Defending the Society of States

Why America Opposes the International Criminal Court and its Vision of World Society

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Introduction

How should the International Criminal Court (ICC or Court) change the way we view international society and how should we assess American opposition to the Court? International Relations (IR) is ideally placed to inform the interdisciplinary approach that is required to answer this question. The IR community has, however, been relatively slow in responding. What has been produced has mainly been the work of international lawyers.[1] There are exceptions, of course, but on the whole the ICC is under-researched by IR academics.[2] This situation has not gone unnoticed. Leila Nadya Sadat, for instance, calls the 1998 Rome Conference, which founded the Court, 'a constitutional moment'. It represented 'a sea change in international law-making with which political theory . . . has not caught up'.[3] It is the first aim of this book to address this situation by interpreting the Court through an approach to IR known as 'the English School'. It is increasingly apparent that a rich source of interdisciplinary research lies at the intersection of International Law and IR.[4] It is suggested here that the normative focus of the English School and the centrality of international law to its conception of international society represent significant interdisciplinary meeting points. More specifically the English School's conceptualization of international society and world society and the role played by law in defining these provides a useful framework for

[1] For example, see Roy Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (The Hague, the Netherlands: Kluwer Law International, 1999); Antonio Cassese, Paolo Gaeta, and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary Vol. I and II* (Oxford: Oxford University Press, 2002); Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law. Justice for the New Millennium* (Ardsley, NY: Transnational, 2002).

[2] For an exception, see David Wippman, 'The International Criminal Court', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), 151–88; Eric K. Leonard, *The Onset of Global Governance. International Relations Theory and the International Criminal Court* (Aldershot, UK: Ashgate, 2004); Steven C. Roach, *Politicizing the International Criminal Court. The Convergence of Politics, Ethics and Law* (Lanham, MD: Rowman and Littlefield, 2006).

[3] Sadat, *The International Criminal Court*, 109.

[4] See, for instance, Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

examining the issues surrounding the Court and for assessing its impact on global politics.[5]

Among the legal commentaries, there is a definite sense that the Court does have the potential to revolutionize global politics. Indeed one commentator equates the 1998 Treaty of Rome, which founded the Court, with the 1648 Treaty of Westphalia. Both are seen as pivotal moments in the history of global politics. For instance, Frédéric Mégret writes that the creation of the ICC 'might well one day precipitate a revolution of Westphalian proportions which, although it may not do away with the state system, would certainly rest its legitimacy on an entirely different footing'.[6] Sadat too, captures this sense of a new beginning. Recalling the problems of an international criminal justice system that relied solely on the state to adjudicate and enforce universal laws, she welcomes the creation of a permanent and independent Court and describes it as a revolution. She writes:

> through a rather astonishing mutation, jurisdictional principles concerning 'which State' may exercise its authority over particular cases have been transformed into norms establishing the circumstances under which the international community may prescribe the rule of international criminal law and punish those who breach those rules.[7]

Sadat would be the first to add, however, that the revolution, if indeed that is what it is, is far from complete or certain ever to be completed. The efforts to transcend an international society of states through the creation of a permanent International Criminal Court (ICC) have demonstrated 'the tenacity of traditional Westphalian notions of state sovereignty'. Concessions to these traditional ideas have weakened the Court and mitigated its impact on international society. The revolution has been, to use Sadat's phrase, an 'uneasy' one.[8]

In this context, one of the most tenacious advocates of Westphalian notions of state sovereignty has been the US government. A frustration with the American position is implicit in many legal commentaries on the Rome Statute and the ICC. Convincing arguments identifying the inconsistencies in the US legal position have been made. The pervading sense of frustration, however, reveals the limitations of the lawyer's perspective. For example, Bruce Broomhall's book *International Justice and the International Criminal*

[5] Richard Little, 'International System, International Society and World Society: A Re-evaluation of the English School', in B. A. Roberson (ed.), *International Society and the Development of International Relations Theory* (London and New York: Continuum, 1998), 59–79.

[6] Frédéric Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution in International Law', *European Journal of International Law*, 12 (2001), 258.

[7] Sadat, *The International Criminal Court*, 103.

[8] Sadat, *The International Criminal Court*, 1–19.

Court devotes a specific chapter to the question of American opposition.[9] Broomhall is clearly dissatisfied with the US position but there is little indication of what lies behind the US stance and how to address that. As we see, the United States continues to argue that its position is in fact consistent with international law. It will not, however, be moved by commentaries that argue otherwise. Legal reasoning alone is insufficient to change policy because that policy is driven by deep-rooted cultural and political factors. Indeed Broomhall acknowledges that more interdisciplinary study is needed to understand the environment that presently legitimates anti-ICC policies.[10]

This is the second aim of this book. It is dependent on the first aim because without a theory of international society and its alternatives, one cannot fully understand US policy, nor can one pass judgement on that policy. It was only after Hedley Bull had formulated his understanding of international society and great power responsibility in *The Anarchical Society*, for instance, that he was able then to identify the United States as a 'great irresponsible'.[11] As this example suggests (Bull was of course a major figure in the English School), the English School approach is well placed to provide the building blocs of such a theory. It not only provides a useful interpretive guide to global politics today, it is also rich in normative theorizing that sensitizes us to the dilemmas that confront the advocates of progressive change. The concept of international society, therefore, is seen by English School scholars as a good description of contemporary international relations (IR). Beyond this interpretive function, however, it offers a site for normative discussion, where the rules of global politics are negotiated and then applied in order to pass judgement on the behaviour of individuals, states, and non-state groups.

THE ENGLISH SCHOOL: A FRAMEWORK FOR ANALYSIS

The term 'English School' originates as a reference to members of the British Committee of International Relations, which met in the 1960s and 1970s.[12]

[9] Bruce Broomhall, *International Criminal Justice and the International Criminal Court. Between State Consent and the Rule of Law* (Oxford: Oxford University Press, 2003), 163–83. See also Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court. National Security and International Law* (Lanham, MD, Boulder, CO, New York, Oxford: Rowman and Littlefield, 2000).

[10] Broomhall, *International Criminal Justice*, 68.

[11] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn. (London: Macmillan, 1977), 194–222; Hedley Bull, 'The Great Irresponsibles? The United States, the Soviet Union and World Order', *International Journal*, 35 (1979–80), 437–47.

[12] See 'British Institutionalists, or the English School, 20 Years on', *International Relations*, 17 (2003), 253–72; Brunello Vigezzi, *The British Committee on the Theory of International Politics (1954–85)* (Milan, Italy: Edzioni Unicopli, 2005).

Whether the term 'English School' is appropriate and who is considered 'in' the School has been a matter of debate. Those debates are not of concern here.[13] What linked these scholars was a shared interest in the existence of a society of states or international society. This is discussed in detail in the next section. For Chris Brown, however, the concept of international society was not the only, nor indeed the main contribution of the English School.[14] That rested with the idea that world politics could be understood in terms of the interplay of three traditions of thought, what Martin Wight identified as realism, rationalism, and revolutionism and what Hedley Bull called Hobbesian, Grotian, and Kantian.[15] This tripartite scheme is used by contemporary writers who draw parallels between Wight's categories and the concepts of international system, international society, and world society.[16] How these concepts are specifically defined and separated is a matter of continuing debate, and by offering a specific definition of world society this book speaks directly to that issue. Yet the idea that Realists emphasize an international system of competing states, Rationalists an international society of coexisting and sometimes cooperating states, and Revolutionists a world society based on ideologies that transcend statehood, has been generally accepted at least as a pedagogical scheme.

