
International Criminal Justice as a Peace Project

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Abstract

Although the Kampala adoption of a regime for the crime of aggression has been generally hailed as a breakthrough, it needs to be understood as part of the long-term evolution of international criminal justice as a peace project. Jus contra bellum considerations have, if anything, dramatically declined in the second half of the 20th century as a central theme in the comprehension of international criminal justice. Compared to an earlier era, starting in the interwar period and culminating in Nuremberg and Tokyo, that saw ‘crimes against peace’ as the ‘crimes of crimes’, contemporary international criminal tribunals are much more concerned with ‘atrocity crimes’. This evolution is strongly correlated to evolving ideas about the nature of international peace and security that are increasingly understood not in their interstate dimension but, rather, as threatened by the breakdown of societies into conflict. It may even be that, compared to a classical approach in which the international criminal justice project was seen as a crucial part of the collective security regime, international criminal justice is now one of the factors that potentially undermines traditional prohibitions on the use of force. Taking seriously the idea that international criminal justice can be understood as a peace project, this article will delineate some of the ways in which it has also contributed to redefining the very meaning of peace in potentially problematic ways.

International criminal justice is typically seen as primarily a justice project. For a significant part of its history, however, it was part of a larger genus of ‘peace projects’. In fact, its reinvention as principally a justice project may herald the decay of its vocation as a peace project. Understanding this may help contextualize the late and fragile inclusion of aggression in the Rome Statute as a much more anomalous and bitter-sweet event than it is typically understood as being.¹

This article is based on three premises. First, the current focus on the inclusion of aggression in the jurisdiction of the Rome Statute does not do justice to the much

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¹ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

broader and more complex relationship of international criminal justice to peace, making it difficult to understand why the inclusion of aggression not only has the striking support that it has with some but also is marked by the indifference of so many. The challenge of including aggression is not, first and foremost, I suggest, one of getting the substantive definition of aggression exactly right (one never will) nor of defining what role the United Nations (UN) Security Council should have in triggering the aggression provisions, important as these issues may be. Rather, it is the challenge of understanding the extent to which pacification is a goal of international criminal justice, what sort of pacification and at what cost. To be sure, the question of aggression is a particularly important piece of that puzzle that will loom large in any debate on peace, but it is only a piece of the puzzle. As a peace project, international criminal justice includes the totality of pacifying effects that, at one time or another, have been associated with criminal justice.

Second, debates on the issue suffer from chronic under-historicization and, in particular, a tendency to see the development of international criminal justice as a continuous narrative rather than as one marked by very significant ruptures. In attempting to historicize the relationship of international criminal justice to peace, this article will suggest that the current form of international criminal justice would be in many ways unrecognizable to some of its early proponents. It serves no useful purpose to gloss over these differences, perhaps in an effort to reclaim the pedigree of earlier initiatives, as if the project had not changed radically. Simply because scholars and diplomats were talking about an ‘international criminal court’ in the 1920s, 1950s or 1990s does not mean they were talking about the same thing, and this is certainly the case when it comes to the overarching issue of peace.

Third, while international criminal justice is typically presented or imagined as a consistent set of prescriptions that have been safely put beyond politics, this article will suggest that the status given to various crimes in relation to each other reflects an intense political struggle over the definition of the ‘worst’ international crimes and, behind it, over the finality of international criminal justice and the nature of the international legal order. Contra the reductionism inherent in seeing all international offences as having equal status simply on account of their recognition in positive international law, I argue that one of the ways in which the ordering of offences is implemented is through evolving conceptions of peace and how it relates to international criminal justice. At any rate, in an environment where much hinges on the transformative energies of various groups, it is necessary to take into account the architecture of their respective visions for international law.

In what follows, I suggest that the evolution of international criminal justice in relation to peace has followed a threefold path, which I illustrate by invoking a number of existing or invented slogans. Originally, the emphasis was on international criminal justice as an integral element of efforts to achieve peace, which was understood as peace between states. The idea was thus, schematically, that no crime against peace would go unpunished because the international legal order depended on it (‘Justice to end all wars!’). Second, through a series of gradual and momentous slippages came the idea that the greatest violations of peace were domestic and consisted of ‘atrocities

crimes' and that only internationally deployed criminal justice would create the conditions of internal peace ('No peace without justice!') Third, the more contentious suggestion developed that international criminal justice, in being morally and instrumentally required by internal peace, is inherently part of the deployment of violence and therefore potentially a threat to international peace ('No justice without war?'). The slogans are presented in succession because different historical eras have been marked more intensely by one of their propositions, but, in truth, their appearance has not been fully chronological or sequential.

1 Justice to End All Wars!

International criminal justice was clearly not central to the post-World War I design.² The goal of collective security, or even of self-determination and its corollary of minority protection, were much more central to the architects of international order. Ideas about international criminal justice tended to develop somewhat slowly and on the margins of the key institutional-legal developments of the interwar. Within these margins, however, significant intellectual activity arose, and all kinds of suggestions were circulated by the Association Internationale de Droit Pénal (AIDP), the International Law Association and the Inter-Parliamentary Union as to what should be criminalized internationally and how it should be done. Although the project was animated by concerns specific to criminal lawyers and their aspiration for a perfected system of international criminal law in and for itself, many of the ideas that did develop were clearly influenced deeply by the compelling, overriding goal of avoiding war.

In fact, the early rise of the idea of international criminal justice – in ways that are simply not replicated in our era, as we will see – was deeply embedded in a centuries-old quest for international and, indeed, 'perpetual' peace. More specifically, it belonged to a genre of projects for world peace that foregrounded the idea of 'peace through law'. International criminal justice was clearly a minor player even in that larger story and not only because prospects for its early institutionalization were dim. The entire idea was mooted intensely among a small coterie of lawyers often with a criminal (rather than international) background, who failed to really excite popular imaginations. Other issues such as minority protection, compulsory settlement of disputes, disarmament and respect for treaties, not to mention the League of Nations's own flailing efforts to interrupt war, typically excited the pacifist imagination more. As a peace project, ideas about international criminal justice nonetheless distinguished themselves by their insistence that certain violations of international peace infringed public order in a way that required exceptional repressive responses that were not simply preventive or political.

² The slogan in the sub-heading is liberally adapted from David Luban's description of the Nuremberg trial specifically as a 'trial to end all wars', which is itself evocative of Thomas Woodrow Wilson's earlier characterization of World War I as 'the war to end all wars'. Luban, 'The Legacies of Nuremberg', 54 *Social Research* (1987) 779. As this chapter will argue, the idea that international criminal law should be first and foremost about putting an end to war was more generally prevalent in the interwar period.

This focus on the goal of avoiding war was not exclusive of the criminalization of crimes other than the launching of an illegal war. Vesapasien Pella, for example, the energetic Secretary-General of the AIDP, did believe in his '[l]a criminalité collective des Etats et le droit pénal de l'avenir' – one of the most influential tracts of its kind – that the international community might intervene to protect oppressed minorities. But he also had no doubt that the criminalization of war was '*le véritable but de la répression internationale*'.³ That is, Pella was not hostile to the protection of minorities, but he thought that the international community could only intervene whilst persecution thereof pushed the country in question on a path of war.

