The London School of Economics and Political Science

Imagining International Justice: A History of the Penal Humanitarian Present

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Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

I declare that my thesis consists of 84,772 words.

Abstract

Since the 1990s, international investigations and prosecutions have become commonplace in the midst and aftermath of mass violence. International criminal justice institutions have contributed to redefining the meaning of justice through the prosecution and punishment of a select number of individuals bearing the most responsibility for mass violence, cementing a conception of justice where retributive action is undertaken in the name of victims. I develop the concept of Penal Humanitarianism to capture this contemporary paradigm of international criminal justice, which rests both on a punitive element (the logic of repression) and on a benevolent element (the logic of compassion).

This thesis examines how Penal Humanitarianism has emerged, consolidated and been legitimated to become the dominant, and largely taken for granted, approach to providing accountability and justice in mass atrocity situations. I argue this Penal Humanitarian paradigm derives from and is legitimated through a social imaginary shared by international justice-makers. This social imaginary is the one through which policy-makers, practitioners, scholars and activists read the phenomenon of mass violence, determine its causes and propose solutions. I contend this social imaginary operates through three prevailing meta-narratives: the *ending impunity for international crimes*, *justice for victims* and *justice as pacification* narratives.

This Penal Humanitarian paradigm is not an obvious consequence from the phenomenon of mass violence. Drawing from genealogical tools, I therefore inquire into the historical conditions of possibility and processes through which this paradigm has developed; and trace the emergence, consolidation and transformation of the three meta-narratives mentioned above from the post-WWII trials in Nuremberg and Tokyo to the establishment of the International Criminal Court in 1998. In doing so, I highlight the options left behind as the Penal Humanitarian paradigm came to dominate, to in turn encourage a critical rethinking of our present-day assumptions and attitude towards international criminal justice.

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[1] *Human, All Too Human: A Book for Free Spirits* (section 180).

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Chapter 1 - Introduction

I) Between compassion and repression: international criminal justice at present

> The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new 'age of accountability'. It began with the special tribunals set up in Rwanda and the former Yugoslavia; today, the ICC is the keystone of a growing system of global justice that includes international tribunals, mixed international-national courts and domestic prosecutions.
>
> Ban Ki-Moon, United Nations Secretary-General (2010)

> In the dark labyrinth of our lives, one of the few things of which we can be certain is the intolerable amount of suffering that human beings cause to one another through cruelty, armed clashes, and aggression. Criminal justice is among the most civilized responses to such violence. It channels the victims' hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims' demands by punishing the culprit. Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for 'an eye for an eye' justice with the public need to prevent and repress any serious breach of public order and community values. In this way, criminal justice contributes potently to social peace.
>
> Antonio Cassese (2011, p. 271)

Mass violence against civilians is nothing new: as the preamble of the 1948 United Nations (UN) Genocide Convention reminds us, 'at all periods of history genocide has inflicted great losses on humanity' (United Nations General Assembly, 1948). Only more recently however, has mass violence been depicted as an impunity problem, requiring international action to punish so-called atrocity crimes (Scheffer, 2007) and to 'uphold the fundamental dictates of humanity' (Cassese, 2002, p. 18). Since the 1990s, international investigations and prosecutions have become commonplace in the midst and aftermath of episodes of mass violence, arguably becoming moral, if not political and legal, imperatives. The rapid proliferation of international criminal courts and tribunals, international commissions of inquiry, and international investigative mechanisms to collect and preserve evidence of international crimes has succeeded in mainstreaming accountability in world politics and in building important momentum globally to fight against impunity for atrocity crimes. These institutions have contributed to redefining the meaning of justice through the prosecution of a selected number of individuals bearing the most responsibility for mass violence, thereby cementing a conception where retributive and corrective action is undertaken in the name of

the victim. Whilst alternative approaches to understanding justice co-exist alongside (such as grounding justice on equality, the ending of ongoing violations, reconciliation or redistribution),[2] the contemporary paradigm of international criminal justice equates accountability and justice with the establishment of individual criminal responsibility. In the words of former International Criminal Court (ICC) Prosecutor Fatou Bensouda, 'genuine accountability . . . by definition includes effective punishment' (ICC, 2016).

Hence the dominant discourse – whether coming from NGOs and activists, diplomats, lawyers or academics – is one promoting individual criminal accountability and the end of impunity as a means to defend human lives in the face of mass violence. I argue that this forms the basis for a contemporary mode of global governance which is at once penal and humanitarian, resting both on a punitive element (the logic of repression) and on a benevolent element (the logic of compassion). I use the term Penal Humanitarianism to refer to international efforts to investigate, prosecute and punish perpetrators of atrocity crimes, in which calls to deploy International Criminal Law (ICL) are motivated by the desire to do something about the suffering of distant victims.

In this thesis I examine how Penal Humanitarianism has developed and been legitimated to become the dominant, and largely taken-for-granted, approach to providing accountability and justice in mass atrocity situations. To do so, I focus on the narratives mobilised by practitioners, policy-makers, scholars and activists, asking: *What narratives have legitimated this Penal Humanitarian paradigm to enable its dominance? How do these narratives structure conceptions of criminality and victimhood as well as peace and justice, and with what effects?*

I argue that this Penal Humanitarian paradigm derives from and is legitimated through the existence of a social imaginary shared by international justice-makers. This social imaginary is the one through which policy-makers and practitioners, scholars and activists read the phenomenon of mass violence, determine its causes and propose solutions. I contend that this social imaginary operates through three prevailing meta-narratives, that I

[2] Some international criminal courts and tribunals have mechanisms at their disposal to order and provide some form of restitution, compensation, and/or rehabilitation. The Trust Fund for Victims, created alongside the International Criminal Court, is for instance tasked with providing reparations and assistance to communities of victims and survivors. These measures are however limited in scope and remain conditional on penal logics, since they are awarded following a successful conviction of the perpetrator(s).

call *ending impunity for international crimes*, *justice for victims* and *justice as pacification*. The presence of these shared meta-narratives explains the remarkable uniformity of the solutions offered in the midst and aftermath of mass violence. Despite important differences in the context and unfolding of conflict and atrocity situations, the same Penal Humanitarian accountability model is advanced as a vital response to outbursts of mass violence. I also offer an account of how this Penal Humanitarian paradigm has come about and of which options were left behind in the process. I show how the Penal Humanitarian imaginary has descended from three streams in international society: the growing concern for preventing and alleviating human suffering domestically and transnationally (the *humanitarian* stream); the rise of punitive sensibilities in world politics (the *international penal* stream); and the birth of the anti-impunity movement (the *human rights* stream). I then trace the emergence, evolution and transformation of each of the three meta-narratives outlined above from the Nuremberg and Tokyo trials in the aftermath of the Second World War to the establishment of the ICC in 1998. In so doing, I provide a critical assessment of the normative common-sense that ICL and its Penal Humanitarian paradigm represent today.

Below I expand on these points. I start in section II by outlining how I draw from and expand on the concept of Penal Humanitarianism, as introduced within the discipline of criminology, to shed light on the combination of punitive and compassionate elements in present-day international criminal justice. I then show in section III that this Penal Humanitarian paradigm is neither self-evident nor neutral, and has meant the displacement or even erasure of alternative understandings of justice and accountability. To explain how it has become the dominant and common-sensical approach to international justice, I argue that more critical thinking is needed at the microsocial level to examine the social/discursive processes of representation and interpretation through which the Penal Humanitarian paradigm is constructed and reproduced. I show that at a more fundamental level, Penal Humanitarianism is made of a social imaginary and its associated meta-narratives shared by international justice-makers, which shape their understandings and representations of mass violence and its solutions. In section IV I turn to the genealogical component of the thesis, by querying how Penal Humanitarianism has emerged, consolidated and transformed over time. Importantly, in this endeavour I seek to highlight the roads not taken and options left behind, to in turn encourage a critical rethinking and problematising of our attitude and assumptions

towards international criminal justice in the present. I end this introduction with a brief overview of the chapters to follow.

II) Introducing the concept of Penal Humanitarianism

The concept of Penal Humanitarianism has recently been mobilised by criminologists to analyse how 'humanitarianism allows penal power to move beyond the nation state', justifying and legitimating the expansion of coercive state power abroad (Bosworth, 2017, p. 40). Whilst the concept was first introduced by Mary Bosworth in 2017 in the context of migration governance, it has been taken up by Kjersti Lohne (2019b, 2020, 2023) to reveal how penal power operates within international criminal justice through humanitarian reason and reversely, how humanitarianism works to justify, legitimate and expand penal power.[3] Through the mobilisation of affects and moral outrage at the suffering of distant victims, humanitarian sensibilities indeed drive calls to end impunity and punish perpetrators of mass violence and disguise the penal nature of international criminal justice (Lohne, 2020). At the same time, the concept of Penal Humanitarianism alerts us to how retribution and repression have become tools in the promotion of human rights and humanitarian objectives. Here the concept joins a chorus of voices which have noted the increasing recourse to international criminal law and adjudicative mechanisms in response to mass violence and gross human rights abuses – with commentators speaking of the legalisation of humanitarian emergencies (Calhoun, 2013), of the 'tribunalization' of mass violence (Clarke, 2009), or of an 'acceleration' of human rights towards penality and carcerality (Pinto, 2020b, 2022b). Despite these important synergies and parallels, so far (to the best of my knowledge) the concept of Penal Humanitarianism has not travelled to the International Relations or International Law

[3] Further uses of the concept include (in relation to migration) the work of Katja Franko and Helene Gundhus (2019) as well as of Eva Stambøl (2019); and (with regards to military interventions to protect populations facing systematic violence) the work of Teresa Degenhardt (2019).

disciplines.[4] I therefore bring the concept of Penal Humanitarianism in conversation with critical scholarship on international criminal law and justice.

At the same time, I seek to deepen and expand our analytical understandings of Penal Humanitarianism by offering a more fine-grained conceptualisation of its constitutive components and mode of operation. I have explained how the concept of Penal Humanitarianism seeks to capture the combination of punitive and humanitarian impulses which characterises the contemporary fight against impunity for atrocity crimes. On the one hand, international accountability mechanisms draw their legitimacy and purpose from a humanitarian ethos, manifested by the commitment to a common humanity and the desire to alleviate suffering. For Penal Humanitarian advocates, the imperative to represent, give voice to or stand for the victimised is seen as the ultimate raison d'être for international justice (Lohne, 2018). On the other hand, the instrument to achieve these humanitarian objectives is fundamentally repressive. International judicial institutions, commissions of inquiry and evidence-gathering bodies all work to transform the complex and collective nature of the phenomenon of mass violence into discrete acts of killing or mass harm, for which the responsibility of specific individuals can be attributed. These two elements – repression (penality) and compassion (humanitarianism) – form the fundamental dualism which is constitutive of Penal Humanitarianism. The penal and the humanitarian do not exist in a pure antagonism; rather their relationship is one of mutual reinforcement *and* tension, resulting in the twin logics of *repressive compassion* and *compassionate repression*. Mobilising Penal Humanitarianism as an analytic thus brings to light the complementarities, tensions and dynamic implications resulting from the combination of repressive and compassionate elements within international criminal justice.

[4] Despite important synergies, the literatures on punishment and society and on international criminal justice barely overlap – but see Mark Findlay (2013); Anette Bringedal Houge et al. (2015); Kjersti Lohne (2018, 2020); Kjersti Lohne and Kristin Bergtora Sandvik (2017); Joachim Savelsberg, (2010, 2017) for important exceptions. As Joachim Savelsberg (2010, p. 1) explains, '[m]ost scholars that study crimes against humanity, war crimes, and genocide, primarily historians, political scientists, and legal scholars, make no use of criminological insights. Simultaneously, innovative criminologists have only recently begun to address HR and HL violations'.

III) Interrogating Penal Humanitarianism

The emergence and eventual dominance of the Penal Humanitarian paradigm is far from self-evident from a historical perspective. Perpetrators of mass violence have indeed been celebrated as heroes rather than criminals – their reputations long following them in history. The abduction and pillage of the entire female population of the Sabine tribe formed part of the founding myth of the ancient Roman empire, and the annihilation of the city of Troy was legendary for the Athenians (Savelsberg, 2010, p. 18). Meanwhile, victims were disregarded as evil or polluted (Giesen, 2004). The etymology of the word 'victim' – from the Latin 'victima' – refers to those to be killed in sacrifice. This shows that victims were originally considered as disposable objects. The current sacred status granted to victimhood, and its association with purity and innocence, thus represents a remarkable inversion in history. This shift is in fact part of a broader, long-term civilising process in international society: the new aversion towards violence meant that past heroes became seen as evil and criminal perpetrators (Giesen, 2004). Nor is the focus on individuals as bearers of responsibility any more evident. As Martii Koskenniemi has aptly noted, while punishing individuals 'may seem natural under one set of (liberal-individualist) ideas, it appears vulnerable in any serious discussion of social causality. . . Individuals become who they are, and do what they do, in larger contexts that ought to become visible in any worthwhile treatment of collective violence' (2019, p. vii). One may also find the Penal Humanitarian paradigm puzzling when considering attitudes towards penality domestically. Whilst civil society and human rights groups have traditionally resisted or called for a humanising of the domestic criminal justice system,[5] the same actors have become largely enthusiastic supporters and advocates for the deployment of penal tools globally.

Hence the Penal Humanitarian paradigm of international justice is not self-evident. The prominence of this paradigm today required considerable productive labour, not least to affirm its taken for grantedness or superiority while dismissing or silencing what is left unseen and unsaid in this paradigm. The way in which mass violence is apprehended today results from historical processes of 'problematisations'. To borrow from Foucault (1984), these

[5] See for instance Karen Engle, noting that from the mid-1970s to the late 1980s, 'much human rights advocacy was directed at states' criminalization of political activity and at abuses of their penal systems' (2016, p. 18).

represent crucial moments in which particular kinds of events (mass violence and atrocities) came to be described and interpreted as problems for society. These problems were then re-articulated by international justice-makers in specific ways that worked to transform them into useful resources for the social imaginary supporting international criminal justice. Hence the Penal Humanitarian paradigm privileges certain aspects of reality, both determining and constituting the very problem it claims to solve and fight against. In so doing, however, it inevitably masks the historical, temporal, political and empirical complexity of the phenomenon of mass violence and marginalises alternative approaches to global justice, leading to the prioritisation of law over justice as the end objective (Clarke, 2010, p. 647).

The emphasis on individual criminal accountability as the 'masterframe' of mass violence (Sandberg, 2006, p. 212) may indeed enable certain types of political and judicial action (investigations and prosecutions), but it simultaneously constrains the perceived margin of manoeuvrability for policy-makers. It notably restricts the purview of transitional justice in post-conflictual or post-authoritarian societies, leading to the marginalisation of alternative measures such as reparative schemes, the exhumation of bodies, public apologies or memorials, to quote a few only (Aukerman, 2002). For instance, Kamari Clarke (2010, pp. 626-629) has argued that in Africa, the tribunalisation of mass atrocities has displaced and largely replaced the truth and reconciliation commissions (TRCs) of the late twentieth century. This has resulted in a move from 'forgiveness and transition' to the individualisation of criminal responsibility (Clarke, 2010, pp. 626-627). While TRCs have provided victims with a space to narrate their sufferings, the contemporary articulation of global justice largely relies on international adjudication and avenging victims.

At the same time, international justice-makers place highly inflated expectations on criminal accountability mechanisms (Hoon, 2017). On top of delivering retributive justice, the latter are expected to alleviate human suffering by advancing the right to know and the right to reparation for victims and to provide guarantees of non-recurrence. Yet the reduction of transitional justice to legalistic understandings of human rights and atrocity justice reveals a very reductionist vision of what the right of victims to truth, justice and reparation ought to entail (Bell et al., 2007). Feminists scholars writing on domestic criminal justice systems have questioned the use of criminal punishment to measure the fulfilment of victim's right to dignity and value (Houge et al., 2015). Judicial proceedings are capable of revealing a specific

type of legal or forensic truth, focused on the recovery of facts. However, they are ill-suited to producing the type of macro historical or political truth needed to identify the causes and patterns of mass violence and abuses; and they cannot by themselves fully do justice to the 'subjective' or personal truths of victims (Landsman, 1997).[6]

Given the limits of ICL and of the struggle to end impunity for atrocity crimes, the existence but marginalisation of alternatives to the current Penal Humanitarian paradigm warrants further explanation. To explain how it is possible, and indeed commonsensical, for the fight to end impunity for atrocity crimes to be seen as a means of ensuring lasting peace and justice in the face of mass violence, one has to look at the processes of representation and interpretation through which the current Penal Humanitarian paradigm of international justice is constructed and maintained. This requires examining the deep structure of the taken-for-granted lifeworlds of international justice-makers upon which one rarely reflects and 'which make possible the practices as well as the social actors themselves' (Doty, 1993, p. 298). I contend that this 'deep structure' is made up of a social imaginary shared by international justice-makers and which mediates their understandings and representations of the phenomenon of mass violence and of its solutions.