From the English School perspective as it is understood here therefore, neither an anarchic international system nor an international society of states is the starting point for IR theorists. Rather the starting point is the recognition that each of the three traditions says something about global politics. The English School approach subscribes in other words to a pluralistic methodology.[17] The extent to which each tradition helps us understand global politics varies according to historical circumstance. In this regard, the Realist's traditional emphasis on anarchy stems not from an arbitrary attempt to separate the discipline of IR from the study of domestic politics. Rather it stems from an understanding that the international system is a product of, and therefore

[13] See Tim Dunne, *Inventing International Society: A History of the English School* (London: Macmillan, 1998) and the exchange between Dunne, Makinda, Knudsen, and Suganami in *Cooperation and Conflict. Nordic Journal of International Studies*, 36 (2001).

[14] Chris Brown, 'World Society and the English School: An "International Society" Perspective on World Society', *European Journal of International Relations*, 7 (2000), 423–41. See also Richard Little, 'The English School Contribution to the Study of International Relations', *European Journal of International Relations*, 6 (2000), 395–422; Barry Buzan, 'The English School: An Underexploited Resource in IR', *Review of International Studies*, 27 (2001), 471–88.

[15] Wight, *International Theory*; Bull, *The Anarchical Society*, 22–6.

[16] Richard Little, 'International System, International Society and World Society: A Re-evaluation of the English School', in B. A. Roberson (ed.), *International Society and the Development of International Relations Theory* (London: Pinter, 1998), 59–79.

[17] Richard Little, 'The English School's Contribution to the Study of International Relations', *European Journal of International Relations*, 6 (2000), 395–422.

contingent on, processes of moral, political, and legal reasoning. Moral, political, and legal communities are, from the Realist's perspective, inevitably unique and separate. Sovereignty bestows freedom and therefore moral accountability on the leaders of such communities, yet Realists have tended to argue that 'a nationalist ideology asserts that this accountability should be to the national group itself'.[18]

The English School, therefore, may reject the methodological (as opposed to legal) positivism that underpins certain approaches to IR theory but it does not reject the interpretive value of realism.[19] Where positivists like Kenneth Waltz simply *assume* the presence of egoistic units in their theory of international politics,[20] the English School approach invites the theorization of the state by noting that the self-help logic of anarchy rests on, and is therefore contingent on, distinct ethical communities. Having done that, however, it does not rule out the possibility that realism can offer a convincing account of international politics at a particular time in history. The English School approach, in other words, recognizes that states are not necessarily other-interested agents and that they may sometimes act in ways that are contrary to the common interest. The balance of power may establish order, but without a common interest in maintaining that order, the balance of power is simply the outcome of a mechanical process and not the consequence of moral or legal obligation. In such times, relations between states have been traditionally described by the English School in terms of an international *system*, the structure of which was constituted by the distribution of material capabilities. In an international system, there is no universal concept of crime and even 'the sacredness of human life is a purely municipal idea of no validity outside the [state's] jurisidiction'.[21]

More recently, however, Barry Buzan has helped to consolidate the methodological difference between English School realism and the Neorealism inspired by Waltz by noting that states have never existed in a systemic or pre-social relationship. Relations between states may at certain times be characterized by power politics but to the extent that states communicate with each other then they exist in some form of society. In this respect, Buzan argues for removing the system/society distinction from the English

[18] James Mayall, 'Introduction', in James Mayall (ed.), *The Community of States* (London: Allen and Unwin, 1982), 6.

[19] See Hedley Bull, 'International Theory: The Case for a Classical Approach', *World Politics*, 42 (1966), 361–77. See also Richard Little, 'The English School vs. American Realism: A Meeting of Minds Divided by a Common Language?', *Review of International Studies*, 29 (2003), 443–60.

[20] Kenneth Waltz, *Theory of International Politics* (New York, London: McGraw-Hill, 1979).

[21] O. W. Holmes cited by Bassiouni and Wise, *Aut Dedere, Aut Judicare*, 31.

School framework.[22] To be clear, this does not mean that the English School approach rejects the interpretive value of realism. After all, those communicative processes that create the rules that structure the social relationships of states are often heavily influenced by power. Realism is, therefore, still relevant, albeit in a 'modified' form. It can, to use Tim Dunne's words, help illustrate how power 'creates a normative framework convenient to itself'.[23] Indeed, much of the evidence presented in this book supports the modified Realist's position on international society. For them, the state generally has an 'instrumentalist' view of international society and this stems from the tendency to see itself as 'master of its own fate', a trait that is naturally more common among the powerful. In such states, a Machiavellian sense of *virtu* is often valued by those holding power. This has been defined as the practice of 'cloaking the refusal to limit the state's full freedom of action in the garb of . . . purely nominal declarations of some such submission'.[24] Such practices guarantee that international rules, which nominally define the common values that exist between states, do not have the quality of law as they too easily give way to the particular interests of the powerful. If international society exists, in other words, it does so only at the behest of the powerful.

Realism is then very much part of the English School approach yet because the state is the site of ethical reasoning the English School does not assume that states will automatically be in competition with each other or that human rights are meaningless. From the Rationalist perspective, the power of a national kind of communitarianism, which realism tends to rest on, does not necessarily rule out the need to think about international society. 'On the contrary, . . . the need becomes more urgent. . . . [W]hile cultural diversity remains a necessary support for our identity, the development of community depends . . . on our capacity to join together not to merge our separate identities but to preserve them'.[25] For Rationalists, humankind is guided towards this capacity by law. Thus, 'the sovereignty of states in the international community and the absence of any common superior does not involve pure anarchy,

[22] On the distinction of 'international society' from 'international system' see Alan James, 'System or Society?', *Review of International Studies*, 19 (1993), 269–88. On the need to do away with the distinction between 'system' and 'society' see Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004). See also Nicholas Onuf, 'The Constitution of International Society', *European Journal of International Law*, 5 (1994), 8. For a response to Buzan which defends the distinction see Tim Dunne, 'System, State and Society: How Does it all Hang Together', *Millennium: Journal of International Studies*, 34 (2005), 157–70.

[23] Tim Dunne, 'Sociological Investigations: Instrumental, Legitimist and Coercive Interpretations of International Society', *Millennium: Journal of International Studies*, 30 (2001), 81.

[24] Hersch Lauterpacht, 'The Grotian Tradition in International Law', *The British Yearbook of International Law*, 23 (1946), 35.

[25] Mayall, 'Introduction', 10–1.

because prior to political organization there still exists law, based on reason and the nature of man being a social being'.[26] Unlike Realists, who dismiss international law and international solidarity as the 'slogans of those who feel strong enough to impose them on others',[27] Rationalists see 'international society as a customary society'.[28] State practice, including the balance of power, is embedded in the institutions of diplomacy and customary international law, which helps to develop and then to articulate an ethic of coexistence based on sovereign equality and non-intervention. This is, as Bull puts it, 'a response to the fact and implied value of diversity on a global scale'.[29]

Rationalism is strongly associated with the Grotian tradition in political theory.[30] For Hedley Bull at least, the work of Hugo Grotius was central to the idea of an international society in which states 'are bound not only by rules of prudence or expediency but also by the imperatives of morality and law'.[31] While this broad definition defines the Rationalist perspective, those working within this tradition dispute the scope and strength of solidarity across international society. This dispute has provided reason for distinguishing the terms 'international society' and 'international community', which in popular discourse are often used interchangeably. In drawing such a distinction, several authors recall the differentiation between *gemeinschaft* and *gesellschaft* made by the German sociologist Ferdinand Tönnies.[32] Tönnies understood community (*gemeinschaft*) as referring to an organic unity with natural bonds between its members. The term emphasizes subjective feelings of commonality. On the other hand, society (*gesellschaft*) was considered artificially created and merely indicated interdependency between autonomous

[26] Wight, *International Theory*, 234.

