor v Dusko Tadic*, Case No IT-94-1, 10 August 1995 (Decision on the Defence Motion on Jurisdiction) [42] and *Tadic (Interlocutory Appeal)* [49–64].

162 See Maogoto, above n 153.

part of Completion Strategies designed to bring to an end the work of the tribunals.[163] Some authors have argued that these strategies indicate the balance is shifting back to domestic prosecution for international crimes.[164] Alternatively, by allowing for less serious cases to be referred to national courts, the strategies can be viewed as a way to ensure that minimal resources are targeted at prosecuting the most serious cases before an international court. Importantly, the Tribunals retain responsibility for determining whether a particular case warrants prosecution before it, or whether the case is suitable for referral to a competent national court. As El Zeidy notes, the practice of deferring less serious cases to national courts reflects a sort of complementarity that functions alongside the existing system of primacy, resulting in the division of labour on the basis of cooperation between the tribunals and national jurisdictions.[165] This form of complementarity, however, is very different from that elaborated in the Rome Statute, where complementarity is premised on a system of admissibility that filters the type of situations that can come before the ICC. Rather, the system contemplated is part of prosecutorial

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163 Proposed initially by the ICTY, the idea of a Completion Strategy for the tribunals was devised between 2001 and 2003 as a response to concerns that neither tribunal had been particularly effective in prosecuting senior military and civilian leaders. There were also concerns about the lengthy period of pre-trial detention and the significant expenditure member states were incurring in mounting the prosecution and trial of a relatively small number of individuals. The strategies were subsequently set out in Security Council Resolutions 1503 (2003) and 1534 (2004).
The Completion Strategies call on the ICTY and ICTR to focus on trials involving those presumed responsible for crimes which most seriously violate international public order, while referring less serious matters to domestic jurisdictions. The mechanism for referral is set out in Rule 11*bis* of the respective RPEs.
Only a Referral Bench in the case of the ICTY and Trial Chamber in the case of the ICTR designated by the President of the respective tribunal can order transfer to a competent national jurisdiction. When contemplating transfer, factors to consider include the gravity of the offences, the level of seniority of the accused, and the prospects for a fair trial in the national jurisdiction.
For extensive commentary on the Completion Strategies of the ICTY and ICTR see, inter alia, Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *Journal of International Criminal Justice* 655; E Mose, 'The ICTR's Completion Strategy: Challenges and Possible Solutions' (2008) 6 *Journal of International Criminal Justice* 677; S Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price' (2006) 17 *Criminal Law Forum* 177; D A Mundis, 'The Judicial Effects of the 'Completion Strategies' on the *Ad Hoc* International Criminal Tribunals' (2005) 99 *American Journal of International Law* 142.

164 See, eg, J Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4 *Journal of International Criminal Justice* 745, 759–62. Almqwist suggests that the Completion Strategies reflect a broader trend in international criminal justice to relocalise international justice efforts. However, she concedes that international criminal tribunals continue to perform a critical function in delivering justice, recognising that these are crimes which transcend the interest of any one state.

165 El Zeidy, above n 157.

policy to use discretionary powers in selecting the sort of cases that warrant attention before the tribunal.

