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War and order: rethinking criminal accountability for the Iraq War

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Abstract

Public calls for the criminal accountability of UK and US politicians for the 2003 Iraq War are part of the war's legal legacies. This article questions whether criminal sanction can be a corrective to war by considering whether the relationship between the two might be understood as symbiotic.

1. Introduction

The 2003 Iraq war remained in the public consciousness far beyond its apparent end in 2011. By comparison with other recent conflicts in which the UK has been involved – Kosovo, or Sierra Leone, for example – Iraq lived on in public discourse for some years after it was ostensibly over. One route by which this occurred, and one of the war's key legacies, was the pressure by some to ensure criminal accountability of the political leaders who had led the country into that conflict. Whilst the prospect of those leaders being prosecuted now seems remote, this lingering public concern with the so-called 'war criminals' of this 'illegal war' speaks to a broader range of processes at work in this period – including the renaissance and subsequent rise of international criminal justice as a political force and the culmination of the reflex to envisage criminal law solutions to all manner of social problems exhibited by the 'punitive turn' in the US and UK.[1]

In the aftermath of the 2003 war, attaching the 'war criminal' label to politically powerful individuals appeared at first radical – from the 'war criminal' placards at peace protests to the activist at the 2012 Leveson Inquiry who interrupted Blair to call for his arrest for war crimes.[2] Yet, over time, this label also garnered remarkable support within the mainstream. By the time of the publication of the report of

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[1] J Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007); D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2002); L Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

[2] E Addley, P Walker and L O'Carroll, 'Tony Blair accused of war crimes by protester at Leveson inquiry' *The Guardian* (London, 28 May 2012) https://www.theguardian.com/politics/2012/may/28/tony-blair-protester-leveson-inquiry, all sites last visited 22 June 2021. See also O Laughland and E Saner, 'Tony Blair and the protesters who keep trying to arrest him for war crimes' *The Guardian* (London, 16 November 2012) https://www.theguardian.com/politics/2012/nov/16/tony-blair-protesters-citizens-arrest.

the Iraq Inquiry led by Lord Chilcot in 2017, a YouGov poll found that a third of those British people questioned wanted to see Blair prosecuted for the war,[3] although a subsequent attempt to do so failed before the Divisional Court.[4] The idea of putting US and UK political leaders on trial provided a potent story for foregrounding international criminal justice in those heady years after the Rome Statute of the International Criminal Court (ICC) came into force, as pre-war opposition to the conflict on the grounds of illegality matured into calls for criminal accountability.[5] In this narrative, criminal justice became framed as the counter to warfare.

During the period of the Iraq war, of course, the definition of the crime of aggression was agreed at Kampala and incorporated into the Rome Statute. Whilst the House of Lords in *Jones* had already held that aggression was a crime in customary international law,[6] its newfound treaty-based footing, within the jurisdiction of an international tribunal, was widely lauded as a milestone in international criminal justice. This development, in the views of some scholars, would allow for the enforcement of the UN Charter's prohibition on the use of force and contribute to the prevention of warfare.[7] This framing of the purpose and potential of the crime of aggression chimes with a tendency to present international criminal justice more broadly – in its contemporary incarnation – as a peace-making project. Scholars of this view argue that international criminal justice furthers post-conflict peace-building, preserves international peace and security, and represents an alternative to warfare.[8] From the perspective of such scholars, and the anti-war protestors, the possibility of turning the tables of international criminal justice on Western leaders for military interventions, such as that in Iraq, might thus have appeared seductive.

In this article, I seek to investigate what the 2003 Iraq war, and the broader 'war on terror' within which it occurred, reveal about international criminal justice and its relationship to military interventions. I do

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[3] C Farand, 'Third of British People Want to See Tony Blair Tried as a War Criminal over Iraq, Finds Yougov Poll' *The Independent* (London, 1 August 2017) https://www.independent.co.uk/news/uk/home-news/tony-blair-war-criminal-iraq-trial-convicted-yougov-british-people-uk-prme-minister-wmds-dossier-a7870341.html.

[4] *R (General Abdulwaheed Shannan Al Rabbat) v Westminster Magistrates' Court* [2017] EWHC 1969 (Admin). On similar attempts in Belgium see I Eberechi, '"Rounding Up the Usual Suspects": Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance' (2011) 4 *African Journal of Legal Studies* 51.

[5] For the history of this opposition to the war, see R Knox, 'International Law, Politics and Opposition to the Iraq War', forthcoming, and M Chiam, *International Law in Public Debate* (CUP 2021), ch 3, forthcoming.

[6] *R v Jones* [2006] UKHL 16. The House avoided the specific question of whether the crime of aggression had been committed in Iraq.

[7] J Sarkin and J Almeida, 'Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls' (2018) 36 *Wisconsin International Law Journal* 518, 520.

[8] P Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95(1) *American Journal of International Law* 7; F Mégret, 'International Criminal Justice as a Peace Project' (2018) 29(3) *European Journal of International Law* 835, 848-9.

not here analyse whether British and American politicians might be guilty of the crime of aggression.[9] Instead, I respond to the clamour to see those individuals in the dock and seek to unpack the idea that criminal justice can be a constraint on, or a corrective to, war. In so doing, I explore the relationship between criminal justice and war as one that is, at times, symbiotic – as well as inevitably complex, contested, and temporally contingent. I argue that this symbiosis emerges in two ways. One is through common narratives shared across warfare and international criminal justice. The other is through the disruption of the distinctions between warfare and criminal justice – of the military and law enforcement, the international and the domestic, the emergency and the everyday (even if those distinctions were in practice more apparent than real). To make these arguments, first, I explain how the understanding of the concept of international security changed during the post-Cold War era. This new understanding resulted in international criminal justice at times legitimating warfare. In so doing, international criminal justice also began to adopt a language of rationalisation which shared a common sensibility with that used to justify the deployment of military force. Second, I explore how this changing understanding of security, and the need to establish order, played out in the context of the post-September 11th global 'war on terror'. Recounting this development exposes how that 'war on terror' can be understood as a war fought by the US and the UK through the use of military might and penality.[10] Finally, I consider where this interconnection between military force and criminal justice leaves international law, and international lawyers, and the potential for conceptualising alternative ideas of justice.