Commenting on the project for an International Criminal Court (ICC) in the 1920s, Permanent Court of International Justice (PCIJ) Judge Megalos Caloyanni gave, as an example of 'crimes and offences committed in peacetime and liable to disrupt peaceful relations between states', those who shot people on the Greek–Bulgarian border or even the forgery of Hungarian banknotes and the risk of war they inflicted on the international community (the assassination of Franz Ferdinand, isolated as it may have been in itself, might thus be internationalized merely by virtue of its international repercussions). In other words, whilst other crimes might have been taken into account, it was only to the extent that they fitted in an overall and relatively unified theory of how they might affect international peace. Some were adamant that an international criminal court should focus only on aggression and not even on war crimes. This was the case with Nicolaos Politis, the Greek diplomat, who had become disillusioned about the prospect of war crimes tribunals after World War I and saw the prosecution of crimes against peace as the only right objective for an international criminal court.⁴

The focus on crimes against peace also explains the earlier focus on the state or at least the non-exclusive focus on the individual. Hence, for example, the proposal to create a criminal chamber at the International Court of Justice (ICJ) focused on state crimes, a proposal that now seems rather quaint but which made perfect sense at the time. Commentators as diverse as Hans Kelsen or Carl Schmitt deferred to the idea that, particularly when it came to aggression, the 'act-of-state' doctrine held sway. Another notable consequence of this strong link between projects of international criminal justice and the idea of international peace was the very strong association between a hypothetical ICC and the international peace machinery. Whereas the involvement of the UN Security Council would come to be seen in the 1990s as, at the very least, problematic by most defenders of international criminal justice (for reasons that I explore below), embedding international criminal justice within the League of Nation's Council was seen as *de rigueur* in the 1920s. For example, as early as 1920, Baron Descamps had suggested that the soon to be created PCIJ should be able to judge 'crimes against international public order' deferred to it by the Plenary Assembly or the Council of the League of Nations. International criminal justice was

³ V.V. Pella, *La criminalité collective des états et le droit pénal de l'avenir* (1925), at 2.

⁴ M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (2014).

very much seen as the logical continuation of the efforts initiated in the late 19th century for compulsory dispute settlement. By the time the 1929 AIDP project was being developed, the link with an international executive was even more explicit, with the Council serving as the sole organ capable of moving a case to the Court. For Pella, the ICC and the League's Council would naturally divide the labour between them; where the Council would take enforcement action, including armed action, the Court would decide what penalties applied to offending states. The goal throughout was to make international criminal justice work for peace.

This early focus meant that international criminal justice was largely seen as a project to civilize the relations of states between themselves. It was consistent with a cosmopolitan ethos, strong juridical monism and an internationalist politics. At the same time, although the criminalization of crimes against peace could be seen, and came to be seen after Nuremberg and Tokyo, as a major piercing of the 'sovereign veil', it should be said that it was a piercing of sovereignty engaged in for the greater good of sovereignty and the sovereign system itself. As Lawrence Douglas has underlined,

by criminalizing the unprovoked attack of one nation on another, the crime against peace can be seen as less a radical if not futile effort to juridify the logic of war, and more as a conservative gesture, an attempt to safeguard and not usurp the system of sovereign states ... on certain rare occasions, such as in the case of transparently unprovoked warfare, it may be necessary to puncture the shield of sovereignty in order to protect the larger system of sovereign nation-states. ... The IMT could thus be seen as protecting the Westphalian system from the destabilizing effects of unprovoked warfare, not as a tool for supplanting it.⁵

The onset of World War II intensified and gave practical character to these musings of scholars in the interwar period. A movement that had by all accounts remained marginal saw its influence greatly enhanced by the fact that the Allies, for their own reasons, no doubt, were increasingly interested in giving the war a suitable judicial outcome. The Soviets, particularly thanks to the writings of Aron Trainin who decried 'systematic state banditry ... consisting of perfidious aggression', were adamant that the prosecution of aggression should feature prominently, to the point of reinvesting strongly in an international law that they had traditionally shunned.⁶ Writing in 1943, Kelsen insisted that 'the offenses for which retribution may be claimed are, in the first place, violations of international law committed by having resorted to war in disregard of general or particular international law, or by having provoked war, that is to say, by having committed the international delict against which the war has been a just reaction'.⁷ It was only 'in the second place' that Kelsen thought that war crimes should be punished, and other crimes barely deserved a mention. Justice Robert Jackson, whose role was so central to the creation of the Nuremberg tribunal, insisted that:

⁵ Douglas, 'From IMT to NMT: The Emergence of a Jurisprudence of Atrocity', in K.C. Priemel and A. Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (2012) 280.

⁶ A.N. Trainin, *Hitlerite Responsibility under Criminal Law* (1948), at 83.

⁷ Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1942) 533, at 530–531.

[a]n attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.⁸

Famously, other crimes entered the jurisdiction of the tribunals only to the extent that they were committed as part of crimes against peace; moreover, they seemed to substantively flow from the commission of crimes against peace ‘as the mother of all crimes’. Nuremberg and, to a lesser extent, Tokyo were in a sense the culmination of this movement of belief in the centrality of crimes against peace to the international legal order. As the Nuremberg judgment put it:

[w]ar is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.⁹

This notion of aggression as being at the pinnacle of the hierarchy of international offences never entirely went out of favour and has been promoted throughout the decades since by a small coterie of international criminal lawyers, some with strong connections to the initial Nuremberg effort.¹⁰ It witnessed a brief resurgence in the 1970s as a result of UN General Assembly efforts to define aggression as part of a clear anti-colonial thrust rather than as concern for international peace per se. And, of course, the condemnation of aggression has experienced occasional bursts of relevance since, most notably with the global movement of protest against the 2003 invasion of Iraq and the occasional talk about prosecuting George Bush or Tony Blair for that invasion. However, these trends have been marginal in terms of international law. The better view is that the centrality of crimes against peace in the Parthenon of international criminal law went on the decline almost as soon as the ink was dry at Nuremberg.¹¹

There are many reasons for this. The centrality of crimes against peace at Nuremberg had something to do with the bizarre structure of indictments there that made all other crimes subsidiary to the commission of an act of aggression and to the underlying effort to strictly connect crimes against humanity to some recognizably interstate

⁸ Justice Jacksons Report to the President on Atrocities and War Crimes, 7 June 1945, available at http://avalon.law.yale.edu/imt/imt_jack01.asp.

⁹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946: Proceedings* (1948), at 426.

¹⁰ B.B. Ferencz, *An International Criminal Court, a Step toward World Peace: A Documentary History and Analysis* (1980).

¹¹ A simple Google Ngram on ‘crimes against peace’ reveals that the notion shot to significance in the mid-1940s and was actively in use until the mid-1950s, after which it went on a steady decline, albeit with a resurgence of interest in the 1990s. See ‘Crimes against Peace’, available at https://books.google.com/ngrams/graph?content=%22crimes+against+peace%22&year_start=1935&year_end=2000&corpus=15&smoothing=3&share=&direct_url=t1%3B%2C%22%20crimes%20against%20peace%20%22%3B%2C0.

matrix. Even Nuremberg and Tokyo may be best seen not as part of an overarching effort to ban 'crimes against peace' once and for all as much as a specific initiative to deal with the question of post-war Germany and Japan. Of course, the guarantee against a resurgence of Nazism and Japanese imperialism was linked to world peace and very much conceived as such. But, compared to interwar utopians, the architects of the post-war international criminal tribunals were already deeply immersed in specifically transitional and occupation *problematiques*.