[27] E. H. Carr, *The Twenty Years Crisis 1919–39*, 2nd edn. (London: Macmillan, 1946), 86. See also Bassiouni and Wise, *Aut Dedere, Aut Judicare*, 36, who write that 'in the present state of international relations, to speak as if an "international community" actually were in being runs the risk of exciting expectations that are bound to be disappointed and, worse yet, of encouraging use of the rhetoric of universality as a cloak for hegemonic objectives'.

[28] Wight, *International Theory*, 39.

[29] Bull, *The Anarchical Society*, 134.

[30] Wight, *International Theory*, 233–4.

[31] Bull, *The Anarchical Society*, 27.

[32] See Andreas L. Paulus, 'The Influence of the United States on the Concept of the "International Community"', in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 59–60; Bruno Simma and Andreas L. Paulus, 'The "International Community": Facing the Challenge of Globalization. General Conclusions', *European Journal of International Law*, 9 (1998), 266–77; Ove Bring, 'The Westphalian Peace Tradition in International Law. From *Jus ad* Bellum to *Jus Contra* Bellum', in Michael N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L. C. Green* (US Naval War College: International Law Studies Volume 75, 2000), 62. For the use of this distinction by IR scholars, see Chris Brown, 'International Theory and International Society: The Viability of the Middle Way?', *Review of International Studies*, 21 (1995), 183–96; Bruce Cronin, *Community Under Anarchy. Transnational Identity and the Evolution of Cooperation* (New York: Columbia University Press, 1999), 4; Buzan, *From International to World Society?*, 108–18.

agents. As Andreas Paulus helpfully puts it, 'Community is prior to its members; society is subordinate to their interests'.[33]

In the international sphere, 'society' is used to identify an association of sovereign states. Those states have interests that are formulated by processes independent of international society. They join to form a society in order to protect and advance those interests but cooperation is the exception and not the rule. As discussed in detail in Chapter 2, this view is often associated with Emer de Vattel. In Vattel's view, the needs of men were met sufficiently within particular nations. Nature had determined that states were the autonomous agents that Tönnies identified. There was little need, according to contractarians like Vattel, to associate beyond the level of the nation-state. While Vattel envisaged a residual responsibility to universal laws of nature (including limits on the conduct of war and universal jurisdiction to prosecute 'enemies of the whole human race'), it was 'for each nation to decide what its conscience demands of it, what it can or can not do; what it thinks well or does not think well to do'.[34] To expect otherwise, in other words to bind a sovereign state to a law it had not consented to, was to threaten the social contract that protected the freedom of the nation. The liberty created by that contract was best preserved if sovereigns recognized that states had duties only to themselves and could only be bound by a commitment, or by a law, to which they had given their consent. With this qualification, the rules that did develop between states could be considered, under this positivist conception of international law, the rules of international society.

On the other hand the term 'community' signifies a normative structure that is prior to, or at least independent of, that which is created solely by the interaction of states. The term 'international community' is in this regard better suited to the kind of association that is structured by rules that states have not necessarily consented to.[35] This view is associated with the Grotian tradition of international thought. This sees states as bound either by natural law or, in the case of the neo-Grotian tradition, customary international law. As Simma and Paulus remind us, this kind of international communitarianism must be distinguished from the use of the label 'communitarian' by those advocates of a closer national society based on national values. As an example of this, it should be noted that the neo-Grotian emphasis on universal human rights and the responsibility of the international society to guarantee those

[33] Paulus, 'The Influence of the United States', 62.

[34] Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington, DC: Carnegie Institution of Washington, [1758] 1916), 6.

[35] See, for instance, Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36 (1998), 564.

rights when states are either unwilling or unable to do so, shows that this kind of international communitarianism is not opposed to the individualism of persons, but to state individualism.[36]

Using Tönnies' distinction therefore, one might suggest that 'international community' is not the same as 'international society'. In the former, states have obligations to a prior community of humankind, while in the latter states are only obliged to observe contracts they have consented to. As the terms are often used interchangeably, however, it is more helpful to use different labels. This book uses the overarching term 'international society' to describe relationships between states that are conditioned by rules and institutions that identify rights and responsibilities. Within that, one can identify a 'pluralist' conception of international society, which is constituted by diverse but coexisting moral communities and by the rules of sovereign equality and sovereign consent. One can also identify a 'solidarist' conception of international society, which notes that states have a responsibility not only to each other but also to a wider concept of the common good, which may include a conception of humanity that is founded on natural or customary international law.[37] Both are distinct from 'world society', which is defined below and in more detail in Chapter 4.

This solidarist and pluralist distinction has been illustrated by reference to the classical work of Grotius and Vattel, respectively. This is particularly apparent in English School research on the issue of humanitarian intervention. Where Vattelian pluralists warned against the idea of intervention, Grotian solidarists have argued that a sense of obligation to a community of humankind does transcend the society of states and a right to humanitarian intervention exists within natural and/or customary international law.[38] This distinction works less well in the area of international criminal justice, however, partly because Vattel's positivism did not cause him to reject Grotian ideas such as restraints on the conduct of war and universal jurisdiction. Both

[36] Bruno Simma and Andreas L. Paulus, 'The "International Community": Facing the Challenge of Globalization', *European Journal of International Law*, 9 (1998), 271.

[37] This distinction was first suggested by Bull, 'The Grotian Conception of International Society', in H. Butterfield and M. Wight (eds.), *Diplomatic Investigations* (London: Allen and Unwin, 1966), 35–50. Buzan's reworking of the pluralist–solidarist distinction demonstrates that if these labels are general they are not necessarily redundant. His more specific descriptions of interstate societies will be introduced in due course. See Buzan, *From International to World Society?*, 139–60.

[38] See the framework used by Nicholas J. Wheeler, 'Pluralist or Solidarist Conceptions of International Society—Bull and Vincent on Humanitarian Intervention', *Millennium, Journal of International Studies*, 21 (1992), 463–87. It must be noted that this was a development of Bull's original use of the term solidarism, which was merely to indicate the possibility of law enforcement within the society of states. See Andrew Linklater and Hidemi Suganami, *The English School of International Relations* (Cambridge: Cambridge University Press, 2006), 59–60.

Grotius and Vattel, for instance, grounded in natural law a duty of states either to extradite or punish those individuals who were guilty of committing crimes that in some way offended humanity. Nonetheless, the Vattelian principle of sovereign consent is central to understanding why contemporary pluralists reject the exercise of universal jurisdiction and why they are suspicious of the solidarist emphasis on customary international humanitarian law (IHL), which is considered to evolve independently of state consent. The solidarist view of international law is more progressive to the extent that it considers binding states, even those that withhold their consent, to 'the principles of humanity and the dictates of public conscience'.[39] Thus, pluralists and solidarists are separated by their views on the sources of international law. They are, however, united within the Rationalist tradition by their view that the state plays an exclusive role in the adjudication and the enforcement of international law. In other words, pluralists and solidarists may disagree on the way international law is formed, but they agree that responsibility for its enforcement rests solely with states.