2. Narratives of coercion

In its post-World War I incarnations, international criminal law was largely concerned with crimes against peace.[11] However, in the decades after Nuremberg, there was a shift away from the criminalisation of aggression towards the criminalisation of atrocities. For Frédéric Mégret, this shift signified a parallel move in understandings of peace – and by extension therefore of war – from a

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[9] See the minute from Sir Michael Wood, 'Iraq: Legal Basis for Use of Force' (Iraq Inquiry, 24 January 2003) https://webarchive.nationalarchives.gov.uk/20171123124035/http://www.iraqinquiry.org.uk/media/226676/2003-01-24-minute-wood-to-ps-fco-iraq-legal-basis-for-use-of-force-with-manuscript-comment-mcdonald-to-wood-28-january.pdf, and more generally the discussion in N Grief, 'The Iraq War: Issues of International Humanitarian Law and International Criminal Law'; A Williams, 'International Criminal Law and Iraq'; and WA Schabas, 'Complicity before the International Criminal Tribunals and Jurisdiction over Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart 2008).

[10] That the US and UK should be responsible for this phenomenon is ironic given that one of the complaints of the US Declaration of Independence was the King's use of military forces for civilian policing purposes.

[11] S Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law' in KJ Heller, F Mégret, SMH Nouwen, JD Ohlin, and D Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020). See further H Matthews, *From Aggression to Atrocity: Interrogating the Jus in Bello Turn in International Criminal Law* (Harvard Law School 2014).

concern with threats to inter-state security to a focus upon the internal order of the state.[12] This happened in part because international criminal justice became increasingly concerned with domestic matters, as it reoriented itself in a humanitarian direction towards atrocities and away from a focus on crimes connected to international conflict.[13] In addition, there was an expansive redefining of the notion of international peace and security to include a concern for large-scale domestic human rights abuses – a redefinition that occurred as the Security Council sought to respond to the internal conflicts of the 1990s. 'In short, the evolving agendas of international criminal justice and the Security Council helped foster a very different kind of peace – an internal peace – that was characteristic of basic public order within the state.'[14]

In consequence, international criminal justice and war have had, since the end of the Cold War, an increasingly complex, contradictory relationship. Indeed, for Mégret, there are three ways in which the demand for international criminal justice may even create pressure for the resort to war.[15] First, at the very least, international criminal tribunals benefit from the fall-out from warfare, since the weakened sovereignty of conflict-affected states provides space for the involvement of those tribunals. Such tribunals are also more successful following warfare where, for example, the conflict generates a change of government and the tribunal therefore has a new ally in investigating and prosecuting atrocities. Mégret gives the examples of Libya and Côte d'Ivoire to illustrate this point, though the Iraqi High Tribunal which, in the aftermath of the 2003 invasion, tried Saddam Hussein for international crimes might also qualify, since it is clearly impossible to imagine that tribunal having been convened absent a change in government.[16]

Second, international criminal tribunals' focus on crime prevention may alter 'the overall economy of the *jus ad bellum*'.[17] Humanitarian interventions become framed as the mandatory maintenance of criminal prohibitions with the result that they are no longer a humanitarian exception to the prohibition on the use of force but rather an action justified for the enforcement of the international legal order.[18] Arresting atrocities is thus invoked increasingly by states as a justification for warfare[19] – the inversion of the Nuremberg conceptualisation of warfare as leading to atrocities. The 2018 air strikes on Syria by

[12] Mégret (n 8).
[13] Ibid, 844-5.
[14] Ibid, 846.
[15] Ibid, 849.
[16] See generally I Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity' (2004) 54 *International & Comparative Law Quarterly* 237.
[17] Mégret (n 8), 851.
[18] Ibid, 851-2.
[19] Ibid, 852.

the US, UK and France as a response to the atrocities caused by the use of chemical weapons[20] and the claims in 2003 about possession of WMDs and the risk of their use by Iraq are both pertinent examples. In legitimating the use of warfare for the purposes of alleviating atrocities, international criminal justice has thereby contributed to the 'destabilization of the jus ad bellum … whose ultimate manifestation may be a dangerous morphing of intervention into its own form of punitive justice'[21] as warfare itself becomes conceived as a route to the international punishment of the perpetrators of atrocities.[22]

Third, as these developments are shaped by changing notions of peace and security, they have themselves – symbiotically – permissively shaped Security Council practice in respect of military interventions. Mégret is clear that neither states nor the Security Council act 'as merely the obedient enforcement arm'[23] of international criminal law, and that Council practice has been inconsistent. Nonetheless, that law provides 'an indirect normative rationale' for Security Council action, since atrocities are on occasion used to justify interventions in the name of restoring international peace and security, such as in Libya.[24] At the very least, international criminal justice has presented the Council, if it so chooses, with a renewed method for legitimising warfare 'with an added degree of humanitarian self-righteousness.'[25]

I follow Mégret by examining the common sensibility through which this legitimation of both international criminal justice and warfare occurs. In making this case, I am concerned less with the technical doctrinal claims which buttress military interventions, and more with the public, political, rationalisation – what, in the context of the 2003 Iraq War, Madelaine Chiam describes as '"collective justifications" for war: justifications that incorporated international legal reasoning within larger claims to rightness, ethics or strategy'.[26] Scholars have documented how, in the space since the end of the Cold War, running into the 'war on terror', Western warfare came to be accounted for via the deployment of particular arguments framed with a broadly humanitarian sensibility. Charlotte Peevers advocates paying attention to such arguments in order to understand the manner in which they facilitate force and thereby serve as a political resource.[27]

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[20] See M Milanovic, 'The Syria Strikes: Still Clearly Illegal' (EJIL:Talk!, 15 April 2018) https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.
[21] Mégret (n 8), 853.
[22] C Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"' (2013) 11(5) *Journal of International Criminal Justice* 955.
[23] Mégret (n 8), 851.
[24] Ibid, 854.
[25] Ibid, 855.
[26] Chiam (n 5), 57. As Chiam points out, these justifications were not stable but shifted in the period leading up to the 2003 war.
[27] C Peevers, 'Media Spectacles of Legal Accountability in the Reporting of an Official History' (2016) 87(1) *British Yearbook of International Law* 231. See further D Kennedy, *Of War and Law* (Princeton University Press 2006).

I contend that the arguments developed and deployed for the purposes of justifying warfare in this period have come to be redeployed in support of international criminal justice. Both international criminal justice and military interventions are, of course, 'practices of power'—in particular coercive power.[28] I therefore describe these common justifications as 'narratives of coercion'. Analysing such narratives highlights an increasingly common linguistic and conceptual structure which serves to facilitate warfare and international criminal penality.

