
The Rise of International Criminal Law: Intended and Unintended Consequences

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Abstract

The rise of international criminal law has been one of the remarkable features of international law since 1990. One of the less-explored questions of international criminal law is its social effects, within the international community and the community of public international law, in other parts and activities of international law. In particular, what are the effects of the rise of international criminal law and its emerging system of tribunals on the rest of the laws of armed conflict? What are the effects upon apparently unrelated aspects of humanitarian and human rights law? What are the effects upon other large systems and institutions of public international law, such as the UN and other international organizations? As international criminal law has emerged as a visible face of public international law, has it supplanted or even 'crowded' other aspects and institutions of public international law? This brief article offers a high-altitude, high-speed look at the effects of international criminal law on other parts of public international law and organizations.

1 Introduction

The emergence of international criminal law ranks as perhaps the signal achievement in public international law since 1990 and the end of the Cold War. The 'rise and rise' of not only a corpus of substantive criminal law but also tribunals, beginning with the Yugoslavia tribunal (ICTY) and culminating in the flagship tribunal, the International Criminal Court (ICC), is one of the most remarkable phenomena in international law and organizations in the past two decades. I say this, moreover, as occasional critic of international tribunals and international criminal law; it is not an idle description.

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The rise and rise of international criminal law has produced, however, a number of consequences for the rest of international law. Some of these consequences appear to have been anticipated, while others appear to have been both unanticipated and unintended. The affected areas of international law include the laws of armed conflict generally, but also – or so this essay will suggest – attitudes toward the United Nations as an institutional and organizational system. My purpose in this essay is to identify some of these phenomena. The purpose is not criticism. It is, rather, to identify them, and to do so cutting across a heterogeneous group in a short space. The aim is to convey that this historically emerging body of law carries weight and ‘structural’ implications, not only within its own sphere of activity, but for international law, politics, and institutions more generally. The essay moves rapidly from one phenomenon to the next, not pausing very long on any particular topic. It does not attempt to link them except by their relationship to international criminal law. It is as much or more about the activity, international criminal law as social practice, as it is about the law itself. It is an unabashed survey, in a short space. At a moment such as this – taking stock of where we have been and where we go – it is useful to look across the landscape and see how this emerging field of international criminal law impacts on other matters. The issues raised are all genuinely deep in their own right, and merit their own treatment, but in this article we gather them together in a single hand.

Is it a bug or is it a feature? Design or design flaw? Is it a problem eventually to be fixed or something to be embraced? Depending on one’s view, any one of these consequences for international law might be seen as desirable or not. The modest point of this article is to identify them. There is some order to the presentation. We start with consequences most closely tied to the international criminal tribunals and international criminal law first. Secondly, we broaden out to consider consequences for the law of armed conflict generally. Finally, we turn to consider the consequences for public international law more generally, but with specific attention to the institutional role of the United Nations system.

2 Regimes of Mutual Benefit and Regimes of Altruism

The emergence of international criminal law is very special in post-World War II international law. Is there really anything to compete with it in the annals of post-Cold War international law? The only thing, really, that could be said to rival or overshadow it is the rise of global trading regimes and the World Trade Organization (WTO).

The WTO has been remarkably successful in setting the terms of global trade, and in achieving robust powers to enforce its adjudicatory mechanisms, so to preserve collective good from defection and free-riding. As the world heads at this writing into serious global economic recession, these mechanisms will be put to the test. Yet global free trade remains an activity the overall goals of which are shared very broadly, even when countries resist the costs today. The tools of global trade institutions for reinforcing neutral adjudicatory authority and substantive trade rules are widely supported. Why? Fundamentally because participants, at least leading participants, regard it as a ‘game’ of mutual benefit with successive ‘rounds’ of play, in which they stand to gain

as individual players by supporting the collective effort.¹ Even those who defect or seek to free-ride generally accept the most fundamental concept underlying the system of gains from trade and the collective action nature of obtaining those gains.

International criminal law has emerged largely without those advantages. It is not really seen by the countries of the world as a mutual benefit 'club' in any obviously material sense – the understanding much of the world has with trade. For the wealthy, developed, stable, democratic countries of the world, international criminal law is mostly an exercise in altruism. One can construct many involved arguments to prove the contribution of international criminal law, international tribunals, and the ICC to the global rule of law, to collective security and stability, and finally to material conditions globally. But those efforts, whatever their intellectual merits, must be regarded as a stretch, at least by the standards on which the practical world judges the material benefits of trade.

The rich and politically stable world is sufficiently politic to frame the issue of international criminal justice in universal terms – one global law for everyone on certain baseline issues, and tribunals to adjudicate these issues which are gradually reaching formal universal adherence. But in practical, real-world terms what are these efforts to put universal penal teeth into certain human rights standards? If not precisely what is sometimes charged – that the ICC is a court aimed at Africa and Africans – international criminal law and the ICC are efforts to address the 'unstable' world, a service which the 'stable' provide to the 'unstable', even if we politely and politically call it 'universal'. The founders of the UN in 1945 did approximately the same thing in creating the Security Council, after all, and UN collective security. Just as collective security, in the UN's original 1945 conception of it, was understood to mean that there would be, as Paul Kennedy has observed, 'providers' and 'consumers' of security, likewise today there are producers and consumers of international criminal justice.² It is not so strictly divided as that in emerging practice, to be sure; the evolving model is for mixed tribunals of international and local justice – still, there are distinct functions of supply and demand.

The ground for the emergence of international criminal law as an aspect of global governance was not, therefore, very fertile or promising, at least seen from the standpoint of international relations theory, incentives and disincentives. Regimes of order based around altruism, one might say, are never very promising, at least if they carry very much in the way of costs. And yet something *has* emerged.

3 International Criminal Law as Alternative to Intervention?

To say that something has emerged, however, does not address a fundamental question. It is a question going to the relationship and consequences of international criminal

¹ At least, the ideal is a mutual benefit game. Much literature suggests that this may not always be the case. See e.g. Choi, 'Legal Problems of Making Regional Trade Agreements with Non-WTO Member States', 8 *J Int'l Economic L* (2005) 825; Picker, 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter This Institutional Threat', 26 *U Pennsylvania J Int'l Economic L* (2005) 267.

² P. Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (2006), at 28.

law, not to the rest of international law, but instead to international politics and especially the politics of the use of force. International criminal law emerged partly because great powers saw it as an alternative to more forceful action in situations of massive human rights violations – but in which they could not see their individual interests in intervening directly. We can try and cabin off international criminal law as simply the apolitical, or even political, exercise of universal justice. In a world in which intervention (to prevent or end the sorts of crimes that international criminal tribunals exist to try afterwards) is not universal, however, international criminal law will always exist in tension with UN collective security, the Security Council, and the interests and ideals of the Security Council's permanent members. It is a matter to which we return at the end of this article.

The ICTY owed something in its formation to the submerged interests of powerful patron states and actors who very much wished that it would provide grounds to avoid intervention in the Yugoslavia conflicts. How much? I would not venture to say. Neither, on the other hand, would I estimate how much the formation of the ICTY might have influenced later decisions by the US and NATO in *favour* of outside military intervention. As an observer at the time, it seemed to me that the tribunal's existence made the Yugoslav slaughter both easier *and* more difficult to ignore. More generally, however: one intention of some people at the beginning of this new period of international law was to use the promise of criminal prosecution as a policy *alternative* to direct intervention – so that an intended consequence (for some, anyway) of this new activity was to reduce the pressure to intervene. An unintended consequence for those actors today (I say with some risk of overstatement) is to have produced a system which is actually *more* comfortable with the idea of intervention, because it sees it hedged about with relatively neutral institutions of justice. And that is so whether anyone is willing actually to incur the costs of intervention or not.

In my experience at Human Rights Watch and subsequently at the Open Society Institute in the 1990s, the ICTY as an alternative to intervention was discussed with senior officials in NATO countries openly, if off the record. I took part in such discussions in those years, seeking to encourage the process of forming the tribunal. Some NATO officials (not all; some favoured the tribunal for its own sake, and some thought it a terrible idea) were candid with me about just how much they saw the ICTY as a way of avoiding military intervention. In the early days, the Europeans and the Clinton administration were *each* internally divided on the Bosnia war and about the tribunal.³ Avoiding intervention was not the only pressure, or the most important one, to be sure, driving forward the agreement of the United States and other NATO countries to the formation of the tribunal under Security Council auspices. My point is far more modest than suggesting such; it is merely an observation about a political force internal to the formation of the ICTY. But tribunals-as-avoidance-behaviour was part of background discussions in trying to encourage the formation of the ICTY,

³ D. Chollet and J. Goldgeier, *America Between the Wars* (2008), at 122–134. This book is, in my view, the indispensable source for understanding the foreign policy of the Clinton years, and its profound connection to the 9/11 foreign policy of the Bush years.

with Clinton administration officials and with their NATO counterparts. I referred to this phenomenon at the time in a review of Telford Taylor's memoir of the Nuremberg trials:⁴