The Penal Humanitarian imaginary represents the common understandings, assumptions and worldviews that enable international justice-makers to function and that provide them with a sense of a wider purpose. This social imaginary is both factual and normative, orienting what is seen as possible and desirable in a given situation. It provides an interpretive lens through which international justice-makers analyse past and current events, construct the problem and its solutions, assign responsibility and blame, attempt to predict outcomes and evaluate the desirability of different policy options. The presence of a shared Penal Humanitarian imaginary is therefore what explains the remarkably uniformity of responses to situations of mass violence in contemporary global governance. Notwithstanding important differences in the cultural, political, historical, geographical and social contexts in which conflict and gross rights violations emerge, the same accountability model is promoted by the international community: investigating, prosecuting and punishing

[6] Some empirical research however suggests that when used in combination with other transitional justice mechanisms (such as amnesties and truth commissions), trials can contribute to reducing human rights violations and improve democracy (Olsen et al., 2010).

alleged perpetrators of atrocity crimes is seen as key to providing justice for victims and ensuring durable peace and reconciliation in conflict-affected societies.

Social imaginaries in turn operate through narratives and stories. In the thesis I identify three prevailing meta-narratives of the Penal Humanitarian imaginary: *ending impunity for international crimes*, *justice for victims* and *justice as pacification*. The first narrative defines the problem at stake (atrocity crimes), identifies the responsibility-bearers (individual perpetrators) and offers a straight-forward solution (ending impunity through criminal prosecutions and punishment). The *justice for victims* narrative imbues the Penal Humanitarian imaginary with deeply affective valences by depicting a tragic display of suffering. This narrative provides the moral impetus for the international community (or those agents acting on its behalf) to intervene to put an end to the suffering of distant others and to deliver justice for victims. The final narrative, *justice as pacification*, provides a further utilitarian justification for punishment by highlighting the expected pacifying effects of international trials, both in terms of their capacity to prevent future atrocities and violence (deterrence) and in terms of their positive effects on proximate conflict reduction.

In identifying these three meta-narratives which drive Penal Humanitarianism and critically examining their assumptions and effects, I place myself in conversation with a growing body of critical scholarship which has investigated the discursive and narrative construction of international criminal justice, its key subjects (such as the victim or perpetrator) and objects (see for instance Clarke, 2015; Elander, 2018; Houge & Lohne, 2017; Kendall & Nouwen, 2014; McMillan, 2020; Sander, 2020; Schwöbel-Patel, 2016, 2018; Tallgren, 2002). For all its strengths, this literature has predominantly focused on present-day discourses and narratives of international criminal justice, with much less emphasis on how they have formed, transformed and consolidated over time. As a result, our understandings of how calls to punish have become naturalised in response to humanitarian suffering remain partial (Lohne & Sandvik, 2017). As Johann Koehler has noted, 'no penal history grapples with how such shifts happen — we have only the agonistic study of those penal options that constitute the already-thinkable, with few tools to account for how they became so and what was left behind' (2019, p. 805). To recover the 'left-behind' and refresh our memories about the alternative paths not taken as the Penal Humanitarian paradigm came to dominate responses to atrocity justice, I mobilise genealogical tools and inquire into the historical

processes and events through which, out of which and against which the Penal Humanitarian paradigm has emerged.

IV) Historicising Penal Humanitarianism

To understand how and why we have arrived at the current paradigm of international justice, with its intertwinement of punitive and compassionate elements, I draw from genealogical tools in the Foucauldian tradition of writing a 'history of the [Penal Humanitarian] present' (Foucault, 1991). Importantly, such an endeavour is motivated not by a concern for understanding the past for its own sake, but rather by a desire to understand how the present became possible, and in turn, to make visible the implicit and unchallenged assumptions and representations on which everyday discourses and practices of international criminal justice rely. In other words, turning to historical materials is ultimately geared towards questioning the present anew (Bartelson, 1995, p. 8) by shedding light on the multiple and contingent streams, continuities and ruptures that have characterised the emergence, propagation and transformation of this Penal Humanitarian paradigm.

In writing such a genealogy of Penal Humanitarianism, I therefore depart from standard textbook historiographies of the discipline, where the rise of international criminal justice is portrayed in a linear trajectory marked by successive waves of institutionalisation. Per the standard narrative, the origins of ICL are found in the ruins of the Second World War (WWII), in an effort by humanity to re-assert itself in the wake of mass atrocities (Robertson, 2013). From the imperfect yet necessary Nuremberg and Tokyo experiments, the oft-seen progressive and teleological narrative ends with celebrating an 'end of history' for global justice with the establishment of a permanent International Criminal Court in 1998 (Nanda, 1998; Bassiouni, 2015).[7] In particular, the 1990s are singled out as a triumphal period in which the international criminal justice project remarkably 'recovered' from four decades of relative silence during the Cold War era (Cassese, 1998; Simpson, 2014). Following the atrocities in

[7] The popularity of the title 'From Nuremberg to the Hague' in disciplinary writings reveals the enduring attraction for the 'progress narrative' in ICL (critically, Koller, 2012, fn. 2; Koskenniemi, 2002, p. 34).

Yugoslavia and Rwanda, the trope of 'fighting impunity' merged with renewed international efforts to deliver 'justice for humanity' and ensure individual criminal accountability.[8]

I revisit these key moments in the historical and political development of international criminal justice, examining the records of the official discussions surrounding the establishment of the International Military Tribunal (IMT) in Nuremberg, the International Military Tribunal for the Far East in Tokyo (IMTFE), the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), the ad hoc International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court. Yet rather than reproducing a teleological narrative about progress, I highlight the missed opportunities, forgotten paths, and erased alternatives that could have led us to a completely different destination. The promise of genealogical inquiry is indeed to remind us of these roads not taken. In so doing, it can rekindle a conversation on new alternatives moving forward by broadening the horizon of possibilities for re-envisioning what accountability and justice may mean in the aftermath of situations of mass violence and atrocity. I show for instance how early debates on the question of combating impunity adopted a holistic understanding of both the manifestations and solutions to impunity. Impunity was considered in relation to both civil and political rights and economic, social and cultural rights, and seen as rooted in the existing processes of global governance premised on racial, neo-colonial and capitalist logics of extraction and exploitation. Combating impunity, from this perspective, involved not only criminal prosecutions of alleged perpetrators, but also restorative justice practices such as reparations for victims, guarantees of non-recurrence, truth-seeking mechanisms and memorialisation initiatives. More importantly, combating impunity was seen as requiring action at the structural level, to disrupt the global governance regimes which contributed to reproducing gross rights violations and shielding those responsible from accountability. Such discussions have today been largely lost, the fight to end impunity being reduced to criminal accountability for individual perpetrators of atrocity crimes.

In tracing the emergence, consolidation and transformation of Penal Humanitarianism, I simultaneously illuminate the evolving relationship between penal and

[8] For a critical account of standard textbook historiographies of international criminal justice and of the 'progress narrative', see (amongst others) the work of Andre Armenian (2016), Robert Cryer (2005) and Sara Kendall (2012).

humanitarian elements in international criminal justice and their shifting importance and visibility over time. In the aftermath of WWII, the retributive element was highly visible and explicit, punishment for its own sake representing a core driver and justification for international trials. This is not to say that the humanitarian element was absent: indeed, especially for Americans, international trials were envisioned as part of a broader agenda for world peace. This humanitarian purpose, however, was arguably seen as secondary and necessarily limited, international trials representing one tool only in rebuilding a more peaceful world. The resurgence of international judicial institutions in the 1990s would come with a shift in the relationship between these penal and humanitarian elements. The increasingly explicit concern for protecting individuals would be accompanied by a growing discomfort with the idea of punishment for its own sake. In this context, the rise of the figure of the victim and the growing faith in the pacifying effects of international criminal justice would reorient the telos of the field away from retribution, and towards a humanitarian or restorative mission. At a time where retributive justice was no longer enough to legitimate the political and material commitment to international criminal justice, the figure of the victim came to provide a much-needed humanitarian supplement, serving to legitimise the inherently retributive core of international criminal justice. At the same time, this humanitarian logic of delivering justice for victims and facilitating deterrence and conflict reduction remained conditional on and constrained by the operation of penal logics of prosecuting and punishing alleged perpetrators of international crimes. What we see presently is therefore not a displacement of the penal by the humanitarian, but rather a reconfiguration of their relationship so the former becomes an indispensable tool in the achievement of the latter.

V) Writing Penal Humanitarianism: The chapters to come

The thesis is structured as follows. Chapter 2 provides the analytical and methodological backbone of the dissertation. I conceive of Penal Humanitarianism as a social imaginary operating through meta-narratives. I then successively outline the narrative-discursive and genealogical tools mobilised in the thesis to critically examine the three key-meta-narratives of the Penal Humanitarian imaginary, and to trace their emergence, consolidation and transformation over time. In Chapter 3, I further probe into the nature and

formal logics of Penal Humanitarianism, deploying Bendix's analytic of conflicting imperatives to examine the complementarities and tensions resulting from the combination of penal and humanitarian sensibilities in international criminal justice-making. I proceed with introducing the three meta-narratives of the Penal Humanitarian imaginary. Having established the 'diagnosis' – that is, a critical account of the problem and object of analysis as constructed in the present moment – I then move to examining the descent of Penal Humanitarianism. This task is undertaken in Chapter 4, where I situate the Penal Humanitarian paradigm of international justice at the confluence between three different streams: a humanitarian stream, capturing the growing concern for preventing and alleviating human suffering in international society; an international penal stream, capturing the rise of punitive sensibilities in world politics; and a human rights stream, capturing the birth of the anti-impunity movement and its diffusion in response to mass violence and gross human rights violations. The chapter closes with a brief overview of key institutional developments in the field of international criminal justice from the end of the Cold War to the present. This provides the backdrop for the three chapters that follow, which trace the emergence, consolidation and transformation of each of the three meta-narratives of the Penal Humanitarian imaginary, from the post-WWII trials in Nuremberg and Tokyo to the adoption of the Rome Statute of the ICC in 1998. In Chapter 5, I focus on discourses and narratives surrounding the definition of international crimes, examining the move from a 'crimes against peace' paradigm in the aftermath of WWII to an atrocity paradigm from the 1990s onwards. This shift in the hierarchy of international crimes has been mirrored in representations of victimhood in international criminal justice. In Chapter 6, I show that while the state was initially represented as the main injured body and direct victim of the crimes committed during WWII, from the 1990s onwards the emphasis shifted to the figure of the individual victim or survivor of international crimes. This rise of the figure of the victim has coincided with, and arguably facilitated, a recast of the telos of international criminal justice away from retribution, and towards a broader humanitarian agenda of delivering justice for victims. In Chapter 7, I turn to the alleged pacifying effects of international criminal trials, that is, their expected capacity to prevent or end conflicts and deter would-be perpetrators from committing atrocities. Taken together, the consolidation and transformation of the *ending impunity for international crimes*, *justice for victims* and *justice as pacification* narratives reveal the shifting modes of legitimation and purposes of international criminal justice.

Chapter 2 – Conceptualising and studying Penal Humanitarianism: analytical and methodological strategies

In the introductory chapter, I have argued that the international commitment to fight against impunity for atrocity crimes forms the basis for a form of governance that is at once penal and humanitarian. This chapter further unpacks the concept of Penal Humanitarianism to answer a set of interrelated questions: What is the nature of Penal Humanitarianism and how does it operate? How can we study Penal Humanitarianism at present and understand its historical (trans)formation?

I contend that the deep structure of Penal Humanitarianism is made up of a social imaginary, that is, a more or less conscious array of representations which are intersubjectively shared and enable international justice-makers to identify what shall be considered as important or 'real' (Castoriadis, 1975). The first section of the chapter unpacks this notion of a social imaginary and shows how the Penal Humanitarian imaginary mediates international justice-makers' understandings of mass violence and its solutions, thereby legitimating specific kinds of political, legal and judicial interventions. It also explains how the Penal Humanitarian imaginary operates through meta-narratives and stories. The second section outlines the analytical tools and strategies mobilised in the thesis to reconstruct and analyse the meta-narratives of the Penal Humanitarian imaginary as well as their historical roots and antecedents. The third section turns to the historical formation, evolution and consolidation of the Penal Humanitarian social imaginary. I show how genealogical tools, in the Foucauldian tradition of writing 'histories of the present', can be deployed to examine how we have arrived at the present paradigm of international justice – that is, the historical conditions of possibility for the emergence of Penal Humanitarianism.

I) Penal Humanitarianism as a social imaginary of international criminal justice

As noted in the previous chapter, Penal Humanitarianism – and its materialisation in the fight to end impunity for international crimes – is not an obvious response to the concrete realities of the phenomenon of mass violence. Rather, Penal Humanitarianism is best

understood as a socially constructed paradigm of international justice. Arguing that the Penal Humanitarian paradigm is socially constructed, resulting from a specific interpretation of the phenomenon of mass violence and of what global justice is and demands, does not entail rejecting the existence of any external reality (the physical world). Indeed, any interpretation of mass violence must recognise and account for the occurrence of acts of killings and mass harm. In that regard, acts of mass violence exert a 'reality constraint' on the construction of different narratives (Weldes, 1996, p. 286). This constraint, however, is quite lax, and allows for a wide range of different interpretations and representations, regarding for instance which acts are regarded as core international crimes and what type of responses these acts command. Hence what is at stake in the claim that global justice is socially constructed is the meanings attributed to it and its social effects, not the physical existence of acts of mass violence.

This shared Penal Humanitarian paradigm represents the 'webs of significance' (Geertz, 1977) of international justice-makers – that is, the '"tool-kit" of symbols, stories, rituals, and worldviews' through which they experience, think and act in the world (Swidler, 2001, p. 273).[9] By international justice-makers, I mean 'anti-impunity' practitioners (international criminal lawyers and judges, human rights advocates and international investigators), but also those for whom justice is part of broader set of objectives (such as diplomats, humanitarian and development workers, peacemakers, and staff from international organisations). The Penal Humanitarian paradigm is further transmitted to public audiences through traditional and social media. Penal Humanitarianism, as a shared paradigm of international justice, explains the remarkable uniformity in the range of policies advocated in the midst and aftermath of episodes of mass violence. Despite the staggering differences between the situations – in terms of cultures, languages, geographies, socio-political contexts, dynamics of violence and conflict histories – international justice interveners quasi-systematically promote the same accountability model, manifested in international calls to investigate, prosecute and punish alleged perpetrators of atrocity crimes. The deployment of an international penal apparatus is indeed seen as a means to both

[9] I here borrow Clifford Geertz's definition of culture, which resonates with the characterisation of Penal Humanitarianism as a socially constructed and collectively shared paradigm of international criminal justice.

enhance justice for victims and to promote other objectives such as truth, peace and reconciliation.

To understand how Penal Humanitarianism operates, one must look at the processes of representation and interpretation through which this specific paradigm of international justice is constructed and maintained. This requires examining 'the deep structure of [the] taken-for-granted lifeworlds' of international justice-makers upon which one rarely reflects (Hopf, 2010, p. 554). This 'deep structure', I contend, is best characterised as a social imaginary shared by international justice-makers. This imaginary, in turn, operates through constitutive stories or narratives. Below I briefly introduce the notion of a social imaginary and its powers, before turning in the next section to the narrative foundations of this social imaginary.

The notion of imaginary alludes not so much to the world as it exists 'out there' but rather to the collective meaning-making of social worlds – in other words, to the way in which people imagine their social surroundings. In the tradition of Cornelius Castoriadis (1975) and Charles Taylor (2002, p. 106), I submit that the social imaginary comprises the common understandings 'that make possible common practices and a widely shared sense of legitimacy'. The imaginary provides the underlying unity and set of presuppositions that enable a community to function and introduces a sense of a wider purpose. It defines the normal expectations that actors have towards one another and the deeper normative principles and images underlying their expectations. As a presiding moral order, the social imaginary is both factual and normative: it gives a sense of how things usually go but also how they *ought* to go, signalling which mistakes or actions would be frowned upon (Taylor, 2002, p. 109).

The notion of social imaginary emphasises the entanglement of collective meaning making and shared practices: ideas held by people configure their encounters with the world. The Penal Humanitarian imaginary frames what William Connolly (2008) calls the 'conditions of possibility' or what Jacques Rancière (2018) defines as the 'distribution of the sensible': the processes that determine what can and cannot be seen, thought or felt and hence what is and is not thinkable and doable (Bleiker, 2017, p. 323). This 'intersubjectively shared lifeworld' (Habermas, 1998, p. 322) enables state officials, international institutions or NGOs to engage in a process of interpretation to understand both the situation they face and how they should

react to it (Weldes, 1996, p. 276). The Penal Humanitarian imaginary is indeed the one through which international justice-makers read past events, ascertain causality, distribute responsibility and blame, anticipate future outcomes and assess the morality and legitimacy of a given policy (Keeton, 2015, p. 129). It does not causally determine action or outcomes but provides preconditions for action by shaping 'what is thought of at all, what is thought of as possible, and what is thought of as the "natural thing" to do in a given situation' (Dunn & Neumann, 2016, p. 263). It also removes from critical analysis and political debate what are in fact particular representations, thereby endowing these interpretations with 'common sense' and 'reality' (Moutsios, 2013, p. 146; Weldes, 1996, p. 304). The Penal Humanitarian imaginary thus provides the intersubjective background for the emergence of shared social practices.