First, both international criminal justice and Western military interventions are forms of crisis governance. As Hilary Charlesworth famously showed, crises serve an important purpose for international law and international lawyers. Crises 'dominate the imagination of international lawyers', 'structure our thinking about international law' and catalyse international legal development 'by exposing the gaps in international law and encouraging us to fill them.'[29] In consequence, crises can be legally productive, providing space and opportunity for legal and political reform and giving rise to 'crisis governance'.[30] Indeed, for Dianne Otto, 'many of international law's most productive formative moments have been in response to calamitous occurrences understood to be crises'.[31] Charlesworth demonstrates the effects of crisis discourse in the context of the military intervention in Kosovo in 1999. However, such analysis equally applies to the 'war on terror' after the crisis of 11 September 2001 and to the Iraq war. In 2003, the invocation of an 'Iraq Crisis' was effected not only by international lawyers[32] but also by the political leaders involved. Bush, for example, explained that '[t]he outcome of this crisis is already determined. The full disarmament of weapons of mass destruction will occur. The only question for the Iraqi regime is to decide how'.[33] Likewise, international criminal justice relies on a crisis framing. In Joseph Powderly's words, the discipline's 'very existence is predicated on the purportedly urgent need of humanity to eradicate impunity for shocking acts committed in the context of past or ongoing crises.'[34]

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[28] F Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 *Finnish Yearbook of International Law* 21, 22.
[29] H Charlesworth 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377, 382 and 380.
[30] D Otto, 'Remapping Crisis through a Feminist Lens' in S Kouvo and Z Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart 2011).
[31] D Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective' in B Stark (ed), *International Law and its Discontents: Confronting Crises* (CUP 2015), 115.
[32] See, eg, ND White, 'The Will and Authority of the Security Council after Iraq' (2004) 17 *Leiden Journal of International Law* 645; V Lowe, 'The Iraq Crisis: What Now?' (2003) 52(4) *International & Comparative Law Quarterly* 859; C Antonopoulos, 'Some Thoughts on the NATO Position in Relation to the Iraqi Crisis' (2004) 17(1) *Leiden Journal of International Law* 171.
[33] *The Independent*, 9 November 2002, 1 and 5, cited in White (n 32) 657.
[34] J Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32 *Leiden Journal of International Law* 1, 3. See also E Bikundo, 'Saving Humanity from Hell: International Criminal Law and Permanent Crisis' (2013) 44 *Netherlands Yearbook of International Law* 89.

Secondly, one effect of this 'crisis governance' is the tendency to narrow the options for crisis-response to a simple binary of action or inaction. Charlesworth again: '[t]he international legal discourse of crises rests on a series of distinctions' including 'action/passivity'.[35] Thus, the question the Western military powers wrestle with is whether to go to war or not. As with Kosovo, the US and UK governments presented both the 'war on terror' and the Iraq war as a binary choice. In the first case, this took the form of Bush's famous claim to every nation of the world that '[e]ither you are with us, or you are with the terrorists.'[36] In the second, Blair subsequently explained in respect of Iraq that for the US and its allies the 'worry is that if the UN – because of a political disagreement in its Councils [sic]—is paralysed, then a threat we believe is real will go unchallenged.'[37] In this framing, the alternative to military action is paralysis—the inability to act. Even if, as Anne Orford explains, '[i]nactivity … is not the alternative to intervention' since other options are always available,[38] international criminal justice has also fallen prey to this form of binary thinking. It has largely come to operate on the back of a rhetoric of 'anti-impunity' which, as Samuel Moyn observes, is often deployed in order to counter the supposed alternative of merely 'standing idly by' whilst perpetrators act with impunity. However, as Moyn goes on to point out, '"standing idly by" … is not the sole option besides punishment in the face of atrocity crime, let alone other forms of injustice that haunt the world. For of course, the alternative to anti-impunity (or any other agenda) is not doing nothing; it is doing something else.'[39]

By reducing the question to one of 'action or inaction' – whether in respect of warfare or international criminal justice – all of the ways in which the international community is already active (politically, socially, and economically) in situations of 'crisis', is masked.[40] In Iraq, of course, through years of sanctions, the oil-for-food programme, weapons inspections, no-fly zones, humanitarian aid and so

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[35] Charlesworth (n 29) 390.

[36] GW Bush, 'Address to the Joint Session of the 107th Congress' (Washington DC, 20 September 2001) https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, 69.

[37] T Blair, 'Full text: Tony Blair's speech', *The Guardian* (London, 5 March 2004) https://www.theguardian.com/politics/2004/mar/05/iraq.iraq. See also GW Bush, 'Transcript: George Bush's speech on Iraq', *The Guardian*, (London, 7 October 2002) https://www.theguardian.com/world/2002/oct/07/usa.iraq#maincontent and C Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (OUP 2013), 173.

[38] A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003), 17.

[39] S Moyn, 'Anti-Impunity as Deflection of Argument' in K. Engle, Z Miller and DM Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (CUP 2017), 69.

[40] Orford (n 38), 17.

forth, the UN, the Security Council, and the US and UK in particular, were already heavily invested before 2003, and have been so since.[41]

Thirdly, the decision to opt for action rather than inaction in these contexts requires justification, and for both military interventions and international criminal justice, human rights have provided fertile ground for just that. The use of human rights to legitimate military intervention was the foundation on which the 'Blair doctrine' was built. As Blair asserted in his famous speech in 1999, '[w]e cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure.'[42] The human rights violations of the Taliban, of course, were invoked as part of the justification for the 2001 invasion of Afghanistan.[43] Antony Anghie has examined how similar arguments (amongst others) were deployed in relation to Iraq, with the liberation of its people from dictatorship also part of the justification for war.[44] Bush, for example, spoke directly to the Iraqi people before the conflict started:

> We will tear down the apparatus of terror and we will help you to build a new Iraq that is prosperous and free. In a free Iraq, there will be no more wars of aggression against your neighbors, no more poison factories, no more executions of dissidents, no more torture chambers and rape rooms. The tyrant will soon be gone. The day of your liberation is near.[45]

Human rights have similarly been used to justify the turn to international criminal justice. Karen Engle unmasks the contribution of the international human rights movement to the post-Cold War renaissance of international criminal justice, revealing the extent to which criminal prosecutions and punishment have come to be seen as essential for addressing human rights violations.[46] If, historically, that movement focused on 'naming, shaming, and sometimes judicially trying states for their violations of human rights', in recent decades this has shifted to a concern with 'finding ways to hold individuals

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[41] See generally, DM Malone, *The International Struggle over Iraq: Politics in the UN Security Council 1980-2005* (OUP 2006).

[42] T Blair, 'Doctrine of the International Community', 22 April 1999, https://archive.globalpolicy.org/empire/humanint/1999/0422blair.htm. See also Orford (n 38), 34.

[43] Bush (n 36).