Senior European military officers and diplomats have told me that they see no point in scheduling a trial if no one is willing to commit to a military victory. Paradoxically, this sentiment comes from officers who deeply oppose military involvement in the former Yugoslavia. They have brother officers who disingenuously hope that the Americans will 'exhaust themselves,' as one put it, 'in fantasizing about a trial and its paperwork,' so that they will not seriously consider an invasion.⁵

But this observation from 1994 raises not just a historical question about the formation of the ICTY. It directly puts on the table something political, legal, and moral which remains fully with us today. Has the subsequent evolution of international criminal justice resolved the relationship between military intervention to address massive human rights violations and the role of tribunals as *post hoc* justice? Not really, not so far. It is not as though anyone avoids the question. As a recent *New York Times Magazine* profile of ICC prosecutor Luis Moreno Ocampo noted, the ICC 'has become a symbol of both the promise of international law and its stunning shortcomings. We have reached a point in world affairs at which we learn about genocide even as it unfolds, and yet it is practically a given that the international community will not use military intervention to stop it.'⁶ Even the most ardent supporter of the ICC and international criminal justice must have a twinge at that admission. At some point, in other words, an answer *has* to be given to the senior UK military lawyer who told me in the early 1990s, as debate over forming the ICTY was taking shape:

Nuremberg was a 'lovely hood ornament on the ungainly vehicle that liberated Western Europe, but it was not a substitute for D-day'.⁷

Or, as I interpreted his remark, a military victory is 'not simply a *practical* prerequisite to a trial ... but a *moral* necessity'.⁸ The forward-looking, although morally perhaps too easy, answer to that challenge has long been: *give us time*. Eventually we will solve *both* issues: the question of massive violations in the present and justice for perpetrators afterwards. But you have to give the system time to work out both its lemmas – the prong of intervention today and the prong of *post hoc* justice afterwards.

As I write these words today, the two lemmas are forming a dilemma, and an ugly one, between *lack* of will to intervene and tribunal justice: the Bashir arrest warrant issued by the ICC, the response by the government of Sudan, and the overall lack of

⁴ T. Taylor, *The Anatomy of the Nuremberg Trials* (1992).

⁵ Anderson, 'Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials', 7 *Harvard Human Rights J* (1994) 281. I preserved anonymity for my sources at the time, given that all of them were off the record discussions with senior military and diplomatic officials. Many of them took place not directly in the context of Yugoslavia discussions, but as an adjunct to meetings about a quite different matter, the campaign to ban anti-personnel landmines.

⁶ Rubin, 'If Not Peace, Then Justice', *New York Times Magazine*, 2 April 2006, available at: www.nytimes.com/2006/04/02/magazine/02darfur.html.

⁷ Anderson, *supra* note 5.

⁸ *Ibid.*

response by the rest of the world (and where that response is not actual *support*, as in the case of China and many others, for Sudan and its regime). I do not pretend to know what to do about Sudan, and this article is not about proposing anything.⁹ But the dilemma of intervention and *post hoc* justice is rapidly fracturing into other dilemmas as well. In the absence of a credible threat of action by the international community, the Sudan government has moved to expel the humanitarian NGOs upon which vast numbers of people depend for their lives.¹⁰ Humanitarian workers have been kidnapped, ostensibly for ransom by private kidnappers; the assumption among the aid community is that this was government-orchestrated. Important voices in the humanitarian aid community attack the international justice community – do not make what amount to idle threats, they say, the costs are borne by suffering people.¹¹ Give us time, say the voices of international justice. In fact, the arguments are far more complicated, involving heated debates which sometimes pit pure Kantian forms of justice against consequentialist humanitarian trade-offs, and sometimes arguments over what the consequences are likely to be. As for international criminal law as an institution, the actions of the ICC prosecutor and the responses of the ICC panels suggest intersections of supposedly apolitical justice and politicized justice, ept or inept, competent or incompetent, on the part of the prosecutor or the court, depending upon one's views.¹²

We may indeed solve such problems in the future, even as today we treat current massive violations and the possibility of outside military intervention as quite separate from *post hoc* criminal liability. Even if international criminal justice does not offer *post hoc* justice deliberately as an *alternative* to other kinds of non-judicial action (what we might call, using old-fashioned language, 'violence by political decision'), it does insist on their separation. International criminal justice asserts that *post hoc* international justice is morally and legally separate from whether anyone, the UN, the Security Council, some group of like-minded nations, whomever, has intervened to stop or prevent the violations of rights. This insistence on separation and independence seems to flow directly from the notion of the rule of law itself – violations of rights are against the affected individuals, and their right to justice has effect whether or not anyone else

⁹ I write this in New York, while sitting with the head of an NGO working in Sudan, who is on the telephone trying to sort out the situation of one of his workers who has been temporarily detained and her computer seized – what exactly and whose name is on it? I don't know what to do. But it is hard to be indifferent to *either* the issues of justice or the issues of humanitarian relief in a situation where no one is going to enforce the ICC's arrest warrant.

¹⁰ See 'Compounding the Crime', *The Economist*, 14 March 2009, at 13 ('[t]he NGOs that were expelled from Sudan provided much of the food, water and medicine to the 2.75 million refugees who live in temporary camps in Darfur').

¹¹ See, e.g., de Waal, 'Appealing the Genocide Decision', Making Sense of Darfur blog, 15 March 2009, available at: www.ssrc.org/blogs/darfur/2009/03/15/appealing-the-genocide-decision/. Human Rights Watch, for its part, says that the arrest warrant is 'warning to abusive leaders ... and a victory for Darfur's victims': Human Rights Watch press release, 4 March 2009, available at: www.hrw.org/en/news/2009/03/04/icc-bashir-warrant-warning-abusive-leaders.

¹² For examples of this debate see, e.g., Heller, 'The Majority's Complete Misunderstanding of Reasonable Grounds', *Opinio Juris* blog, 5 March 2009, available at: <http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonable-grounds/>.

lifts a finger to stop it. International criminal law has the effect, at least, of *permitting* it to serve as a *de facto* alternative to intervention – the two lemmas, in other words, are claimed to be independent whereas in fact they are not.

Moreover, the insistence that they are independent also has the consequence – comforting to international criminal lawyers but, frankly, in political theory, somewhat odd – of giving this whole system of international criminal law, its jurisprudence, tribunals, substance, and procedure, a jurisprudential separation from the rest of the system of the United Nations which could never be politically true. China is on the Security Council. It has a veto. Vast numbers of states in the General Assembly would vote to protect Sudan no matter what. Everyone has always known this, of course, and it figures into the politics of the prosecutor and the court at the ICC. It is an open question whether insisting on this independence and juridical space – sacred, as it were, to the world’s international criminal lawyers – makes sense. The ICC issues a warrant but the price is paid by humanitarian aid organizations on the ground and, more exactly, those they serve.

4 Earning the Moral Right to Administer Universal Justice?

Again, I do not know how to resolve this in the case of Sudan or elsewhere. My point is that the lack of resolution ensures that what is sometimes treated as juridical independence of everything else mostly has its effects upon *other* things that turn out, to their sorrow, to be joined at the hip with international criminal justice. Perhaps *time* – time for the system to resolve the contradiction, the underlying dilemma – might manage to reconcile them. But perhaps not.

There is, however, a further and much sharper moral argument here, one that is easily ignored on practical grounds, but which possibly should be taken far more seriously and overtly than it is. What did that UK military lawyer argue, back in 1992? As a moral and legal matter, he insisted, military victory is not just a practical prerequisite for trial – it is a *moral* prerequisite as well.

I myself expressed such views in similarly strong terms – and not to wild applause – in that same period, the early 1990s, observing how the structure of the Nuremberg *Ur*-trials in which Telford Taylor participated had the peculiarity of reducing atrocities of global scale to the bland and deliberately affectless scope of a courtroom. Taylor’s account was chiefly striking for how much Nuremberg quite deliberately ratcheted down the emotional scale, indeed the sense of historical scale, of the crimes of the Nazis. What, I wondered then, justified reducing crimes of historical scale to the scale of a courtroom in which one might as well be discussing the ‘replevin of a cow’. Following on that UK military law, it seemed to me then – writing in 1993, before any NATO intervention, and knowing that non-intervention was the point of the exercise for some of the tribunal’s supporters:

[T]o reduce the world to a courtroom, to legal memoranda and pleadings and paperwork, is possible only once an army sits atop its vanquished enemy. Otherwise, the enormity of the crimes left unaddressed out in the hills of Bosnia so dwarf those raised before the tribunal that it mocks justice. *A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have*

rectified with force. These officers imply that to hold a trial without having 'fixed things' in the field is, symbolically, as much or more an act of ratification as condemnation. In other words, to hold a war crimes trial in the former Yugoslavia today [1993] would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.¹³

Re-reading that 15-year-old article today, I am convinced it is right as moral argument, even if unsustainable on practical grounds. But because the argument is morally right but not practical, it underlies some of the deep dilemmas and dichotomies of international criminal justice in addressing places like the Sudan today. People *do* insist today – you, me, and everyone else – upon the logical, moral, and legal separation of individual criminal liability through a *post hoc* tribunal, the ICC, from any question of *jus ad bellum* intervention. There is a problem of consistency, but the problem thus lies with not carrying 'backwards', as it were, the standards which international criminal law enforces after the fact, back to the present moment of their massive violation. For those in the professional world of international criminal law the right to judge is a universal act of justice, and it sets the standard for what should be enforced in the present but, if not in the present, then *post hoc* in the future. This standard is universal and neutral. It applies to all parties, it applies whether or not other actions (such as intervention) take place, and it even applies across time. Indeed, the juridical world takes the fact that it is ostensibly neutral in all these dimensions as a marvelous indicator of its ability to be impartial in rendering judgments – neutral in order to be a neutral judge. Questions of resort to force are left for someone else; the system of justice is justified by its impartiality, universality, neutrality in judging, and the foregoing are evidenced by the fact that this system is even independent of the decision to intervene.