The concept of primacy will have its most powerful impact if applied at the ICC. International *ad hoc* tribunals may retain a role in the international criminal justice system as arrangements that are more politically palatable than the ICC, and as international criminal tribunals it would make sense that these forums should also operate on the basis of primacy. However, as a permanent forum situated at the apex of the international criminal justice system, the ICC is both an enduring symbol and permanent iteration of the international community's commitment to ontologies of 'humanity' as the normative basis for constructing international peace and security. Accordingly, efforts should be focused towards implementing primacy at the ICC and bringing appropriate cases within its ambit, rather than promulgating *ad hoc* tribunals limited both temporally and geographically. In practical terms, implementing the notion of primacy at the ICC requires adjusting the admissibility and jurisdiction provisions of the Rome Statute to elaborate a changed relationship between the ICC and national jurisdictions.[166] This would not invest the ICC with exclusivity, and national jurisdictions would retain a significant role in the prosecution of international crimes. The ICC, however, would have the ability to assert its primacy during the course of a matter where it was appropriate to do so, perhaps taking into consideration matters such as the gravity of the alleged offences, the status of the accused, the general importance of the legal questions involved, and whether it is related to proceedings already the subject of an investigation by the Court. This does not mean that states would completely surrender their sovereignty and abdicate responsibility for prosecuting criminal behaviour; rather it is to say that the ICC should be able to focus on the gravest crimes involving those in positions of power, such as Commander-in-Chief of the Lord's Resistance Army in Uganda, Joseph Kony,[167] and President Al Bashir in Sudan,[168] while leaving allegations involving lower-level subordinates to national courts.[169] There will be challenges, of course, but as the practice of the ICTY and ICTR has shown, primacy can operate effectively.

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166 This would require the agreement of member states in accordance with the provisions of Article 121 of the Rome Statute. The regulated ICTY scheme or the less constrained ICTR format (see above n 154) could provide a model on which to base amendments to the Rome Statute and the ICC RPEs (ICC-ASP/1/3 (Part II-A) (2002)).

167 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No ICC-02/04-01/05.

168 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No ICC-02/05-01/09.

169 See allegations involving British and US personnel in Iraq: G Simpson, 'The Death of Baha Mousa' (2007) 19 *Melbourne Journal of International Law* 340, 350–1; and J W Smith III, 'A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System' (2006) 27 *Whittier Law Review* 671. Although international crimes were technically committed, the low-level status of the accused and the comparatively 'minor' nature of the allegations mean the offences were probably not sufficiently grave to warrant prosecution before an international tribunal such as the ICC.

(b) Concluding remarks

Primacy in the sense elaborated here offers one way to rethink ICL and reconnect the practice of ICL with its theory as a system of law encompassing global ideals. As a discipline reflecting the contingencies, interests and imperatives pervading constructions of international and criminal law, ICL encompasses both an instrumentalist purpose (peace and security) and a moralist agenda (protection of 'humanity'). While efforts to reimagine international law and politics with reference to ideals of 'humanity' have facilitated space at the global level for considering systems of criminal law and constructing a system of international criminal justice, for the moment ICL remains incarcerated within power structures grounded in the primacy of the state. Yet changes associated with globalisation have undermined both the practical viability and moral acceptability of the sovereign state. A new security agenda has arisen in the context of the erosion of state autonomy and independence, with the politics of identity emerging as a source of conflict with effects transcending sovereign boundaries. At the same time, a shared moral discourse centred on the language of human rights and democracy has emerged to challenge those who decry the relevance of justice within the global arena. Given the changed nature of global politics, it cannot make any sense for a system of ICL rationalised around values transcending sovereign boundaries to remain embedded within an idea of states as bounded political communities.

The challenge is to rethink ICL in ways that enable us to behave in spaces beyond the arbitrarily constructed boundaries of the state, and to explore the possibilities for something other than the traditional ways of depicting international law and politics. If justice and peace are to be given any meaning within the global arena, the narratives of international law and politics that have dominated debate must be reconnected to the unreflected narratives of those who can see the promise of a shared morality at the same time as they face the brutality of identity-based violence. In other words, the theory of ICL must be reconciled with its practice. Solutions to complex problems, of course, are rarely simple and never easy, and care must be taken to avoid simplistic answers presented in ritualised terms. Accordingly, this article has taken seriously the suggestion that legal traditions are contingent notions, reflecting shifts in the political role of law that require consideration of the manner in which the techniques of political power generate certain 'truths' about international law and politics. It is here that the disjuncture within ICL has arisen, and it is from here that this concluding section suggested 'primacy' as one way to free ICL from a ritualised, state-centric depiction of international law and politics, and reconnect theory with practice by moving ICL beyond the state structure into a realm of post-sovereign political space that better reflects contemporary global relations.