[44] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005), 297. See also GW Bush, 'Address to the United Nations General Assembly, 12 September 2002, https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, 139.

[45] GW Bush, 'Full text: Bush's speech', *The Guardian* (London, 18 March 2003) https://www.theguardian.com/world/2003/mar/18/usa.iraq.

[46] K Engle, 'Anti-impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1069. See also A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107(1) *American Journal of International Law* 1; M O'Flaherty and N Higgins, 'International Human Rights Law and "Criminalization"' (2015) 58 *Japanese Yearbook of International Law* 45 and M Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42(4) *Human Rights Quarterly* 729.

criminally responsible for them'[47] and the resultant endorsement of prosecution and punishment of violations.[48] In consequence, Engle contends, '[t]oday, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law.'[49] In this sense, international criminal justice and warfare are linked by a claimed humanitarian sensibility.

Fourthly, and more specifically, these human rights narratives have tended to coalesce around, in particular, 'saving' certain 'victims' of human rights abuses. In this respect, such narratives are concerned with the power to designate '"legitimate" victims' on whose behalf action is necessary.[50] Accordingly, warfare is rationalised via the deployment of – in Orford's words – 'images of the people who live in states targeted for intervention as starving, powerless, suffering, abused or helpless victims, often women and children, in need of rescue or salvation.'[51] These narratives, of course, are both gendered and racialised.[52] In respect of the wars in Afghanistan and Iraq, for example, the treatment of women in particular was used to highlight the existing regimes' human rights abuses.[53] Similarly, in international criminal justice, Christine Schwöbel-Patel unearths the discipline's 'ideal victim' – the person on whom the status of victimhood is most readily bestowed.[54] Schwöbel-Patel contends that 'infantilized, feminized and racialized victim stereotypes [are] produced and reproduced inside and outside the international criminal courtroom,'[55] with such stereotypical victims—often women or children—portrayed as 'weak and vulnerable'.[56] The result, as Vasuki Nesiah explains, is to attract sympathy but also to render the victims' power and agency imperceptible.[57] Such framings thereby

[47] Engle (n 46) 1071.
[48] Ibid, 1119; F Mégret, 'The Politics of International Criminal Justice' (2002) 13(5) *European Journal of International Law* 1261, 1265.
[49] Engle (n 46) 1070.
[50] Mégret (n 28) 25.
[51] A Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10(4) *European Journal of International Law* 679, 697. See also J Sudbury, 'A World Without Prisons: Resisting Militarism, Globalized Punishment, and Empire' (2004) 31(1-2) *Social Justice* 9, 20-1.
[52] Orford (n 51).
[53] N Al-Ali and N Pratt, *What Kind of Liberation? Women and the Occupation of Iraq* (University of California Press 2009), ch.2; G Heathcote, 'Feminist Reflections on the "End" of the War on Terror' (2010) 11 *Melbourne Journal of International Law* 1, 14.
[54] The idea originates from N Christie, 'The Ideal Victim', in EA Fattah (ed.), *From Crime Policy to Victim Policy* (Palgrave Macmillan 1986).
[55] C Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law' (2018) 29(3) *European Journal of International Law* 703, 704.
[56] Ibid, 710. See further KM Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (CUP 2009), ch 2.
[57] V Nesiah, 'Gender and Forms of Conflict: The Moral Hazards of Dating the Security Council' in F Ní Aoláin, N Cahn, DF Haynes, and N Valji (eds), *The Oxford Handbook of Gender and Conflict* (OUP 2018), 295. See also Orford (n 51) 698; Mégret (n 28) 49.

serve to buttress the deployment of military force or criminal justice for the purposes of these victims' 'rescue'.

Fifthly, if the stereotypical victim in these narratives tends towards the weak and passive, perpetrators may be portrayed quite differently. Leaders of states subject to military intervention may appear in legal and political texts as 'bullies and tyrants,'[58] exercising 'only deviant agency' and depicted using colonial stereotypes 'as oppressors, criminals or primitive barbarians, requiring disciplining and controlling' by the intervener.[59] As Blair explained (pointing to both Iraq and the Kosovo 'crisis'): '[m]any of our problems have been caused by two dangerous and ruthless men—Saddam Hussein and Slobodan Milosevic.'[60] For Bush, 'Saddam Hussein is a homicidal dictator who is addicted to weapons of mass destruction', has inflicted on people 'decades of deceit and cruelty'[61] and, like the Taliban, operates a 'murderous regime…'.[62] Dick Cheney, meanwhile, asserted that the toppling of Hussein meant he was 'taking his rightful place alongside Hitler, Stalin, Lenin, Ceausescu in the pantheon of failed, brutal dictators'.[63]

International criminal justice also displays a tendency to present stereotypes of victims and perpetrators in co-constituting opposition to each other: if the 'ideal victim' is portrayed as weak, passive, and vulnerable, the offender is presented—in Schwöbel-Patel's words—as 'strong, male and puts himself at risk; he is independent and politicized … "ugly"' and evil.[64] The 'dangerous and ruthless' Saddam Hussein and Slobodan Milosevic were, of course, eventually subject to trials for international crimes. These constructions of vulnerable victims and depraved despots recall Makau Mutua's argument about international human rights law's metaphor of 'savages, victims and saviors'.[65] They also illustrate, as Gerry Simpson explains, that

> in calling for the trial of world leaders, the opposition to the [Iraq] war seems to be mimicking the very thinking that led us into the war — based as it was on the belief that

[58] Orford (n 38) 35. See also Sudbury (n 51) 20-1.
[59] Orford (n 38) 170 and 173. Although cf Neocleous, who argues that enemies most subject to police power are 'effeminised': M Neocleous, *War Power, Police Power* (Edinburgh UP, 2014) ch 3.
[60] Blair (n 42).
[61] Bush (n 37) and Bush (n 45).
[62] GW Bush, 'Address to the Republican National Convention', 2 September 2004, available at https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, 265.
[63] LA Times, 'Rumsfeld Savors Sudden Turn of Events' (Los Angeles, 10 April 2003), https://www.latimes.com/archives/la-xpm-2003-apr-10-war-rumsfeld10-story.html. See also A Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441, 463-4.
[64] Schwöbel-Patel (n 55) 718.
[65] M Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

> deep structural and systemic deformities that result in aggression or tyranny, can somehow be blamed on one person.[66]