Over time, as this dominant Penal Humanitarian paradigm is enacted and reproduced, it becomes natural, given and common-sensical to international justice-makers. The narratives, collective understandings and practices, which together form this Penal Humanitarian paradigm appear as the 'only conceivable modes of seeing and acting' (Berger & Luckmann, 1967). They come to define 'the horizon of the taken-for-granted: What the world is and how it works, for all practical purposes' (S. Hall, 1988, p. 44). Consistently stated as natural, unproblematic and transparent reflections of reality, social representations become so socially conventional and so well known that they are assigned to 'some well-rehearsed and virtually automatic interpretive routine' (Bruner, 1991, p. 9). Both the constructed nature and socio-political origins of these representations are concealed (Weldes, 1996, p. 303). They are reified and naturalised, thereby coming to represent the 'categories of practical consciousness' which set limits on the possible and representable (S. Hall, 1986).[10] Hence narratives and practices work to naturalise meanings and identities by fixing particular representations, which thereby appear as truths, transforming Penal Humanitarianism into a 'self-evident and natural order which goes without saying' (Bourdieu, 1977). This is not to say that the Penal Humanitarian imaginary is fixed and unchangeable. As a social construction, the Penal Humanitarian imaginary may become relatively stable and

[10] This vision of common sense comes close to Antonio Gramsci's (2014) concept of hegemony, as a type of dominance over thought and practice so deeply rooted in social existence that it comes to be regarded as natural, including by those being dominated. Hence common-sense functions akin to a horizon beyond which society cannot look (Pretorius, 2008, p. 109).

robust over time, but contestation and change always remain possible (Schmidt & Trenta, 2018, p. 216). Change may appear as a result of rational reflection and the deliberate promotion of alternative ways of thinking and acting, or as provoked by untoward circumstances or the unexpected (Autesserre, 2014, p. 41; Hopf, 2010, p. 544). However, the space and terms of the struggle are conditioned by the social imaginary.

If Penal Humanitarianism is best understood as a shared social imaginary of international justice, how does it operate? That is, through which objects and processes does it empirically manifest and become reproduced or transformed? The construction of the Penal Humanitarian imaginary is carried out not through theories, but largely through images and narratives (C. Taylor, 2002, p. 106). When one strives to make sense of a complex issue, the sense one seeks first appeals not so much to rationality, but rather to consistent and convincing narratives. Hence narratives provide the means through which we (and international justice-makers) see and navigate the world (Monbiot, 2017). Following Laura Shepherd (2021, p. 31), I understand narratives as 'sticky arrangements of discourse, as assemblages o[f] partially and temporarily fixed configurations that cohere over time and have a broadly consistent, if contextually contingent, form'. Narratives are not perfectly faithful and mimetic accounts of the events, actions, objects and relationships of the world as it exists 'out there'. They are constitutive stories instead of merely representational ones – that is, they produce social facts, operating 'as an instrument of mind in the construction of reality' (Bruner, 1991, p. 6) by 'delineat[ing] the terms of intelligibility whereby [this] reality can be known and acted upon' (Doty, 1996, p. 6).[11] This constructivist character has two main facets.

On the one hand, narratives are inevitably selective as they invest different actions, events and actors with varying degrees of significance. They help to organise not only the worries that are addressed, but also those that are neglected (Rein & Schön, 1977); the meanings which are treated as rational or meaningful, and those which are not (Wibben, 2010, p. 43). In so doing, narratives both enable and constrain representation (Wibben, 2010, p. 2). It is this selective appropriation of relevant facts from a potentially infinite collection of social experiences resulting from contact with people, places, institutions and events that

[11] This does not mean that stories are by necessity false and/or misleading, but rather that they represent *one way* of making sense of a complex reality (Schön, 1979).

enables international justice-makers to quickly analyse the almost endless amount of information otherwise received at any time (Latham, 2000, p. 15; Somers & Gibson, 1994, p. 60). In short, ontological narratives do not simply reflect but create the social world in which actors think and act, investing particular elements with meaning and significance, and inventing an order for that world.[12] As such, narratives are always imbricated with the exercise of power, and deeply political (Shepherd, 2021; Wibben, 2010).

On the other hand, narratives associate events with one another in temporal and causal sequences. They are organised around a plot or storyline which allows for comparing and assimilating different cases. Without this plot, outbursts of mass violence would appear as mere chronicles or catalogues of unique events, unrelatable to one another. The presence of a plot binds 'together the salient features of the situation . . . into a pattern that is coherent and graspable' (Rein & Schön, 1977, p. 239), 'convert[ing] these mere events into meaningful episodes within iterated, coherent, temporally sequential, and more or less well-developed story lines' (Latham, 2000, p. 15). By directing attention towards particular developments, and by re-arranging significant events into meaningful chains of causality and relationality (Latham, 2000, p. 15), narratives both enable and prompt action. They in turn facilitate the 'normative leap from findings to recommendations' or from is to ought, which appears as natural, compelling and self-evident (Rein & Schön, 1977, p. 240; Schön, 1979, p. 265).

Below I outline the methodological and analytical strategies that will be deployed in the rest of the dissertation to identify these narratives and critically examine their discursive elements, which collectively make the Penal Humanitarian imaginary. I then introduce the tools mobilised to trace the (trans)formation of these narratives over time.

II) Studying Penal Humanitarianism: Narrative and genealogical strategies

a. (Re)/(de)constructing narratives: tools and strategies

The previous section has highlighted how the Penal Humanitarian imaginary operates through narratives. I have noted that these narratives are closely linked with the extra-

[12] By providing the basis for action, narratives can also make a real difference to the empirical world, as in the case of self-fulfilling prophecies (Guzzini, 2000, p. 149).

discursive social and institutional practices of international justice-makers. Whilst discourses and narratives provide preconditions for actions, shaping what is thought of as possible or doable, actors enclose meaning in time and space through practice (Adler & Pouliot, 2011, p. 8) and ultimately reproduce and naturalise the Penal Humanitarian imaginary. For the purpose of this thesis, I have chosen to focus on discursive and narrative practices as a point of entry into the Penal Humanitarian imaginary. In deploying analytical tools that focus on written (textual) material as a methodological strategy and vehicle for analysis of the Penal Humanitarian imaginary, I do not mean to imply that the social world can be reduced to its discursive manifestations, or that the discursive domain is ontologically primary. Rather, following Laura Shepherd (2008, p. 31), I want to suggest that these '[discursive] "truths" should be problematized – or deconstructed – in order to illustrate the contingency and fragility of that which is taken as empirically, verifiably, solidly, real.' Ultimately, the choice to focus on the discursive construction of international criminal justice was driven by pragmatic reasons: discursive practices leave a tangible and durable trace, especially when articulated or transcribed in written form. They provide an accessible medium to study the Penal Humanitarian imaginary, since they do not require the researcher do be embedded in the institution studied. I have therefore opted for focusing on key narratives of international justice-making as a way of approaching this Penal Humanitarian imaginary and its historical antecedents. In doing so, I follow Anette Bringedal Houge's invitation (2018, p. 284) to put the emphasis on international justice's '*stories*, not its truths, its *understandings*, not its punishments, its descriptions and explanations, not its normative evaluation and judgment'. Such an approach requires attending both to the stories that are told and those that are silenced, discounted, or erased; and examining how, in so doing, international justice-making produces knowledge about complex situations of collective violence (Houge, 2018; Shepherd, 2021).

To reconstruct the key narratives which structure and constitute the Penal Humanitarian imaginary, I have proceeded in an empirically inductive manner, by searching for the main tropes and scripts in the discussions of international justice-makers. I have surveyed a deliberately broad range of sources, including policy documents, such as UN resolutions on the question of accountability in the midst or aftermath of episodes of mass violence, and any associated speeches by states or civil society; press releases from international investigative and judicial institutions; mediatic coverage; academic analysis and

commentary (Hansen, 2006, p. 75). I have sought to cover a large range of international justice institutions, from international commissions of inquiry and international investigative mechanisms to international criminal courts and tribunals, as well as non-governmental actors involved in the fight against impunity, such as international human rights NGOs.

The narratives did not appear as fully formed. They were often fragmented, compiled by different individuals or institutions over a period of time, and shifted back and forth in terms of chronological sequences (Houge, 2018). The reconstruction of these different fragments enabled me to progress from the narrative fragments mobilised by each actor to three overarching meta-narratives about international justice-making. Analytically, these meta-narratives are best regarded as ideal types, that is, as analytical constructs that facilitate the work of classifying and making sense of empirics (Nantermoz, 2020, p. 261). Per Max Weber, ideal types rest on the 'one-sided accentuation of one or more points of view and [on] the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasised viewpoints into a unified analytical construct' (1949, p. 81). Treating the meta-narratives as ideal-types is not to say that they do not have any empirical prevalence, but rather that their analytical value lies in 'provid[ing] a lens through which a multitude of different representations and policies can be seen as systematically connected and [in] identify[ing] the key points of structuring disagreement within a debate' (Hansen, 2006, pp. 46–47).

These three meta-narratives respectively describe the problem of mass violence and its solutions (*ending impunity for international crimes*); provide a rationale for the deployment of international criminal justice globally (*justice for victims*); and legitimate punishment by highlighting the expected effects of international trials on peace and atrocity prevention (*justice as pacification*). These three meta-narratives are introduced in further detail in Chapter 3. The analytical reconstruction of these three meta-narratives, in turn, enabled me to examine what kind of knowledge about mass violence and international justice is produced, and thereafter fed into wider social and political discourses. Such an approach towards narratives and discourses does not presuppose the rationality and intentionality of agents. Indeed, this thesis does not attempt to explain or even speculate on the interests or motivations behind the use of specific discourses by actors (which would assume the

presence of a pre-discursive and rationally acting agent) (Shepherd, 2021, p. 32). Instead, the focus is on what the narratives and discourses that populate the Penal Humanitarian imaginary reveal about how international criminal justice is known, imagined, and acted upon.

It is important to note that these meta-narratives, as analytical reconstructions, are not as neatly formed and distinct in practice. As noted above, they often appear in the form of narrative fragments, which are often closely inter-related. Whilst there is analytical usefulness in distinguishing between the three meta-narratives introduced above, ultimately it is the merging of the three that constitutes the Penal Humanitarian imaginary. Here it may be helpful, following Annick Wibben (2010, p. 8), to think of these meta-narratives as operating like a patchwork quilt:

> although each piece is individually crafted in detail, it is the eventual sewing together of the pieces that provides the overall image. At the same time, the stitch pattern that covers the entire quilt indicates the continuation of the argument and showcases reappearing questions and insights. Each [meta-narrative], then, presents a crucial piece of the overall pattern.

Whilst these meta-narratives define the parameters of the discussions and influence the ways in which situations are interpreted, they are not totalising. Narratives are indeed open-ended, always leaving space for contestation and change (Doty, 1996, p. 6). In introducing the three meta-narratives that constitute the Penal Humanitarian imaginary at present, Chapter 3 presents a static and admittedly stylised image which cannot fully do justice to the contestation, complexity and clashes that occur in the everyday discursive practices of international justice-making. It is also worth noting that public facing international criminal justice discourses (e.g., coming from diplomats, prosecutors and ICL institutions) tend to make greater use of hyperbolic and florid language, and as such are not necessarily representative of everyday discourses within the field, which may allow for more nuance and contestation. This approach therefore must be complemented by a critical examination of the plurality of discourses that co-exist within, and sometimes in reaction to, these meta-narratives – the meta-narratives providing the basis for these debates, instances of contestation and contradictions.[13] This task is undertaken in Chapters 5-7, where I analyse

[13] In doing so I also draw from deconstructive discourse analysis to 'examine how meanings are produced and attached to various social subjects and objects' (Doty, 1996, p. 4), and in turn, 'how the discourse in question creates relational chains of meaning between these subjects and objects such that they are known/knowable in particular ways – according to particular logics' (Shepherd, 2021, p. 32)

the emergence, consolidation and transformation o f each of the three meta-narratives over time.

The reconstruction of the present-day meta-narratives of the Penal Humanitarian imaginary raises the question of how these narratives have emerged, and what their historical roots and antecedents are. The second part of the dissertation therefore examines the multiple and contingent streams and pathways which have resulted in the present Penal Humanitarian imaginary, highlighting the continuities and ruptures in the emergence and propagation of each of the three meta-narratives (Foucault, n.d.; Pinto, 2022b). In doing so, I have focused my inquiry on five locales, which represent 'historically significant points' from which to observe the stability/repetition or change/transformation in the discourses and narratives of international criminal justice (Foucault, 1978, p. 8; Hansen, 2006, p. 70). These locales are the International Military Tribunal in Nuremberg; the International Military Tribunal for the Far East in Tokyo; the International Criminal Tribunal for the former Yugoslavia; the International Criminal Tribunal for Rwanda; and the International Criminal Court. For each of these institutions, I have primarily examined the records of the discussions surrounding the establishment of these courts and tribunals and the rules governing their functioning. I have opted for focusing on the negotiations of these legal instruments (over, for instance, the implementation or subsequent record of these institutions) as they represent moments of institutional innovation and renewal where key questions surrounding the nature and purpose of international criminal justice/international trials, the definition of international crimes, the role and responsibility of the international community in situations of mass violence (to cite a few examples only) come to be debated. These moments therefore provide an important opportunity to examine the expectations placed on international criminal justice and the justifications accompanying the institutional development of the field. They also provide a window into the evolving relationship between punitive/penal and compassionate/humanitarian elements at different points in time. Moreover, these negotiations provide a direct point of entry into the expressed views and preferences of participating states – states being the ultimate drivers of the institutional development of international criminal justice.

The corpus of documents examined includes the records of the 1945 International Conference on Military Trials, as compiled by Justice Robert H. Jackson for the United States (Department of State, 1949f); the discussions in the United Nations Security Council (UNSC) preceding the adoption of UNSC Resolutions 827 (1993)[14] and 955 (1994)[15] respectively establishing the ICTY and ICTR; and the records of the 1998 Rome Conference on the Establishment of an International Criminal Court (United Nations, 2002). It is important to note that these official records leave out the informal, off-the-records discussions that happened before and during the negotiations of each judicial instrument, as well as the considerable amount of preparatory work that resulted in the draft statutes discussed by state representatives. These records therefore give a necessarily limited and incomplete image of the considerations that went into the adoption or rejection of specific provisions, the preference for certain institutional design choices, or the motives behind collective and individual decisions. As a result, I do not seek to make any claims regarding the true intentions, motives or reasons behind the adoption of certain provisions by state representatives during these negotiations. Rather, my interest lies in how international criminal justice is discursively constructed, represented, and legitimated. From this perspective, the official records of the negotiations of these judicial instruments reflect the record that these actors wanted to leave to the public and to history. Examining what these records include but also exclude (that is, the absences) therefore provides an excellent window into how state actors view the field, its aims and purposes and the values driving the development and expansion of international criminal justice.

Similar to the process deployed to reconstruct the present-day narratives of the Penal Humanitarian imaginary, I proceeded with a close reading of the statements in the corpus of documents mentioned above, and looked for regularities of representations, but also for

[14] More specifically, I reviewed the content of UNSC Resolutions 780 (1992), 808 (1993), 827 (1993) and UNSC Report 25704 (1993); of the verbatim records of UNSC meetings on 6 October 1992 (S/PV.3119), 22 February 1993 (S/PV.3175), 25 May 1993 (S/PV.3217), 21 October 1993 (S/PV.3296); of the International Conference on the Former Yugoslavia (S/25221); of letters S/25266 (from France) and A/47/920-S/25512 (from Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey); of the interim and final reports of the Commission of Experts on the former Yugoslavia (S/25274; S/1994/674); and of the ICTY Statute and Rules of Procedure and Evidence (IT/32/Rev.50).

[15] Here I reviewed the content of UNSC Resolutions 935 (1994), 955 (1994); of the verbatim records of UNSC meetings on 1 July 1994 (S/PV.3400) and 8 November 1994 (S/PV.3453); of the interim report of the Commission of Experts on Rwanda (S/1994/1125); and of the ICTR Statute and Rules of Procedure and Evidence (ITR/3/Rev.1 (1995)).

instances of contestation, silences and contradictions. Given that my interest was in tracing the historical antecedents and roots of the three meta-narratives (*ending impunity*, *justice for victims* and *justice as pacification*), the coding and analysis was not fully inductive but informed by a series of questions targeting the different elements and analytical dimensions of each of these meta-narratives, as detailed in the table below. To build these questions, I have drawn from Foucauldian discourse analysis and discourse-theoretical analysis (Foucault, 1972; Shepherd, 2008; Torfing, 1999) to focus on three analytical dimensions: the formation of objects; the formation of subjects or subject positions; and how these objects and subjects are positioned and related to one another and to penal and humanitarian logics (Pinto, 2022a, p. 4). The formation of objects relates to how discursive statements come to define what is talked about, thereby making a matter 'manifest, nameable, and describable' (Foucault, 1972, p. 46). For instance, I examine how the categories of international crimes, of atrocities and of justice are constructed, and which qualities or attributes are associated with these objects to make them immediately recognisable and knowable. The formation of subject positions relates to how discourses come to define specific identities and assign them with given attributes, roles and expectations regarding ways of being and acting (Pinto, 2022a, p. 4). Here I have analysed the different figures of the injured body(ies) constructed and reproduced by international justice actors, and the association (to give one example only) of the identity of the victim with characteristics of innocence, purity, vulnerability and helplessness. Finally, I examine how these objects and subjects are related to one another – for instance, how *justice* is connected to *the victim*, or *international prosecutions* related to *international peace*. I also ask how the discursive construction of the main objects and subjects of international criminal justice connects to penal and humanitarian logics.