For philosophers in Wight's third tradition—the Revolutionists—the state is part of the problem. Far from being a guarantor of an individual's liberty, the state is often the means used to ensure his or her continuing repression. From this perspective, international society is not a prudent association of states that manages ethical diversity and provides the international stability out of which a universal moral consensus may grow. Rather international society is simply 'a global protection racket', the rules of which protect the privileged position of statist elites.[40] Clearly, the Marxist view of history, where the state advances particular class interests but would eventually wither away to be replaced by a communist utopia, fits neatly into this tradition.[41] Yet the tendency to place Immanuel Kant in this tradition and to link his philosophy to a vision of world society that transcends and replaces the state is difficult to sustain.[42] Certainly, Kant argued that the state and the society of states were insufficient institutions to sustain the moral progress that was required to move towards perpetual peace, but it is clear that Kant sought to work with a reformed conception of international society rather than overthrow it. In fact states organized along republican lines were necessary in order to check the power of leaders who might threaten the rights of individuals. Moreover, because some individuals

[39] As articulated by the Martens Clause of The Hague Convention II of 1899. See Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd edn. (Oxford: Oxford University Press, 2003), 8–9.

[40] Ken Booth, 'Military Intervention: Duty and Prudence', in Lawrence Freedman (ed.), *Military Intervention in European Conflicts* (Oxford: Blackwell, 1994).

[41] Buzan, 'The English School', 475.

[42] For a similar view see Linklater and Suganami, *The English School*, 160–9.

found liberty in particular communities, international society was needed to help defend the independence of states. In this regard, Kant argued against the forceful intervention of one state into the affairs of another, even when the latter is 'struggling with its internal ills'. He considered such interference to be a violation of the rights of an independent nation. It would, moreover, 'be an active offence and would make the autonomy of all other states insecure'.[43] If Kant did have a conception of world society, therefore, it was one in which the state and the society of states were necessary components.

Yet Kant also argued that national and international law could not guarantee individuals the right to be treated as ends in themselves because these laws did not apply to those individuals who were part of stateless communities. Extending hospitality to these 'strangers'—what Kant called cosmopolitan law—was thus a necessary 'complement' to national and international law.[44] This conception of cosmopolitan law has been interpreted by some as facilitating a 'spirit of commerce', which is said to give states 'a material incentive' to act peacefully.[45] This interpretation is too narrow. Kant did use the term 'commerce', but only as an example of interaction between peoples. The right not to be treated by foreigners as enemies has a much more profound meaning. For Kant,

> [t]his right, *in so far as it affords the prospect that all nations may unite for the purpose of creating certain universal laws to regulate the intercourse they may have with one another*, may be termed *cosmopolitan (ius cosmopoliticum)*.[46]

'Hospitality to strangers' therefore goes beyond 'commerce' and even beyond what we might now call 'asylum', which is consistent with the categorical imperative of treating people as ends in themselves. The point Kant makes when he says that peoples have a right not to be treated by foreigners as enemies is that their views should be taken into consideration during the process of 'creating certain universal laws' that regulate all aspects of human relationships. Contemporary audiences might interpret this not only in the negative terms of human rights but also in the more positive terms of

[43] Kant, *Perpetual Peace*, 96. He also opposed 'attempts to put into practice overnight revolution, i.e. by forcibly overthrowing a defective constitution . . . for there would be an interval of time during which the condition of right would be nullified. Kant, *The Metaphysics of Morals*, 175.

[44] Kant, *Perpetual Peace*, 108.

[45] Michael W. Doyle, 'Liberalism and World Politics', *The American Political Science Review*, 80 (1986), 1161.

[46] Kant, *The Metaphysics of Morals*, 172, emphasis added; and in *Perpetual Peace*: 'In this way, continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public laws, thus bringing the human race nearer and nearer to a cosmopolitan constitution', 106.

cosmopolitan democracy.[47] Proof that cosmopolitan law was in Kant's view much broader than the 'spirit of commerce' can be found in Kant's observation that trade may in fact violate that law. He writes for instance of the trading republic's encounter with non-sovereign peoples. '[T]hese visits to foreign shores', he recalls, 'can also occasion evil and violence in one part of the globe with ensuing repercussions which are felt everywhere'.[48] As Daniele Archibugi put it, Kant realized that 'nations which are democratic domestically, do not necessarily behave democratically beyond borders'.[49]

Kant's view that reason was universal, which gave rise to the categorical imperative of treating individuals as ends in themselves, and his criticism of the society of states for failing to respond to that imperative, clearly associates him with the English School's idea that a world society of humankind exists independently of states. Yet as is explained in more detail below, Bull's conception of world society was more demanding than the identification of cosmopolitan consciousness based on humanity and reason. The idea of world society was not limited to the expression of common values or to an ideological attack on the normative foundations of international society. World society in Bull's view was itself constituted by rules and institutions. What Kant did share with Bull, however, was the belief that a cosmopolitan consciousness was, at the time they were writing, insufficiently developed for world society to be able to support anything other than the most basic of global institutions. Bull's concern that such institutions could undermine order between morally diverse states is well known to the English School. Evidence that Kant thought along similar lines can be found in his rejection of criminal justice as an institution that could respond to the violation of cosmopolitan law. Kant feared that the global consciousness was insufficiently defined to be able to maintain a check on the jurist or to prevent him from throwing 'the *sword* into the *scales* if it refuses to sink' (i.e. to maintain impartiality based on reason).[50] Thus, the kind of punishments (including the death penalty) that Kant demanded for certain crimes in other settings could not be applied to violations of cosmopolitan law.[51] The institution that enforced cosmopolitan law was thus the rather limited one of 'publicity'. A court of public opinion would expose unlawful acts in a way that would, at least according to Kant, encourage the wrongdoer to reflect on and to change his practices. Despite this limited

[47] See Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy. An Agenda for a New World Order* (Cambridge: Polity Press, 1995).

[48] Kant, *The Metaphysics of Morals*, 172; also *Perpetual Peace*, 106–7.

[49] Daniele Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace', *European Journal of International Relations*, 1 (1995), 448.

[50] Kant, *Perpetual Peace*, 115.

[51] Kant, *The Metaphysics of Morals*, 154–9.

conception of cosmopolitan law enforcement, contemporary commentators argue that cosmopolitan criminal justice is in fact a logical extension of Kant's thinking. As Archibugi argues, 'it would not have been excessively foolhardy, upon recognition of the rights of citizens of the world, to propose their protection through the creations of bodies . . . independent from states'.[52] Indeed, Archibugi interprets the ICC as just such a body.[53] The point here, however, is that if supranational institutions are created to protect cosmopolitan law, they would, in Kant's view, complement rather than replace the institutions of international and national society.

INTERNATIONAL AND WORLD SOCIETY

Hedley Bull used the terms 'international society' and 'world society' in the context of his inquiry into the nature of order in world politics. He argued that order could exist even in the absence of common values and common interests if a balance of power existed between states. Within a society, however, 'order is the consequence not merely of contingent facts such as this, but a sense of common interests in the elementary goals of social life.'[54] In the international context, Bull believed that states shared a common interest in maintaining order, a point that clearly places him within Wight's Rationalist tradition. This common interest was derived 'from fear of unrestricted violence, of instability of agreements or of the insecurity of their independence or sovereignty'. There are, according to Bull, three 'complexes' of rules that emerged from and articulated this common consciousness. The first is what he called 'fundamental' or 'constitutional' rules. These determine the members of society and distinguish the idea of a society of states from alternative ideas such as 'a universal empire [or] a cosmopolitan community of individual human beings'.[55] Thus

> the idea of international society identifies states as members of this society and the units competent to carry out political tasks within it, including the tasks necessary to make its basic rules effective; it thus excludes conceptions which assign this political competence to groups other than the state, such as universal authorities above it or sectional groups within it.[56]

[52] Archibugi, 'Immanuel Kant', 451–2. See also Garret Wallace Brown, 'State Sovereignty, Federation and Kantian Cosmopolitanism', *European Journal of International Relations*, 11 (2005), 495–522.