Finally, both international criminal justice and warfare are disciplinary techniques practised predominantly on states in the Global South by states and institutions residing in the Global North. One important legal tool for the imposition of these practices is the doctrine of 'unwilling and unable' which acts as the threshold for intervention for both the Responsibility to Protect and the ICC.[67] The same framing was also, of course, the claimed legal basis for the invasion of Afghanistan in the first days of the 'war on terror'.[68] The doctrine's effect is to give primary responsibility to the state whilst a residual, complementary authority lies elsewhere – with the 'international community' in respect of the Responsibility to Protect and the ICC;[69] with other states in respect of the use of force in self-defence. Those states deemed 'unwilling and unable' will therefore be subject to these disciplinary techniques, as their obligation to maintain their internal order is 'readily transferable' elsewhere.[70] Thus, the doctrine seeks to make '*good* sovereigns, a project as old as international law itself'.[71] Those good sovereigns (i.e. states willing and able) have their sovereignty validated and strengthened, whilst bad sovereigns may be made into good ones. The latter description would encompass Afghanistan and Iraq after their so-called transformative occupations.[72] Indeed, one commentator has described the invasion of Iraq as a form of punishment for its 'deviancy'.[73]

3. Hybridity

That warfare and international criminal justice should share these narratives, which serve to legitimate their deployment is, perhaps, unsurprising in light of critical criminological analyses of the relationship between criminal justice and the military in other contexts. International criminal justice and warfare may have what Mégret—in the context of the Responsibility to Protect and the ICC—describes as a

[66] G Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 167, 178.
[67] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 17; The Secretary-General's High-level Panel on Threats, Challenges and Change, *Report: A More Secure World: Our Shared Responsibility* (2004) UN Doc. DP I/2367, para.201.
[68] AD Sofaer, 'On the Necessity of Pre-Emption' (2003) 14(2) *European Journal of International Law* 209.
[69] J Ralph, 'The International Criminal Court' in AJ Bellamy and T Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 638.
[70] A Orford, 'Constituting order' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012), 286.
[71] Mégret (n 28) 38 (emphasis in original). See further on the use of police power for colonial purposes: Neocleous (n 59) ch.4.
[72] M Craven, 'The Tyranny of Strangers: Transformative Occupations Old and New', forthcoming.
[73] T Degenhardt, 'Representing War as Punishment in the War on Terror' (2010) 3(1) *International Journal of Criminology and Sociological Theory* 343.

'deep natural complementarity' of agendas which means that 'the two must be understood as mutually dependent and constituted'.[74] But beyond the Responsibility to Protect and the ICC, critical criminological scholarship, such as that of Angela Davis and Julia Chinyere Oparah, already understands that the relationship between military force and criminal justice can be symbiotic.[75] To further explain this symbiosis, I turn to a phenomenon known as the US 'crimefare state'.[76] Like the symbiosis between international criminal justice and warfare detailed above, the 'crimefare state' also arises from a changed understanding of security and a concern with domestic order. And the moment at which that 'crimefare state' most perfectly reveals itself is arguably the 'war on terror'.

The 'crimefare state' has post-Cold War origins. As that war's bipolar stasis ended, and faced with a declining threat from the USSR with a military lacking continued relevance and capacity, the idea that crime – rather than warfare with communism – was a threat to US security was mobilised to provide 'a more inviting target for state activity, both internationally and in the United States'.[77] Allegra McLeod explains how the US government reasserted itself as hegemon for a new unipolar world by turning its attention to establishing external order in the face of feared post-Cold War disorder. At the same time, the US sought to reinforce its domestic 'war on crime' by controlling overseas cross-border crime (perhaps arising out of that disorder) and thus preventing it from reaching US shores.[78] For Peter Andreas and Richard Price, the resultant US 'crimefare state' was characterised by both 'a militarization of policing and a domestication of soldiering' and a blurring of the boundaries 'between an internally oriented domestic police sphere and an externally oriented military sphere.'[79] The result, says McLeod, was 'a U.S.-dominant form of global governance'[80] effected through crime control.

This included US military support for the 'war on drugs' through, for example, use of military surveillance of drug-traffickers.[81] In particular, by labelling certain groups in Latin America as 'narco-terrorists', it became possible to justify the use of military resources to target them.[82] The subsequent overlap between the 'war on (narco-)terror' and the 'war on drugs' 'provided a rationale for blending

[74] Mégret (n 28) 22.
[75] AY Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003); Sudbury (n 51) 12, 16 et seq.
[76] P Andreas, 'The Rise of the American Crimefare State' (1997) 14(3) *World Policy Journal* 37.
[77] PB Kraska and VE Kappeler, 'Militarizing American Police: The Rise and Normalization of Paramilitary Units' (1997) 44(1) *Social Problems* 1, 2. See also J McCulloch, 'Blue Armies, Khaki Police and the Cavalry on the New American Frontier: Critical Criminology for the 21st Century' (2004) 12 *Critical Criminology* 309, 311.
[78] AM McLeod, 'Exporting U.S. Criminal Justice' (2010) 29 *Yale Law and Policy Review* 83.
[79] P Andreas and R Price, 'From War Fighting to Crime Fighting: Transforming the American National Security State' (2001) 3(3) *International Studies Review* 31, 31 and 32.
[80] McLeod (n 78), 103.
[81] Andreas and Price (n 79), 43-51; F Gamal, 'The Racial Politics of Protection: A Critical Race Examination of Police Militarization' (2016) 104 *California Law Review* 979, 996 et seq.
[82] Sudbury (n 51) 25.

police and military operations and combining domestic law enforcement with foreign policy'.[83] The US also undertook a legal transplant project which encouraged the adoption of US-style crime-control methods in other states. The resulting criminal justice export allowed, in McLeod's view, the US to 'govern through crime' beyond its borders.[84]

These developments arguably crystallised with the 'war on terror' launched after the attacks of 11 September 2001.[85] For Michael Sherry, the US response to September 11th exhibited an on-going 'friction' between the designation of 'war' and the 'frequent resort to the language of crime [that] went largely unnoticed'.[86] Thus, in Sherry's words, '[j]ust as terrorism crossed the smudgy line between war and crime, America's responses straddled waging war and fighting crime'.[87] The two became conflated as 'the Bush Administration insisted that the nation was at "war" while acting more like a cop on a beat or a warden in charge of the world's inmates.'[88]

