1. Introduction

This essay is intended to discuss the relationship between the International Criminal Court and third States (i.e. non-parties to the Rome Statute).¹ To provide a little context, however, it is worth going back in time, to 1998. Then, when the Rome Statute was being drafted, there was considerable discussion about the number of ratifications necessary to bring the statute into force. Some wanted there to be a low number, to get the Statute into force as fast as possible. Others thought that to ensure the Court was representative a high number of states ought to be required.² Some saw this as a way of ensuring the ICC deserved its definite article, others saw it as “an American plot to ensure that the Court would never be created”.³ Contrary to the best hopes of the hopeful, and the worst fears of the fearful, 108 States have ratified the Statute,⁴ thus there are now more members than non-members in the world. As such, non-parties to the Statute are in the (State-based) numerical minority.

But, as is well-known, this is the positively-spun side of the story; there are many large and powerful States outside the Rome Statute regime, many of whom are happy to let the US pay the diplomatic price for leading the early opposition to the Court.⁵

²¹87 UNTS 90.
²⁴ And not just, as was feared initially, States who would not have considered themselves possible candidates for the exercise of the Court’s jurisdiction.

* Professor of International and Criminal Law, University of Birmingham.
The ICC has to operate in an international environment that is not entirely conducive to its actions. This is not just because some States are, at best, ambivalent towards the Court, but also because of structural features of the international legal order. Irrespective of possible developments towards a more cosmopolitan international order, the current international legal system remains, to a large extent State-based, decentralised and consensual in nature. Although there are collective problems that require collective solutions, that does not, in itself, mean that the international legal system has fundamentally restructured itself. As yet, general international law has not developed to a position in which States are obliged to become members of any particular international organisations, or to assist international organisations of which they are not members.

This latter point is no more than a recapitulation of one of the fundamental tenets of treaty law, the *pacta tertiis* rule. Whether it is liked or not, third States, absent Security Council action, have no obligations toward the Court other than to accept it as

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8 See, for example, R. Falk, Law in an Emerging Global Village: A Post-Westphalian Perspective (1998), or, at a more avowedly idealistic level, P. Allott, Eunomia (1990).


10 The urgent necessity of averting environmental degradation, and perhaps, collapse, immediately springs to mind.

11 Although some assert that the creation of the International Criminal Court has caused or reflected a fundamental change in the way in which international law is made (see e.g. L. N. Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium (2002)) there is no reason to assume that the Rome Statute was seen, in particular by its drafters, as being based on such a change, nor is it is advisable to see it as such. See R. Cryer, ‘International Criminal Law vs State Sovereignty: Another Round?’, (2005) 15 European Journal of International Law 979, 982-5.

12 As was accepted though in the Reparation for Injuries Suffered in the Service of the United Nations opinion (1949) ICJ Reports 151, 185, International organisations may have objective personality. The ICC has such personality, as is evidenced with the relationship agreement between the UN and the ICC, (Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, October 2004, ASP/3/Rev.1). Since the UN is not a party to the Rome Statute, the agreement must be based on the understanding that the UN (and probably its membership) accepts that the ICC is an international legal person in spite of the fact that not all UN members are parties to the Rome Statute.