In retrospect, the centrality of crimes against peace may have merely represented, from the Anschluss to Pearl Harbor, the specific centrality of aggression in the policies of the Reich and the Japanese Empire. The events of World War II seemed a perfect match for the international criminal law of the time – but only because the international criminal law of the time had been invented to punish the crimes of World War II. The Nuremberg prism was therefore misleadingly helpful; it was a product of circumstances that, unsurprisingly, provided a fairly tailor-made prism to analyse said circumstances. Indeed, it has been argued that, by the time of the post-Nuremberg proceedings and as the need for a mega-trial involving top Nazis sitting together in the dock receded, the emphasis was already much more on what would become known as atrocity crimes.¹²

The seizing by Third World states of the question of aggression, and the manoeuvring by the UN General Assembly to essentially turn that definition against the West, may paradoxically have proved the death knell for the crime of aggression. The effort did rightfully politicize a question that was begging to be politicized. In doing so, and doing so successfully, however, the General Assembly almost guaranteed that Western nations and the Eastern bloc would shift their gaze. Indeed, debates over aggression almost invariably reactivated and, in some cases, revealed for the first time deep-seated polarities within the international community. As the image of the Wehrmacht storming the Polish border or overrunning the Maginot line receded, and the intensely political character of any definition of aggression in a deeply antagonistic world became impossible to miss, the star of aggression dimmed.

Invariably in the decades that followed, when a chance occasionally emerged for the prosecution of aggression, that chance was missed. This was the case, for example, in the prosecution of Saddam Hussein. Although the special tribunal had jurisdiction over 'crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait', this was not the same thing as jurisdiction over the act of engaging in war against those states in the first place. Indeed, the debate over aggression would degenerate into a farce, as when Article 14 of the 2003 Statute for the Iraqi Special Tribunal criminalized 'the abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country', thus conveniently excluding attacks against Iran and Israel.¹³

¹² Douglas, *supra* note 5.

¹³ Statute for the Iraqi Special Tribunal 2003, 43 ILM 231 (2003).

If the Iraqi Special Tribunal can be faulted for not looking into the issue at all, at least it was not doing worse than the UN Security Council, which, confronted with one of the most spectacular breaches of the collective security regime in the UN's history and even as it otherwise ordered successful military action, never once described the invasion of Kuwait as constituting the crime of aggression. This reticence is instructive. It suggests an unwillingness to emphasize the specifically criminal element in such attacks and, instead, an aspiration to see them as mere 'breaches of the peace', grave as they may be. Of course, certain acts may be clearly labelled as having 'breached international peace and security', but the council's reaction in restoring them is not in itself conceived of as law enforcement, let alone criminal law enforcement, as much as what might best be described as a form of 'riot control'. Aggression fell prey to a sort of international *omerta*, a crime whose status never again reached the sort it had attained in 1945.

2 No Peace without Justice

From the 1950s onwards, a series of complex developments contributed to very significantly reframing the relationship of the international criminal justice project to peace. In fact, the more realistic the prospects of such justice turning permanent and universal became, the more tenuous its relationship to international peace. Two major breaks, in particular, have characterized the last 60 years – one substantive and the other jurisdictional – and have contributed to profoundly severing the traditional link between the two. On the substantive level, the original focus on crimes against peace has gradually been superseded first by a focus on war crimes and subsequently by a focus on crimes against humanity. War crimes committed in international armed conflicts had always exhibited a certain international pedigree long before the rise of the *jus contra bellum* and had often been mentioned as prosecutable internationally in the same breath as (even if secondary to) aggression. In the 1970s, in particular, the adoption of Additional Protocol I spurred renewed interest in such crimes.¹⁴ War crimes in and of themselves told a very different story than the focus on crimes against peace. Where aggression dealt with the fundamental issues of war, violence and politics, the focus on war crimes offered a more modest emphasis on the *jus in bello*, helpfully bracketing the henceforth 'complex' and 'political' questions of the *jus ad bellum*. One might be fighting a war of aggression or a war of self-defence, but this mattered less than the fact that one had targeted civilians, ordered no quarters or bombed indiscriminately.¹⁵ Where aggression brought attention on governmental leaders, war crimes offered a much greater variety of targets.

¹⁴ Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3.

¹⁵ The one possible exception is Additional Protocol I's recognition of the belligerent privilege of forces 'fighting against colonial domination and alien occupation and against racist regimes'. This is achieved, however, through characterizing the resulting conflicts as international ones and, otherwise, changes nothing to the humanitarian obligations of either party.

In this respect, one cannot be entirely oblivious to the fact that the very humanitarian neutrality of the *jus in bello*, in practice and in theory, constitutes a significant symbolic undermining of the *jus ad bellum* (however necessary this may be from the point of view of the *jus in bello*'s own internal logic, which is not the question here). That is, especially in conditions where resort to war has been made illegal under international law, the *jus in bello* at least objectively rewards 'aggressor combatants' in granting them a privilege of belligerency that, from a *jus contra bellum* point of view, one might think they had done nothing to earn.¹⁶ As for the focus on war crimes in non-international armed conflict, in a context of absolute neutrality about the ends pursued by either party (or automatic siding with the state), if anything it made *jus contra bellum* questions even more irrelevant. International criminal justice did not exactly create these subterranean tensions between the *jus contra bellum* and the *jus in bello*, but it has tended to amplify them – for example, through aggression's 'leadership' requirement, which is a considerable concession from a *jus contra bellum* point of view that may well be defensible but no doubt contributes to the humanitarian normalization of war.¹⁷

Perhaps more than war crimes at all, however, it is crimes against humanity that have increasingly become the emblematic offences of the international legal order. The reappraisal of the extreme gravity of crimes against humanity and genocide, including before and during World War II, was a slow and broad social process on which much could be said. But, for our purposes, one of the interesting lessons is that this reappraisal was energized precisely as the link with crimes against peace was de-emphasized (crimes against humanity can be committed on both sides of the *jus ad bellum*) and, indeed, as crimes against humanity emancipated themselves conceptually from the supportive matrix of war altogether. In fact, one of the great 'discoveries' of the last 50 years in international criminal law is the extent to which crimes against humanity may, but are probably unlikely to, be connected to an armed conflict.

In that respect, the World War II model of conquered territories being used to feed an extermination machine may have been partly misleading. States are much more likely to engage in genocidal projects at home, far from the search for a hypothetical lebensraum. Moreover, although there is a historical association between war and crimes against humanity and war may facilitate the commission of such crimes, there is no necessary, as opposed to circumstantial, link between war and crimes against humanity. The 1970s focus on apartheid, which is today largely neglected as a crime against humanity, had already made that point very clear. Of course, the Rwandan genocide occurred simultaneously with an armed conflict between the Rwandan

¹⁶ McMahan, 'The Morality of War and the Law of War', in D. Rodin and H. Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 19.

¹⁷ The 'leadership requirement' ensures that only those in a position of leadership can be prosecuted for aggression. This means, for example, that even lower-level officers who knew perfectly well that a war was illegal and nonetheless participated in it could not be prosecuted, even though they otherwise very much had the requisite *mens rea*. Such an arrangement is generally largely justified on domestic grounds (discipline, military civilian relations and the need to respect democratic will), but its justification in international terms is far less evident.

government and the Rwandan Patriotic Front, but it unfolded quite distinctly from that conflict. In fact, the suggestion that what was going on was an armed conflict or some kind of anti-insurgency struggle is every revisionist *génocidaire's* favourite excuse – from the young Turkish republic to the Khartoum regime. A war may be going on in parallel, and it may contribute to genocide, but the logic of genocide is typically irreducible. Resorting to the relatively bland rhetoric of ‘armed conflict’, with its increasingly misleading vision of opposite militaries at worst abusing an otherwise legal use of force, risks fundamentally mistaking the nature of genocidal violence. It thus becomes quite essential to emphasize the fact that genocide is not an ‘excess of war’ in the humanitarian tradition but, rather, very much its own thing, resembling much more the ‘politics gone cancerous’, which are described by David Luban as characteristic of crimes against humanity.¹⁸

After a moment of hesitation (the Statute of the International Criminal Tribunal for the former Yugoslavia still required nexus to war but more, it seems, because a war was raging in the former Yugoslavia at the time and so the threshold did not seem insuperable), crimes against humanity have been defined as entailing a ‘generalized or systematic’ attack against a civilian population.¹⁹ In effect, international crimes gradually became crimes that could and would be committed by a state (or quasi-state group) against a population. Borrowing from Theodor Meron, one could say that international criminal law, like the laws of war before it, had undergone a process of ‘humanization’.²⁰ But if war crimes and, especially, crimes against humanity (including genocide) did not require war at all, then they required a war of aggression even less; as a result, the value of the latter notion diminished significantly.