One obvious example of this conflation is through practices of incarceration. Laleh Khalili shows how incarceration has been a feature of 'counterinsurgency' warfare, both during the period of formal colonisation and the 'war on terror' with the latter's detention sites in Guantánamo Bay, Afghanistan and Iraq.[89] That 'war', James Forman Jr contends, served as an export vehicle for US domestic criminal justice techniques. Much criticism of the treatment of detainees at Abu Ghraib or Guantánamo Bay concentrated on the manner in which detention beyond the US mainland denied inmates their rights under domestic law.[90] Yet, as Forman highlights, 'war on terror' detention and US domestic imprisonment share common features, including the scope of the prison complex, harsh treatment of juveniles, attacks on judicial authority, and the undermining of defence counsel. In consequence, 'war on terror' detention was arguably an extension of existing domestic practice.[91] Further connections include the deliberate adoption of detention conditions from domestic 'supermax' prisons within extraterritorial facilities and common cases of prisoner abuse; the treatment of detainees coming full

[83] Mcculloch (n 77) 312.
[84] McLeod draws on Simon's concept of 'governing through crime': Simon (n 1).
[85] Mcculloch (n 77) 310-314; PB Kraska, 'Militarization and Policing—Its Relevance to 21st Century Police' (2007) 1(4) *Policing* 501, 510.
[86] M Sherry, 'Dead or alive: American vengeance goes global' (2005) 31 *Review of International Studies* 245, 258.
[87] Ibid.
[88] Ibid, 262.
[89] L Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford University Press, 2013).
[90] E.g. J Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) *International & Comparative Law Quarterly* 1; F de Londras, 'Guantánamo Bay: Towards Legality?' (2008) 71(1) *Modern Law Review* 36.
[91] J Forman Jr, 'Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible' (2009) 33(3) *New York University Review of Law & Social Change* 331. See also M Brown, '"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad' (2005) 57(3) *American Quarterly* 973, 984-5.

circle with US military veterans increasingly recruited as domestic prison guards.[92] Whilst the parallels between domestic and 'war on terror' incarceration are obviously inexact, as Forman explains, they nonetheless share important continuities, provide fuel for each other[93] and also demonstrate how – in Darryl Li's words – the 'war on terror' was fought through a 'network of carceral practices'.[94]

Whilst some, such as Sherry, suggest that in holding detainees collected from battlefields around the world at Guantánamo Bay but refusing them the status of prisoners of war, the US resorted to a penal rather than war model,[95] a better view might be that such spaces of incarceration exemplify the hybridity of the war/crime 'crimefare' model of the 'war on terror'. The designation of the detainees there as unlawful combatants speaks to this hybridity – the detainees were neither strictly criminals (who would have been detained on the mainland and tried in regular criminal courts) nor strictly military (in being denied the status of prisoners of war[96]).

Such hybridity is further evident in the deployment of military force in Iraq, Afghanistan and elsewhere when coupled with policing elements. Military personnel undertook police-like roles—for example, US forces performing security patrols, house searches and arrests in Iraq and Afghanistan,[97] alongside the UK military which was able to export its supposedly 'successful' experience on the streets of Belfast to Basra, Camp Bastion, and beyond.[98] At the same time, the US was reforming the Iraqi criminal justice system, including funding prison-building by US private prison contractors.[99] As Mégret explains, this

> response to terrorism … hesitated between a traditional war-waging model, a police enforcement model, and one that is a curious mix of both models … much of what has occurred has fallen somewhere in the middle of war waging and police enforcement, and in some cases outside either.[100]

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[92] Forman (n 91) 348-356.

[93] Forman (n 91).

[94] D Li, 'From Exception to Empire: Sovereignty, Carceral Circulation, and the "Global War on Terror"' in C McGranahan and JF Collins (eds), *Ethnographies of U.S. Empire* (Duke University Press, 2018) 470.

[95] Sherry (n 86) 259-60 but cf F Mégret, 'War and the Vanishing Battlefield' (2011) 9(1) *Loyola University Chicago International Law Review* 131, 150.

[96] Antony Anghie argues that debates about the application of international humanitarian law to terrorists have colonial dimensions since they hark back to similar debates in the 1920s in respect of those resisting imperial domination: Anghie (n 44), 289.

[97] Kraska (n 85) 510.

[98] G Ellison and C O'Reilly, 'From Empire to Iraq and the "War on Terror": The Transplantation and Commodification of the (Northern) Irish Policing Experience' (2008) 11(4) *Police Quarterly* 395; C Campbell and I Connolly, 'A Model for the "War Against Terrorism"? Military Intervention in Northern Ireland and the 1970 Falls Curfew' (2003) 30(3) *Journal of Law and Society* 341.

[99] Sudbury (n 51) 19.

[100] Mégret (n 95) 150.

In this way, the 'war on terror' is arguably the paradigmatic conflict fought through a mixture of *both* warfare *and* criminal justice and incarceration, and 'simultaneously on both domestic and international fronts.'[101] It was a 'war' concerned with the establishment of order – whether in the US and UK in response to the threat of terrorism domestically;[102] within Iraq, Afghanistan, and states at their borders; and internationally through the use of terrorism legislation and targeted sanctions which expanded the role of domestic criminal justice systems, often at the behest of the UN Security Council.[103]

One consequence of the war on terror's pincer movement of military force and criminal justice was, as Nathaniel Berman argues, that the legal construction of war became destabilised.[104] Accordingly, the nature of the conflict in which the US and UK were (are?) engaged—against a non-state actor operating from the territory of multiple states and frequently on the move—meant that, as Mégret argues, the battlefield in which the 'war' occurred appeared without limit to its geographical scope, including orthodox and unorthodox battlefields and extra-battlefield violence such as via the use of drones.[105] As such, the 'war' (and indeed the criminal justice apparatus which accompanied it) appears essentially boundless – limited not by geography[106] (international/domestic) nor by technique (war/law enforcement) nor by temporality (emergency/everyday) – yet impinges more heavily on some than others.

4. **Beyond binaries?**

As I wrote this, the merger of the military and criminal justice played out visibly on TV screens and social media via the Black Lives Matter protests across the US. The heavily militarised police response saw the deployment of the National Guard. Armoured vehicles and troops in combat fatigues and with automatic weapons swarmed the streets. Helicopters carrying armed soldiers flew low on surveillance missions and dispersed protestors with rotor winds (a 'counter-insurgency' technique practised overseas). The then US Secretary of State for Defence said its cities were a 'battlespace', whilst the then President celebrated the state's 'overwhelming force' and 'domination' of the protestors.[107] The