Whereas the implication of the UK military lawyer's argument is utterly and radically different. The right to judge is a right one *earns*. And one earns it, not by hanging back in some stance of passive, perhaps handwringing neutrality, perhaps by consoling ourselves with our neutral humanitarian assistance to suffering non-combatants, impartial but also uninvolved – but instead by the willingness to intervene.¹⁴ *Post hoc* justice and willingness to intervene today are not independent – and not only are they not independent, there is a lexical order to them. Justice is universal, but the right to *administer* it is earned on the basis of having shown oneself to be, not the neutral, but the just party or the party of the just party. Appeal to the rule of law does not offer international criminal law quite the blanket moral independence from the conditions under which it is administered that it sometimes seems to think. Put another way, the claim of universal *post hoc* justice is that the 'independence' dilemma is resolved by having it over time reach backwards to the present day and its current violations.

¹³ *Ibid.* (emphasis added).

¹⁴ This problem of humanitarian neutrality has not received sufficient critical attention. I discuss it briefly in 'Humanitarian Inviolability in Crisis', 17 *Harvard Human Rights J* (2004) 41, and in 'What the Swiss Miss', *Wall Street J*, 21–22 October 2006, at 8, but the whole issue of neutrality deserves a much more detailed discussion as a matter of moral philosophy as well as in law.

The claim of an ‘earned right’ to administer justice, by contrast, is that it is forward looking – it is your actions to stop and prevent *today* that give you the right to be the administrators of justice *tomorrow*. It is lexically and morally ordered looking forward, not the other way around. Justice may be a matter for the angels, above all things and looking down, but the administration of justice is an earthly mission that partakes as much of partiality as impartiality, peculiar as that must sound to international criminal lawyers and those, like the human rights organizations, who believe they have unique purchase on the categorical imperative because they incarnate Kant.¹⁵

This conception of what gives one the moral authority to conduct trials is, I well understand, contrary to the contemporary universalist understanding. It draws, in fact, from a far older just war tradition which held neutrality to be somewhat morally disreputable, because Christian love of neighbour called upon one to come to the aid of the just side. Stephen Neff, in his history of the law of neutrality, observes that the

medieval Christian world held neutrality in low esteem. It could hardly do otherwise, given the prevailing concept of war in Christian thought as a contest between justice and injustice ... third parties might decline to participate in the actual hostilities. But they could hardly be neutral in the sense of being utterly indifferent to the outcome.¹⁶

Our contemporary understanding, the one that allows us not to intervene but then to arrest and try people afterwards, depends, on the contrary, upon an assertion of universality, universal jurisdiction. But it depends still more importantly on the strict logical separation, the independence, of obligations to intervene from the right to conduct trials. Can this really be morally right? You didn’t intervene – but you still have the right to conduct a trial? On what moral basis, pray? Your prudence or your cowardice?¹⁷

A consequence of our emerging regime of international criminal law is that we accept, at least for now, the strict legal separation of those two. I have drawn out the hypothetical conversation above not to suggest that we drop the idea of international criminal justice – far from it – but instead to make explicit the moral ideal that is actually correct. And to urge that the moral ideal of universality that people embrace is not the genuinely ideal argument, but instead a compromise with practicality that we have difficulty acknowledging in institutional ways. Its compromise with practicality is a good thing – but because it is not actually right, it causes profound institutional problems that we have trouble addressing – except, as ever, by the mantra of ‘more time, more time’.

Suppose, however, that we *never* find a way to grapple with both lemmas. What then? What will that mean over time for the moral legitimacy of international justice?

¹⁵ For a sympathetic dramatic treatment of the dilemma between partial and impartial justice see the famous 1950s play by the Swiss writer Friedrich Dürrenmatt, *Ein Engel Kommt Nach Babylon* (1954).

¹⁶ S.C. Neff, *The Rights and Duties of Neutrals: A General History* (2000), at 7–8. Neff goes on to describe the grudging emergence of the view, via Grotius and Vitoria, that human beings may not have perfect, God-like knowledge of the just side, so providing a basis for moral neutrality: *supra* at 9–10.

¹⁷ ‘Aux Prudents: Il neige sur le maquis et c’est contre nous chasse perpétuelle. Vous dont la maison ne pleure pas, chez qui l’avarice écrase l’amour, dans la succession des journées chaudes, votre feu n’est qu’un garde-malade. Trop tard. Votre cancer a parlé. Le pays natal n’a plus de pouvoirs’: R. Char, *Feuillets d’Hypnos* no. 22 (1946).

Will it really continue to have the same commanding moral sway that it currently claims, at least among the professional elites of international law and politics? Surely many people are uncomfortable with the idea that intervention and justice are truly independent of each other, and that if they do not come together over time, then questions are raised about criminal justice as a system? Questions are raised, in other words, for whether justice should be forward looking or can be backward looking, whether intervention and justice are morally independent in the way our legal system proposes. Whereas surely one morally implies the other?

Perhaps not everyone would frame it as I have – as an obligation in one case and a right in the other. Many would prefer to frame them both as obligations, one of which, however, we are today unable to enforce. But I am not alone in thinking that the ICC prosecutor saying that he can do nothing about mass murder today, but he will indict and, someday, prosecute some individuals is not morally admirable, even if defensible on grounds of realism. More precisely, I am surely not alone in thinking that those two propositions are morally connected, not merely two independently good things that in a perfect world we might undertake, but propositions of which each implies the other.

The way in which we ‘fix’ the problem, fix the inconsistency, is simply to say that over time, looking into the future, we will solve that problem by finding a way to make current enforcement possible. We say that we accept this strict separation ‘at least for now’, and from a practical standpoint, it is no doubt the best we can do. But it is a consequence of our *unevenly* emerging system of international criminal justice and our system of enforcement. Justice is universal, but the right to administer it is not. That has consequences for international criminal justice, even if we do not know what to do about them.

5 Reprisal and Reciprocity in the Laws of Armed Conflict

We put aside those moral disputes and move on. The outlawing of reprisal against innocents, civilians, non-combatants, and those made *hors-de-combat* is one of the great civilizing achievements of the law of armed conflict since World War II. But *reciprocity* (of which reprisal against innocents was traditionally a featured, if morally dubious, part) has *also* been undermined, and specifically by the development of international criminal law.¹⁸ Undermining the sting of reciprocity and replacing it with the mostly stingless future promise of *post hoc* justice has profound consequences for the incentives and disincentives in the conduct of war, which are only now beginning to express themselves on the battlefield.

Reciprocity in the law of war is traditionally the idea that the two sides hold each other hostage, as it were, to their compliance with the law. The failure of one side to hold to the law releases the other side to respond in kind.¹⁹ There are multiple ways to conceive of the concept. One is merely as non-moral, non-legal, prudential military

¹⁸ The discussion which follows mostly limits itself to reprisal *jus in bello*, rather than the different discussion of reprisal *jus ad bellum* – that discussion involves a separate discussion of the effect of the Charter and other matters.

¹⁹ For a general statement of the traditional concept of reprisal see Neff, *supra* note 16, at 81–82.

necessity. That is, if one side gives itself an advantage by violating the law, the other side does so as a matter of prudence and necessity. Alternatively, the law of war itself can be seen as a matter of reciprocal contracting between the parties, so that a breach by one side legally releases the other from at least certain obligations. The law traditionally embraced customary mechanisms designed to strengthen the grip of the law of war on conflict by providing ways in which a breach by one side could be remedied – balanced out – by some response on the other. The retaliation was legally a ‘reprisal’ insofar as it was aimed at a specific breach by the other side, was proportionate to the violation, and had as its intent to bring about a return to the *status quo ante* rather than create a cycle of escalation.²⁰ Of course, this ratcheting down, rather than ratcheting up, works only if there is a common understanding between the two sides of the meaning communicated by proportionate and similar retaliations.

Eric Posner has famously applied standard law and economics theory to the law of war, embracing an essentially legal contractarian view of reciprocity.²¹ Like me, he has grave concerns for the way in which international criminal law tends to undermine reciprocity by removing, or at least minimizing, the ability of sides to respond to violations of the laws of war with proportionate reprisals, aimed at belligerents rather than at innocents. Posner’s view is fundamentally contractarian and necessitarian. I want to suggest, however, that a better way to embrace the crucial role of reciprocity in the law of war is to look to a paradigm which is legalist, but to the end of supporting a certain *sociology* of the soldier. Its concern is for a law of war that accepts reciprocity, at least insofar as reprisals are addressed to belligerents and their violations of the laws and customs of war, but it does so on the basis of reciprocal obligations of soldiers on any side in a war that go beyond legal obligations. Those obligations are fundamentally obligations of a professional role and social relations, a code of conduct based upon the inculcation of a certain concept of honour of a soldier. The law matters, as a matter of sanction and punishment – but much more fundamentally, it matters as a legitimacy device, as a device for providing the social structure by which the law is accepted *by* one, rather than merely as a command backed by a threat *against* one.