From ‘mother of all crimes’, crimes against peace were downgraded to the offence that had briefly made visible to the world what would otherwise have been invisible. Having largely served its purpose, the focus on crimes against peace could be treated as a historical quirk, one that said more about the Allies’ calculations than it contributed to a sustained system of international criminal law. At any rate, even if a war of aggression occurred and was recognized for what it was, that fact alone would henceforth always seem less important than whether it caused war crimes, crimes against humanity or genocide. Popular opposition to aggression as a crime might remain strong from anti-Vietnam campus protests to the huge rallies in the wake of the invasion of Iraq in 2003, but its cardinal role in the architecture of international criminal law was significantly eclipsed. At best, issues involving the illegal use of force by one state against another drifted towards the ICJ and state responsibility.

From the point of view of the jurisdictional operation of international criminal justice, this substantive descent into the heart of sovereignty has changed everything. It has oriented international criminal justice, taking its cue from both humanitarian and human rights logic, in a much more interventionist direction that does not need to establish the existence of an international or even non-international conflict as a

¹⁸ Luban, ‘A Theory of Crimes against Humanity’, 29 *Yale Journal of International Law* (2004) 90.

¹⁹ Statute of the International Criminal Tribunal for the former Yugoslavia 1993, 32 *ILM* 1159 (1993).

²⁰ Meron, ‘The Humanization of Humanitarian Law’, 94 *American Journal of International Law* (2000) 239.

trigger for international solicitude. Crimes might occur entirely domestically, but they would nonetheless be catalogued as international because they 'shock the conscience of mankind'. International criminal justice is no longer or at least not primarily asked to mediate issues of high inter-state high politics, let alone pacify the world. Rather, it increasingly sees itself as stepping in judicially to substitute for states that have proved 'unwilling or unable' to carry their internationally ordained prosecutorial burden (hence, the increasingly defining character of debates on complementarity/primacy as opposed to the issue of the compulsoriness of dispute settlement that had been foregrounded in the 1920s). This has forged potentially many new roles for international criminal tribunals, focusing on one society at a time: as transitional, restorative, truth telling, deterring mechanisms, and so on.

Linked to this foray into ever more domestic and peace time matters, international criminal justice has increasingly taken on a legalistic and systematic overtone. The Nuremberg and Tokyo tribunals, for all of their lofty rhetoric, were probably understood even at the time as 'one-off' instances by their creators. By contrast, the idea of fighting 'impunity' in the name of human rights in the 1990s had pushed the notion that criminal trials are part of the response that individuals are entitled to in certain cases. Where international criminal justice had been seen as integrated in a larger political calculus, it increasingly became seen as a good in itself. The creation of the ad hoc tribunals in the 1990s was a reminder that this deontological drive still needed the instrumentalist validation of the UN Security Council to come into being.

However, that creation also seemed to be based on the *quid pro quo* such that what was deontologically required also happened to make plenty of instrumental sense. Despite international tribunals being created superficially for some ulterior peace and security purpose, there was little doubt that their justification was grounded in the promise of criminal justice for atrocities in and of itself. At any rate, the prize was a permanent international criminal court that would become unmoored from the political arbitration of the powerful and, notably, the Security Council. Later on, proponents of international criminal justice would claim to tolerate a role for the Security Council in relation to the ICC only to the extent that it was consistent with the latter's judicial constitution. Indeed, the project has been one of not only insulating international criminal justice from the political interference of the Security Council but also, simultaneously, of seeking to judicialize the behaviour of the Security Council in relation to atrocities by holding it to its once-expressed commitment to justice.

This movement to fundamentally redefine the realm of international crimes accompanies, and is simultaneously accompanied by, a movement to redefine international peace and security by the UN Security Council. This is a movement that started long before the rise of international criminal tribunals and that can be understood as laying the ground for them as well as being accelerated by them. It is a movement that relates both to what gets described as a breach of international peace and security and to the willingness to describe this reality in the terms of the criminal law. Traditionally, breaches of international peace and security have broadly been understood as the occurrence of a certain level of violence between states (even leaving aside the question of aggression). Kelsen, for example, distinguished international from internal

peace and reminded his readers that the former is the ‘purpose’ of the UN, whereas ‘it is not the purpose of the United Nations to maintain or restore internal peace by interfering in a civil war within a state’.²¹ This understanding – which was admittedly only that and was never cast in stone – gradually gave way to the notion that certain exacerbated manifestations of internal violence could also constitute threats to international peace and security. But something was needed to explain how breaches of internal order could be internationalized in compelling fashion. The Security Council had traditionally been agnostic in relation to the *jus in bello*, as part of a well-understood division of labour between the political tradition it represents and the humanitarian sensitivity better left to the International Committee of the Red Cross (ICRC). In effect, the Security Council acted in relation to *jus in bello* violations the way the ICRC acted in relation to *ad bellum* violations: by conspicuously ignoring them. The Security Council was also wary of becoming involved in issues of human rights, even systematic human rights violations, leaving them to bodies within the UN better specialized in such matters.

It is that division of labour – and the theory that undergirded it – that gradually came under attack in the 1990s, with momentous and, to this day, ill-understood consequences. Already with the Rhodesian and South African episodes, the suggestion that situations of radical racial discrimination might endanger international peace and security had been made, but these were relatively isolated instances in the midst of the Cold War. The idea that violations of the laws of war and crimes against humanity could affect international peace and security was more systematically mooted by the Security Council itself in the early 1990s, from Somalia to the Balkans and from Iraq to Haiti. Of course, it was not just a *vue de l’esprit*; atrocity crimes can reverberate across states. If nothing else, they can create huge refugee flows that clearly have a more than notional indirect impact on international peace and security. However, it is perhaps worth noting that given how little noticed this connection had been before (despite the obvious link), one suspects that the change results from a change of outlook rather than from a change in the circumstances of the world. To be clear, therefore, the Security Council did not ‘discover’ that violations of international humanitarian and human rights law might affect international peace and security – something that presumably had always been the case – rather, it decided that the time had come to emphasize this element in a context where it was looking for tools to manage increasingly internecine conflicts in the post-Cold War era.²²

In short, the evolving agendas of international criminal justice and the Security Council helped foster a very different kind of peace – an internal peace – that was characteristic of basic public order within the state. In this view, the crimes committed are no longer a consequence of a crime against peace having been committed; rather, it is the crimes that cause the breach of domestic peace and therefore international peace and security. The picture is radically reversed from how it was portrayed implicitly

²¹ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems with Supplement 1964* (1950), at 19.