On top of these three analytical dimensions (formation of objects, subjects and their mutual positioning/relations), I have paid attention to the power constellations that both enable and result from these discursive constructions. For instance, I ask what is made possible and occluded by each of the three meta-narratives and by the representations contained therein, as well as who benefits from these narratives. A core tenet of discourse analysis is indeed the recognition that 'discursive practices are practices of power' (Shepherd, 2008, p. 23), therefore requiring the critical questioning of 'the interrelationship of power and representational practices that elevate one truth over another' (der Derian, 1992, p. 7). The

table below summarises the list of questions I drew from in tracing the historical evolution of the three meta-narratives of the Penal Humanitarian imaginary.

Meta-narrative	Ending impunity for international crimes	Justice for victims	Justice as pacification
Driving questions	- Which qualities or attributes are associated with the notion of international crimes, and how (if at all) has this changed over time? - Are these attributes and qualities ever contested or challenged, and if so, how? - Which narratives and arguments are advanced to justify the inclusion or exclusion of a given offence amongst international crimes? - Is there an (implicit or explicit) hierarchisation of international crimes, and if so, on which criteria is it based? - How are narratives surrounding the definition of international crimes connected to penal and humanitarian logics? - What do these representations and narratives make possible and what do they occlude or elide?	- How is the figure of the injured body constructed and represented in the corpus of documents examined? - Is this representation of injured body(ies) ever contested or challenged, and if so how? - How is the relationship between international criminal justice and injured body(ies) portrayed? - How are narratives of *justice for victims* connected to penal and humanitarian logics? - What assumptions – about the characteristics of those perpetrating and harmed as a result of mass atrocities, the needs, interests and preferences of victims/survivors, and the power of the law – make possible such narratives? - What type of justice is enabled through these narratives? - Who is represented as benefitting from these narratives, and to what extent are these represented beneficiaries truly served by these narratives? - What do these representations and narratives make possible and what do they occlude or elide?	- How are peace, deterrence and conflict prevention articulated, discussed, or challenged in the documents examined? - How are these different elements related to one another? - How are international prosecutions (and the operation of ICL more broadly) related to peace and pacification? - How are these narratives of peace and pacification connected to penal and humanitarian logics? - What assumptions – about the nature of atrocities and mass violence or conflicts, the role of the law, and the functions of punishment – make possible such narratives of pacification? - Who is served by this project of pacification? - What do these representations and narratives make possible and what do they occlude or elide?

Table 1– List of guiding questions for the empirical analysis

Guided by these questions, I extracted from the corpus of documents quotes and statements that addressed the three analytical dimensions mentioned above. I used an Excel spreadsheet to collect these statements and proceeding with coding and classifying them according to what I saw as recurring themes and sub-themes.[16] This process enabled me to identify patterns of recurring discourses and representations across the documents of a given period or institution, and therefore to highlight the prevailing discourses and narratives in that historical moment. Applying the same set of questions to the different empirical cases and time periods in turn enabled me to compare and contrast the content of these discourses in the different historical and empirical cases examined, by paying attention to the discursive elements that (dis)appeared or changed at a given point in time or in a given context (Hansen, 2006). Importantly, in working through the corpus of documents, I attended not only to the discourses and stories which are told and (hyper)visible, but also to those which are discounted, marginalised and/or forgotten, and therefore had to disappear for the present narratives to triumph (Shepherd, 2021, p. 27). In this juxtaposition between hyper- and in-visible discourses indeed lies the possibility of calling into question existing structures of power and creating space for rediscovering new possibilities and alternatives to the status-quo. I then related the findings of this analysis to academic interventions so as to reflect on the power and effects of these narratives. That is, I examined how the representations contained within these narratives have in turn enabled or marginalised certain practices in international criminal justice-making, using secondary material as 'critical means through which the so-called objectivity and naturalness of these representations can be contested' (Hansen, 2006, p. 74).

This section has outlined the analytical tools mobilised in this study to examine the meta-narratives of the Penal Humanitarian imaginary and their historical antecedents. Studying the emergence, consolidation, propagation and transformation of these meta-narratives in turn sheds light on how the Penal Humanitarian imaginary has formed and transformed over time – in other words, how and why this paradigm has become the internationally dominant mode of thinking about mass violence and atrocity justice. Asking these questions involves what Foucault referred to as writing genealogies or histories of the

[16] The spreadsheet was divided by time period/institution, and by meta-narrative. Some statements were found to be relevant to more than one meta-narrative, and therefore included several times in the spreadsheet (this reflects the interconnection and entanglement of the three meta-narratives that I noted earlier in the chapter).

present. Below I outline how genealogical tools are used in tandem with the narrative and discursive tools already introduced, to study the (re)constitution of the Penal Humanitarian imaginary over time.

b. The (trans)formation of a social imaginary: writing a history of the present

> What history at its best . . . provides is critical distance that allows us to examine the present in abstraction from the immediacy of its concerns; to look away from the questions and problems posed by today's institutions and instead enquire about whether those are the right questions and problems to begin with.
>
> Koskenniemi (2019, p. x)

This section briefly explains the meaning, aims and key components or steps of a genealogy. Although largely drawing from the work of Foucault, my aim is not to propose a new manual or recipe for success in conducting a Foucauldian genealogy. As several commentators have aptly noted, there is 'no single genealogical method' emerging from the work of the French philosopher (Biebricher, 2008, p. 365; Walters, 2012, p. 7). Rather, Foucault's pragmatic approach led him to view theory as a toolbox whose various instruments were means to work on specific problems and further certain inquiries, but certainly not as a ready-made grand theoretical edifice that could directly be applied by others or forced into different lines of inquiry (Garland, 2014, p. 366). In line with Foucault's methodological pragmatism, this section will borrow, with some liberty, some of the tools and analytics characteristic of Foucauldian genealogies.[17]

i. What is a genealogy?

For Foucault, genealogy must begin with a question posed in the present, that is, by a critical examination of a situation or problem expressed in the terms of today (Kritzman, 1988, p. 262). If Foucault often referred to his genealogical method as a 'history of the present', it is because he used history to engage critically with the present moment. That is, a genealogy

[17] Foucault himself remarked that transforming and even deforming the conceptual tools provided by others was one of the biggest tributes he could pay to those whose ideas influenced his work. In an interview given in 1975, he confides: 'For myself, I prefer to utilise the writers I like. The only valid tribute to thought such as Nietzsche's is precisely to use it, to deform it, to make it groan and protest' (Foucault, 1980, pp. 53–54).

seeks not to shed light on the past as traditional historians do, but rather to describe 'how the present became logically possible' by using historical materials to question the present anew (Bartelson, 1995, p. 8). What the genealogist endeavours to do is trace the forces from which present-day practice emerged, and to identify the historical conditions of possibility for these practices (Garland, 2014, p. 373).

Whilst drawing from the burgeoning critical scholarship on the historiographies of International Criminal Justice, the genealogy presented in this thesis is therefore motivated by a different concern. The former approach has sought to recover lost stories and 'hidden histories' of war crime trials (Heller & Simpson, 2013), and to write 'histories of international criminal justice beyond, against, or in the shadow of the master narrative' (Koskenniemi, 2019, p. 2). In advancing untold stories or committing to retrials of the existing ones, recovering forgotten episodes, highlighting the role of erased historical figures and protagonists, these new histories of the field have shown that 'there are *always* many different perspectives, possibilities, and undetected threads of history to trace and explore' (Hamilton, 2017, p. 138).[18] The genealogical project undertaken here, in contrast, starts from a diagnosis of the present situation and a concern for understanding the conditions of possibility of the current Penal Humanitarian paradigm of international justice. It is motivated by what David Howarth (2000, p. 135) has characterised as a 'strategy of problematization [that] carries with it an intrinsically ethical connotation, as it seeks to show that dominant discursive constructions are contingent and political, rather than necessary'. Besides, whilst the new historiographies of ICL have tended to focus on temporally, geographically, institutionally and/or individually distinct contexts, this genealogical project seeks to attend to questions, dynamics and processes that traverse the history of international criminal justice, albeit with important transformations and ruptures.

Hence armed with the genealogical eye, my aim in this thesis is to shed new light on how the concepts, narratives and practices, which make international criminal justice thinkable and knowable at present, have formed. It is important to note, however, that such

[18] Space considerations prevent me from providing a full account of this literature. For a short selection of important recent works in that vein, see the work of Gerry Simpson (2014; 2013); Mark Lewis (2016); Philippe Sands (2017); Frédéric Mégret (2018); William Schabas (2018); the two excellent edited volumes aforementioned (Heller & Simpson, 2013; Tallgren & Skouteris, 2019); and the forthcoming edited volume on women in international law (Tallgren, 2023).

a project does not start from the assumption that there is a unique, truly objective history of Penal Humanitarianism waiting to be unearthed for posterity, nor even that a singular historical thread ties everything together (Hamilton, 2017, p. 161). In this process, one must look at the historical forces and episodes which shaped current practices but also pay attention to 'those instances where they are absent, the moment where they remained unrealized' (Foucault, 1977b, p. 140). In other words, looking for misfits and finding 'moments that disrupt (if only provisionally) a field of force' (Stoler, 2009, p. 51).

ii. Why do a genealogy?

As mentioned before, for the genealogist historical reconstruction is not guided by the objective of reifying the true past, nor even of knowing it better. The goal is rather to breach a false self-evidence and to '[make] visible a singularity' – here, the singularity of the fight to end impunity for atrocity crimes – where there is a temptation to invoke a linear and progressive history of international criminal justice (Foucault, 1991, p. 76). The matter is one of bringing up to surface the 'submerged problems' that are implicit and hidden in our everyday thought and practices; and to reveal 'on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought' our depictions and practices of international justice rest (Kritzman, 1988, p. 154). Such a critical attitude is much needed, not to condemn what is being done to address mass atrocities, but rather to grasp what is left silent or deliberately hidden, to notice the ambiguities and contradictions, to understand the stakes involved. In short, it is needed to render intelligible a Penal Humanitarian government that often goes without saying and is seen as inherently morally progressive (Fassin & Pandolfi, 2010, p. 16).

This 'breach of self-evidence' – and of 'those self-evidences on which our knowledges, acquiescences and practices rest' (Foucault, 1991, p. 76) – is an invitation 'to explore the different moments in history where distinct turns were taken and certain understandings of problems became dominant over others, and to trace these practices up to the present' (Bueger & Gadinger, 2018, p. 140). The aim is to uncover or rediscover 'the connections, encounters, supports, blockages, plays of forces, strategies and so on which at a given moment establish what subsequently counts as self-evident, universal and necessary'

(Foucault, 1991, p. 76). Doing so, in turn, provides a fresh perspective on our understanding and analysis of the present situation, encouraging us to enquire 'whether those are the right questions and problems to begin with' (Koskenniemi, 2019, p. x). Having outlined the objectives and motivations for conducting a genealogy, I briefly introduce the successive steps of the approach, as used in this thesis.

iii. How to conduct a genealogy?

A genealogy starts with a question asked in the present. The first step is thus to provide a specific, concrete and critical account of the problem to be explained or the object of analysis as it is experienced and constructed in the contemporary moment. This phase – which Foucault refers to as the 'diagnosis' – requires a certain puzzlement or discomfort with institutions and practices that are generally taken for granted (Garland, 2014, p. 379). The introduction has begun to problematise the Penal Humanitarian paradigm of international justice. The following chapter (Chapter 3) will pursue this diagnosis by critically examining the Penal Humanitarian paradigm of international criminal justice at present. The genealogy of Penal Humanitarianism that will follow thus seeks to illuminate the historical processes through which calls to investigate and prosecute atrocity crimes have come to represent the prevailing conception of how to promote justice for victims of mass violence.

Writing such a genealogy involves probing into how the processes of descent and emergence, and the contingencies associated with these processes, have shaped (and continue to shape) the present (Garland, 2014, p. 371). Drawing from Nietzsche, Foucault insists that a genealogy is *not* a quest for the origin(s) (*Ursprung*), which would imply the existence of an exact essence of things or their purest possibilities. This essentialist view is replaced with the belief that '"there is something altogether different" behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms' (Foucault, 1977b, p. 144). Hence conducting a genealogy is about cultivating the details and accidents, complexities and apparent misfits which all contributed to define the present moment.

The examination of descent (*Herkunft*) is a search for beginnings (the plural being important here), whose faint traces can be uncovered only through historical attention to 'the

subtle, singular, and subindividual marks that might possibly intersect in them to form a network that is difficult to unravel' (Foucault, 1977b, p. 145). Following the course of descent is about looking at the 'myriad events through which – thanks to which, against which' the present moment was formed; and about identifying 'the accidents, the minute deviations – or conversely, the complete reversals – the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us' (Foucault, 1977b, p. 146). This examination of descent is undertaken in Chapter 4, where I situate the contemporary Penal Humanitarian paradigm of international justice at the crossroads of three different streams: the humanitarian stream; the international penal stream; and the human rights stream.

The second aspect, tracing emergence (*Entstehung*), is an invitation to question the congelation of practices once thought as disparate or unrelated and to enquire into the conditions of their accidental overlap. Emergence is about the moment of arising. That is, the moment wherein a specific interpretation or problematisation of the world forces itself over others, and thereafter achieves dominance. The process of emergence should thus not be conceived as the final term of an historical development, but rather as the entry of forces and their eruption, what Foucault (1977b, p. 150) characterises as 'the leap from the wings to centre stage'. Chapters 5-7 will successively examine the emergence of the three prevailing meta-narratives of the Penal Humanitarian imaginary.

Chapter 3 – Diagnosis: Penal Humanitarianism unveiled

Starting from Bendix's analytic of 'conflicting imperatives', this chapter probes the fundamental dualism of penality and humanitarianism which characterises the present operation of international criminal justice-making. I show how this dualism manifests itself through the twin logics of *repressive compassion* and *compassionate repression*. These logics, in turn, give rise to the prevailing meta-narratives of the Penal Humanitarian imaginary – narratives through which international justice-makers make sense of the situations they are presented with and the course of action they adopt in response. Given the focus of this thesis (on the *why* and the *how* humanitarianism is deployed to justify international criminal punishment), I further examine the three meta-narratives which constitute the first logic of *repressive compassion*. These three meta-narratives – *ending impunity for international crimes*, *justice for victims* and *justice as pacification* provide meaning to situations of mass violence and suffering and propel forward a demand for accountability through the deployment of an international penal apparatus.

I) The nature and formal logics of Penal Humanitarianism

As noted in the introduction, Penal Humanitarianism captures the combination of repressive (penal) and compassionate (humanitarian) dynamics at the heart of present-day international criminal justice-making. These two elements of compassion and repression form the fundamental dualism which is constitutive of Penal Humanitarianism. Below I draw from Reinhard Bendix's (1964) notion of conflicting imperatives to further unpack the nature and internal logics of Penal Humanitarianism.

Bendix introduced the idea of conflicting imperatives to characterise 'concepts that entail a dynamic tension among contradictory goals, priorities, or motivations' (Gould, 1999, p. 439).[19] Yet the presence of conflicting imperatives at the core of a concept or ideal-type did not lead Bendix to presume that the empirical phenomena matching this concept were constantly undermined from within. Rather, the idea of conflicting imperatives reflects the

[19] Bendix employed other labels such as 'conceptual oppositions', 'basic conflicts of values' and 'polarities' to refer to the same idea (Gould, 1999, fn 1, p. 4).

existence of 'fundamental components that are mutually reinforcing *and* in tension with each other' (Gould, 1999, p. 441). The oxymoronic quality of such concepts quality invites the researcher to interrogate the 'complementarities, persistent tensions, and dynamic implications' (Gould, 1999, p. 442) resulting from the presence of conflicting imperatives.

Penal Humanitarianism is one such concept. The present-day paradigm of international justice indeed comprises two faces: a repressive face and a compassionate face. On the one hand, the repressive element – penality – denotes the political and legal project and the institutional practices of attributing guilt and sanctioning crimes. International judicial institutions, commissions of inquiry and evidence-gathering bodies all work to transform the complex and collective nature of the phenomenon of mass violence into discrete acts of killing or mass harm, for which the responsibility of specific individuals can be attributed. On the other hand, the compassionate element manifests itself both as a commitment to a common humanity (the push for universality associated with the idea of humankind) and as an affective movement drawing individuals towards their fellows (humanness, creating the moral imperative to provide assistance to suffering others) (Fassin, 2011, p. 1). International accountability mechanisms thus form part of the international humanitarian order or what Michael Barnett calls the 'global governance of humanity' – that is, 'the self-conscious efforts by the global community to relieve the suffering of distant strangers' (Barnett, 2013).[20] In international justice, humanitarianism extends beyond the saving of human lives to include processes of memorialisation of the dead and pre-emptive measures aimed at obviating the need for future rescue, such as the indignant call of 'never again'. Hence even when the individual lives under threat cannot be saved, it becomes possible to at least safeguard a 'possibility of humanity' (Radice, 2019, p. 6). This humanitarian or compassionate face also reveals itself through the deployment of moral sentiments and the appeal to emotions in atrocity justice politics (Fassin, 2011, p. 1). Spectacles of violence and suffering appeal to the pity and empathy of external audiences, fuelling the moral impetus to show benevolence and solidarity with victims – what Didier Fassin (2011, p. 5) terms the 'politics of precarious lives'.