It is sociological insofar as it is Weberian in its appeal to legitimacy.²² It views the law less as a sanction than as the codification of a social structure of honour.²³ It is very much as the great military historian John Keegan once wrote of a book by Adam

²⁰ See the classic treatment in F. Kalshoven, *Belligerent Reprisals* (1971).

²¹ Posner, ‘Optimal War and Jus Ad Bellum’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=546104; also discussed at <http://www.opiniojuris.org/2007/01/17/the-bargain-theory-of-war/> (2007). Although this article is titled ‘jus ad bellum’, I would suggest that the reciprocity argument is at least and, arguably, more directly applicable to *jus in bello*.

²² Legitimacy is a topic of much recent discussion among international legal scholars, and with good reason: see, e.g., I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (2008); see also my piece, ‘Global Governance: The Problematic Legitimacy Relationship Between Global Civil Society and the United Nations’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265839; the best article on the general relationship of law and legitimacy is still Hyde, ‘The Concept of Legitimation in the Sociology of Law’ [1983] *Wisconsin L Rev* 379.

²³ I draw here from the very interesting account of honour as a concept in moral psychology: J. Bowman, *Honor: A History* (2006).

Roberts: '[t]here is no substitute for honour as a medium for enforcing decency on the battlefield, never has been, and never will be'.²⁴

What then of Hamas and Hizbollah, for example, and their embrace, on the contrary, of violations of the laws of war through the use of human shields, direct attacks on non-combatants, and measures that both disavow the laws of war and yet understand them only too well as a mechanism for 'channelling' the behaviour of the other side?²⁵ If the law is understood as a structure in which reciprocity is a means for reinforcing not just behaviour but a certain internalized legitimacy about conduct in war, then what could it possibly mean in the case of an enemy which has a quite different idea about normative behaviour in conflict? Let me suggest two answers.

One is that under such circumstances one is forced back to a contractarian, and thence to a necessitarian, view of reciprocity. Reprisals against belligerents do not have a communicative quality, only (perhaps) a deterrent one. Legitimacy and the internalization of norms are not at issue. The second, however, is to query – a question, that is all – whether the determinate and exacting application of belligerent reprisal, not just applied in kind by Israel, but *supported*, as a matter of legitimacy by those watching from the outside (other states, human rights monitors, etc.), *might* have had an influence upon Hamas and Hizbollah's behaviour. *Might* have had, that is, an influence in the specific sense of legitimacy and internalization of norms. It is not, after all, quite that everyone always approves of these parties' violations of the law regarding non-combatants, including civilians of their own side. It is sometimes, even often, condemned. The problem, rather, is that they cannot help but notice that practically no one forthrightly approves and applauds, *as acts of lawful response*, as acts of law, responses taken against them as fighters and belligerents.

Hamas and Hizbollah violations are condemned, at least sometimes and even with frequency; but responses to their fighters, responses taken against them, seem never to be praised as acts in favour of the law. Instead they are merely regretted and excused, if that much, on grounds of necessity. But this is a dangerous move, one might have thought. To frame both the law and reciprocity, *including* the way in which the law responds to violations by the other side, merely as a matter of necessity invites, and legitimizes, the invocation of necessity as a reason in the first place to *break* the law, as well. I wonder if this 'legitimacy' view of reciprocity might not have shown itself as something distinct from necessity and contract alone, had it been framed that way by a larger group of outside parties. Be that as it may, the rise of international criminal law as a *substitute* for self-help in addressing violations of the law of war – tribunals and prosecutions after the fact, if things work out properly – acts to undermine reciprocity. This is so even if in the real world it is a very uncertain tool.

The answer to this is to say the same thing that was said earlier: *give it time*. As this system of tribunal justice matures, it will take on sufficient scope and power to be able

²⁴ Anderson, 'First in the Field', *Times Literary Supplement* no. 4974, 31 July 1998, at 4.

²⁵ It will be evident that I am referring to what has come to be called 'lawfare'. I do not use the term here because I think it has been stretched beyond its original meaning of behaviour by combatants on the battlefield. See 'Lawfare', available at: <http://kennethandersonlawofwar.blogspot.com/2004/12/lawfare.html> (2004).

to offer redress after the fact, redress which will be sufficient to deter *post hoc*. This will be better than the crude system of self-help upon which reciprocity relies. There are people – Posner, me – who rather doubt that international criminal law, if for no other reason than that it operates *post hoc*, will ever really be able to assume that role. *Post hoc* justice works within a society, one which is able to enforce the rule of law across time. Its essential characteristic is that the law is internalized and accepted as a matter of Weberian legitimacy by nearly everyone, so that enforcement really is ‘policing’ what often even the lawbreakers regard as ‘deviancy’, rather than ‘war’.²⁶ Reciprocity is the condition of law that we are still able to re-create in the state of nature. Stretching things a bit, we call that state of nature international ‘society’, as though it were like a domestic Weberian society of individuals internalizing law as legitimate, and that we tell ourselves is governed, even in the midst of conflict, by a rule of law that can be administered, like ordinary criminal law in a settled domestic society, after the fact.²⁷ We cite Nuremberg as an example; the fact that it is hard to cite very many more examples in history is what makes international criminal law so special in the contemporary period, the last 20 years. It is the promise for the future, and perhaps it is well and truly coming to be. Certainly it has made great strides forward. Perhaps, for the narrow range of the world’s worst crimes, the objection that a system of criminal justice thus conceived requires something far closer to a settled domestic society which has internalized both these norms and their legitimate administration is overwrought. Perhaps the objection that the current theory of how the system of international criminal law develops oddly puts the cart of judiciary ahead of political actors; the objection that in legitimate political systems the judiciary is not the political vanguard and where it is – Pakistan at this writing, for example – that is typically a sign of deep political trouble, not maturity. But who would have thought that the international criminal law system of tribunals would have made it this far in so short a time already? I think the objections are as salient as ever. But it is quite possible that the objections are objections mostly of a too-narrow vision of liberal political theory, and that political legitimacy can be developed in altogether different conditions and different ways. Who can know today what it will all mean in another 50 years?

In the present, however, international criminal tribunals undermine reciprocity. And reciprocity still matters.²⁸

²⁶ For a discussion of the differences between soldiers and policemen, with an emphasis on this issue of legitimacy, see Anderson, ‘Remarks on the Differences Between Soldiers and Police’, Panel on Law and Literature, *ASIL Proceedings*, 10 April 1997 (Theodor Meron, Chair).

²⁷ To be more specific, Posner’s objection is that one-sided bargains do not finally survive. My concern is somewhat different. It is that the concept underlying this kind of *post hoc* justice presumes the legal rules and legitimacy expectations of the use of force which really apply only in a settled domestic society, not war.

²⁸ Anderson, ‘Who Owns the Rules of War?’, *New York Times Magazine*, 13 April 2003, at 38, available at: <http://query.nytimes.com/gst/fullpage.html?res=9904E1DF1138F930A25757C0A9659C8B63>.

6 The Rise of the Machines: Technological Responses to Accommodate International Criminal Law?

Technology as a consequence of the rise of international criminal law? This is not the hobby-horse that it sounds. After all, aiming – aiming weapons – is finally a function of technology, and hence is bound up irretrievably with discriminate and indiscriminate attack. After all, the question of technology – not directly related to international criminal law, but far from unrelated – ever since the First Gulf War and its use of cruise missiles, advancing discrimination in targeting has been an important issue. Gradually emerging is a question whether a party which has access to advanced targeting and weaponry has an obligation to use them – or produce them, research them, deploy them – and what are the limits to that demand created by military necessity.

That is not actually the most difficult question raised by targeting technology, however. The more difficult question, and one in which interaction with international criminal justice is surely on the horizon, is a legal question whether the law of war, *jus in bello*, imposes the same minimum standard on each side when it comes to weaponry and aiming technology. The narrow question is indeed narrow. Assume that certain weapons are ruled out – anti-personnel landmines, for example – as being incapable of being aimed. Each side has available to it weapons which have traditionally fitted the model of being capable of being aimed, assuming the parties wish to do so – but, compared to the very latest advanced technology, still quite crude, with the foreseeable result of more civilian deaths than would be produced by using the latest technology. One side has access to those weapons, and the other side does not. Is the side with access to the advanced weapons obliged not just to use those weapons as a matter of law, but is the legal principle thereby that the sides are not held to the same actual standard? The standard of what is legal for one side versus what is legal for the other side turns out to be context-driven and situational? So as to incur potentially individual criminal liability for, in the circumstances, technology-negligence even though not required of the other side?