²² T. McCormack, *Critique, Security and Power: The Political Limits to Emancipatory Approaches* (2009).

at Nuremberg and in the UN's beginnings. The emphasis on collective security as a function of statehood rivalry in an anarchic world has been gradually replaced by the global management of particular states whose descent into chaos is seen as a function of criminal actors working in their midst. This precipitates an entirely new research agenda that mixes elements of the traditional international peace and security discourse with more criminological concepts borrowed from theories of 'social defence'.²³

The idea that atrocities were a major impediment to international peace and security, in turn, has affected the sort of means that the UN Security Council can imagine itself as deploying. The creation of international criminal tribunals, in particular, emerged as the naturally suitable response to crimes having been identified. As has been mentioned, the Security Council created the Yugoslavia and Rwanda tribunals, based on its Chapter VII powers. But, of course, the suggestion that the tribunals were created 'to remedy a breach of international peace and security' was always a bit of a formalist construction. The tribunals were created, or started functioning, often significantly after the crises that had given rise to them and continued to exist long after these crises had abated. In fact, the tribunals, theoretically, could have been created, as was mooted at the time,²⁴ by a UN General Assembly resolution or a treaty on other grounds than those typically justifying Security Council intervention. That such measures were not expeditious in the circumstances, notably because they would have lacked the element of urgency and compulsion that the Security Council could provide, does not mean that international criminal tribunals could only be conceived as measures to restore international peace and security; rather, it simply meant that to go through the Security Council was efficacious.

This is not to say that, in the discourse of proponents of international criminal justice, tribunals would not lead to peace at least in the medium or long term. In this respect, international criminal justice came to be equated with peacemaking and peace itself, at the risk of some disillusionment when it turned out in many cases that it barely scratched the surface of the underlying causes of conflict. Having said that, any notion that international criminal tribunals should directly and deliberately contribute to international peace and security (for example, by launching or desisting from certain prosecutions in order to maximize such objectives) has increasingly come under attack. Even in the early 1990s, few would have argued that prosecutors should consciously pursue international peace and security goals. Rather, the underlying, albeit never fully articulated, assumption seems to be that, if each pursued its functional logic narrowly, then peace would somehow ensue. Security Council members may have had misgivings about this reading of the autonomy of international

²³ See, e.g., Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (HRQ) (1998) 737; Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', 31 *HRQ* (2009) 624; Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', 23 *Fordham International Law Journal* (1999) 473; Farer, 'Restraining the Barbarians: Can International Criminal Law Help?', 22 *HRQ* (2000) 90.

²⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Doc. S/25704, 3 May 1993.

criminal tribunals – one that is at odds with the shorter leash that held the Nuremberg and Tokyo tribunal – but there was little doubt that the international criminal lawyers who had been given a once-in-a-generation opportunity to shape the global atrocity regime were going to (reasonably) run with it. In the minds of its most ardent proponents, international criminal law could increasingly be propelled entirely through its own energy.

At any rate, a certain cunning of history seems to have been involved. As far as the Security Council was concerned, international criminal tribunals had been created for relatively instrumental purposes. As international criminal tribunals became more permanent, autonomous and less context and victor driven, they increasingly tended to be oblivious to this specific instrumentality of their creation, easily mistaking a mandate to restore international peace and security with one to enforce cosmopolitan justice. Whereas international criminal justice had largely been seen as instrumental to peace, it increasingly came to be seen as a good in itself.²⁵ Moreover, international criminal justice, in return, made growing demands, including quite onerous ones on the international peace and security agenda (for example, that the Security Council create international criminal tribunals or refer situations to the ICC in a fashion that was consistent with a quasi-legal body).²⁶ The ‘no-peace-without-justice’ mantra, which epitomized the run-up to Rome, affirmed the primacy of international criminal justice over any compromises for the sake of arriving, for example, at a peace settlement. A degree of relative stridency had therefore been introduced in global judicial governance by the idea that justice is a good in itself that must be pursued come what may. This newfound hubris of international criminal justice has manifested itself, for example, in the increasing rejection of individual immunities before international tribunals,²⁷ as well as in non-criminal forms of traditional justice and even amnesties,²⁸ all obstacles that in some form or other have catered to the protection of the state and the stability of international relations.

3 No Justice without War?

By and large, the idea that crimes against humanity affect peace has been saluted as ‘an endorsement of deeper levels of peace’.²⁹ There is an argument that international prosecutions may encourage peace processes domestically. For example, they may

²⁵ Mégret, ‘A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice’, 21 *Leiden Journal of International Law (LJIL)* (2008) 485.

²⁶ L. Moss, *The UN Security Council and the International Criminal Court: Towards a More Principled Relationship* (2012).

²⁷ See Frulli, ‘The Question of Charles Taylor’s Immunity – Still in Search of a Balanced Application of Personal Immunities’, 2 *Journal of International Criminal Justice (JICL)* (2004) 1118; Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, 7 *JICL* (2009) 315.

²⁸ Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’, 3 *JICL* (2005) 695.

²⁹ B.D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (2003), at 153.

help exclude certain dangerous individuals from the political game, or the timing of prosecutions might subtly disqualify warmongers and empower peacemakers.³⁰ More generally, the preventive function of international criminal justice is often stressed as a fundamentally pacifying feature that ought to diminish the overall level of use of force. The ICC prosecutor in her briefings to the Security Council has been very keen to emphasize the contribution of the Court to international peace and security. For example, there is a concern for women and children shared by both institutions, and the protection of peacekeeping missions is clearly an area to which the ICC has made a contribution that is crucial to the Security Council. And, to the extent that these interests temporarily diverge, there remains the possibility of a deferment.

Moreover, it is common to present resort to international criminal justice as an alternative to the use of force, legal or illegal, welcome or unwelcome, so that international judicial interventions may have the further pacifying effect of avoiding military ones.³¹ It was customary in the 1990s, for example, to present (although often to bemoan) the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as 'fig leaves' for the uses of force that never occurred. Even in the ICC context, Security Council referrals may be presented as the 'next best thing' in a context where it is unrealistic to hope for the use of force to alleviate violence. It may also be the case that the judicialization of crises over time creates very specific disincentives for muscular international interventionism. For example, although the ICTY's open-ended temporal jurisdiction was never actually exercised against North Atlantic Treaty Organization (NATO) troops bombing Kosovo, even the discussion of that possibility by the prosecutor may have been a closer call than some of the big powers were comfortable with.

Having said this, the relationship of international criminal justice to the question of violence in international relations remains complicated and at times contradictory. Over time, international criminal justice has created the conditions for the traditional concept of peace (the non-use of force except in self-defence or as part of collective security arrangements between states) to be in tension with the emerging one (the punishment of crimes against humanity or war crimes). Behind this tension, it is the entire dynamics of peace and war, non-intervention and intervention that is at stake. Might the notion that there can be no peace without justice naturally lead to war? Could it be that international criminal justice paradoxically secretes its own discreet violence, even as it seeks to limit atrocities? To what extent are uses of force, by states or even the Security Council, justified by the need to repress what international criminal tribunals are designating with increasing frequency as threatening the very fabric of the international community? I suggest there are at least three ways in which the increasingly imperative demand for justice might create a certain pressure for the unleashing of violence, albeit in often-ambiguous ways.

³⁰ The literature is generally supportive of this conclusion. See Jo and Simmons, 'Can the International Criminal Court Deter Atrocity?', 70 *International Organization* (2016) 443.

³¹ Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism', 39 *International Politics* (2002) 175.

A first hypothesis is that international criminal tribunals could implicitly or explicitly encourage the use of force in order to facilitate their very operation. Although it may well be true that there can be no peace without justice, the reverse is also true – namely, that it is difficult to imagine justice without peace. At a very basic level, there could not have been a Nuremberg or a Tokyo tribunal without war (and not just victory, as is often stressed). World War II effectively created conditions of collapse of the international system from which exceptional prosecutions could be launched. Victory ensured Allied suzerainty over the lands of the defeated and, thus, allowed international criminal justice to proceed unhindered. Moreover, the pursuit of justice had contributed to the intensification of demands for an unconditional surrender and was part of the psychological warfare of the Allied. Modern international criminal tribunals themselves have not *ipso facto* benefited from some victorious war, but they have, on the one hand, objectively benefited from the weakened sovereignty of the states over which they had jurisdiction and, on the other hand, been quite dependent on, and solicitous of, sources of international enforcement, most notably of the Security Council. They have thus tended to implicitly solicit the normalization of social conditions that their continued operation presupposes. At the very least, international tribunals have not spared their efforts to nudge states or the Security Council towards facilitating arrests.