[20] Barnett does not mention international justice mechanisms in the practices which he lists as falling under the umbrella of humanitarian governance. Still, these mechanisms can be said to participate in 'the administration of human collectivities in the name of a higher moral principle that sees the preservation of life and the alleviation of suffering as the highest value of action' (Fassin, 2011, p. 151).

These two elements of repression (penality) and compassion (humanitarianism) form the fundamental dualism which is constitutive of Penal Humanitarianism. The relationship between these two components is however not a purely antagonistic one; rather, it is best characterised as one of mutual reinforcement *and* tension. As Bendix reminds us, these conflicting imperatives have dynamic implications, resulting in the two logics of *repressive compassion* and *compassionate repression*. These two logics permeate the functioning of present-day international criminal justice bodies, from international commissions of inquiry and investigative mechanisms to international criminal courts and tribunals.

The logic of *repressive compassion* relates to the *rationale* of punishment, or why we punish. It captures the expressivist theory of punishment at the core of retributive justice, whereby criminal liability and punishment are advanced as means to further the interests of victims. For the Independent International Fact-Finding Mission on Myanmar, addressing human rights abuses in the country must begin 'by ensuring that the perpetrators of crimes are held to account, and by giving hope to victims of a future without the fear and insecurity that have characterised their existence' (United Nations General Assembly, 2018b, p. 422). In the words of former ICC Prosecutor Fatou Bensouda, 'genuine accountability . . . by definition includes effective punishment' (ICC, 2016). This model is not new: defending the need for redress for Hitler's victims, Benjamin Ferencz (n.d.) argued in 1948 that 'to avoid revenge and retaliation, victims of oppression must know that their oppressors have been brought to justice; and efforts must be made to heal the wounds of those who have suffered'. The past decades however have seen this logic embraced not only by international courts and tribunals, but also by international commissions of inquiry and investigative bodies. Hence speaking at the 2019 Doha Forum, the Head of the Investigative Team in Iraq noted:

> Punishment is important. We are dealing with an organisation that has burnt people alive, that has raped, that has subjected to slavery, that has murdered, and that has crucified individuals. . . Not only is it a requirement of justice. . . we need to make sure we do proper investigations. . . that will allow the rule of law to prevail (UNITAD Iraq, 2019).

The second logic – *compassionate repression* – focuses on the modalities of punishment, or how we punish. This logic generates expectations about how to treat alleged perpetrators of international crimes: here justice demands moderation and compassion. Hence international justice advocates often draw a stark opposition between the impartiality

and fairness of the law on the one side, and the arbitrariness and violence of other modes of retaliation on the other side. This opposition was arguably first and most prominently advanced by Robert Jackson, Chief of Counsel for the United States, in his opening statement before the International Military Tribunal at Nuremberg in 1945:

> That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason (IMT, 1947c).[21]

The Investigative Team for Iraq has recently emphasised that 'witnesses and survivors . . . do not seek revenge, but assistance in obtaining recognition for what they have suffered and in bringing those responsible to justice', insisting that the 'call for accountability is not one of retribution, but one of justice' (United Nations Security Council, 2019, p. 4). If prosecution and punishment remain the main ways through which perpetrators are held accountable for their crimes, anti-impunity advocates insist that this punishment should be 'appropriate' – that is, in line with international standards and human rights instruments. This concern for temperance and restraint in meting out punishment manifests itself in several respects.

First, the punishment is not arbitrary or unbounded, and is subject to rules presiding to the unfolding of the trial and the rights and guarantees granted to the accused. The ICC for instance claims to be 'steadfast in its commitment to ensure the proceedings before it are in conformity with the highest legal standards and due process rights of suspects and accused persons' (International Criminal Court, n.d., p. 1). Among those rights are the entitlement of the accused to a fair, impartial and public hearing and additional guarantees such as the right to be informed in detail of the charges in a language which they fully understand and speak; to be defended by themselves or a counsel (lawyer) of their choice; to present evidence and call their own witnesses; to have legal assistance paid by the Court if the person lacks sufficient means; and not to be compelled to testify or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence (International Criminal Court, n.d., p. 1). Investigative mechanisms demonstrate a similar commitment to procedural rights and due process. For instance, the terms of reference of the

[21] This dichotomisation between the impulse of the law and the impulse of revenge has however been criticised by scholars. For instance, Gerry Simpson (2016, p. 20) proposes to regard war crime trials 'not as depoliticised programmes of management but as slightly wild-eyed theatres of revenge: human rights with a vengeance.' He argues that international criminal law begins with a moment of vengeful fury in the aftermath of the First World War, captured by the promise to 'hang the Kaiser' (Simpson, 2016, pp. 15–16).

International, Impartial and Independent Mechanism for Syria provide that the latter 'shall share its information only with those jurisdictions that respect international human rights law and standards, including the right to a fair trial, and where the application of the death penalty would not apply for the offences under consideration' (2017, para. 14).

Second, as noted by Lohne (2019a, p. 136), the amount of punishment – represented by the length of sentences delivered by international criminal courts and tribunals – is strikingly 'limited' compared to that imposed by domestic jurisdictions, not least when one considers the scale and gravity of the crimes in question. In fact, international standards are often viewed as too 'luxurious', that is, not 'punitive' or tough enough, when comparing with the standards in use in some countries, notably in the Global South (Lohne, 2019a, p. 128). As Mark Drumbl (2005, p. 542) has noted, '[t]he "enemy of all mankind" is punished no differently than a car thief, armed robber, or cop killer'. The ICC can sentence convicted criminals to a period of imprisonment 'which may not exceed a maximum of 30 years' (Rome Statute of the International Criminal Court, 1998, art. 77 1(a)).[22] This creates the paradox that that those bearing the most responsibility for international crimes, judged by international courts, may face lighter sanctions or better conditions of imprisonment than the lower degree perpetrators judged by domestic courts.

The relative excessive lenience of international standards compared to domestic provisions has been particularly manifest in the case of Rwanda, where domestic criminal law allows for death penalty sentences, while those were not permissible in the UN ad hoc tribunals. This has meant that in some cases, judicial punishment has kept 'perpetrators alive to enjoy a quality of life that exceeds that of victims and might well exceed that which they would claim were they not "punished" at all' (Drumbl, 2005, p. 539). Similarly, Nancy Combs (2003, p. 936) reported that in the case of the former Yugoslavia, '[v]ictims reacted with predictable outrage' upon learning that 'Plavšič [a Bosnian Serb leader who pled guilty of crimes against humanity] was sent to serve her term in a posh Swedish prison that reportedly

[22] Note however that article 77 1(b) of the Rome Statute authorises the Court to impose life imprisonment under exceptional circumstances 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. The sentencing in November 2019 of Bosco Ntaganda to 30 years of imprisonment was the first time ICC judges handed the maximum penalty. The sentence was then confirmed in appeals (UN News, 2019).

provides prisoners with use of a sauna, solarium, massage room, and horse-riding paddock, among other amenities'.

The relatively light or compassionate penalty imposed to perpetrators of mass atrocities may appear less surprising when noting that discussions about sentencing are largely absent from international justice (Drumbl, 2005, n. 44; Lohne, 2015, p. 196). Rather than the demand for longer or more severe imprisonment sentences (that is, for harsh punishment), it is 'the *legal recognition* of [the victims] in the charges brought against the defendant that becomes important': the 'judicial recognition of victimhood takes precedence over moral calls for revenge' (Lohne, 2019a, p. 137). In fact, some have argued that the sentence imposed on perpetrators 'may be little more than an afterthought to the closure purportedly obtained by the conviction' (Drumbl, 2005, p. 549). Hence when an ICTY Trial Chamber convicted Ratko Mladić of committing genocide in Srebrenica and sentenced him to life imprisonment in November 2017, the Prosecution still decided to appeal the judgment to ask that Mladić be found guilty of committing genocide in six other municipalities (Dizdarevic, 2020).

Whilst these two logics of repressive compassion and compassionate repression are closely interconnected, the thesis primarily focuses on why, how and with what effects humanitarianism is deployed to justify international criminal punishment. This directly relates to the first logic of *repressive compassion*, which is therefore more heavily emphasised in the remainder of the thesis. A growing body of scholarship has examined aspects more directly connected to the second logic of *compassionate repression*, such as the extent to which the rights of the accused have been integrated into ICL (Hafetz, 2018; McDermott, 2016; Zappalà, 2003), or sentencing practices in international criminal justice (Hafetz, 2018). In offering new analytical tools to examine the logic of *repressive compassion* and its historical antecedents, I however hope to provide a model that can serve in the future for a more systematic examination of the logic of *compassionate repression*.

In the next section, I show how this logic of repressive compassion gives rise to three meta-narratives which underly the practice of international criminal justice at present, and are a constitutive part of the Penal Humanitarian imaginary. As noted in Chapter 2, these meta-narratives are best understood as ideal-types, that is, analytical constructs which help

capture the significance and connections between the multitude of different discourses and representations permeating the field of international criminal justice.

II) Introducing the meta-narratives of the Penal Humanitarian imaginary

a. Ending impunity for international crimes

The *ending impunity for international crimes* narrative provides a script governing international attempts at justice-making in situations of mass violence that is mobilised by international policy-makers and justice advocates.[23] This meta-narrative articulates a specific reading of the issue at stake – mass violence being interpreted in terms of atrocity crimes – and offers a clear solution to the problem identified – ending impunity. Although analytically separable, these two dimensions (problem and solution) operate in symbiose and are mutually reinforcing. Indeed, constructing the origin of a collective social problem, or describing what is wrong with a present situation, sets the direction for future transformation by considerably influencing and limiting the 'reasonable solutions' and strategies proposed in response (Benford & Snow, 2000, p. 616; Schön, 1979, pp. 264–265). Once mass violence has been depicted as an impunity issue, the solution proposed – investigations and prosecutions to hold alleged perpetrators criminally accountable for their acts – appears as a direct and logic consequence. Criminal prosecutions are however not the only path through which the fight to end impunity can be pursued. Transitional justice is often praised for representing a comprehensive approach to combating impunity, combining truth-seeking mechanisms, reparations, prosecutions and guarantees of non-recurrence (OHCHR, 2011). While international investigative mechanisms and judicial bodies often recognise the value of complementing penal processes with a broader approach to transitional justice, legalistic understandings of atrocity justice still largely prevail.

The *ending impunity* narrative starts by offering a depiction of the situation of mass violence. This dimension is two-fold: it relates to problem-identification and to the issuing of responsibility – answering the question of 'Who is to blame'? In the Penal Humanitarian

[23] This section owes an intellectual debt to Barrie Sander's (2020) conceptualisation of the 'anti-impunity mindset' which is closely, though not exclusively, associated with criminal prosecutions and punishment.

imaginary, mass atrocity is often portrayed as a 'radical evil' (Arendt, 1958, p. 241; Nino, 1996) and as 'something extraordinarily transgressive of universal norms' (Drumbl, 2005, p. 540). In particular, mass human rights abuses and violations of humanitarian law are seen as 'a universal threat that all humankind shares an interest in repressing' (Luban, 2004, p. 85) and which are thus 'offenses against us all' (Drumbl, 2005, p. 540). Since these acts of atrocity put in jeopardy the peace, security and well-being of the world (A/CONF.183.9, 1998), alleged perpetrators are considered *hostes humani generis* – enemies of the human race. While emphasising the exceptional and excessive character of mass violence, the ending impunity narrative directs attention towards specific, and often spectacular violations (notably physical harm) as opposed to structural phenomena such as economic, social, cultural and environmental forms of violence (Kiyani, 2015, p. 187; Sander, 2020).

Mass violence is indeed often equated with the three atrocity crimes of genocide, crimes against humanity and war crimes, which have been instituted at the apex of all international crimes (Scheffer, 2007). Whilst the Rome Statute lists aggression as a fourth international criminal offense, few of the major powers have ratified the amendment on the crime of aggression, which means that prosecutions on this count remain unlikely in the near future (Cowell & Magini, 2017; Ruys, 2017).[24] Yet from a historical perspective, the adoption of an atrocity crimes framework as the lens through which to interpret and react to mass violence is neither self-evident nor incidental. In the immediate aftermath of the two world wars, international criminal justice was more preoccupied with criminalising crimes against peace and with re-asserting the importance of protecting an international order based on state sovereignty and non-interference than with prosecuting offenses against human victims (Mégret, 2018). Contrary to oft-seen progressive and teleological narratives, the path from Nuremberg to Rome was anything but self-evident. As contended by Kamari Clarke (2010, p. 633), it has 'involved particular genealogies of criminal possibility in which . . . particular sets of . . . negotiations . . . have put in place the possibility for normalising some crimes as adjudicable by the world community and not others'. Lengthy negotiations were needed to reach an agreement on the four Rome Statute crimes, which would hitherto be considered as the 'most serious crimes of concern to the international community' (A/CONF.183/9, 1998).

[24] See also Frédéric Mégret (2018b) for an account of the enduring marginalisation of aggression since 1945 and the shift from an emphasis on crimes against peace to a focus on atrocity crimes in the evolution of international criminal jurisprudence.

As noted by Clarke (2010, p. 640), during the negotiations there was no clear or incontestable criterion underlying the choice of which offenses deserved recognition as core international crimes. The determination of prohibited crimes instead resulted from a specific power configuration in which politically 'weak' states were seldom in positions to prevail over 'stronger' ones (Clarke, 2010, p. 640).

The historical origins and social construction of these shared understandings of mass violence and international crime are however largely masked. The notion of atrocity is widely treated as the self-evident subject-matter of international justice, yet the term is rarely (if ever) precisely defined (DeFalco, 2017, pp. 36–37). The assumption, instead, is that these understandings are mere reflections of the nature of atrocities – what Randle DeFalco calls the '"know it when you see it" approach to identifying atrocities' (2017, p. 37). As Immi Tallgren has explained (2002, p. 580),

> the international jurisdiction for these crimes is generally based on the commonly shared understanding of their being universally and unexceptionally prohibited. In that sense, the task of the 'international criminal justice system' is to communicate what everybody knows already.

This belief that atrocities manifest themselves as a self-evident phenomenon is grounded in an 'atrocity aesthetic model', which influences which forms of violence (and thus which forms of life) are seen as worthy of consideration and intervention (DeFalco, 2022; Meiches, 2019). Gross human rights violations and core international crimes indeed largely appear as highly visible and 'intuitively recognizable spectacles of horrific violence and abuse' (DeFalco, 2022, p. 40) which, in the words of Justice Forrest, 'assault our eyes' (cited in DeFalco, 2017, p. 51). Dominant understandings of what constitutes mass atrocities are grounded in feelings, emotions and moral judgments that are intuitively felt and viscerally understood, rather than on dispassionate definitional descriptors or intellectual assessments (DeFalco, 2017, p. 40). ICL discourses abound with such use of dramatic, emotionally charged language and with recourse to graphic imageries of violence, suffering, destruction and death, meant to shock the conscience of audiences and help them 'to imagine what is hard to describe' (Stolk, 2015). This appeal to inward feelings and emotions removes the need for more elaborate justifications of what international crimes are and masks the circular reasoning on which ICL is based: 'international crimes are described as atrocities, while atrocities are described as international crimes' (DeFalco, 2022, p. 28).

Having identified the problem or issue at stake, the ending impunity narrative proceeds with assigning responsibility and distributing blame. Responsibility for these crimes is largely individualised – what Larry Backer has characterised as a 'cult of personal responsibility' (2003, p. 525). The Penal Humanitarian imaginary assigns guilt for proximate acts of killing or mass harm, while diverting attention away from the longue durée of mass violence. This vision is echoed in the following statement by former UN Secretary General Kofi Annan (2002, cited in Clarke, 2009, p. 4):

> to the survivors who are also the witnesses and to the bereaved we owe a justice that also brings healing. Only by clearly identifying the individuals responsible for these crimes can we save whole communities from being held collectively guilty. It is that notion of collectivity which is the true enemy of peace.

This focus on individual responsibility, together with an aesthetic model of international criminal justice (which prioritises spectacular forms of violence, as outlined above), creates a disconnect between the complex root causes of violence and abuses on the one hand, and a narrow focus on acts of killing and mutilating on the other hand.[25] It lends credibility to a vision of international criminal law as driven by humanitarian ideals, notably the rejection of physical suffering and cruelty, and therefore as forming part of a broader 'civilising process' in international society (Elias, 2000; Linklater, 2017). Human rights abuses become 'understood as aberrational, exceptional and distanced from politics writ large, a horrifying event to be remembered rather than a potential that informs and continues to reappear within present political conditions' (Meiches, 2019, p. 138). Since atrocity crimes are not able to capture the full range of manifestations of mass violence and destruction, this means that other forms of violence are not granted as much attention, importance or resources. Notably, structural forms of violence – that is, the more silent and slow forms of violence built into the social, political and economic structures of an international society – and socio-economic rights violations are often treated as natural or unchangeable, rather than as a product of structural injustices. The relationship between the neoliberal and capitalist economic order, global inequalities and mass violence is largely lost, as substantive inequalities are believed to lie outside the purview of legality (Franceschet, 2004, p. 24). In other words, the more banal suffering and violence which predominantly (though not exclusively) touches

[25] As Frédéric Mégret (2001, p. 204) has aptly noted, this hierarchy of harms grossly underappreciates daily suffering and injustices, which are treated as 'such trivialities as the world's billion poor, 800 million hungry, 2.4 billion without sanitation, or 90 million children without basic education'.

populations in the Global South is relegated to the margins of the international justice agenda (DeFalco, 2022). Addressing past abuses, from this perspective, is reduced to questions of political and legal change, instead of social justice and economic redistribution.