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[101] Mcculloch (n 77) 323.
[102] E.g. J Sim, 'Militarism, Criminal Justice, and the Hybrid Prison in England and Wales' (2004) 31(1-2) *Social Justice* 39, 44 et seq.
[103] E.g. UN SC Res 1373 (28 September 2001), UN Doc S/RES/1373 § 1(b), 2(e).
[104] N Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43(1) *Columbia Journal of Transnational Law* 1, 6 et seq.
[105] Mégret (n 95) 148. See also Berman (n 104) 32 et seq and M Sterio, 'The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law' (2012) 45(1) *Case Western Reserve Journal of International Law* 197, 201 et seq.
[106] D Gregory, 'The everywhere war' (2011) 177(3) *Geographical Journal* 238.
[107] J Borger, '"How Did We Get Here?": Trump Has Normalised Mayhem and the US is Paying the Price', *The Guardian* (London, 2 June 2020) https://www.theguardian.com/us-news/2020/jun/02/donald-trump-coronavirus-george-floyd-normalized.

protestors, of course, were (and still are) protesting in part against the very response with which they have been met, since one effect of US police militarisation is that African Americans are, in Fanna Gamal's words, 'both overpoliced and underprotected'.[108]

Such images illustrate that the relationship between war and criminal justice is complex, and, at times, interconnected and cooperative, both domestically and internationally. Justice Robert Jackson's well-known claim that international trials at Nuremberg served to 'stay the hand of vengeance' treats criminal justice as if it were the opposite of violence.[109] International criminal justice in its modern incarnations is often presented as an alternative to warfare, thereby burnishing its pacific credentials.[110] But, as I have argued in this article, warfare and international criminal justice may have a significant sociological, conceptual, political and legal correspondence. Rather than being in opposition to each other, they are, at times, symbiotic. In consequence, the endorsement of a criminal justice model for dealing with Western political leaders is a turn to an apparatus which is entwined with the very militarisation that its proponents often oppose. If the 'war on terror' was concerned with 'transforming political, social and economic problems and issues into law and order, security, or military problems'[111] in a manner which served to redefine 'social relations … through a convergence of militaristic, police, and penal contexts',[112] then to call for the prosecution of those leaders is also to reinscribe warfare as a law and order problem. And, since '[t]he military and police comprise the state's primary use-of-force entities, the foundation of its coercive power'[113] then this is a call which 'is itself inscribed in violence'[114] and serves to legitimate it.

The implications of this go further, however, than merely cautioning against the public clamour for the prosecution of political leaders. First, on account of the merging of the supposed binaries of war/law enforcement, military/criminal justice, international/domestic and emergency/everyday which I have described, the ways in which these binaries might have conventionally been legally distinguished – via questions of technique or technology, by designation of times of war or peace, or by locating such actions within the local or global (even if it might be argued that those distinctions were in fact unsustainable) – do not seem to apply. Stephen Graham explains that '[i]ncreasingly, wars and associated mobilizations cease to be constrained by time and space and instead become both boundless and more or less permanent.'[115] This condition was one clearly envisaged by Nazi jurist Carl Schmitt

[108] Gamal (n 81) 988.
[109] Moyn (n 39) 77.
[110] Mégret (n 8) 849
[111] Mcculloch (n 77) 322.
[112] Brown (n 91) 985.
[113] Kraska and Kappeler (n 77) 2.
[114] Mégret (n 28) 48.
[115] S Graham, *Cities Under Siege: The New Military Urbanism* (Verso, 2011), xv.

in his writing on the League of Nations. For Schmitt, one effect of the League had been the creation of a situation which was simultaneously both war and not-war.[116] Subsequently, Schmitt argued that war had been reimagined as a form of policing action against deviants, criminals, and trouble-makers.[117]

Even before the League of Nations, the US had been imagining for itself a law and order role both domestically and overseas.[118] Mark Neocleous argues that in the period between the ends of the first and second world wars, the idea of a global police force gained traction and 'by the close of WWII it was widely held that a new liberal international order could be achieved only through an international police.'[119] Whilst this notion was both complex and unstable, for Neocleous it is nonetheless telling that 'the operational drive is almost always "world order" rather than "world government" or "world federation", and hence the issue ultimately turns on the police idea'.[120] Simpson shows how this idea was taken up in the negotiations to establish the UN. In 1945, the Americans, British and Russians envisaged a military role for the great powers in the post-World War II settlement which they described as 'an international police' and which became embodied in Chapter VII of the UN Charter.[121] Claims of peace and security on which the liberal international order rests thus depend on latent militarism.[122]

Secondly, the symbiosis between criminal justice and warfare rests, as I explained earlier, on particular understandings of security and its relationship to domestic order. This in turn has led to a reconceptualization of the tools available for maintaining and restoring security beyond mere warfare, encompassing also the mechanism for the creation and maintenance of order, namely, criminal justice (both international and domestic) and its attendant apparatus (policing, surveillance, incarceration and so forth). These developments have served to reallocate authority within the international legal order. The Responsibility to Protect and the ICC, for example, have served to reinforce the power of the Security Council. As 'the single most important international dispenser of legitimate violence'[123] the Security Council's authority is necessary for the implementation of these schemes. Advocates of both the Responsibility to Protect and the ICC have therefore sought to harness that authority. The consequence, Mégret suggests, is thus to empower the Council since both schemes generate a

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[116] C Schmitt, 'The Turn to the Discriminating Concept of War (1937)' in T Nunan (ed and trans.), C Schmitt, *Writings on War* (Polity, 2011), 32. See also A Orford, 'Foreword' in J Bachmann, C Bell and C Holmqvist, *War, Police and Assemblages of Intervention* (Routledge 2015).
[117] C Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, GL Ulman (trans), (Telos Press, 2006), 321.
[118] Neocleous (n 59) 177.
[119] Ibid, 185.
[120] Ibid, 187.
[121] G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004), 170 and Simpson (n 66) 173.
[122] Neocleous (n 59) 186.
[123] Mégret (n 28) 41.

stigmatizing effect which softens up targets for Council intervention, providing it with 'legal and moral cover' to enable interference in other states' affairs.[124] This, of course, perpetuates international law's existing power imbalance in respect of which states merit such intrusion, and which do not.