One quite radical possibility is therefore that international criminal justice always requires either war, the threat of war, or at least the possibility of war for its successful operation. All other things being equal, for example, the ICC seems to be working best in cases where there has been a change of government through some kind of war, domestic or international (for example, in the Ivory Coast or Libya), and is working dismally in all of the circumstances in which there has been no war displacing or marginalizing those sought (Sudan, Kenya). The same could be said of the ad hoc international criminal tribunals. Absent propitious local circumstances of this sort, international criminal tribunals are entirely dependent on the sovereignty of states and the powers of the international community and have never functioned as effectively as when they have benefited from their assistance to achieve their enforcement objectives. For example, the NATO bombings in Bosnia and Herzegovina in 1995 preceded the Dayton Agreement, which required Serbia to cooperate in arresting suspects; although neither Serbia nor NATO immediately facilitated the work of the ICTY, the agreement ultimately paved the way for the normalization of political life in the former Yugoslavia, leading to a steady streak of arrests.³² The scale and the sword certainly may not work in unison, but they do have a subtle way of reinforcing each other over time.

Simply objectively benefiting from such circumstances, however, does not mean that one is directly pressing for them. Although they may insist on arrests, at times even against the better instincts of peacemakers on the ground who fear a resumption of hostilities, international prosecutors have steered clear of any suggestion that they

³² General Framework Agreement for Peace in Bosnia and Herzegovina 1995, 35 ILM 75 (1996).

are calling for some sort of intervention; indeed, they would be neither in a position to command one nor in their role in doing so. More importantly, neither states nor the Security Council have displayed any enthusiasm to recast themselves as merely the obedient enforcement arm of international criminal justice. Aside from the ability to 'wage war', states and the UN remain in a position to 'withhold war' so to speak and, therefore, re-establish their political pre-eminence by starving international tribunals of the enforcement assistance they need. In particular, the Security Council, having created international tribunals, has typically dragged its feet to commit itself to an agenda of using force when it comes to even the relatively inoffensive task of arresting suspects (for example, via already deployed peacekeepers, even for its own ad hoc tribunals), let alone to create more fundamentally pacified conditions in which a normalized international criminal justice might prosper. If anything, when it comes to the ICC, the Security Council has been happy to reap the rewards of referring situations to the Court, without then siding with it when it would have required its enforcement muscle.

Moreover, when the Security Council has authorized force (for example, in Bosnia against the Bosno-Serbs) that objectively benefited the work of an international criminal tribunal, it has done so as part of its own peacekeeping agenda and on its own timetable. In fact, the distinctness of international peace and security as an agenda is recognized in the Rome Statute through the double possibility of referring cases to the ICC ('congruence' with international criminal justice) and suspending investigations and prosecutions (divergence). The Security Council has gone as far as to occasionally exempt peacekeepers from the ICC's jurisdiction and has therefore amply shown that it is not a tributary to its own subsidiary organs, let alone a Court such as the ICC that operates outside the UN Charter architecture. There is even evidence that international criminal prosecutors themselves have been understanding of the demands of peace, as when Louise Arbour conveniently kept the indictment against Slobodan Milošević secret in ways that greatly facilitated the Dayton peace process. If anything, indictments against Milošević and Muammar Al Gaddafi have tended to piggyback on a prior Security Council determination to use force rather than precede it. If a link is to be found between the atrocities regime of international criminal tribunals and certain uses of force, therefore, it is to be found elsewhere than in mechanistic assumptions about the powers that be going to war for international criminal justice.

A second hypothesis is that, quite aside from soliciting outside enforcement aid in order to achieve their aims, international criminal tribunals, by relentlessly focusing on the imperative need to prevent international crimes, are more generally altering the overall economy of the *jus ad bellum*. This would count less as an intended, than as an objective, consequence of the operation of international criminal justice. The increasing focus on international crimes has arguably tilted the 'humanitarian' in humanitarian intervention in a much more legal and imperative direction characteristic of human rights. Where humanitarian interventions in the 19th century may have been portrayed as guided by the *noblesse oblige* of the civilizing mission, they are

increasingly likely to be framed as the obligatory enforcement of fundamental criminal prohibitions. As such, the status of intervention is strongly enhanced from that of a loose ‘humanitarian’ exception to otherwise supposedly rigid rules of international law to one that is justified by the enforcement of international law rules of the highest order. Simultaneously, those targeted by indictments are branded as suspects of the worst international crimes and therefore no longer acceptable partners in diplomatic negotiations, thus making more likely a descent into further violence.³³

The Kosovo bombing in 1999 suggested that, among other things, NATO allies had not been insensitive to the accumulated moral pressure created by the activities of the ICTY and the ICTR. In fact, the ICTY prosecutor, in framing the Milošević trial against Milošević’s own attempt to portray the NATO bombings as an act of aggression, obligingly portrayed ‘Operation Allied Force’ as a necessary response to Serb’s policy of ethnic cleansing.³⁴ Moreover, various Allies provided pointed support to the prosecutor’s office in the run-up to the campaign.³⁵ In a context where the international community had at least twice stood by genocide and ethnic cleansing in the 1990s, the tribunals arguably made it difficult to forget that abject lesson. Calls to use force, even if outside Security Council authorization, were accordingly magnified. Although that period is perhaps most remembered for the tragic failure to act in Rwanda and Srebrenica, therefore, the opposite is also significant – namely, that the need to avert atrocities has been invoked by states with increasing regularity – from Kosovo to Iraq – to argue in favour of the unilateral use of force.

For those who militate for the continued relevance of humanitarian intervention, there is little doubt that the prevention of atrocities trumps any apparent prohibition on the use of non-defensive force, and, in fact, criminalizing aggression may come to be seen as a problematic distraction from the imperative of the age, understood as atrocity prevention. This is very clear in the occasionally strongly worded resistance to the inclusion of aggression in the Rome Statute in the name of the anti-atrocity goals of international criminal justice themselves³⁶ or in the suggestion that aggression is not ‘manifest’ if the purpose of the use of force is to prevent atrocity crimes.³⁷ Even some scholarly defences of aggression reframe it as a crime against peace only to the

³³ See P. Hayner, ‘Libya: The ICC Enters during War’, European Council on Foreign Relations Background Paper (2013), available at www.ecfr.eu/ijp/case/Libya.

³⁴ Prosecutor’s Opening Statement, *Prosecutor v. Slobodan Milosevic* (IT-02-54), Trial Chamber, 13 February 2002, at 165.

³⁵ Gowan, ‘Commentary: Kosovo: The British Government and ICTY’, 13 *LJIL* (2000) 913.

³⁶ See, e.g., the fear that ‘activation of the aggression jurisdiction will harm the Court’s ability to carry out its core mission – deterring and punishing genocide, crimes against humanity, and war crimes’. S. Sewall, Under Secretary for Civilian Security, Democracy, and Human Rights, Annual Meeting of the American Society of International Law, Washington, DC, 9 April 2015.