Besides, the focus on individual criminal liability has been criticised for failing to account for the multiplicity of agents involved or complicit in the making of mass rights violations. As noted by Barrie Sander (2015, p. 812),

> just as the mirrors of a carnival fun house, international criminal courts tend to greatly exaggerate one aspect of mass atrocities, the actions of individuals and the specific events relating to their actions, whilst at the same time distorting and minimising others, namely the collectivities and structural forces that give rise to conflicts in practice.

This 'fiction of justice', as Clarke (2009, p. 4) terms it, has been criticised for reproducing and entrenching the impunity of 'invisible perpetrators', whether they be multinational corporations, arm merchants, international institutions or even Western donors, involved in the origins of many conflicts by ultimately creating environments conducive for mass violence and abuses (Branch, 2011, p. 212; P. Roberts & McMillan, 2003, p. 325).[26] It also results in an 'impunity gap', marked by the disjuncture between ICL's conception of individual guilt and bottom-up conceptions of historical responsibility and guilt for mass violence (Clarke, 2015, p. 609). It is important to stress here that the problem does not come from an incomplete application of ICL, but rather flows from the very nature and limits of it. ICL is by definition concerned with the criminal responsibility of individuals, and as such cannot attend to the responsibility of states, structures, corporations and world systemic forces. What is needed is not more ICL, but rather a recognition that it alone cannot be the only or even the main solution to conflict and violence (Trever, 2017, p. 313).

These biases and limits of international criminal justice at present are rarely acknowledged by those working in the field. As a result, the anti-impunity agenda is seen as lending legitimacy to a liberal global order which in turn further entrenches impunity for the abuses it perpetrates, including the exploitative terms of global trade which make possible

[26] Taking the example of the most recent civil wars in Africa, Clarke argues that responsibility for outbursts of mass violence extends well beyond that of individual perpetrators to involve histories of colonial injustices and their contemporary power legacies, resource extraction, the role of foreign powers in aiding and abetting the traffic of legal and illegal arms that further fuel violence, as well as social injustice and endemic poverty (2010, p. 646).

and condition socio-economic abuses (Nesiah, 2016). As Immi Tallgren (2002, pp. 594–595) put it,

> Perhaps international criminal law serves a purpose simultaneously both to reason and to mystify the political control exercised by those to whom it is available in the current 'international community'. Perhaps its task is to naturalize, to exclude from the political battle, certain phenomena which are in fact the pre-conditions for the maintaining of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, especially white men, and so forth.

The ending impunity narrative not only encompasses a description of the issue at stake (atrocity crimes) and of the bearers of responsibility (individual perpetrators), but also provides a clear solution, which is to end impunity through international accountability processes. The continuing existence of mass violence is related to a lack of ICL, and therefore the solution is to invest politically, materially and financially more in international penal institutions. As explained by Grietje Baars (2019, p. 256):

> once "impunity" is 'discovered', or is used to label 'inaction' with regard to certain harms that triggers media and legal attention, it automatically generates the call for 'punity' or prosecution. The marked absence of ICL then creates the desire for ICL.

As stressed in the preamble of the Rome Statute, the establishment of the ICC marks the recognition by the international community that core international crimes 'must not go unpunished' and its commitment 'to put an end to impunity for the perpetrators of these crimes' (A/CONF.183/9, 1998). Similarly, the creation of commissions of inquiry and evidence-gathering bodies has been explained by the determination 'to identify those responsible [for violations of international law and for the crimes perpetrated and] to make recommendations . . . on accountability measures, all with a view to ensuring that those individuals responsible are held accountable' (United Nations General Assembly, 2011, p. 2).

In offering a specific depiction of the problem of mass violence, of its responsibility-bearers and of its solution(s), the *ending impunity* narrative relies on binary categorisations such as right and wrong, guilt and innocence, or victims and perpetrators (Sander, 2020). The two figures of the criminal perpetrator and the victim are particularly key to the story. They are almost always presented as mutually exclusive categories of people or as mirror opposites, the evilness or ugliness of the former being contrasted with the innocence and purity of the latter (Osiel, 1997, p. 159). Indeed, in victims' testimonies, perpetrators appear as savages, evil or inhumane beasts (Mutua, 2001). Although scholars have constructed fine-

grained typologies of the profiles and motivations of those taking part in mass atrocities, in the collective imagination the depiction of perpetrators as monsters remains strong (Mohamed, 2015).[27] Their nicknames often connote their alleged brutality and cruelty: 'the Terminator' for Bosco Ntaganda (Dale, 2019), 'the butcher of the Balkans' for Milošević (Chicago Tribune, 2006) or the 'butcher of Damascus' for Assad (Margolis, 2018). This 'typically male, strong, independent and gruesome. . . warlord, who seemingly makes decisions on slaughtering, enslaving and violating victims without regard to humanity' (Schwöbel-Patel, 2016, p. 256), is opposed to the passivity of the victim(s).

These representations articulate specific identity-positions through associations of meanings – connecting perpetrator-hood with evilness and victimhood with innocence – thereby corroborating 'cosmopolitan social narratives of legitimacy and illegitimacy, justice and progress' (Sagan, 2010, p. 9). The seemingly unambiguous categories of innocence and guilt, right and wrong and victim and perpetrator introduce comforting patterns of causality and responsibility in the otherwise turmoil of economic, social and political problems surrounding mass violence. International criminal law thereby 'seems to make comprehensible the incomprehensible' (Tallgren, 2002, pp. 593–594). These articulations, however, do not rely on intrinsic qualities of perpetrators and victims but are socially constructed and mutually constitutive.[28] In other words, the ending impunity narrative does not simply use or mobilise pre-existing categories of victimhood or perpetratorhood but actively makes them. Over time, the repeated articulation of these representations makes them appear as natural and accurate representations of reality, concealing the fact they are

[27] See for instance Martha Nussbaum (2001, p. 450), stating that '[w]e very often tell ourselves that the doers of heinous wrongs are monsters, in no way like ourselves'; Larry May (2010, p. 242), identifying genocide perpetrators as 'monsters'. See also Sofia Stolk's (2015) description of the Prosecution's opening speech in the *Ntaganda* case:

> The people killed include little girls, elderly, priests, and a 'retired school principal with disabilities'. The buildings destroyed include schools, hospitals, and churches. Examples that make the audience shiver for they symbolize the intrusion of unquestioned innocence, which is exactly the picture the Prosecution wants to paint. . . Bensouda's [ICC's Chief Prosecutor] accusation is straightforward: Bosco Ntaganda is the notorious, merciless, greedy, and powerful leader who is responsible for the death of this family and thousands of other victims who are waiting for justice. Justice, she claims, that is demanded by humanity.

[28] See for instance Christine Schwöbel-Patel (2016, p. 256), arguing that:

> the image of the victim of international crime and the perpetrator of international crime are therefore interdependent. Their contrasting properties enable their constitution and construction as each other's antithesis. The perpetrator is only strong in relation to the victim's weakness; the victim is only innocent in relation to the perpetrator's guilt.

historically contingent social constructs (conventions) rather than logically or structurally necessary (Weldes, 1996, p. 285).

Yet these unidimensional, adversarial distinctions do not always chime with the messy reality of conflict-affected societies, where there can be overlaps between victims and perpetrators (McEvoy & McConnachie, 2012, p. 531). From a temporal viewpoint, the categories of victims and perpetrators are not fixed, as victims in one context may become perpetrators in another (and vice versa). It is indeed not uncommon for mass violence to be committed as revenge for past atrocities (Bellamy, 2018, p. 284). Another complication relates to the assumption that the prohibition of atrocity crimes reflects legal and community standards in place in all societies. Yet in mass atrocity settings, acts of violence and revenge, including killings, can be legal and even expected, while those who refuse to commit atrocities may violate social norms in place and thus be perceived as acting deviantly (Bellamy, 2018, p. 284; Drumbl, 2008, p. 8; Tallgren, 2002, p. 573).[29] The categories of victimhood and perpetrator-hood are therefore social constructions that are subject to disruption and contestation.

Still, these two figures are axiomatic in the 'regime of truth' (Foucault, 1979) sustaining representations of past violence and suffering and claims to provide justice. The diametrical opposition between victims and perpetrators serves to define who are the good people worth saving or defending, and who are the bad people deserving punishment. As criminologists working in domestic contexts have long argued, the figure of the victim is crucial in the call for and justification of more punitive responses to crime, giving 'authenticity and moral purpose to treatment that might otherwise appear merely vengeful or abusive' (McEvoy & McConnachie, 2012, p. 530). From this perspective, punishing the wicked appears as the most appropriate way of honouring the righteous victim. This allows for retributive measures to be cast as acts of kindness or therapeutic interventions aimed at facilitating closure for the families of the victims (Garland, 2012, p. 66). This appeal to humanitarian sensibilities and empathy for victims is arguably all the more present in international justice-making, driving the second meta-narrative of the Penal Humanitarian imaginary: the *justice for victims* narrative.

[29] Nazi Germany and Cambodia under the Khmer Rouge regime are two examples where mass killing was supported by state legislation itself.

b. *Justice for victims*

If the *ending impunity* narrative offers specific prescriptions in episodes of mass violence, it is not sufficient in itself to spur international action to secure these goals. What is needed is a clear rationale or 'call to arms' (Benford & Snow, 2000, p. 617) motivating the need for intervention. For Penal Humanitarian advocates – whether they be civil society activists, diplomats, academics or lawyers – mobilising for victims becomes a worthy cause (Houge & Lohne, 2017; Robinson, 2008). This second meta-narrative, which I call *justice for victims*, relies on three elements. First is the description of the plight and suffering of victims, that is often depicted in graphic terms. This suffering is directly linked and explained by the second element of the meta-narrative, which is the enduring climate of impunity, and the ensuing demand of victims for accountability (Fletcher, 2015, p. 306). This in turn provides the basis for calling the international community to intervene and put an end to such suffering, which represents the third and final element of the *justice for victims* meta-narrative. Compelled to action, the 'saviours' confirm their humanitarian character while entrenching relationships of dependency and distance (Boltanski & Burchell, 2009; Chouliaraki, 2013; Fassin, 2011; Houge & Lohne, 2017). Below I expand on these three elements.

The imperative to represent, give voice to or stand for the victimised is often described as the ultimate telos and raison d' être of international justice (Lohne, 2018).[30] If victims are omnipresent in the Penal Humanitarian imaginary, they are largely presented as suffering beings (Sandvik, 2012, p. 237). A telling example is the ICC exhibit 'Justice Matters' which, as explained on the website of the institution, 'uses intimate portraits and videos to explore how justice is crucial to survivors of the world's most heinous crimes, and how it matters to the world as we strive together to achieve lasting peace'.[31] The exhibit echoes with the preamble of the Rome Statute, which opens with a reminder that in the past centuries 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' (Rome Statute of the International Criminal Court, 1998). Similar statements and representations pervade the work of international investigative mechanisms.

[30] See also Darryl Robinson (2008), who argues that global justice is driven by a 'victim-focused teleological reasoning'.

[31] A digital version of the exhibit is available at: https://www.icc-cpi.int/iccdocs/PIDS/other/JusticeMattersSlideshow-ENG.pdf.

Defending the legitimacy of the IIIM in front of the General Assembly, the representative of Turkey stressed the 'unthinkable agony' endured by the Syrian people since 2011, while the representative of Norway 'called for justice for the thousands of people who vanished, lost their loved ones, were tortured, starved and gassed, or forced to flee their homes' (United Nations, 2019). When describing the ongoing genocide perpetrated against the Yazidi, the international Commission of Inquiry on the Syrian Arab Republic stressed that it 'is the genocide accomplished through the destruction of a nine-year-old girl in a slave market, surrounded by men waving their bids; of a woman and children locked in a room, beaten and starved; of a little boy trained to kill his father' (United Nations General Assembly, 2016b, para. 204).

Similarly, when reporting on situations of mass violence, human rights NGOs and journalists tend to provide graphical testimonies of the violence and cruel treatment underwent by victims, accounting for the violence in excruciating details (Houge & Lohne, 2017, p. 775). Such testimonies and statements are often accompanied by photographs. As noted by Susan Sontag (2003, p. 83), 'the very notion of atrocity, or war crime, is associated with the expectation of photographic evidence'. From piles of dead human bodies to the infamous skull map of Cambodia,[32] from mass graves to sites of extermination, images carry a reality effect, lending 'a face to the distant object of [one's] endless and hurting sympathy' (Tallgren, 1999, p. 684). Images indeed interpellate audiences by providing a direct representation of the crimes that are 'shocking and revolting to the common instincts of civilized peoples' (Prosecutor Robert Jackson, *France et al. v. Göring et al*., cited in Tallgren, 2017). Representations of mass suffering therefore draw upon politics of pity: their capacity to incite outrage – a mix of agitation and anger, sympathy and fear (Perlmutter, 1998, pp. xiv–xv) – is key to their power of political persuasion. They appeal not to reason but to emotion, operating at a deeply symbolic and affective level, and relating 'to a practice of meaning-making that is seductively simple and *felt*, rather than known' (Koulen, 2019, p. 109). 'Humanitarian icons' such as women and children are instrumental in that regard, providing easily identifiable figures capable of raising sympathy and awareness globally and acting as

[32] The map made with 300 human skulls, all belonging to victims of genocide, was assembled in 1979 for the Tuol Sleng Museum of Genocide. The map was meant to serve as a reminder of the atrocities committed by the Khmer Rouge. It was taken down in 2002 to prevent further decay of the skulls, but the skulls and bones of victims are still on display at the museum (Strangeremains, 2005).

symbols of purity and innocence (Manzo, 2008).[33] They represent the 'fundraising image of victimhood' (Schwöbel-Patel, 2016, p. 250)[34] or what Fassin (2011, p. xii) has characterised as the 'morally driven, politically ambiguous, and deeply paradoxical strength of the weak.'

This tragic 'spectacle of suffering' (Arendt, 2016) is explicitly linked to the second element of the *justice for victims* narrative: the persistence of impunity for international crimes. Criticising the ICC's pretrial chamber decision to reject an investigation into crimes committed in Afghanistan, Amnesty International (2019) portrayed this decision as a betrayal of the victims: 'Afghanistan has been witness to heinous crimes committed with near-absolute impunity, across the country, for more than a decade and a half. The ICC's decision today is a shocking abandonment of the victims which will weaken the court's already questionable credibility'. In the same vein, the Netherlands has recently affirmed in front of the General Assembly that Syria was 'the most poignant modern example of the effects of impunity', adding that '[t]he regime that cannot be held to account will continue its degrading behaviour, with prolonged suffering on the ground and the risk of severely undermining international law and order' (United Nations, 2019).

Victims are further understood not only as deserving recipients of legal justice, but also as *demanding* accountability – that is, punishment of the perpetrators of atrocity crimes. According to Karim Khan, Special Adviser and Head of UNITAD (2019a), '[i]n Iraq, all communities have been impacted by the crimes of Da'esh. Their message has been clear and consistent, and they are united behind *one single demand*: Da'esh must be held responsible for the crimes that were committed.'[35] This vision of the needs and preferences of the victim, deeply embedded in and normalised by the norms, institutions and discourses of international justice, however 'suppresses or deprioritises other understandings of the victim as demanding, for example, compensation, political participation or non-retributive measures' (Fletcher, 2015, p. 306).

[33] See for instance Liisa Malkki, highlighting the common perception that children 'cut across cultural and political difference' and 'address the very heart of humanity' (1996, p. 388); and Christine Schwöbel-Patel: 'when it comes to victims of international crime, these tend to be women and children, non-white, perhaps with some form of mutilation, often sparsely clothed, sometimes carrying make-shift weapons, unsmiling' (2016, p. 250).
[34] This is not specific to international justice: the Penal Humanitarian imaginary here mobilises commonplace images and tropes of humanitarianism and human rights advocacy (Schwöbel-Patel, 2016).
[35] My emphasis.

The emotional power of victims' stories, and the explicit link made with the persistence of impunity, both reinforce the idea that the severity and urgency of the situation can only be overcome through outside assistance and intervention. That is, to put an end to (or at least alleviate) the suffering of victims, penal investigations, prosecutions and punishment of alleged perpetrators are seen as the main if not the sole solutions. This represents the third element of the *justice for victims* meta-narrative, which, in showing the path to put an end to endless suffering, makes the narrative particularly powerful in its capacity to mobilise action (Tallgren, 2017, pp. 270–271). Images of human remains are complemented by those of alive victims and individuals held responsible (or in the process of it), thereby showing a future path after the violence. As noted by Michael Barnett (2011, pp. 27–28), '[t]he living are a bridge between the dead that still walk among us and history's future victims if we do not act differently'. Broadly diffused through transnational media, the affective power of these representations nourishes 'a moral impulse to join the quest for international criminal justice — a reaction of "epidermic humanity"' (Tallgren, 2017, p. 265).