I raise these possibilities not to answer them, but in order to make clear the close connection between technology and international criminal law. But now let me turn to a question of technology in which it appears that, at least in some part, the very development of the technology has been driven by concerns about and with international criminal law. It is the effect of international criminal law *both* to drive up the pressure to use more and more discriminating targeting technology – at least if you are the technologically adept party – *and* to drive up the incentive to find new technologies to address the loss of reciprocity exploited by the other side, partly as a result of the rise of international criminal law.

Hence, the robots. Loss of reciprocity partly driven, or at least endorsed, by the rise of international criminal law partly drives what is now a profound shift in military affairs. The US military is moving toward a battlefield populated as little as possible by live soldiers and as much as possible by remote-operated stand-off platforms. Driverless vehicles on the battlefield to do logistical activities like ammunition resupply, for example, run by someone offsite using a computer and a joystick and, eventually, a

vehicle able to drive itself on the battlefield without a human operator.²⁹ Or, more importantly in today's warfare, a remote piloted Predator drone armed with missiles – the current form of warfare undertaken by the US in Pakistan, and one set to continue and very possibly expand. Or the move to create, for example, many tiny surveillance robots which can autonomously enter buildings, tunnels, and other physical infrastructure in order to transmit back information – thus giving attackers far greater possibilities of discriminating among targets. But what has stand-off, remote-platform warfare, or surveillance robots, to do with international criminal law?

The connection is not direct, nor is it complete. However, the move to robotics is driven in part by concerns about the loss of behavioural means to affect the behaviour of parties on the other side who do not follow the rules of war – human shields, hiding among civilian populations, etc. The loss of reprisal to enforce behaviour has pushed the US to seek technological counters rather than behavioural ones. Those technological counters are driven in some measure – I do not want to overstate how much – by the pressure of international criminal law on the model of war rules as reciprocity.³⁰ There would be reasons in any event why the United States would move to ever more technologically driven and capital-intensive forms of war-making, and battlefield robotics would always be part of that effort. Force protection and the desire to minimize the number of targets on the battlefield are crucial.

But it would be incorrect to leave aside the effect of the loss of reciprocity and the rise of asymmetric warfare structured by systematic violations of the laws of war as drivers of the new battlefield robotics. The US Congress has mandated, for example, that by 2015 one third of new US battlefield vehicles be robotic – not just remotely driven, but genuinely autonomous in driving capability.³¹ It is a large-scale effort to use the classic American 'fix', technology to counter battlefield strategies that its enemies use, enemies who capitalize on violations of the laws of war to gain advantage, primarily by the illegal utilization of civilians on the battlefield. On-going attempts to make battlefield targeting more discriminate would certainly lead on their own to development of surveillance robots, but the urgency and breadth of the US technology project are driven by the effort to find ways to address asymmetric warfare. International criminal law, including its systematic and well-informed violation, creating pressures to create whole new battlefield technologies?

²⁹ For the best current overview see P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (2009). Many analysts have been focused, unsurprisingly, on cyberwarfare and law, the many questions, for example as to the legal status of the internet and cyberspace in wars built around technologies of information, command, and control, and beyond. In many ways, however, the more important revolution in military technology and the law will be robotics – questions of surveillance, targeted killing from remote platforms, and finally genuinely autonomous targeting and weapons systems.

³⁰ See the discussion of these issues in a series of blog posts on robotics and war at *Opinio Juris*, 'Battlefield Robotics, A Very Brief Introduction', available at: <http://opiniojuris.org/2008/05/20/battlefield-robotics-a-very-brief-introduction/> (2008).

³¹ See www.darpa.mil/grandchallenge/overview.asp ('[i]t shall be a goal of the Armed Forces to achieve the fielding of unmanned, remotely controlled technology such that ... by 2015, one-third of the operational ground combat vehicles are unmanned').

Moreover, in a somewhat different area of war law, emerging interpretations of law governing detention, interrogation, and rendition are, unsurprisingly, creating new incentives leading to reliance on new technologies. Movements in international criminal law, intertwined with national laws in several states, are creating strong disincentives to capture suspects. On the contrary, strong incentives have emerged to kill suspected enemies rather than attempt to detain them. The Predator and targeted killing via a stand-off robotic platform are legally less messy than the problems of detention. Stand-off Predator attacks have many other counter-terrorism and counter-insurgency advantages, to be sure, so, absent a straight admission from the United States government, one cannot say that the Obama administration operates from a calculation of disincentives to capture created by current understandings of international criminal law. The incentives to undertake targeted killing over capture (despite the loss of possibly valuable information obtained through interrogation) are so obvious and significant today, however, that it can hardly be discounted.³²

This might seem very far afield – the connection between robotic technology and international criminal law – and partly it is. But partly, albeit indirectly, it is not. And in any case, who would have anticipated such a thing?

7 Individual Liability and the Loss of the Laws of War as Rules for the Social Organization of War Between Groups

International criminal law focuses on criminal liability of individuals. War crimes, we say and following the teaching of Nuremberg, are committed by individuals, actual persons. Wars, however, are fought between political communities and by groups.³³ War is a corporate activity.³⁴ Why does this matter?

My point here is not the gradually surfacing question of private business corporation liability for war crimes or related questions of aiding and abetting liability, though those are very important issues. It is, rather, to point out that the attention focused by international criminal law on individual criminal liability has the unintended consequence of reducing attention to the rest of the laws of war – the corpus of the laws of war *not* devoted to liability at all, let alone criminal liability for individuals. Indeed, to those of us who came to the laws of armed conflict not from a background in criminal law, the gradual emergence of international criminal law seems a little bit

³² I discuss these issues in a forthcoming book chapter: Anderson, 'Violence by Political Decision: Defending the Domestic and International Legal Space of Targeting Killing', in B. Wittes (ed.), *Legislating the War on Terror: An Agenda for Reform* (2009), also available at: www.brookings.edu/press/Books/2009/legislatingthewaronterror.aspx.

³³ War is a phenomenon, says Brian Orend, which 'occurs only between political communities ... [it is] an actual, intentional and widespread armed conflict between political communities ... all warfare is precisely and ultimately about governance': Orend, 'War', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2005), emphasis in original.

³⁴ R.L. O'Connell, *Ride of the Second Horseman: The Birth and Death of War* (1997), at 5–8.

as though the individual penal liability aspects of the law have swallowed the laws of war whole.

The amount of attention paid in the Geneva Conventions to individual criminal liability, the grave breaches provisions, is tiny in comparison to the whole body of law.³⁵ Although Protocol I expands the grave breaches provisions, they are not large.³⁶ Even the substantive criminal provisions of the Rome Statute of the ICC are a very particular slice of the matters considered within the laws of war.³⁷ The whole body of law covers many matters which are not, on their surface, very usefully made a matter of individual criminal liability. The provisions in the Third Geneva Convention (POWs) covering the organization of POW camps, the protocols of officers and commanders among the POWs, for example – such provisions can be fundamental to the organization of POW life.³⁸ Yet it is hard to see how the details of daily camp life would be served by making these penal statutes with violations potentially a matter of criminal sanction for either individuals of the detaining power or the detained.

Perhaps that is wrong, however, and the correct way forward for the law of war is to continue a process of making all these requirements, even where seemingly technical – in the sense that, if part of civil contract law, would be non-material rather than material breaches – subject to criminal sanction. After all, why not? If such provisions are important enough to include in the laws of war, then it is because they have some importance to someone's well-being or protection. Their wilful violation ought, in a perfected law of war, to carry individual liability. The laws of armed conflict should continue forward the process of revision so as to make it *all*, at least insofar as it requires specific duties, a matter of criminal law, even if some of the penalties are small. The problem of the criminal law of war seeming to swallow the rest is better understood in that a perfected law of war would be criminal in nature, one that would cover everything in the law imposing a duty, and we just have not got there yet.

The view that a perfected law of war would be all criminal owes something implicit to the fact that international law generally does not have a law of civil damages, a law of non-criminal tort. Nor does it – *pace* certain novelties in the American case law of the Alien Tort Statute³⁹ – yet have a law of enterprise liability, rather than the liability of individuals. Therefore the tendency is to subsume all issues of liability within a criminal and individual frame. Whereas one might think that what the law of war needs to complete its scheme of liability is a notion of civil

³⁵ Geneva Convention I, Art. 50.

³⁶ Geneva Conventions, Protocol I, Art. 85.

³⁷ The text of statute is available at: <http://untreaty.un.org/cod/icc/index.html>. Crimes currently within the jurisdiction of the Court are (i) genocide, (ii) crimes against humanity, and (iii) war crimes: Rome Statute, Part 2, Art. 5(1), which are defined in Art. 5(6)–(8). For the Statute see the ICC website <http://www.icc-cpi.int/>.

³⁸ E.g., Geneva Convention III, Arts 12–31, 39–42.