³⁷ Harold Hongju Koh, Legal Adviser, US Department of State, Statement at the Review Conference of the International Criminal Court, Intervention, Kampala, Uganda, 4 June 2010. For a review of the claims that criminalizing aggression might have a chilling effect on genuine humanitarian intervention and consideration of how the International Criminal Court might deal with such interventions, see T. Ruys, ‘Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC’, in this issue, 887.

extent that it actually leads to the undermining of human rights, regardless of the fact that the sovereignty of the attacked state has 'superficially' been undermined.³⁸

The decline of aggression and the rise of atrocity crimes in the hierarchy of international crimes are therefore arguably not just vaguely parallel phenomena; they are deeply correlated. If international peace and security is defined as the absence of atrocities, then the prohibition of aggressive war becomes only relevant to the extent that such aggressive war causes atrocities. If war, on the contrary, can conceivably alleviate atrocities, then it is no longer aggressive or its aggressive character is easily forgiven. The humanization of war, understood as an evaluation of war's harm entirely through its humanitarian consequences, can thus ultimately undermine the prohibition of war. In that respect, international criminal justice is part and parcel of a movement of systematic destabilization of the *jus ad bellum* that has continued to produce ripple effects since Kosovo,³⁹ and whose ultimate manifestation may be a dangerous morphing of intervention into its own form of punitive justice.⁴⁰ It is also noteworthy that when it comes to some of these international interventions, whether in Kosovo or Iraq, international prosecutors, on the one hand, have not had the ability to investigate the *jus ad bellum* issue and, on the other hand, have declined to investigate *jus in bello* conditions in ways that seem to objectively facilitate 'bombing in the name of humanity'.⁴¹

Third, is it possible that these broader evolutions are having an impact on the nature of the force deployed by the UN Security Council itself, perhaps enhancing its modes of intervention whilst reining in the worst excesses of unilateral violence? The Kosovo intervention was an abnormal event occurring outside the ambit of the UN Charter. Much of the following decade was spent trying to reshape the scope of the Security Council's missions and prerogatives along atrocity-prevention lines, so as to reconcile the need to avert atrocities with respect for the UN Charter and the *jus contra bellum*. Rhetorically at least, 'atrocities' came to be seen less as a 'humanitarian' problem to be alleviated through UN assistance and protection and more as grave human rights violations in the form of crimes against humanity. These ongoing crimes, moreover, required not only criminal justice and law enforcement (which may be a long way away and are unable to deal with the immediate impact of victimization) but, increasingly, instant prevention through the use of force. The logic of atrocity crimes as one of the main threats to international peace and security thus suggests a potentially major shift in the Security Council's interventions, from avoiding war for the sake of international law to international law enforcement at the price of the use of force.

³⁸ L. May, *Aggression and Crimes against Peace* (2008).

³⁹ Haines, 'The Influence of Operation Allied Force on the Development of the Jus Ad Bellum', 85 *International Affairs* (2009) 477; Reeves, 'To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine', 23 *Michigan State International Law Review* (2014) 199.

⁴⁰ Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment on "Red Lines" and "Blurred Lines"', 11 *JICL* (2013) 955.

⁴¹ In effect, litigation of those matter migrated to the International Court of Justice and the European Court of Human Rights respectively, thus underscoring the relative marginality of the International Criminal Tribunal for the former Yugoslavia.

The actual effect on the Security Council has been ambiguous. On the one hand, the influence of atrocity rhetoric is surely not such that the Security Council has forced its own hand and that the exigencies of international crime prevention, notably as they express themselves through the responsibility to protect (R2P) henceforth dictate its agenda. A French–Mexican initiative seeking to bind Security Council members to not use their veto in R2P situations and the ‘Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes’ have not and are unlikely to be accepted at this stage.⁴² If R2P were to lead to an intervention, it would do so largely on the Security Council’s own terms and not because of some automatic deference to alarm ringing about mounting atrocities. Last but not least, no amount of documentation, by the UN or otherwise, of the crimes of the Syrian regime has led to Security Council authorized use of force there. Even where the Security Council has referred a situation to the ICC, as in Darfur, and, as a result, has ‘put pressure on itself’ to act as it were, it has shown a strong ability to resist being drawn into military intervention. Moreover, as already indicated, it is not as if international criminal tribunals themselves have been known to go beyond soliciting arrests and a degree of pacification to actually endorse widespread use of force in crime prevention.

On the other hand, it was inevitable that the Council’s own occasional framing of international peace and security through an atrocities lens would come back to haunt it. Where the traditional understanding of international peace and security inscribed international decisions to intervene within a horizon of political calculus and strategy, its reframing as an imperative of mass crime prevention purports to render Security Council decisions much less discretionary. The logic of atrocity crimes – crimes that must be avoided at all costs and that are the concern of the entire international community – militates all other things being equal in favour of a more systematic use of force. Moreover, in dramatizing the stakes of action – for example, to prevent a genocide – international criminal justice puts the Security Council before its responsibilities. International criminal justice, itself a product of changing conceptions of international peace and security, has thus in turn shaped the normative environment within which the Security Council operates.

International criminal law, in this context, has at least provided an indirect normative rationale for the Security Council to occasionally take sides and intervene in domestic crises. If atrocities in and of themselves breach international peace and security, then the scope of the Security Council’s intervention is significantly magnified. The concrete effect of ‘atrocity talk’ was notably visible in the use of air power in Libya where the Security Council and the ICC prosecutor seemed to be aligned in their condemnation of crimes committed by the regime. It should also be noted that even in the absence of explicit references to R2P, references to violations of international criminal law have become extremely common in the debates of the Security

⁴² Annex I to the Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General Code of Conduct Regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes, Doc. A/70/621-S/2015/978, 14 December 2015.

Council. When it comes to Sudan or Syria, despite no decision to use force being taken, the interventionist camp was prone to frame its arguments in terms of preventing atrocities; perhaps equally importantly, the anti-intervention camp stated its case mostly in terms of these atrocities not having been proved or paling in comparison to those committed by the other side, rather than never being a sufficient cause for the Security Council to act. Moreover, aside from the influence of international justice on the Security Council's authorizations to use force, the impact is also and perhaps more systematically evident in the transformation of peacekeeping itself from a tool of keeping the peace between parties to one increasingly deployed to protect civilians from atrocities ('chapter-six-and-a-half' missions), a goal that has tended over time to become an end in itself.⁴³

It would be an ironic outcome if the Security Council, having created international criminal tribunals for its own instrumental ends (and probably as a substitute for the use of decisive force) had put itself in a situation where that use of force was increasingly required as a result of the normative output of those same tribunals. The link between tribunals' activities and the UN's use of force remains at this stage ad hoc and complex. In the end, perhaps the most that can be said about the pressure effectively created by international criminal justice on the Security Council to use force is that it may change some of the operating concepts by which the use of force – if and when it is used – is justified, but not that it actually determines such uses of force. But, although the Council has not straitjacketed itself into having to intervene whenever atrocities are committed, it has been offered a renewed modality to legitimize those interventions it decides with an added degree of humanitarian self-righteousness. In effect, understanding R2P as being less of an obligation to intervene than as an added modality of justifying interventions frames the influence of international criminal justice in quite a different, highly permissive light.⁴⁴ Finally, although the moralizing stridency of atrocity rhetoric has so far failed to generally lead the Security Council to intervene, this is an all-things-being-equal assessment, and this failure has arguably occurred despite the finger-pointing work of international criminal justice.