Taking action is portrayed not simply as an act of charity or benevolence, but more importantly as the fulfilment of a moral obligation towards communities affected by episodes of mass violence and towards civilisation itself, which cannot but stand against the forces of violence and evil represented by perpetrators of international crimes.[36] References to civilisation and to the civilising mission of international law have in fact pervaded international criminal justice since its early days, as illustrated in the famous opening statement of Justice Robert Jackson (1945) in front of the Nuremberg Military Tribunal:

> The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. . . Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive. . . Their [the defendants] acts have bathed the world in blood and set civilization back a century. . . The real complaining party at your bar is Civilization.

More recently, Leila Sadat (2008, p. 314) – then Chair of the International Law Association Committee on an International Criminal Court – stressed that international criminal law 'has

[36] See for instance the statement by the representative of Ukraine following the head of the IIIM's report to the General Assembly in April 2019: '[e]stablishing accountability for crimes committed on Syrian soil since the beginning of the eight-year brutal conflict is not only a core element of the universal rule of law, but a moral obligation of the international community towards its victims' (United Nations, 2019).

a *mission civilisatrice . . .* to bring order and justice to chaos and impunity'. This civilising mission (*mission civilisatrice*) operates through a fundamental differentiation between the self (as civilised, modern, the abode of order and justice) and the other (the uncivilised, backwards, abode of chaos and impunity). In the Penal Humanitarian imaginary, the deviant other is the war criminal or atrocity perpetrator, that is, the individual who infringes upon the most basic rules of civilisation and must be punished for it (Nielsen, 2008, p. 105). This uncivilised other thus makes necessary an intervention from the civilising and universal force of the international community (Nielsen, 2008). This civilising mission, as post-colonial scholars have noted, taps into and reproduces the 'dynamic of difference' between the self (normal) and the other (deviant) at the heart of imperialism and coloniality (Anghie, 2005, p. 4; Sayed, 2019, p. 19). The 'barbaric' perpetrator is epitomised by the figure of the African warlord living in a 'failed state' or in the 'Heart of Darkness' – a world of 'chaos', 'human misery', 'widespread brutality and sickness and depravation' – as described in a TV series on the Congolese wars (ABC News, 2001). Meanwhile, the Western world stands as the symbol of civilisation and is thus given the responsibility to implement the rule of law in backward societies.

The Penal Humanitarian imaginary indeed hinges on a specific understanding of how distant Western spectators should react and feel for victims (Donini, 2010; Hutchison, 2014, p. 16). Pace Laurel Fletcher (2015, p. 307), '[v]ictims become symbolic targets of the observers' aspirations to righteousness.' In the *justice for victims* narrative, the call to intervene is made all the more powerful by the use of the 'we' and the interpellation of specific actors. When opening the debates of the Rome Conference that led to the creation of the ICC, then UN Secretary-General Kofi Annan reminded diplomats that '[t]he eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us' (UN, 1998). Speaking in front of the UN General Assembly regarding the mechanism to ensure accountability for the atrocities committed in Syria, UK Permanent Representative Karen Pierce stressed the imperative to 'ensure that those responsible for this crime are held to account. . . [and to] demonstrate that those who have committed the most serious crimes of international concern can have no place to hide.' (2018).

Through these statements, the international community is established as the subject in charge of doing the protecting and bringing justice to victims. The international community

is constituted as 'a particular kind of subject, with a specific identity and with the interests attendant to that identity' (Weldes, 1996, p. 287) – that of a liberal, human-rights protecting and benevolent agent. These interpellations further draw on a 'representation of belongings' (Tomlinson, 1991, p. 81) to urge countries to stand on the 'good side' of humanity, that is, to join the family of nations supporting the fight against impunity, and in doing so defending the UN ideals of international peace, justice and security. This is precisely the aim of a 2019 campaign of the ICC calling for 'unit[ing] humanity against crimes'. Humanity is here reserved for states working with 'the ICC and all those supporting it . . . to build a more peaceful, just world by deterring crimes and promoting accountability and access to justice' (ICC, 2019). Conversely, *not* ratifying the Rome Statute or *not* supporting accountability mechanisms means being excluded from the family or clique of international peace and justice champions.[37] These representations of belonging are not limited to state actors: individuals themselves, whether in their professional capacity as international justice-makers or as public advocates, can similarly show solidarity with the suffering of others (Eichert, 2021, p. 403). In so doing, they constitute themselves as progressive, caring and rights-protecting agents. As Lilie Chouliaraki (2013, p. 3) explains,

> The communication of solidarity becomes simultaneously the communication of cosmopolitan dispositions – public dispositions towards vulnerable others shaped by the moral imperative to act not only on people close to 'us' but also on distant others, strangers we will never meet, without the anticipation of reciprocation.

The call for international action to provide justice for victims is further bolstered through the mobilisation of memories of past traumatic events. The Holocaust and Rwandan genocide stand out as particularly powerful yardsticks for what is regarded as moral or immoral behaviour.[38] Through analogical bridging (Alexander, 2002, p. 46), these past injustices set 'the moral agenda of the present' (Poole, 2008, p. 159). Audiences are reminded of the horror, anger and shame following discovery of past atrocities, and of their pledge of 'Never again'. Urging states to put an end to the ongoing genocide of the Yazidis and to bring perpetrators to justice, Amal Clooney warned that:

[37] See also the rallying cry of ICC President Eboe-Osuji (2019) for the United States to support the ICC, calling the country 'to join her closest Allies and Friends at the table of the Rome Statute', and adding that '[t]he past, the present and the future victims of genocide, crimes against humanity and war crimes need her to do so'.

[38] Jeffrey Alexander (2002, p. 6) has shown that over the past decades, the Holocaust has been redefined as a traumatic event for all of humanity, while Thomas Olesen (2012) argues that the Rwandan genocide has become a global injustice memory.

> If we do not change course, history will judge us, and there will be no excuse for our failure to act. . . The UN was created as the world's way of saying 'never again' to the genocide perpetrated by the Nazis. And yet here we are, 70 years later, discussing the UN's inaction in the face of a genocide that we all know about, and that is ongoing. . .That's why I am asking you today: to stand up for justice . . . on behalf of all of ISIS' victims, I call on you to send the letter to the Security Council requesting an investigation into ISIS crimes. . . Don't let this be another Rwanda, where you regret doing too little, too late. Don't let ISIS get away with genocide (cited in Walker, 2017).[39]

These calls to intervene and rescue the suffering 'other' tend to reproduce the 'saviour'/'victim' dichotomy entrenched in international humanitarianism (Barnett, 2013). Victims are represented as a category of individuals waiting to be saved by global rule of law institutions (notably international judicial and investigative bodies). As argued above, in survivors' stories, the focus is largely on the disabling and traumatic effects of mass violence. The risk is for victims-survivors to be systematically and perpetually defined by the violations and abuses committed against them, since they appear on the international agenda in so far as they are passive agents waiting for rescue. Along Makau Mutua (2001, p. 229), victims become 'hordes of nameless, despairing, and dispirited masses. To the extent they have a face, it is desolate and pitiful.'[40]

The depiction of urgent human need thus reproduces a social and political hierarchy between the victim (sufferer) and the distant viewer (urged to act as a saviour). It resonates with the idea that the West needs to step in and come to the rescue (Orford, 2003). The victim in international justice is indeed largely equated to the image of the Third World sufferer, whose government is unable or unwilling to protect (Clarke, 2009, p. 109). For instance, a former ICC President affirmed that it was the incapacity of the Rwandan government to ensure accountability for acts of genocidal violence that legitimated the creation of the ICTR. Judge Chile Eboe-Osuji (2019) described a 'judicial system which, at its best, was found incapable of ensuring against impunity, was left utterly broken altogether by the genocide. It

[39] See also the Editorial 'Time for Action' on Sudan published in July 2004 in the *New York Times*: 'the rising death toll could soon evoke memories of the tragedy in Rwanda a decade ago, when both the United States and the Security Council found excuses to stand aside while 800,000 died. That shameful failure must not be repeated' (cited in Olesen, 2012, p. 383).

[40] Mutua focuses on human rights narratives, however much the same can be said about international justice and notably the 'justice for victims' narrative. Human rights actors are indeed often at the forefront of calls to end impunity for international crimes and provide justice for victims. This assumed passivity of the victims, as Kieran McEvoy and Kirsten McConachie (2013) have noted, also ensures that they are considered as purely innocent and blameless figures.

needed the international community to step in and do justice – through an international criminal tribunal'. There lies the paradox of the 'spectacle of vulnerability' on which international justice relies: while building on the idea of a common humanity, it simultaneously 'evokes the language of power, and thus tends to reproduce existing global divides rather than propose bonds of solidarity beyond the West' (Chouliaraki, 2013, p. 29; Tallgren, 2017, p. 268). By supporting the establishment of international criminal courts and tribunals, states are able to divert attention away from their past histories of exploitation and abuse and from the failure to intervene to prevent atrocities, instead 'convert[ing] a catastrophe into a positive, humanist project for themselves' (Sander, 2015, p. 772; Skouteris, 2010, pp. 209–210).

c. Justice as pacification

The third meta-narrative of the Penal Humanitarian imaginary, which I term *justice as pacification*, provides a further utilitarian justification for punishment. The need to fight against impunity for atrocity crimes is indeed justified by the articulation of quasi-causal arguments regarding the utilitarian and consequentialist effects of prosecutions and punishment. The individualisation of responsibility, distribution of criminal guilt and meting out of punishment is seen as key to deter atrocities and even prevent conflict itself. These alleged pacifying effects of international criminal justice can be sorted out into four main categories of claims: conflict resolution, conflict prevention, atrocity/crime mitigation and atrocity/crime prevention. These categories differ in the temporality and object targeted by ICL's pacifying effects (as summarised in Table 2 below). Whilst deterrence puts the focus on the prevention and mitigation of atrocities and crimes which typically occur in armed conflicts, conflict reduction shifts its focus to preventing and ending war itself. A second distinction regards the temporality associated with the pacifying effects of international criminal justice. Such effects can be assumed to occur in the present – international trials having an immediate effect on the situation under investigation, thereby influencing the fate of presently affected communities. Pacifying effects can alternatively be located in a future temporality, generally referring to an abstract or hypothetical situation and to imagined (potential) future victims.

Temporality / Object of intervention	Present	Future
War	Conflict resolution	Conflict prevention
Atrocities/international crimes	Specific deterrence/atrocity mitigation	General deterrence/atrocity prevention

Table 2 – Conceptualising the pacifying effects of international criminal justice.

Deterrence is generally understood as referring to the idea that the fear of punishment will dissuade potential perpetrators from committing a crime by altering their cost-benefit analysis. As one delegate in the Rome Conference on the establishment of an International Criminal Court put it, 'the more gas we give to the punishing machine, the less criminality we end up with' (cited in Tallgren, 1999, p. 686). Through deterrence, international criminal courts are believed to 'contribute to the building of a robust dam against any future inhumanity' (Cassese, 2011, p. 275). For Diane Orentlicher (1991, p. 2542), by 'laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence'. This deterrent rationale has been mobilised not only by international justice advocates and policy-makers, but also by international criminal courts and tribunals themselves. For instance, in the Judgment *Prosecutor v. Rutaganda*, judges at the International Criminal Tribunal for Rwanda (ICTR) indicated that:

> the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights (ICTR Trial Chamber I, 1999, para. 456). [41]

Similarly, in the resolution establishing the IIIM for Syria, the UN General Assembly stressed 'the need to ensure accountability for crimes involving violations of international law . . . through appropriate, fair and independent investigations and prosecutions at the domestic or international level . . . to ensure justice for all victims and to contribute to the prevention of future violations' (United Nations General Assembly, 2016c, p. 2).

[41] For additional examples of the deterrent rationale in sentencing, see Mark Drumbl (2008, fn. 31).

International prosecutions and punishment of perpetrators of international crimes are also believed to have a facilitating role in the resolution of ongoing conflicts and the prevention of future ones. At the societal level, international prosecutions are believed to be a catalyser for long-lasting peace, by redefining the rules of legitimate authority and behaviour and breaking the cycle of violent revenge and retaliation. As stressed by the first annual report of the ICTY (1994, para. 15):

> [t]he only civilized alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty. If no fair trial is held, feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence.

In particular, 'credible and comprehensive accountability' is seen as key 'to bring about reconciliation and sustainable peace' (A/RES/71/248, 2016, p. 2). A direct and explicit link is thereby made between the need for accountability, understood in terms of criminal proceedings, which leads to justice for victims, prevents future violations of international law, and brings long-lasting peace and reconciliation. Similar justifications are advanced by many scholar-advocates to justify the need to punish perpetrators of mass atrocities. For Kathryn Sikkink (2011, p. 262), '[t]hese human rights prosecutions will continue to fall short of our ideals of justice, but they represent an improvement over the past. . .The new world of greater accountability that we are entering now, for all its problems, offers hope of reducing violence in the world.' Similarly, Anja and Bronik Matwijkiw (2008, p. 51) have argued that '[j]udicial accountability must be implemented as a no-choice step toward a Good Order post-conflict society. A compromise would testify to. . . indifference toward the victims of harm and disrespect. . . [T]here is no acceptable alternative to taking action *for* the victims and *against* the perpetrators in a court of law.'

Ending impunity for atrocity crimes is thus seen as the key to a positive domino theory, articulated around the faith that all good things (justice, peace, truth and reconciliation) must come together. This contrast between a time of violence, impunity and suffering on the one hand, and a time of peace, justice and accountability on the other, is evident in the address of William Pace (Chairman of the Coalition for an International Criminal Court) at the occasion of the formal inauguration of the Court:

> The ICC was born of a century of brutal wars characterized by overwhelming violence against civilians and compounded by a lack of accountability for those responsible. The resulting impunity furthered the cycle of violence, drove neighbour to fear neighbour, destroyed the

> social fabric and placed long-term peace and security impossibly beyond reach. The birth of the International Criminal Court marks a shared recognition . . . that international mechanisms can provide a forum for accountability when the national systems fail, and give new hope for justice and long-term peace (Paris, 2011, p. 19).

These causal beliefs on the relationship between punishment (or ICL more broadly) and pacification are themselves attached to moral beliefs. Such moral beliefs drive, for instance, the preference for judicialised punishment over revenge killings, or the perception of peace as valuable, desirable, and worth pursuing. The appeal to morality, accompanied by a faith in the transformative power of the law, helps sustain claims to deterrence and conflict reduction, even when existing research and evidence leaves such claims unproven or even disproven (McAuliffe, 2012, p. 227).[42]

These claims regarding the pacifying effects of international criminal justice indeed rely on pseudo-causal chains of relations between punishment and pacification. These relations are 'pseudo-causal' in the sense that they appear or are claimed to be empirically valid, but in fact rely on claims that are unproven or even disproven by the available scientific evidence (Weldes, 1996; Zaun & Nantermoz, 2022). What is important is not the accuracy of these chains of relation but that they 'make a particular action or belief more "reasonable", "justified", or "appropriate", given the desires, beliefs, and expectations of the actors' (Fay, 1975, p. 85). While deterrence is a very common rationale for the application of criminal law at the domestic level, its transplantation at the international level creates several challenges. In mass violence settings, group dynamics and the need for protection may lead masses of individuals to participate and support atrocities when they would otherwise have not. Meanwhile, the three interrelated processes of authorisation, routinisation and dehumanisation lead to the weakening of moral restraints against violence (Kelman, 1973, p. 38). Besides, only a handful of perpetrators have been indicted and convicted under international criminal tribunals, leaving the majority of perpetrators of mass violence, and in many cases those holding most responsibility, unaccountable for their acts. In the absence of collective sanctions, group members have thus little incentive to oppose and attempt to stop violence (Drumbl, 2008, pp. 14–16). Besides, the empirical evidence and track record of international criminal courts and tribunals is mixed at best when it comes to deterrence and

[42] More provocatively, Immi Tallgren (2002, p. 590) has argued that '[e]veryone knows that prevention does not work, even if one hopes it might one day. Everybody knows, but the knowledge has no consequences'.

conflict reduction (Kirby, 2015; Tallgren, 2002, p. 590; Thoms et al., 2010). Notwithstanding this, claims regarding the pacifying effects of international prosecutions and punishment are of enduring importance in structuring discussions and shaping collectively held beliefs in international criminal justice.

References to the alleged deterrent and conflict reducing effects of international criminal prosecutions put in sharp relief the combination of punitive and humanitarian drivers within international criminal justice. On the one hand, retribution (or the fear of it) is seen as a condition of possibility for the pacifying effects of international criminal justice. That is, the presumed deterrent and conflict reducing effects of international criminal justice rely on the expectation that punishment awaits perpetrators of international crimes. Retribution therefore appears as an instrument or means to achieve aspirations towards world peace. The prevention of conflicts and of the atrocities and crimes committed during war is in turn connected to the humanitarian mission of alleviating present and future suffering. On the other hand, international criminal law has increasingly attempted to distance itself from a purely retributive rationale ('punishment for the sake of punishment'), which sits uncomfortably with the benevolent and rights-protecting image projected by liberal societies. As Cherif Bassiouni (1996, p. 26) has written:[43]

> Accountability mechanisms appear to focus on events after the fact, and may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability therefore has a necessary punitive aspect. However it is also integrally linked to prevention and deterrence. . . [A]ccountability. . . has a crucial role to play in the formation and strengthening of values and the future prevention of victimization within society.