[53] Daniele Archibugi, 'From the United Nations to Cosmopolitan Democracy', in Archibugi and Held (eds.), *Cosmopolitan Democracy*, 121–62.

[54] Bull, *The Anarchical Society*, 63.

[55] Bull, *The Anarchical Society*, 65.

[56] Bull, *The Anarchical Society*, 65.

The second complex of rules prescribes behaviour necessary to sustain the ethic of coexistence between states. Bull is quite clear that such rules are not necessarily the same as international law as they exist as customary practice. For instance, states agree that maintaining a balance of power is necessary to securing the elementary goals of society, even if a practice guided by such a rule (as in the cold war) violates the sovereign independence of smaller states. Yet international law does have a key role in articulating rules of coexistence, most notably the basic rules of *pacta sunt servanda* and the reciprocal respect of sovereignty, including respect of the 'supreme jurisdiction of every other state over its own citizens'.[57] The third complex relates to those rules devised by states to advance goals beyond mere coexistence.

While these *rules* help to constitute international society by identifying its members and the interests they share, *institutions* are those shared practices that make, communicate, administer, interpret, enforce, legitimize, adapt, and protect rules. In the absence of world government, these functions are fulfilled by states as they engage in practices such as the balance of power, diplomacy, and war, to the extent that war seeks to protect order. Thus, international society exists when

> a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.[58]

The idea that international society is not merely an ideal but also an empirical reality is thus central to English School inquiry. International society takes on a structural form that helps to constitute an agent's identity and restrains or enables its actions. However, the English School's awareness of history leads it to qualify statements such as this. As Bull put it, there is 'nothing historically inevitable or morally sacrosanct' about the society of states. Yet at the time of writing *The Anarchical Society*, Bull accepted that the society of states was the dominant structure in world politics.

A number of other writers not necessarily associated with the English School approach have written in similar terms about the constitution of international society. For instance, Reus-Smit argues that international society contains 'issue-specific regimes' (e.g. the Non-Proliferation Treaty), which are the product of 'fundamental institutions' (e.g. multilateral diplomacy). These institutions, however, are contingent on 'constitutional structures'. These are

> *coherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitled to all the rights and privileges of statehood; and they define the basic*

[57] Bull, *The Anarchical Society*, 67. [58] Bull, *The Anarchical Society*, 13.

parameters of rightful state action. They are 'constitutional' because they are systems of basic principles that define and shape international polities and they are 'structures' because they 'limit and mold agents and agencies and point them in ways that tend towards a common quality of outcomes even though the efforts and aims of agents and agencies vary'.[59]

Reus-Smit's emphasis on structure is echoed by Nicholas Onuf who recognizes the constitutive role played by state practices but claims that international society 'is a thing *and* a process'.[60] Rules occupy the pivotal point between structure and agency. 'By making, following and talking about rules', Onuf writes, 'people constitute the multiple structures of society; through such rules societies constitute people as agents'.[61] Following Hart's distinction between primary and secondary rules, Onuf argues that there are certain (secondary) rules in international society that act as a constitution by recognizing states as sovereign and by conferring and limiting their powers to make, execute, and adjudicate legal (primary) rules.[62] In international law such rules are considered *jus cogens*, that is 'a peremptory rule of law which may only be superseded by another peremptory rule'. Given this, Onuf draws a parallel between such laws and James Madison's claim that constitutional law cannot be changed by the normal procedures of law-making. Furthermore, Onuf argues that the principle of sovereign equality is *jus cogens* and Chapter I of the UN Charter, where the principle is codified, can thus act as a 'material constitution' of international society. Thus,

> If [sovereign equality] . . . is peremptory, it is hard to see why all of Chapter I [of the UN Charter] is not as well. The parallel between claims on behalf of *jus cogens* and Madison's claim that constitutional law is unalterable by law issued under the constitution further supports the view that Chapter I stands apart from the rest of the Charter and the rest of international law. That Chapter I approximates a model constitution strengthens the case for its status as a material constitution [of international society].[63]

To be certain, universal treaties like the UN Charter merely help to affirm and articulate the constitutive rules of international society, which must exist prior to the creation of treaties because they in fact define the meaning of

[59] Christian Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', *International Organization*, 51 (1997), 566. Emphasis in original. Quoting Kenneth N. Waltz, *Theory of International Politics* (New York: Random House, 1979), 74.

[60] Nicholas Onuf, 'The Constitution of International Society', *European Journal of International Law*, 5 (1994), 1.

[61] Nicholas Onuf, 'The Constitution', 6.

[62] Nicholas Onuf, 'The Constitution', 13–4.

[63] Onuf, 'The Constitution', 17. See also Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36 (1998), 529–619.

such contracts. The rule of sovereignty for instance determines who can make treaties and the rule of *pacta sunt servanda* determines their binding quality. As Nardin points out,

> constitutional treaties like the League of Nations or the UN Charter establish only limited associations within international society, not international society itself. The 'Constitution' of international society as a whole . . . is the unwritten constitution of customary international law, not the voluntary pacts and charters that certain states may occasionally enter into to establish particular, historic associations within the larger society of states.[64]

Nevertheless Onuf's formulation matches both Bull and Reus-Smit's argument that state sovereignty is recognized by custom and treaty law as the organizing principle of international society. Moreover his arguments that Article 38 of the International Court of Justice Statute supplements the UN Charter by limiting the ways in which the Court can discern international law satisfies Reus-Smit's argument, which notes that constitutional structures must incorporate norms of procedural justice, that is norms indicating a baseline agreement on how rules are formulated.[65] Of course, the interpretation of Article 38 and the emphasis on sovereign consent as the procedure by which law is created is very much disputed and this is discussed in detail in Chapter 2.

Before assessing the implications of these arguments it is worth clarifying what is being claimed here. Firstly, international society is based on *common values* and *common interests*. Such values and interests are hard to find outside the nation-state. What is held in common, however, is an ethic of coexistence that accepts diversity as a value in itself or as a reality to be tolerated for the sake of order. On this moral foundation rest *constitutive* or *jus cogens* rules that identify states as the members of society as well as placing limitations on their actions and their freedom of contract. In order to protect the ethic of coexistence, therefore, international society is constituted by the rules of sovereign equality, non-intervention and sovereign consent. Fundamental *institutions* are, to use Reus-Smit's formulation, 'those rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy'. As noted these institutions do not necessarily have to be understood in legal terms and the balance of power is perhaps the best example of a non-legal (and possibly illegal but legitimate) institution. In more cooperative societies, however, the balance of power might be replaced by the promise and, more importantly, the practice of collective security.

[64] Terry Nardin, 'Legal Positivism as a Theory of International Society', in D. R. Mapel and T. Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1998), 22. See Chapter 2 for further discussion.

[65] Reus-Smit, 'The Constitutional Structure'.

Reus-Smit's focus on multilateralism as an example of a fundamental institution mirrors Bull's understanding of the role diplomacy plays in protecting the values of international society and cultivating a thicker consensus, although given its centrality to this book it is also worth noting here the importance of diplomatic immunity to this process.