³⁹ See the text of the Alien Tort Statute at 18–19 and notes 38–42.

enterprise liability which assigns liability and requires compensation from a side, a group, a party to a conflict, rather than seeking to make everything criminal and individual.⁴⁰

However, one might think – moving in the opposite direction – that, instead, we need an explicit recognition that the law of war is not mostly about liability. It is mostly about the ‘social organization of conflict’, whether liability is involved or not. The laws of war structure armed conflict between groups. Our contemporary emphasis on liability, and on individual criminal liability particularly, displaces attention from the ways in which law organizes war by organizing it among groups. This carries us in several directions at once. One is that the emphasis on liability as the basis of the law of war is an echo of the observation made earlier about Eric Posner’s theory of reciprocity as conceptually a form of contract, in which breaches of the ‘contract’ of the laws of war serve as the triggers of liability. But we might take the notion of liability in a quite different and, to my mind, more persuasive, direction. Reciprocity, I earlier suggested, can be seen as grounded not on the direct threat of punishment, but instead as grounded upon the legitimacy expressed by the codified rules, and it is this sense of legitimacy which converts mere threat of retaliation into a form of self-limiting reprisal. Similarly, the law of war as a form of social organization can be seen as grounded upon legitimacy codified by rules. Liability is a contributor on the margin to enforcement and, in any case, enforcement is less important, from the standpoint of Weberian legitimacy, than adherence – not merely formal adherence, as in signing a treaty, but internalization of norms. Enforcement in that case depends fundamentally not just on a *mutually accepted* (at arm’s length, so to speak) set of contractual rules, but instead upon an actually *shared* regimen of rules (internalized, in Weber’s social sense), constituting the legitimacy of the laws of war as a ‘regime’ and not merely an agglomeration or set of contracted-for behaviours.

Overemphasis upon liability as the mechanism of enforcement risks losing the connection to legitimacy upon which the law of armed conflict, and adherence to it, perhaps mostly rests. Tribunals are, however, about liability.

Moreover, apart from liability and legitimacy, the emphasis upon individual liability takes the emphasis away from where it properly should be, at least insofar as understanding the nature of the social activity is concerned – upon groups. Converted as they have been over the course of the ‘human rights epoch’ into a species

⁴⁰ See, e.g., Vora, ‘Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability’, 50 *Harvard Int’l LJ* (2009) 195; Dhooze, ‘A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations’, 13 *U California Davis J Int’l L & Policy* (2007) 119; Roberts, ‘The Agent Orange Case’, 99 *ASIL Proceedings* (2005) 380; Anderson, ‘Declaration on Issues of the Laws of War, Corporate Liability and Other Issues of International Law in Agent Orange ATS Litigation’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901012 (2004), at 44–47; Anderson, ‘Reply Declaration on Issues of International Law, Laws of War, Corporate Liability in International Law in Agent Orange ATS Litigation’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901020 (2005), at 20–25.

of individual human rights, portable by human beings individually rather than as an assignment and concession of group membership, the laws of war have both gained and lost. Gained because, well, rights to life and liberty are surely individual endowments, even in their expression in the *lex specialis* of war. Lost, however, because war is an activity between groups, not individuals, and a law predicated upon individual rights misapprehends something when it moves to disregard the question of sides, groups, and parties to a conflict in favour of seeing it as a matter of individual rights and individual liability. It is a legal and moral construction which arises from our conception of rights – valuable and right for many reasons – but one which leads to a mis-gauging of the nature of war and the activity in the way that, in fact, many if not most of the participants, including the civilians, understand themselves to be engaged upon.

8 Does Anyone ‘Own’ the Rules of War Any More? Does It Matter?

In 2003, near the beginning of the Iraq war, I posed the question in the *New York Times Magazine* ‘Who owns the rules of war?’.⁴¹ At that time, I suggested, the rules of war, including their formation, restatements, enunciation, interpretation, etc., had been gradually passing out of the hands of state actors, those which actually engaged in it, and into the hands of NGOs. That essay argued that ‘ownership’ of the rules needed to pass back much more into the hands of states, and indeed states which actually undertook war. The law needed to be framed much more as state practice and much less as idealized by NGOs.

Whether that view be right or wrong – and many readers thought it nakedly wrong – the question of who has ‘ownership’ is an important one. And since that time, ‘ownership’ of the rules of war has fragmented still further. International criminal law is only part of the phenomenon, but it has a role. This is not meant as a judgement of good or bad. New and different communities of interpretation and authority, as we might call them, have been emerging in the arena of the rules of war. Perhaps they are better or ultimately more authoritative or legitimate interpreters of the laws of war than those long-standing. The traditionally authoritative actors included states and the International Committee of the Red Cross (ICRC) and the so-called ‘invisible college’ of international law.⁴² The new ones include NGOs; the Security Council; other organs of the United Nations such as the Human Rights Council and its dependencies such as certain special *rapporteurs*; the activist-scholars who make up what we may call the ‘visible college’ of international law; public intellectuals of several fields, through books, journals, and the media; national or regional courts, not specialized as such in law of armed conflict but called upon to interpret it; and international

⁴¹ Anderson, *supra* note 28.

⁴² Schachter, ‘The Invisible College of International Lawyers’, 72 *Northwestern U L Rev* (1977) 217.

criminal tribunals of all types, their staffs, and the staffs particularly of their prosecutors' offices.⁴³

This fragmentation has particular implications for international criminal law, insofar as it is conceived as being more than simply the processes, actors, and jurisprudence of the international criminal tribunals. One is that these communities of interpretation are susceptible of moving gradually off in their own directions, asserting the primacy of their own views and gradually tending to ignore other communities of interpretation. Again, this may be perfectly correct as a matter of substantive law. However, it does press its own hermetic dynamic.

Consider, for example, the very particular sub-community of interpretation of the laws of war by US courts in Alien Tort Statute interpretation.⁴⁴ Those courts (constantly citing each other) have gradually built up a hybrid jurisprudence of certain aspects of international criminal law – war crimes, crimes against humanity, and genocide, for example – together with other materials drawn from US civil and tort law, such as corporate liability, aiding and abetting, and similar doctrines.⁴⁵ The individual terms of the one-sentence Alien Tort Statute (ATS) – ‘in violation of the law of nations or a treaty of the United States’, especially – create idiosyncratic pressures on interpretation. What is the ‘law of nations’ – for purposes of US jurisprudence, under US constitutional standards and current Supreme Court interpretation under the *Sosa* decision?⁴⁶ Whatever exactly the law of nations means as an international law term, it means something different in the hands of American courts which, under *Sosa*, are required to look not strictly to ‘traditional’ international sources, such as those stated in the ICJ statute, nor strictly to such concepts as *jus cogens* – but instead, per *Sosa*, to a somewhat altered form of original meaning jurisprudence and what the drafters of the statute meant, along with some ‘fundamental’ matters of the law of nations.⁴⁷ In other words, the jurisprudence of the US courts applying the ATS is not merely internationally agreed substantive international law plus some US civil litigation concepts to make the claim out in US tort terms such as enterprise liability. It is, instead, an interpretation of ‘international law’ filtered through an ancient US statute, with US

⁴³ We could perhaps add Israel and its legal community as well, much as with the US and even courts of the EU as they go their own way on the matter of the binding power of the Security Council. See Cases C–402/05 P, *Kadi v. Council of the European Union* and C–415/05 P, *Al Barakaat International Foundation v. Council of the European Union* [2008] 3 CMLR 41. Israel's community of interpretation is idiosyncratic in part because of the intertwining of its civilian justice system with its military detention system; the nature of the long-running, usually low level but persistent, conflict has led to the long term involvement of the justice system with the military apparatus in ways which are quite special to that society. Those circumstances, plus the unique role of the Supreme Court of Israel in Israeli society, are so special to Israel and the Israel–Palestine dispute that I do not think they hold many broader lessons for other communities of legal interpretation. But it is its own community of interpretation, in the sense meant in the text.

⁴⁴ Alien Tort Statute, 28 USCA § 1350.

⁴⁵ For an overview of ATS jurisprudence see Kochan, ‘No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute In Human Rights and International Law Jurisprudence’, 8 *Chapman L Rev* (2005) 103.

⁴⁶ *Sosa v. Alvarez-Machain*, 542 US 692 (2004).

⁴⁷ *Ibid.*, at 725.

canons of constitutional interpretation applied to the meaning of the statute and only by extension to the 'international' law underlying it.

The whole process of interpretation, while fairly ordinary in US constitutional adjudication, must look slightly strange to international lawyers. The substantive results, especially as driven by the urgent, overriding need of plaintiffs to prove a law of nations violation, must start to look strange to those international lawyers as well.⁴⁸ I suspect – it is hard to get anyone to say much, frankly – that many international law experts are, on the one hand, reassured to see American courts involve themselves with substantive international law, gradually drawing it into American jurisprudence and adjudication. On the other hand, I suspect many of them are also privately unhappy with the actual content of that law, thinking that it is evolving within its closed community in ways which are not consistent with the 'authoritative' interpretation of international law in the international community and which are, in a word, *weird*. But who wants to be the 'international lawyer' to tell a US District Court that?

Is this ATS law 'international criminal law'? Not in the sense of international criminal law as established by international tribunals. But it is a form of international criminal law as far as US courts are concerned, even if others in the world think that it perhaps deserves its own special appellation – 'ATS-international law', maybe – to distinguish that parochialism from the genuinely universal 'real thing'. But ATS court cases are not the only body of arguably parochial international criminal law interpretation even within the US court system. The US courts have also been hearing, and freely making law on, all sorts of issues of the Geneva Conventions, Common Article Three, the definition and consequences of combatancy, etc. We might call this the 'US national security' community of interpretation of the laws of war; it includes the Supreme Court as its main source of interpretation, in the run of decisions partly affirming, but mostly reversing, Bush administration interpretations of the laws of war.