4 Conclusion

Contemplating the evolution of international criminal justice over the last century, one cannot help getting the impression of an enterprise that has come full circle. The project began as one that foregrounded the preservation of international peace at all costs. Atrocities only entered international legal consciousness to the extent that they appeared on the fringes of crimes against peace. International criminal justice was to be one of the centrepieces of an international order focused on collective security. By

⁴³ Mégret, 'Between R2P and the ICC: "Robust Peacekeeping" and the Quest for Civilian Protection', 26 *Criminal Law Forum* (2015) 101

⁴⁴ Mégret, 'ICC, R2P and the Security Council's Evolving Interventionist Toolkit', 21 *Finnish Yearbook of International Law* (2010) 21.

contrast, the regime emerging in the 1990s has been almost entirely focused on atrocities, with aggression being little more than an afterthought. In fact, the regime may even objectively press for more use of force, ideally ordered by the Security Council but possibly slipping into unilateral international law enforcement. Indeed, the failure of the Security Council to more forcefully assume the mantle of R2P does not guarantee the international community against a repeat of the Kosovo episode.

It is this turn away from crimes against peace by international criminal justice that is being challenged, albeit not very forcefully, by the late-hour inclusion of aggression in the Rome Statute. This raises no shortage of questions about how this inclusion will fit into the evolving dynamics of justice and peace. It may be that it owes more to a nostalgia for a simpler, starker world than a real willingness to engage the complexities of the current international system as it is. It is true that the strategizing involved in obtaining the criminalization of aggression in Rome and Kampala did not lend itself to very creative thinking and seems to involve a defence of the positive law status quo rather than a vigorous re-imagining of the potential of crimes against peace in the 21st century. What exactly is the criminalization of aggression in the contemporary era part of, and what international political moment does it express?

As it stands, international criminal justice's promise of pacification remains limited and not simply because of a certain tendency by its proponents to rhetorically prioritize justice over peace (*fiat iustitia et pereat mundus*). The de-emphasizing of crimes against peace has evident costs in terms of international criminal justice's ability to be part of a reinvigorated peace design. It amplifies certain problematic tendencies in the global regulation of violence. For example, the Security Council's investment in atrocity talk may diminish its ability to see the specific dynamics of peace and war through a prism other than the 'perpetrator/victim' dichotomy. More generally, the marginalization of aggression is a symptom of a deeper phenomenon that one might describe as *ad bellum* capitulation before the pragmatic, humanitarian imperative. Indeed, at a certain level, the human rights movement – which has otherwise been so central to sustaining the international criminal law regime – has become not only indifferent to the *jus ad bellum* but also positively ambivalent towards it. This is evident, for example, in the letter signed by 40 non-governmental organizations (NGOs) in Kampala, including human rights ones, about the undesirability of criminalizing aggression.⁴⁵

One senses that the managerial approach of the *jus in bello*, taken to its logical extreme, requires not only that the *jus ad bellum* be kept separate but also perhaps even that the *jus ad bellum* be given up on, at least in its criminal dimension of condemnation of aggression. Combined with purely tactical arguments about the risk of 'politicizing' the ICC and the need for it to establish its credentials,⁴⁶ an agenda of perpetual deferral of criminal consideration of aggression is set. Andreas Paulus, for example, has suggested that:

⁴⁵ 'Letter by 40 Civil Society Organizations to the Foreign Minister of Uganda', 10 May 2010, available at www.opensocietyfoundations.org/sites/default/files/icc-aggression-letter-20100511.pdf.

⁴⁶ R. Goldstone and D. Kaye, 'Prosecuting Aggression', *New York Times* (26 May 2010).

joint consideration of issues of *ius ad bellum* and *ius in bello* might render difficult the acceptance of the Court's impartiality. Once the 'war guilt' is assigned to one party alone, supporters of this party will consider the whole court as partial and inimical to their side. And indeed, the analysis of the responsibility for the war may make it difficult for the international court concerned to maintain its neutrality and objectivity. Violations of humanitarian law by those who legitimately defend theirs or another country against aggression may appear in another light: in their case, war crimes may not have been justified, but at least excused.⁴⁷

The classic humanitarian argument that one must continue to regulate war in a *jus contra bellum* era until war is effectively abolished, can thus quickly lapse into the suggestion (clearly entertained by some international lawyers) that aggression will never be significantly abolished and so one might as well give up on such a lofty 'political' goal and concentrate on the serious, practical and humanitarian business of saving lives in war. If nothing else, this reasoning also seems to evidence a remarkable lack of faith in the ability of the *jus in bello* to police its border with the *jus ad bellum*. It remains more than possible to imagine ways in which *jus ad bellum* violations can be seriously prosecuted even as *in bello* violations are as well, the two remaining quite separate. Both the equal privilege of belligerency in the *jus in bello* and the idea that aggression is a leadership crime in the *jus ad bellum* effectively insulate the two. At the very least, the indifference to questions of aggression not only from the ICRC but perhaps more spectacularly from human rights NGOs themselves suggests how much ground has been ceded to the humanitarian ethos, except perhaps by a handful of veteran pacifists.

Perhaps more problematically, to the extent that it continues to sideline the issue of crimes against peace, international criminal justice condemns itself to deal with the manifestations of a deeper phenomenon that it has found to be off-limits and, therefore, to fail to understand the very cause of so many of the atrocity crimes that are committed. This is true of war crimes, which needless to say are produced not only by lapses in humanitarian compliance but also through the very existence of war. At the risk of expressing a truism, there can be no war crimes, without war, and there can be no international war without aggression. But it is also true of crimes against humanity or genocide, albeit not in the straightforward sense understood at Nuremberg of aggression leading to extermination. Although some atrocity crimes may no doubt be committed in purely domestic and even outside clear conflicts, one does not begin to address the genesis of some of them outside an analysis of the international conditions of their production, which often involves major international breaches of peace.

The massive cycle of violence occurring in Iraq during the last 15 years, for example, is impossible to understand independently of the immeasurable ripple effects on that country of its illegal invasion in 2003 – to the point, in fact, that one may want to consider aggression to be part of the larger genus of crimes against humanity.⁴⁸ Even beyond interstate aggression, transnational and even intra-national 'crimes

⁴⁷ Paulus, 'Peace through Justice: The Future of the Crime of Aggression in a Time of Crisis', 50 *Wayne Law Review* (2004) 1, at 33.

⁴⁸ Mégret, 'What Is the Specific Evil of Aggression?', in C. Kress and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2016) 1398.

against peace' arise that are at the very source of countless atrocities. The Congolese crisis, in all of its complexity, is at least as much the product of foreign meddling in the sovereignty of that state as it is of a few warlords deciding to recruit child soldiers. International criminal justice's relentless focus on 'atrocious crimes' in isolation from an analysis of the dramatic decisions to embark on an unlawful course of violence risks mistaking the forest for the trees.

The conclusion, then, is that the regime of international criminal justice is one that is, if not fundamentally eviscerated at its core, incapable of tackling head on what remains one of the great enduring challenges of the international system. Opponents of the inclusion of aggression in the Rome Statute, perhaps even more worryingly, often fail to tell us how the entire project of the *jus ad bellum* is salvageable if aggression is not part of it. Surely, if one is not confident enough about the clarity of the prohibition of the use of force for criminal imputation purposes, then it is unclear why one should be confident enough about it for the purposes of establishing state responsibility or, for that matter, for the much more momentous decentralized or centralized decision to resort to force or not.

What remains unclear, moreover, is how the very notion of an international rule of law can be rescued even as the most blatant violation of it – the use of force by one state against another – remains beyond the pale. Kelsen long ago intuited the centrality of the prohibition of the use of force not only to international peace but also to the very idea of international law. For the sort of neo-Kantian inspiration that animated the Austrian author, the prohibition of unjust wars was a necessary condition of an international legal order, one that international law should strive for if it was to be international law at all. Given that aggression has since clearly also become criminal (those who challenge its incorporation in the jurisdiction of the ICC do not dispute that fact), it is difficult to understand how this criminalization should not be rendered as central as possible, despite the pragmatic scepticism of mainstream humanitarianism and human rights.