Breaking international society into common values/common interests, constitutive rules, and fundamental institutions in this way allows us to compare *types* of societies and to address a problem at the centre of the English School's research agenda, which is how can we distinguish international society from world society.[66] Bull helped make this comparison by maintaining symmetry between the constitutional structures of international and world society. In other words, both international and world societies are based on common values and common interests as well as shared rules and institutions. So for instance, Bull understood 'world society' to mean

> not merely a degree of interaction linking all the parts of human community to one another, but a sense of common interest and common values, on the basis of which common rules and institutions may be built.[67]

What distinguishes international society from world society is the kind of values that are held in common. Where moral *diversity* underpins international society, world society rests on a common conception of *humanity*. As noted above, however, Bull's definition also suggests that world society is more than just the existence of a common or cosmopolitan consciousness. A society develops only when that consciousness can articulate and sustain common rules and it is at the level of rules where the English School's confusion on the difference between international and world society starts. For on the one hand, English School scholarship has tended to equate the idea of world society with Wight's revolutionary tradition where relations between individual human beings are not 'mediated' by states.[68] In this revolutionary conception of world society the state, in Marxian terms, simply 'withers away'. Constitutive rules in this kind of society would simply indicate that human beings are the members of a global society and that supranational institutions would form the structure that mediated their relations. Yet on the other hand, authors like John Vincent have seen the state as an institution of world society.[69] Presumably, the common value in this second conception of world society is

[66] See Buzan, 'The English School'; Dunne, 'Sociological Investigations', 89.

[67] Bull, *The Anarchical Society*, 269.

[68] This term is taken from Evan Luard who argued that states '*mediate* between their own people and those of other countries; that is they can, to a large extent determine what kind of relations they can enjoy', *International Society* (Basingstoke, UK: Macmillan, 1990), 6.

[69] Vincent, J., *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986).

still humanity, but crucially there is still a role for states as agents of humanity. Yet to distinguish this conception of world society from international society and to make sure that states work to protect different common values (i.e. humanity and not diversity), the constitutive rule in this conception of world society can no longer be state sovereignty or sovereign consent. Instead, one might suggest that the organizing principle in this kind of world society is complementarity. In other words, states are not only expected to be agents of humanity, they are also expected to give up their sovereignty to supranational or world institutions charged with the same function. These two visions of world society have been implicit in the English School framework. They are referred to in this book as a *revolutionary conception of world society* where the state no longer mediates human relationships and, keeping in mind the discussion in the previous section, a *Kantian conception of world society*, where the state complements the work of other supranational institutions.

While this distinction might help the English School better define the idea of world society, it does not by itself address the question driving part of the contemporary research agenda. That question is this: how can we distinguish between solidarist conceptions of international society and world society? The distinction between a solidarist international society, where states are the agents of humanity, and the revolutionary conception of world society where states no longer mediate human relations, is self-explanatory. However, the distinction between solidarist international society and the Kantian conception of world society is less clear cut and at first sight non-existent. However, Barry Buzan's answer to this question is helpful here. In *From International to World Society?*, Buzan makes significant and somewhat radical revisions to the English School framework, many of which are addressed in more detail in Chapter 4. The revision that is adopted here, at least partially, is the decision to refine pluralist and solidarist conceptions of international—or as Buzan prefers—interstate society. Towards (and beyond) the pluralist end of the spectrum Buzan locates what he calls 'Asocial', 'Power Political', and 'Coexistence' interstate societies; and towards (and beyond) the solidarist end of the spectrum Buzan places 'Cooperative', 'Convergence', and 'Confederative' interstate societies.[70] These are to be understood, at least initially, as being distinct from what he calls 'interhuman' and 'transnational' societies. As noted, these categories and the manner in which he ultimately argues that 'world society' should be understood as 'a situation' in which all three domains (i.e. interstate, interhuman, and transnational) are 'in play' together are assessed in Chapter 4. It is useful here, however, to adopt Buzan's categories of 'Convergence' and

[70] Buzan, *From International to World Society?*, 139–60.

'Confederative' interstate societies as a means of articulating the difference between solidarist international society and a Kantian world society.

From Buzan's perspective, a Convergence interstate society is characterized by common values other than an ethic of coexistence (e.g. liberal democracy, Islamic theocracy, communist totalitarianism). This inevitably has an impact on the constitutive rule of interstate society, but on this Buzan is somewhat vague. 'Convergence', he writes, 'would almost certainly push non-intervention as a corollary of sovereignty towards obsolescence for many purposes'. One might interpret this to mean that in a society that converges around the value of 'humanity' state practices such as humanitarian intervention and universal jurisdiction are permitted. In a 'Confederative' interstate society, however, states no longer expect (nor indeed welcome) intervention by other states because they have given up their sovereignty to supranational institutions (e.g. the European Union) which function to develop, interpret, and enforce those laws that protect common values and common interests. By serving the moral purpose of the wider society, in other words, the states in a Confederative society are expected to complement the work of supranational institutions. It is proposed here that what Buzan describes as a Confederative interstate society can also be understood as a Kantian world society but only when the Confederation exists on a global scale. In this respect it rejects Buzan's suggestion that 'world' societies can exist at regional levels, for example in Europe. This blurring of distinctions seems out of place in Buzan's work, which does so much to clarify the confusion across English School categories. Clearly, the European Union (EU) might be organized along Kantian lines, but as a regional organization it can be no more than a model for world society to imitate. The implication of this move is that Convergence interstate societies are at the far end of the solidarist spectrum. To go further (i.e. for states give up sovereignty and to complement the function of global supranational institutions) is to move into a Kantian world society.

Before summarizing the argument and chapter outline it is worth saying specifically how criminal justice fits into this framework because it does after all provide the empirical focus for this book. A helpful place to start is Emile Durkheim's perception of the role that criminal justice plays in helping to (re)constitute society. For Durkheim, the identification of a crime and the punishment of the criminal

> does not serve, or serves only incidentally, to correct the offender or to scare off any possible imitators. From this dual viewpoint its effectiveness may rightly be questioned; in any case it is mediocre. *Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.* If that

consciousness were thwarted so categorically, it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus there would result a relaxation in the bonds of social solidarity. That consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only consist in suffering inflicted on the wrongdoer.[71]

In this sense criminal justice is an institutionalized set of practices that are separate from, but obviously designed to restore faith in, those rules that constitute a society. In this sense, it has a similar sociological function to Kant's conception of publicity and (at the other extreme) Bull's conception of war, where war is considered an institution that enforces international law.[72] Yet the idea that *individuals* can be held criminally responsible for violations of international law is, as Bull noted, 'subversive to the whole principle that mankind should be organized as a society of sovereign states'.[73] This is the case even if the crime that is being tried is a crime against the society of states, for example what the Nuremberg Tribunal called a 'crime against peace' or what is now commonly referred to as the 'crime of aggression'. This is still subversive because in international society only states have responsibilities under international law and to safeguard this it is a fundamental principle that individuals acting on behalf of states—either as Heads of State, as diplomats or as soldiers—are immune from prosecution unless the state has consented to a treaty stating otherwise. Criminal justice is doubly subversive, however, when the act being prosecuted is an act against values other than the coexistence of sovereign states, for example what the Nuremberg Tribunal called 'crimes against humanity'. In this latter sense, the process of criminal justice is, in Durkheim's terms, helping to maintain inviolate the cohesion of a society that is based on humanity rather than sovereignty. It is in other words helping to constitute a society that differs fundamentally from pluralist conceptions of international society. The ultimate subversion, however, is if a process of criminal justice responds to crimes against humanity *when states are unwilling or unable to act*. In this scenario criminal justice is helping to constitute a society that by definition cannot be called international society. It is, in the terms outlined above, helping to constitute world society and, as this book shows, this vision finds expression in the Rome Statute.

[71] Emile Durkheim, *The Division of Labour in Society* (Glencoe, IL: Free Press, 1933), 63. Emphasis added.