This body of US national-security-international law is striking for the fact that although it makes many references to the laws of war, both international law as well as longstanding American interpretations of the laws of war, the driving concerns underlying the cases are fundamentally American constitutional national security

⁴⁸ Under the terms of the statute, jurisdiction is obtained only if there is a 'violation of the law of nations', and so a case goes nowhere if a violation cannot be made out. This is presumably what drives plaintiffs to allege that small numbers of people killed, for example, in street protests are actually 'crimes against humanity': *Mamani v. Bustamante*, Case Nos. 07-22459 & 08-21063 (see plaintiff's pleadings) or that the use of a herbicide such as Agent Orange, whatever damage it may have caused, is part of 'genocide': Anderson, 'Declaration on Issues of the Laws of War, Corporate Liability and Other Issues of International Law in Agent Orange ATS Litigation', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901012 (2004), at 51–52. One might have thought that in a genuinely knowledgeable forum of international law, allegations on such a questionable basis would weaken the credibility of the party in the eyes of the court – in ATS litigation, however, plaintiffs seem to believe that they must try every avenue conceivable in order to show a law of nations violation, and that in dealing with US district courts they address judges who are both unlearned in the relevant international law and possibly sympathetic to the result even if not exactly consistent with the elements of law. On this point, plaintiffs' lawyers may well not be wrong.

versus civil liberties questions. Important as they indubitably are on their merits, these cases are a little bit like the national security tail wagging the dog of the international laws of war. Setting out basic, sweeping propositions of the laws of armed conflict in cases driven through and through by considerations of terrorism and counter-terrorism, rather than ordinary battlefields and large scale armed conflict involving armies, is likely to produce many anomalies in the law, at least considered from the standpoint of the core conditions of ordinary war. The attempt by US courts to reach conclusions which satisfy many different practical realities of US counter-terrorism, but doing so by an excursion through the Geneva Conventions, might yield good behavioural rules and results, but at risk of deforming the law of war as it applies to 'ordinary' armed conflicts. It is impossible for me to believe that the ICRC, at least, and others are not privately worried about this possibility.⁴⁹

Once again, I would guess that many international lawyers applaud the fact that the Supreme Court took up these issues and applaud, all things considered, its dispositions of these questions – but, at the level of legal analysis of the judgments, are privately dismayed at how much at variance the Supreme Court's analysis is with others in the wider world. Many presumably welcome, for example, Hamdan's embrace of Common Article Three simply because of the embrace of the substantive standard; I am far less certain that many knowledgeable laws of armed conflict lawyers think the Court understood it or got the law right.⁵⁰ Who knows? It is not something that many experts would want to stand up and say, for fear of undermining the result. But the Supreme Court has embraced the view that the United States is in a war of uncertain, seemingly global (at least in possibility) reach, with a non-state actor, to which Common Article Three applies.⁵¹ It is hard for me, at least, not to see that result as having been reached by saying: we need a baseline humanitarian standard applied to these detainees; CA3 provides such a standard; we can get CA3 by finding a possibly global armed conflict with Al Qaeda. How many knowledgeable international law experts think that is the right reading of the Geneva Conventions or the right way to proceed?

For that matter, consider the fragmentation of the communities of interpretation caused by differing views on Protocol I. The United States has never accepted it while never exhaustively and definitively saying what it accepts as binding custom and what it does not. This puts everyone else in the position of guesswork (although the US has been much plainer in recent years on the main issues with the effect of reducing the uncertainties).⁵² At the same time, those 'communities of interpretation' which do accept Protocol I as binding law are in the peculiar position of either *not* asserting it when stating that the US is in violation (or not in violation) of international law on some matter, since it is not law for the US as far as the US is concerned – or saying that

⁴⁹ I am – and I am a largely unreformed supporter of the US war on terror.

⁵⁰ *Hamdan v. Rumsfeld*, 548 US 557 (2006), at 642.

⁵¹ *Ibid.*, at 628–629.

⁵² For many years, the standard citation for the US view on customary law and Protocol I has been Matheson, 'Remarks, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', 2 *Am UJ Int'l L & Policy* (1987) 419.

it is law for this community of interpretation, it is the 'law' by which 'we' judge, so we will interpret US behaviour according to it, whether the US has accepted it or not.⁵³

We could continue through many more communities of interpretation, none of which is especially likely to cede authority to others, except, of course, when others' interpretations go your way. And the US military, we should add, is getting close to releasing its long-awaited revised US Army laws of war manual; what effect will that have upon the authoritative expression and interpretation of the international law of war? The point about this fragmentation of communities of interpretation is that, as time goes on, it may turn out that they talk to each less, rather than more. What happens to this emerging body of international criminal law if it turns out that the answer to the question 'who owns the rules of war?' is – *no one*?

9 International Criminal Law as an End-run Around the P5? Or an End-run Around 1945?

We finally turn from consequences of international criminal law for the laws of war generally to two matters which run to international organizations and the UN. The first is the relationship between the tribunals of international criminal law and the Charter system of collective security and the Security Council. The first tribunals – the ICTY and the International Criminal Tribunal for Rwanda (ICTR, established 1994) – were creatures of the Security Council.⁵⁴ Two later 'mixed' tribunals – partly international and partly national in character, jurisdiction, and staffing – for Sierra Leone (established 2002) and Cambodia (2003) have been established jointly between the United Nations and the states concerned, with more proposed for other places in the world.⁵⁵ In this sense, the tribunals are creations and creatures of the UN, sometimes in conjunction with a particular state – but still institutions of the UN. Funding for these tribunals has often been provided by donor states (and indirectly even by private foundation and philanthropic donors for activities such as forensic mass grave exhumation), but organizationally these are UN organs. The ICC was created through a multilateral diplomatic conference 'facilitated by the General Assembly', and its activities, ranging from referral from the Security Council to activities of the prosecutor, are intimately intertwined with organs of the UN.

In that sense, then, the tribunals of international criminal law represent simply a new branch of collective security itself through the UN, a means of pursuing peace

⁵³ Those 'communities of interpretation' include international tribunals, human rights advocates such as Human Rights Watch, the ICRC, and many more, so the issue when laws of war standards are debated is far from minor. However one comes out on the proper approach to that question, one thing which seems particularly unpersuasive is to announce that the US is in violation of the laws of war and leave it at that, where the thing in question is a matter of Protocol I to which the US has not agreed – and not add that fact when issuing the press release to an inexperienced public and media.

⁵⁴ United Nations Handbook, 2008/09 (New Zealand Ministry of Foreign Affairs 2008, 46th annual edn.), 103.

⁵⁵ UN, *The United Nations Today* (2008), at 290–291.

and justice. But there is a longer term question, raised by the Rome Statute of the ICC, which could have important consequences for the institutional UN and international collective security. The Rome Statute left open the question of defining a specific crime of international aggression to fall under the jurisdiction of the ICC. This was striking in its way, since everything else in the ICC's writ goes to crimes of conduct in war or mass atrocity – *jus in bello* – whereas the crime of aggression is the question of the resort to force *jus ad bellum*. Although Nuremberg considered all these matters, *jus in bello* and *jus ad bellum*, in a single trial and under a single tribunal, traditionally these two have been considered separately. Why the strong preference for separation? Because they have been regarded as separate legal and moral judgements, in which a determination that the resort to force is illegal aggression is independent of whether the conduct of hostilities violates international humanitarian law, and vice versa. Although in theory a single adjudicator could hear both the resort to force and conduct questions, and simply maintain perfect independence, in reality the same tribunal – even with separate panels – would tend to conflicts of interest, path dependence between the two supposedly independent areas. Many questions are raised about the legal propriety of the same forum hearing both kinds of substantive questions – so much so that it was surprising that the Rome Statute even took up, and then reserved for later discussion, the matter of defining a crime of aggression.

But now discussions on defining a crime of aggression under the Rome Statute are under way; even the United States, a non-participant in the ICC, must decide whether and how to participate or observe such discussions. The intended consequence, for those who favour creating a judicially supervised crime of aggression under the ICC, is quite precisely to move the question of resort to armed force from the exclusive purview of the Security Council (leaving aside questions of self-defence) to a judicial forum. It is still a UN-intertwined forum, in several important senses – leaving aside the number of important states, beginning with the United States, which are not party – but it nonetheless significantly alters the structure of collective security from that of the 1945 Charter.

One might have thought, after all, that the fundamental point of UN collective security – the realist point – was to assert that it had to be a function of the great powers, through the Security Council. The failure of the League had been, in considerable part, an idealization of the majoritarianism of states, without sufficient regard for great powers who would have to enforce that majority will. As Paul Kennedy says, the framers of 1945 understood perfectly that the League had been 'too democratic and too liberal' among nation states.⁵⁶ The Security Council, with its permanent members, vetoes, and other privileges of great powers, even has-been great powers, might 'weaken certain universalistic principles and compromise the effective response to possible transgressions where a large nation was involved, but that was a lot better than no security system at all'.⁵⁷ The move today to use the ICC as a vehicle by which

⁵⁶ Kennedy, *supra* note 2, at 27–28.