The 'war on terror' also served to consolidate the power of international law and its institutions, including the Security Council. The panoply of resolutions, programmes, lists, committees, and procedures adopted at the UN as part of its response to the phenomenon of terrorism in the post-September 11th world exercises, as Isobel Roele and Gavin Sullivan argue, a disciplinary function. The aim is to change state (and sometimes individual) behaviour and to enforce a particular mode of law and order. Absent such a change, states may be found to threaten international peace and security and international institutions empowered to take measures to engineer compliance.[125] The 2003 Iraq War, as part of the 'war on terror', might also be examined in this light. Many opponents of the war in 2003 took the view that, in the absence of explicit authorisation via a second resolution, the Security Council's authority would be undermined, perhaps fatally. Yet paradoxically, some proponents of the war argued that the invasion was justified for the purpose of maintaining the power of the Security Council.[126] Part of the manner in which the UK sought to legitimate the invasion was in order to vindicate the Council. In Blair's words: '[o]ur primary purpose was to enforce UN resolutions.'[127] In the end, despite the opponents' fears, the Council was able to emerge from the 'Iraq crisis' unscathed – reasserting its authority in respect of the 'post-conflict' reconstruction of Iraq,[128] the broader 'war on terror', and more generally in the world at large.[129] Again, these developments illustrate international law's capacity to create 'good sovereigns' as the law shifts the residual authority for the maintenance of order (particularly in the decolonised world) from states to international institutions (in particular, the Security Council),[130] thereby shaping the international order.[131]

Finally, all this calls into question the usefulness of the international criminal justice project for constraining war. Mégret suggests that the recently adopted crime of aggression is central to

[124] Ibid, 49 and see 48.
[125] I Roele, 'Disciplinary Power and the UN Security Council Counter Terrorism Committee' (2014) 19(1) *Journal of Conflict and Security Law* 49; G Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (CUP 2020).
[126] Chiam (n 5), ch 3.
[127] Blair (n 37). See also Kennedy (n 27) 159; and Simpson (n 66) 173-7 who analyses the various arguments deployed by the UK to justify the war.
[128] E.g. UN SC Res 1483 (22 May 2003), UN Doc S/RES/1483.
[129] See, e.g., C Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism' (2008) 19 *Finnish Yearbook of International Law* 63.
[130] Orford (n 70), 283.
[131] L Brock and H Simon, *The Justification of War and International Order: From Past to Present* (OUP 2021). See also Orford (n 63).

international peace and indeed the international rule of law.[132] Whether that crime, as currently constituted, however, can serve international peace may also be in question. As the criminologist Stephen Box has argued, one way of understanding criminal law is as functioning to uphold distributions of power. But, this does not mean that all laws do so:

> some legislation reflects temporary victories of one interest or allied interest groups over others … some laws are passed purely as symbolic victories which the dominant class grants to inferior interest groups, basically to keep them quiet; … occasionally the ruling class is forced into a tactical retreat by organized subordinate groups, and the resulting shifts in criminal law enshrine a broader spectrum of interests. But these victories are short lived. Powerful groups have ways and means of clawing back the spoils of tactical defeats.[133]

Some clawing back from the tactical defeat of the inclusion of the crime of aggression in the Rome Statute might be evident in respect of the definition of the crime agreed at Kampala. The criterion that the aggression must 'by its character, gravity and scale, constitute… a *manifest*' – rather than merely technical or subtle – 'violation of the Charter'[134] seems designed to be defeated by exactly the type of legal reasoning deployed in respect of the wars with Iraq and Afghanistan. The contesting of the lawfulness of those wars within the frame of legal justification – i.e. the rationalisation of their legality – is arguably itself evidence that the breach was not manifest. After all, as Peter Rowe says, the (un)lawfulness of the Iraq war is not clear cut since it is 'a matter over which specialist lawyers argue'.[135] Thus, the adoption of carefully calibrated, legal doctrinal justifications for war – alongside the political arguments I have documented above – may serve to ensure that such acts lack the obvious and blatant illegality necessary for criminal liability. The result, as Kevin Heller suggests, is that the crime of aggression is so narrowly defined, and so full of loopholes (not to mention various jurisdictional complexities), that it may never be prosecuted.[136] What at first blush might have looked like victory – and provides for the protestors faith that the crime of aggression can be used to deal with Western political leaders – thus seems increasingly like a mirage. We might also ponder, without diminishing the harm caused by conduct falling within the definition of aggression, the poverty of that definition in the face of threats of climate change and resultant pandemics, food and water shortages, rising temperatures, fires, floods, and hurricanes – threats not only to international peace and security but to

[132] Mégret (n 8) 858.
[133] S Box, *Power, Crime, and Mystification* (Tavistock 1983), 8
[134] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNT S 3 art 8(1) (my emphasis).
[135] P Rowe, *Legal Accountability and Britain's Wars 2000-2015* (Routledge 2016) 188-9.
[136] KJ Heller, 'Who Is Afraid of the Crime of Aggression?', SSRN, 21 August 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440408#.

the very survival of our species. Viewed in that light, re-centring the crime of aggression within the international legal order smacks of mystification.[137]

This all leaves a dilemma about how to respond to the problem of warfare in ways which do not instrumentalise machinery which may be inextricably bound-up with it. Such dilemma brings to mind Sundhya Pahuja and Luis Eslava's exploration of the tension between resisting and reforming international law evident within Third World Approaches to International Law scholarship. For Pahuja and Eslava, some of this literature exhibits an oscillation between advocating resisting international law given its relationship to colonialism, and advocating reforming that law in ways that serve to empower the marginalised.[138] Similarly, for some scholars, the prospect of limitless war illustrates the need to resist abandoning the legal distinction between war/law enforcement and military/criminal justice, perhaps even the need to reinforce those distinctions, not least given the atrocious purpose behind Schmitt's argument.[139] For others, the distinction between war and non-war has itself been made 'available for strategic instrumentalization', with actors shifting between the two to secure an advantage.[140]

If, however, as I have suggested, warfare and criminal justice are, at times, symbiotic, this poses the question of how to oppose war without turning to criminal law, whilst also avoiding reinforcing, instrumentalising, or collapsing the boundaries which scholars have examined. For abolitionists, who understand the relationship between the military and criminal justice as symbiotic, the question of how to address particular social issues is not answered via the police, or the military, or both. Instead, abolitionism seeks to undertake a (perhaps utopian) positive project of gradually dismantling the power wielded by such structures whilst rebuilding society around community security and social and economic justice.[141] To return to the discipline of international law, to the aftermath of the Iraq war, and the hyper-threats[142] to survival which contemporary society faces, this might beg the question of whether, and if so, how, international law might be used to engineer a similar project of global justice.

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[137] Box (n 133); I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13(3) *European Journal of International Law* 561.

[138] L Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) *Trade, Law and Development* 103.

[139] Orford (n 116) xxiii.

[140] Berman (n 104), 7. See also Kennedy (n 27), ch 3.

[141] See the articles in the special issue 'Critical Resistance to the Prison-Industrial Complex' in (2000) 27(3) *Social Justice* and AM McLeod, 'Prison Abolition and Grounded Justice' (2015) 62 *UCLA Law Review* 1156.

[142] I draw here on T Morton, *Hyperobjects: Philosophy and Ecology After the End of the World* (University of Minnesota Press 2013).