[72] Bull, *The Anarchical Society*, 181.

[73] Bull, *The Anarchical Society*, 146.

THE ARGUMENT AND CHAPTER OUTLINE

The central claims of this book are as follows: the Rome Statute helps to constitute world society by creating an institution (i.e. criminal justice) and a Court (i.e. the ICC) that respond to a universal interest in prosecuting individuals who commit crimes against universal values (i.e. humanity) even when the society of states is unwilling or unable to do so. The United States opposes this for two reasons: first, the Court can exercise jurisdiction over citizens of states who have not consented to the Rome Treaty and the act of resisting the Court on these terms allows US nationalists to sustain the image of America as *the* example of an independent, self-governing republic that is to be imitated by other states; and second, when criminal justice is exercised through the institutions of international society (e.g. universal jurisdiction exercised by national courts or the limited jurisdiction exercised by UN Security Council courts), the United States can control the constitutive processes in ways that are consistent with its identity and its particular interests. In other words, the United States defends the society of states against the vision of world society articulated in the Rome Statute because the society of states enables nationalists to perpetuate a preferred image of 'America' and it helps Realists advance America's national interests. To develop this argument, the book adopts the following chapter outline.

Chapter 2 begins by explaining the moral purpose of legal positivism. In the Vattelian approach, legal positivism helps to protect individual liberty by maintaining the integrity of the social contract between 'the people' and their sovereign. In this respect, the spread of liberal democracy might signal a shift from a Coexistence international society to one characterized by Convergence but it does not necessarily mean the obsolescence of sovereignty or the principle of sovereign consent. Indeed, if the contractarian notion of accountability underpins constitutional rules such as sovereign consent, then one might expect to see liberal democrats resist moves towards a Kantian world society. The shift between Convergence and Confederative societies requires not merely the spread of common values. It also requires a change in constitutive rules, including a shift away from the positivist notion of sovereign consent to one based on a customary understanding of values that speak for 'international society as a whole'. These rules apply to states and their citizens, even when they withhold their consent, and they are embodied by supranational institutions.

The starting point for this move is found in the critique of post-war solidarists like Lauterpacht, Brierly, and Falk. They demonstrate how positivism itself rests on customary understandings of universal values that cannot be derived from the principle of consent (e.g. *pacta sunt servanda*). This does

not mean that positivist institutions like the state, consent, and *pacta sunt servanda* are necessarily illegitimate. Clearly, they serve important social functions. It does mean, however, that as customary rather than natural institutions their status as constitutional norms is not beyond challenge. Indeed as Chapter 2 demonstrates, the post-war solidarists saw consent as an obstacle to the development of law that can better respond to the growing awareness of universal values and universal interests. The positivist response to this challenge is to emphasize the importance of sovereign consent because it is there that the voice of democratically constituted communities finds expression at the international level. In this respect, by protecting the idea of the social contract between the citizen and the state, positivists stand on strong normative ground. An unspoken consequence of their approach, however, is that it clearly limits the development of a concept of 'the global common good' and as a result, it provides individual states with more freedom than they might otherwise expect. Understanding this helps to explain why positivism is resurgent in parts of US academia and indeed US government. Positivism is not merely a means of defending the social contract; it is a means of defending the privileges that the powerful have in a society organized along what in a domestic context would be called 'individualist' rather than 'communitarian' lines.

Although positivists contest the matter, the question of whether individual human beings have rights and responsibilities as a matter of customary international law is somewhat moot. Since the Second World War, treaties codifying the humane treatment of individuals and non-state groups have received near universal ratification. What remains unsettled, however, is the right of national courts to exercise universal jurisdiction and thereby respond to the common interest in seeing individuals prosecuted for inhumane behaviour. Chapter 3 demonstrates the unsettled nature of this institution by focusing on the questions raised in two cases involving the intended prosecution of public officials for crimes that had no direct connection to the courts in question. In the first case, *ex parte Pinochet*, it is noticeable that the House of Lords agreed to the exercise of jurisdiction but only on grounds that Chile had consented to be bound by the 1984 Convention against Torture. The most significant aspect of the House of Lords' decision, however, was the denial of absolute immunity for a former head of state. In this respect, it challenged a fundamental rule of the society of states. Immunity from prosecution is considered not only an attribute of state sovereignty but also an important institution in facilitating 'comity' or good relations between states. This concern resurfaced in *Yerodia* or the *Arrest Warrant Case* before the International Court of Justice (ICJ) in 2002. Here the ICJ held that as a serving Foreign Minister Yerodia, who had been indicted for war crimes by a court in Belgium, was entitled to

immunity. Given that one of the reasons for upholding this principle of the society of states was the need to avoid 'judicial chaos', the judgement stands as an excellent example of what the English School call pluralist conceptions of international society. The dissenting opinion of Judge Van den Wyngaert is offered as an example of the solidarist critique.

The *Arrest Warrant Case* had an important impact on Belgium's decision to reform the legislation that allowed its courts to exercise universal jurisdiction. The pressure it experienced, however, was not merely legal. The Belgian government came under intense political pressure to reform its practices when it became clear that the legislation would be used to target Israeli and US officials. The fact that universal jurisdiction is a threat to good relations between states is a strong normative reason for rethinking the way in which international society responds to the common interest in seeing individuals prosecuted for crimes that offend humanity. An additional reason, one that is clearly demonstrated by Belgium's recent experience, is that universal jurisdiction is highly selective and often contingent on not offending the particular interests of the powerful. This argument is at the centre of Chapter 4's analysis of the Rome Statute. It is argued in this chapter that towards the end of the 1990s, international society experienced what might be termed 'a tipping point'. That is, the common interest in seeing individuals punished for crimes that offended the common value of humanity became so well developed that it was no longer willing to accept the selectivity of a system of criminal justice that was dependent on states exercizing universal jurisdiction or the UN Security Council setting up 'ad hoc' international courts. In other words, in the mid-1990s there was a call for a change in the constitutive rules of global politics so that criminal justice was no longer contingent on the interests of those great powers that sat on the Security Council. The response to that call was the Treaty of Rome, which set up the world's first permanent and independent international criminal court.

Chapter 4 argues that the Rome Statute further clarifies the common values based on the humane treatment of individuals and groups. It specifically defines acts—that is genocide, crimes against humanity, and war crimes—that violate those values. The argument that these are now recognized as *jus cogens* and therefore constitutional rules is evident not merely in the preamble of the Statute, which affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished'. It is also evident in the fact that the rules designed to protect these values have a higher place in the hierarchy of norms. For instance, the norm of diplomatic and sovereign immunity, which as noted above still governs relations between states, does not apply when the ICC exercises jurisdiction. The Court's independence of the society of states is further articulated in Article 15, which enables the

Prosecutor to pursue a case without prior authorization of either a state or the UN Security Council. The process of criminal justice and the reaffirmation of common values based on humanity can therefore now take place, at least theoretically, without state interference. The Court will no doubt depend on states for material support, yet even this can conceivably be provided by non-state actors and in this respect the Rome Statute does offer a truly revolutionary *vision* of world society. To be certain, the drafters of the Rome Statute created an Independent Prosecutor because they wanted to transcend the political machinations of the Security Council and they did not wish to overthrow the society of states. In fact, it is clear from various compromises made during the Rome negotiations that those drafting the Statute obviously saw international society as part of the solution rather than as part of the problem. In this respect, therefore, it is more fitting to argue that the Rome Statute helps to constitute a Kantian world society where cosmopolitan law and cosmopolitan institutions exist in a complementary relationship with national and international law.