⁵⁷ *Ibid.*, at 28.

to define the crime of aggression is plausibly viewed as analogous to the problem of the League, only this time round, instead of committing decisions about the resort to force into the hands of the League's majority of states, they are committed into juridical hands.

From a liberal internationalist, idealist perspective, taking determinations of the resort to force out of the hands of political actors and committing them over to judicial ones is surely a great step forward in human social progress. There is a 'counter-idealism' so to speak, one which I share, which doubts that the underlying narrative of global governance into which this step forward fits is, indeed, progress. What would have to be true of 'international society' for questions of violence of this kind to be judicialized? But leave that aside. The realist (different from the 'counter-idealist') has to wonder whether it is really the case – even as a matter solely of determining liability *post hoc*, in the manner of a tribunal – that juridical authorities are a better practical method of addressing resort to force questions than the unabashedly, unapologetically political organ of the great powers. The question, of course, is an open one as debate and discussion get underway on defining a crime of aggression which may one day be committed into the adjudicatory hands of the ICC.

What does seem clear, however, is that moves in that direction are a significant alteration of the plan of great power realism which the 1945 founders established through the Security Council. This is an anticipated and intended consequence of international criminal law for those who think this is the right way to go. And it can be stated still more strongly. In an important sense, the move to juridicalize the crime of aggression and put some manner of its adjudication into the hands of judges rather than the Security Council can be understood as a move to manoeuvre round the intractable problem of Security Council reform, and the long-standing inability to alter the composition, power, and veto of the five permanent members. No doubt any final plan for addressing the crime of aggression through the ICC would have to include delicately balanced mechanisms for taking into account the role of the Security Council; otherwise it would not go forward at all. But the long term aim of those who favour such changes surely – among many, at least – is not only the ideal of putting the determination of this crime of aggression into judicial hands, not political ones, but much more specifically finding a way to revamp the power and authority of the Security Council and its permanent members over a long run of time. International criminal law, in other words, as a mechanism for achieving reform of the Security Council over the long haul by gradually hiving off parts of its mandate and authority.

I understand that one need not see it this way – one can see it as supporting the role of the Security Council, not revamping or weakening it. But it equally seems to me that this is an accurate way of looking at consequences of the rise of a tribunal system which moves to take on the vexed issue of both defining a crime of aggression and gradually moving to put its determination into juridical rather than political hands. I myself rather doubt the wisdom of that move, on many grounds, but it seems to me that even the 1945 founders themselves might have been dubious of this move, because it has the tendency to separate questions of international security from the great powers. In an increasingly competitive, multi-polar world of newly-emerging

powers, one can imagine a hopeful, yet hard-nosed, diplomat of 1945 – British negotiator Gladwynn Jebb, for example – asking, is this wise? Might not the belief that we can take these questions out of the political realm and vest them in the juridical ‘set too high a bar for this wicked world?’⁵⁸

10 Neglecting the UN?

A final question of the social, cultural, and even professional relationship of the tribunal system of international criminal law with the rest of the institutional UN.

How to put something that is not a systematic academic observation, but merely my own impression as an involved observer over the years? For what it is worth, anecdotal observation of the rise of the tribunal system and international criminal law from its origins with the ICTY causes me to wonder whether it does not go hand in hand with a certain *inattention* to the United Nations itself. Of course in one sense the question is wrong, since, as already noted, these tribunals are all set up under UN authority. In that regard, they are always about and part of the UN system. I mean, however, the UN in its more narrowly institutional setting – the system of the Security Council, General Assembly, agencies, secretariat. Am I alone in having a nagging cultural and social sense that the rise of international criminal law and its exciting, cutting edge tribunals, and the growth of a body of specifically criminal law, is somewhat at the expense of the older institutional UN – even if these ‘new kids on the block’ are technically part of it?

This query is every bit as anecdotal as it sounds. As someone completing a book on US–UN relations, I have been struck, conducting interviews and research for that project, how seemingly little interest the new generation of international legal scholars, inside the United States particularly but also outside it, appears to have in the institutional UN which I have been studying – the institutions of the Secretariat, the General Assembly, even the Security Council. The tribunals, the substantive body of criminal law, all that seems new and exciting. Those who are attracted to it frequently come from legal backgrounds in criminal law, not from a background or necessarily deep prior interest in international organizations as such.

But my further impression, also perhaps wrong but drawn from direct interviews especially, is that this phenomenon is more than just institutional fashion. The preference among many of those with whom I conversed as experts, scholars, and policy analysts on these topics had to do not just with newness. It had to do specifically with a view that the general institutions of the UN were somehow beyond change or alteration. One had a general obligation to support the ideal of the UN – UN Platonism I have called it elsewhere⁵⁹ – but without a great deal of interest either in learning about

⁵⁸ Gladwynn Jebb, quoted in R.C. Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (1990), at 257.

⁵⁹ Anderson, ‘The Past, Present, and Future of the United Nations: A Comment on Paul Kennedy and the Parliament of Man’, *Revista de Libros* (Madrid), Nov. 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265833. I might inadvertently have raided that term from Glennon, ‘Platonism, Adaptivism, and Illusion in UN-Reform’, 6 *Chicago J Int'l L* (2006) 613.

or having much to do with these international organizations and their issues in the present. The tribunals were seen as being much more receptive to change and development. They seemed less about the jaded, frozen, exhausted, caught in amber – I am caricaturing my impressions, but not by much – than the traditional institutions of the UN. The tribunals represented the place in which public international law was genuinely evolving.

This impression might be quite wrong. Still, I, at least, am left with a certain understanding that the traditional institutions of the UN are under some neglect by the public intellectuals, scholars, activists, even the visible and invisible college of international law who have long concerned themselves with those institutions. A new generation is finding not just more exciting, but also more *tillable*, more amenable to *its* influence, ground in the tribunals and in international criminal law. To be blunt, neither the Security Council nor the General Assembly, regrettable as it may be, is so much under the tutelage of the invisible college as the tribunal system. And if something like that observation were true, it would scarcely be surprising that the idea of the tail of the judicial function wagging the dog of the political institutions might be thought wholesome and right.

And then a question about the UN itself. Suppose for a moment that something like this is right. How would one characterize the behaviour of the UN in setting up these systems – systems in which it has a role, to be sure, but in which as a matter of law and procedure, even funding, to a great extent they go their own way? They have the blue flag attached and the logo. One can attribute this independence to the sanctity of the rule of law – but still, they go their own way to a remarkable extent.⁶⁰ What has the UN itself done in this institutional process? How best to describe it? Outsourced? Licensed? Branded? Franchised? There are many unanswered social and organizational questions here.

11 Conclusion

This article has sought to offer a survey of heterogeneous phenomena which may be seen in one way or another to be linked to the rise of international criminal law over the past 20 years. It moved at high speed, at a high level of abstraction, and has not hesitated to offer highly personal observations about the international criminal law and its possible impacts on a variety of issues in law and politics. An essay, in other words.

Why these topics? Much discussion of international criminal law is about its internal structure, as properly it should be. But there is still a virtue in seeing how international criminal law presses, structures, and drives areas of law, policy, and politics which are quite outside international criminal law, and in particular beyond the international criminal tribunals.

⁶⁰ Something I have called the ‘leveraged buyout of the UN-that-works’ – meaning the UN agencies which voluntary state and outside funders find reasonably functional and effective, and so are willing to pay for beyond the regular UN budget. See K. Anderson, *Returning to Earth: Abiding Principles of Relations Between the United States and the United Nations* (forthcoming 2009–2010).

Some of these issues are about the fundamental moral questions which underlie the whole enterprise – the separation of intervention questions from prosecution questions, for example. Another issue is the way in which international criminal law restructures fundamental incentives and disincentives in the laws of war – beginning with the questions of bargain and reciprocity in that grand moral contract which Walzer famously called the ‘war convention’.⁶¹ Still another question has to do with what may be called the interaction of the law of war (driven by certain conceptions of criminal law of individual liability) and the phenomenology of war; and potential contradictions between the individual orientation of the criminal law and the group orientation of war itself. And then technology – robotics and Predators – as a response to the breakdown of reciprocity and asymmetrical warfare driven, perhaps in part, by fundamentals of international criminal law. The possible fragmentation of the ‘ownership’ of the laws of war by the rise of different communities of interpretation, important ones of which are grounded upon international criminal law and its system of tribunals; and resulting possible breakdowns of consensus around authority and interpretation of the laws of war – paradoxically, however, even as tribunals of international criminal law gain traction. And finally (unrelated to the law of war strictly), whether all this may lead to a neglect of the institutional UN, the traditional UN, and the traditional attention given to international organizations; and even the possible restructuring of the 1945 structure of Security Council authority over collective security.

The fast survey skips over hard questions. It surfs rather than dives. But this ‘essay’ approach has the virtue, perhaps, of allowing the reader to see just how breathtakingly broad the horizon of our rising system of international criminal law turns out to be. One cannot appreciate how remarkable that rise is unless one sees its impact not solely within its own subject matter, but upon so many apparently unrelated things. They may turn out to be not so unrelated after all.

⁶¹ M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), at 125 ff.