For reasons explained in Chapter 4, the Court can only exercise universal jurisdiction when it receives a referral from the UN Security Council. When the Prosecutor acts independently of states, his jurisdiction is curtailed by Article 12 of the Statute. In this instance, he can only exercise jurisdiction if the accused is the national of a state party or if the crime took place on the territory of a state party. Theoretically then the Court is able to exercise jurisdiction over the citizens of states that have withheld their consent from the Treaty of Rome. This can be justified in two ways. First, one might argue, in a Falkian sense, that the Rome Conference was quasi-legislative (see Chapter 2). In other words, the overwhelming majority of states voting for the Court demonstrated that it did reflect the interests of the 'international community as a whole'. Second, one might argue that Article 12 reflects the customary understanding that states have the right to exercise jurisdiction over their nationals and their territory and that all they are doing by creating an independent court is delegating that right. As Chapter 5 demonstrates, the United States rejects both these arguments and insists that the Court is illegitimate because the Statute violates a constitutional principle of the society of states, which is that the citizens of states cannot be bound by laws their sovereign has not consented to. The specific question addressed in Chapter 5 is why the United States has adopted this policy when many, although by no means all, democratic states have been able to support the Court. The Realist argument that the United States has lost the capacity to determine when and where international criminal justice is done, a capacity it had when international criminal justice was a matter exclusively for states and the Security Council, gives only a partial answer. Chapter 5 argues that while this Realist explanation is clearly relevant,

US policy is contingent on those prior social processes that help construct an image of America as an exceptional state. In fact, the act of opposing the ICC can be considered as one of the many social processes that help construct American national identity.

The influence that the United States wields through the institutions of international society is very much on display in Chapter 6. This chapter examines the success that the United States had in negotiating exemptions from the Court's jurisdiction for its citizens. There were two separate strands to this strategy. The first related to Article 98 of the Statute and so-called 'bilateral non-surrender agreements'. Through these agreements, the United States sought to use the negotiating advantage it has in a bilateral setting to guarantee what it could not secure in a multilateral convention. The second related to Article 16 of the Statute and the authority of the Security Council to postpone the judicial process for twelve months if it identifies that process to be a threat to international peace and security. While these articles were not intended to create indefinite exemptions from the Court's jurisdiction, the United States was able to interpret them in a way that helped it to persuade (and sometimes coerce) certain states to grant US citizens and US peacekeepers exemptions from the Court's jurisdiction. For other states, notably those 'like-minded states' that had been so influential in creating the Court, the US strategy was not consistent with either the letter or the spirit of the Statute. Moreover, to the extent that US strategy posed a threat to international peace and security—the United States implicitly threatened to veto future peacekeeping operations if their demands were not met—these states were presented with the dilemma of having to choose between order and justice. Chapter 6 describes in detail how the European states approached this particular dilemma from different perspectives and it uses this case study to refine the concept of 'good international citizenship'.

When Hedley Bull identified threats to the society of states, his attention was drawn to the activities of sub-state actors as well as supranational actors like the ICC. In this vein, Chapter 7 shifts the focus of the book towards the challenges posed by violent non-state groups like al-Qaeda. Of course, al-Qaeda's ideology of unrestrained violence is an obvious threat to the elementary goals that sustain social life, but that is not the focus of the chapter. Rather Chapter 7 focuses on the threat posed to international society by a willingness to treat violent non-state groups such as the Palestinian Liberation Organization (PLO) and al-Qaeda as 'lawful combatants'. As this chapter demonstrates by examining the negotiations on the 1977 Protocols additional to the Geneva Conventions, this willingness has a political but also a humanitarian impulse. For instance, the PLO saw such designation as an indication of their 'state-like' status and humanitarians who sought to encourage respect for the laws

of war argued that it would create an incentive for PLO fighters to think twice before targeting civilians. The key point in this chapter, however, is that the United States resisted such moves in part because it believed the Protocol would lead to a process that Hedley Bull called 'the restoration of private international violence' and that this would undermine international society by changing the constitutive rule that grants states an exclusive right to wage war.[74] In resisting this move, the United States was defending another rule that constituted the society of states and to the extent that it helped a key ally (e.g. Israel) discredit an opponent (e.g. the PLO), the United States was acting as a 'modified Realist'. It was helping to construct, to repeat Dunne's formulation, 'a normative framework convenient to itself'.[75]

This process takes on an alarming dimension following 9/11 when the US government argued that al-Qaeda fighters were not entitled to prisoner of war status because they were fighting on behalf of a non-state actor that had not and indeed could not have consented to the laws of war. The government also argued that these individuals were not protected by US law because they were being held outside the jurisdiction of the US courts. In this respect, the United States was using not merely the state's exclusive right to wage war to further discredit al-Qaeda, it was using other key principles of the society of states (i.e. consent and sovereignty) to manufacture a normative order where its military power and its capacity to conduct aggressive interrogations was unrestrained by law. To be certain, there is no argument that can legitimize al-Qaeda. Its activities were no doubt unlawful and its members who committed terrorist acts could obviously have been prosecuted under national or international law. Rather the point made in Chapter 7 is that the United States has used al-Qaeda's status as a non-state belligerent in the war on terrorism to deny its members the rights they might otherwise have expected as human beings. The fate of those at Guantánamo Bay, in other words, illustrates Kant's point that cosmopolitan law is necessary to address what Lord Steyn called the 'legal black hole' that was created by US national and international law.[76]

Finally, Chapter 8 expands on the modified Realist theme by using E.H. Carr's realism to help summarize US policy on the ICC. Unlike those who use Carr to dismiss the ICC and thereby implicitly justify US policy, this chapter argues that Carr's insights can be used to criticize US policy and justify an alternative approach.[77] When the United States argues the process

[74] Bull, *The Anarchical Society*, 258–60.

[75] Dunne, 'Sociological Investigations', 81.

[76] Lord J. Steyn, 'Guantánamo Bay: The Legal Black Hole. 27th F. A. Mann Lecture, 25 November 2003', reprinted in *International and Comparative Law Quarterly*, 53 (2004), 1–15.

[77] For an example of those who attack the Court using Carr, see Jack Goldsmith and Stephen Krasner, 'The Limits of Idealism', *Daedulus*, 132 (2003), 47–63.

of international criminal justice should be confined to either national or to UN courts because these do not threaten international order, it is in effect deploying what Carr described as the 'harmony of interests' argument. This, Carr suggests, is little more than a rhetorical device to disguise the pursuit of selfish interests behind the veil of the common interest. This aspect of great power policy is naively utopian because it fails to see how the defence of an unjust order breeds resentment and revisionism. To sustain international order, great powers should follow the example of those powerful interests in domestic society. In other words, they should forfeit the privileges that the old system offers and respond positively to the demands for just change. This is not unknown within American political culture. Indeed, Carr would no doubt have had the example of the New Deal in his mind when formulating this argument. It is argued in Chapter 8 that US policymakers would do well to recall this kind of internationalism because the policy of opposing the Court is not only harming America's international credibility, it is also exacting unsustainable material costs. In other words, the alternatives proposed by the Bush administration have been shown to be too expensive in political, financial and, most importantly, in human terms. For instance, the Bush administration was politically unable to veto the referral of the situation in Darfur having recognized that genocide was taking place there. Its preferred alternative, that is another ad hoc court, was unconvincing, partly because the Bush administration had previously attacked such courts for being financially inefficient. Finally, support for national courts in failed states is often exceptionally costly because they are invariably part of a broader 'nation-building' agenda. This is clearly demonstrated by the enormous human costs of bringing Saddam Hussein to trial in Iraq.