Deterrence and conflict resolution therefore provide a utilitarian justification for punishment, lending support to the idea that international criminal justice serves a purpose higher than punishment itself (Klabbers, 2001, p. 260). Still, the recourse to repressive tools of punishment and control creates a dissonance between the humanitarian ideals and values

[43] Bassiouni acted as Chair of the Commission of Experts established in 1992 by the UN Security Council to investigate violations of international humanitarian law in the former Yugoslavia. He subsequently participated (as expert member or chairman) in over 20 UN commissions and committees, and served as chairman of the Drafting Committee during the UN Diplomatic Conference on the Establishment of an International Criminal Court. Bassiouni was equally prolific in his scholarly work, making major contributions to the fields of international criminal law and human rights (DePaul College of Law, n.d.; Robertson, 2017).

on which international criminal justice supposedly relies, and the less laudable means through which it attempts to realise these aspirations.[44]

This tension created by the use of fundamentally repressive means to advance humanitarian goals is rarely acknowledged by international justice-makers and practitioners. Instead, international criminal justice is articulated as a cosmopolitan and equalising project which aspires to protect and render justice – reproducing the fantasy of 'a law without violence' and of a humanitarianism which protects without injuring (Graf, 2021, pp. 122; 165). Speaking of ICL as a project of pacification and as having alleged pacifying effects should indeed not be confused with an absence of force. By definition, 'to pacify' is 'to bring peace to a place. . . often using military force' (Cambridge Dictionary, n.d.) or even 'to reduce to a submissive state' (Merriam-Webster Dictionary, n.d.). Whilst the act of pacification is profoundly forceful (Elliot, 2018), this recourse to force is often disavowed and made inconspicuous. Talking about pacification, then, is revealing the violence at the core of a political project that sees and represents itself as being against violence (Baron et al., 2019, p. 207).

Conclusion

Operating in symbiosis, the *ending impunity*, *justice for victims* and *justice as pacification* narratives 'turn a polysemic opaqueness of different kinds of violence into stable narratives that are ideological in the sense that they provide meaning both for suffering and for justice' (Tallgren, 2017, p. 276). These meta-narratives operate in chronological sequences: a time of violence and suffering is to be replaced by a time of peace and justice, the movement towards the end of impunity being associated with progress and redemption. These three meta-narratives can be said to represent the two strands of 'the Restoration Story' of Penal Humanitarianism (Monbiot, 2017). This story, according to former chief Prosecutor at the Special Court for Sierra Leone David Crane (2004a), goes like this:

[44] The existence of this performative tension between humanitarian ideals and the repression necessary for the implementation of this vision is not to say that humanitarianism otherwise exists in a pure expression as devoid of violence. As shown notably by Talal Asad (2015, pp. 393–394), modernity has been characterised by the intertwining of compassion and benevolence with violence and cruelty. The history of the humanitarian movement is therefore one where violence has been used to subdue violence.

> On this solemn occasion, mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice. The path will be strewn with the bones of the dead, the moans of the mutilated, the cries of agony of the tortured, echoing down into the valley of death below... The pain, agony, the destruction and the uncertainty are fading. The light of truth, the fresh breeze of justice moves freely about this beaten and broken land.

This *Restoration story* derives its normative force from certain images, purposes and values which are extremely pregnant in modern culture: we abhor suffering and violence, and strive for justice, liberty and peace. Seen from this perspective, the *fight* to end impunity becomes a literal one, portrayed, in Crane's discourse, as a story of battle and victory, with villains, victims and heroes. The same metaphor is developed in Crane's Opening Statement in *Prosecutor v. Sesay, Kallon and Gbao* (2004b):

> This is a tale of horror, beyond the gothic into the realm of Dante's inferno. . . The Revolutionary United Front, the infamous RUF, was backed by a wide-ranging joint criminal enterprise . . . [and operated] for decades in a dark corner of the world—a world without law and accountability . . . Their alleged crimes against humanity cannot justly or practically be ignored, as they were the handmaidens to the beast—the beast of impunity that walked this burnt and pillaged land—its bloody claw marks in evidence on the backs of the hundreds of thousands of victims in this tragic conflict. . . This case will be proven by witnesses, again the brave and courageous people of Sierra Leone who stepped forward to meet and slay the beast of impunity with the righteous sword of the law.'

Here again, the use of an extended war metaphor serves as a powerful thread ordering the Prosecutor's story and conveying emotional valence throughout his discourse. The distinction between an in-group ('us', who fight for the good of the Sierra Leonese and humanity as a whole) and an out-group (the evil perpetrators, here represented by the RUF) urges the audience (whether it be judges, victims or the general public) to rally behind the figure of the Prosecutor and support his fight. The war metaphor further conveys a sense of urgency and gravity, prompting people to pay attention and take immediate action.

Having outlined the prevailing meta-narratives of the Penal Humanitarian imaginary, the next chapter examines the historical formation and transformation of Penal Humanitarianism.

Chapter 4 - The making of Penal Humanitarianism: Descent

This chapter examines the historical processes which have led to the formation and transformation of Penal Humanitarianism, mobilising the genealogical tools outlined in Chapter 2. As noted above, such a genealogical project is motivated not by a historiographical concern for understanding and explaining the past, but by a critical concern for understanding the present. Animated by an ethos to question Penal Humanitarianism anew through an exploration of its historical conditions of possibility, this chapter provides a first account of how and why the Penal Humanitarian paradigm became the internationally dominant mode of thinking about mass violence and atrocity justice. Importantly, I do not seek to assert claims about the motivations or intentionality of agents as a way to explain the formation of the Penal Humanitarian paradigm. My interest lies instead in the broad historical processes and transformations that have made possible the present paradigm of international criminal justice. The genealogy presented here is necessarily partial, as a full genealogical inquiry would require a broader spatial, temporal and intellectual scope than what is feasible in a single chapter (Doty, 1996, p. 3). What this chapter aims to do instead is to identify and isolate several historical trends and processes which have represented important conditions of possibility for the emergence and consolidation of Penal Humanitarianism in world politics. The genealogy presented here is also necessarily partial in that there is no objective history of Penal Humanitarianism that can be unearthed by a neutral observer or scientist. Rather, writing such a genealogy is inevitably a political commitment that implicates the productive power of epistemic interventions. Since there is no escape from this entanglement of knowledge-making with power, as Dennis Schmidt (2022, p. 1081) has suggested, 'the best we can do is to critically and openly reflect on the premises, assumptions and motives that underpin the historical study of international law' and international justice. Albeit unavoidably limited and imperfect, the genealogy presented here seeks to diagnose, trace and interpret the emergence on the international stage of the anti-impunity movement and how it became associated with the trope of *justice for victims* of atrocity crimes.

The story told in this chapter is largely a Western-centric (if not Eurocentric) one. Indeed, much akin to the global neoliberal economic, security and humanitarian orders, the Penal Humanitarian paradigm of international justice is deeply rooted in Western history, and

has globalised in ways which have often sustained and furthered the interests and ideas emanating from the West.[45] The purpose of this chapter is thus not to provide a genealogy of reactions to mass atrocities and suffering in other civilisations, but rather to understand the conditions of possibility for the birth and development of the Penal Humanitarian paradigm – which admittedly inevitably results in a Western bias. These conditions of possibility are not necessary conditions, not even sufficient causes; they are forces and processes which have participated in the engendering of the contemporaneous situation, and which still influence our practices and modes of justice in the present. The genealogy presented here predominantly focuses on the short-term temporality of the long twentieth century, though I briefly allude to some larger and longer-term historical processes that have informed the development of Penal Humanitarianism. I start by examining the descent of Penal Humanitarianism, situating it at the crossroads of three different pathways: international humanitarianism, international penalism and the late 20th century human rights movement. The second part of the chapter then provides a brief overview of key institutional developments that have accompanied the emergence of Penal Humanitarianism.

I) The historical roots of Penal Humanitarianism: descent

To examine the descent of Penal Humanitarianism, I argue that it is situated at the crossroads of three different streams, which collectively represent important conditions of possibility for the emergence of this paradigm.[46] The first stream captures the growing concern for human suffering. The second stream is about the rise of punitive sensibilities in world politics. The third stream is that of the emergence of an anti-impunity movement within human rights advocacy. While interconnected, these three streams have until the 1990s operated as relatively independent domains of practice with their own history, shared rules and practices. It is precisely the blurring of boundaries between the three (the humanitarian stream, the international penal stream and the human rights stream) which has been constitutive of Penal Humanitarianism. There is thus analytical utility in separating between

[45] See for instance Barrie Sander (2015, p. 819): '[s]imilar to the field of international human rights, international criminal courts are the product of a particular time and place: secular, rationalist, Western, capitalist and modern.'

[46] I purposely avoid using the terminology of 'fields' to refer to the humanitarian, ICL and human rights domains studied in this chapter. I am indeed interested in the longer history of these practices, which have pre-dated the consolidation of these three streams as relatively autonomous fields in the 1990s.

these three streams, which provide the backdrop from which Penal Humanitarianism emerged.

a. The growing concern for human suffering: the humanitarian stream

As Michael Barnett (2011) has aptly noted, '[t]he revolution in sentiments and the emergence of a culture of compassion is one of the great unheralded developments of the last three centuries'. This is obviously not to say that compassion, benevolence, and charity are a recent invention, but rather that while these moral sentiments have always been part of everyday life, they have for long stayed in the private realm. Only in modern societies would the alleviation of suffering move to the public realm and reconfigure both domestic and international politics by impregnating discourses and practices (Fassin, 2011). The emergence of this 'passion for compassion' (Arendt, 2016) is best comprehensible when examining long-term processes and transformations in early modern Europe. Norbert Elias finds that from the 15th century onwards, Western European societies began to experience new sensitivities towards public and private acts of violence and a heightened distaste for cruelty. This unfolding 'civilising process' led to a fundamental transformation in the relationship between violence and civilisation, leading to an expansion of what Elias (2000, p. 71) calls 'the expanding threshold of repugnance'. In the international realm, this notably led to an increasing concern for policing forms of (il)legitimate violence, especially during the conduct of hostilities.

Attempts to regulate war, and to introduce limits on the amount and forms of authorised violence, admittedly pre-date the modern period: the tradition of just war theory, for instance, goes back to the fifth century AD. These efforts, however, found new momentum in the writings of Enlightenment philosophers (such as Kant's essay on P*erpetual Peace*) and 18th century legal and political theorists who resuscitated the concept of the law of nations (notably Hugo Grotius, Emmerich de Vattel and Jean-Jacques Rousseau). With the creation of the International Committee of the Red Cross in 1863 and signature of the First Geneva Convention a year after, these efforts found an institutionalised expression. For the first time, a semi-official body would be there to regulate the conduct of war and the treatment of soldiers (Barnett, 2011). Further rules regulating warfare were later adopted with the Hague Conventions in 1899 and 1907. In its early days, humanitarian law was largely focused on

outlawing or putting limits on specific types of conduct during war, on regulating the use of weapons and other military technologies, and on improving the conditions of prisoners of war. The devastating impact of the two world wars on non-belligerent populations, however, brought to the fore the existing gap regarding the protection of civilian populations under international humanitarian law. The Geneva Conventions of 1949 specifically addressed this gap, by providing that those taking no active part in hostilities shall be treated humanely at all times and be protected from violence or violations of personal dignity.[47]

This increasing codification of warfare and policing of violence did not mark the end of violent harm. Quite the contrary in fact, since it was the industrialisation of warfare, and the risk that it would lead to unprecedented levels of violent harms in wartime, that provided important incentives to further control the use of force (Linklater, 2017). As Elias aptly pointed, 'civilizing and decivilizing processes invariably developed in tandem' (Linklater, 2011, p. 19). Besides, this growing aversion to suffering has been accompanied, since the Enlightenment, by desires to alleviate harm through concrete action to assist strangers.

Since the Enlightenment indeed, 'many social and political theorists have argued that the highest political goal is to end needless suffering in line with what has been called the 'affirmation of ordinary life' (Linklater, 2011; C. Taylor, 2002, p. 209). The profound change in ideas and social mores led to the consolidation of the belief that every human being was born with certain basic rights and liberties, and to the recognition that belonging to humanity rested on adherence to certain moral codes and on respecting the dignity of others (Barnett, 2011). This facilitated the emergence of sentiments of 'we-feeling' and the personal identification with the suffering and pain of others (Kaspersen & Gabriel, 2008): emotions of pity and compassion would lead to the arising of solidarity between people. Meanwhile, the scientific revolution and the developing science of government around intervention for the public good resulted in heightened confidence in the human capacity to make a difference and to drive humanity towards progress and human improvement (Roberts, 2004, p. 4). Enlightenment processes thus furthered both awareness of the suffering of others and a collective belief in the possibility – and responsibility – of benevolent action to alleviate such suffering.

[47] This is provided by the common article three to the four Geneva Conventions (ICRC, 1949).

The revolution in information and transportation technologies in the late twentieth century has accelerated these tendencies, by both enhancing awareness of distant suffering and opening new possibilities to help the world's vulnerable. As Barnett puts it (2011, p. 166), 'ignorance [is] no longer an excuse in a world of twenty-four-hour news stations, the World Wide Web, and satellite technology'. Radical improvements in transportation and logistical capacity indeed made it possible to not only know in real time what was happening on the opposite side of the globe, but also to act quasi-immediately. This awareness that one had the power to alleviate suffering came with a growing sense of political and moral responsibility (Tester, 1999). As the pressure to do something increased, so did the 'willingness to assume global responsibilities for alleviating the misery of strangers because of the moral conviction that relievable suffering had become intolerable' (Linklater, 2011, p. 21).

As shown by Andrew Linklater (2011), this recognition of a 'harm principle' – calling for the prevention and alleviation of violence and suffering – has been built deep into the constitution of modern international society, notably within international law. The harm principle thus arguably forms the basis for a 'global governance of humanity' (Barnett, 2013) or 'humanitarian government' in Fassin's terminology (2007, 2011), that is, the global 'administration of human collectivities in the name of a higher moral principle that sees the preservation of life and the alleviation of suffering as the highest values of action'. The imperative to reduce suffering has therefore become the foundation of a distinctively modern moral culture, which has motivated and still motivates varieties of humanitarian action. As Charles Taylor (1989, p. 394) has observed:

> We routinely grumble about our lack of concern and note disapprovingly that it requires often spectacular television coverage of some disaster to awaken the world's conscience. But this very critique supposes certain standards of universal concern. It is these that are deeply anchored in our moral culture.

In considering this brief story of humanitarianism in the modern world, two caveats or clarifications are needed. First, I have used the term 'humanitarianism' to refer to the ethico-political contours of the concept – manifested by the defence of a specific 'politics of humanity' (Radice, 2019). This interpretation of humanitarianism departs from the standard institutionalised version of humanitarianism, which is often associated with 'the impartial, neutral and independent provision of relief to victims of conflict and natural disaster'

(Barnett, 2011, p. 10).[48] It is indeed this emergence of a new sensibility towards violence and suffering, more than institutionalised and organised acts of assistance beyond borders, that is most relevant to the emergence of Penal Humanitarianism.

Second, the compassion and benevolence dynamics mentioned above have always been intertwined with violence and cruelty (Asad, 2015). There is indeed a mutual dependence between the formal and the latter, to the effect that humanitarianism (and modernity more largely) has largely been founded on violence, by violence and through violence.[49] As Asad (2015) has shown, humanitarianism and its core notion of a common humanity were born and cultivated in the crucible of early modern conquests and the expansion of European colonial empires. One should therefore be wary of equating the growth of humanitarianism with moral progress. Humanitarianism is a product of the world it responds to, with its intertwinement of care and control, compassion and violence, emancipation and domination (Barnett, 2011). While defending the notion of a common humanity and of the equal value of lives, humanitarianism presupposes difference and a double hierarchy of lives: between lives worth defending, saving and protecting, and those which can be sacrificed; and between those doing the protecting and those to be saved (Fassin, 2011).

Having examined the 'revolution of care' (Barnett, 2011, p. 18) which unfolded in the past few centuries, I now turn to the rise of punitive sensibilities and its expression in modern international criminal law.

b. The rise of punitive sensibilities in world politics. the international penal stream

In his book *Discipline and Punish*, Foucault traced the emergence of a 'political economy' of punishment in 18th and 19th century Western European societies. Foucault was interested in the move from corporal punishment, as an exceptional and excessive demonstration of the force of the sovereign, towards routinised imprisonment. This shift, he argued, in fact served to bureaucratise and normalise punishment, deeply entrenching it into

[48] The history(ies) of modern humanitarianism in its institutionalised version have been told many times (see Barnett (2011) for a more critical perspective). They generally begin in 1859 around the person of Henri Dunant and with the subsequent creation of the International Committee of the Red Cross.
[49] I am thankful to Rachel Zhou for directing my attention to this point.

the social body of the state. The main goal of Enlightenment legal reform in penal practice was indeed 'to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with more universality and necessity; to insert the power to punish more deeply into the social body' (Foucault, 1977a, p. 82). Albeit Foucault limited his analysis to domestic contexts, his examination of how disciplinary power has increasingly individualised people and how the use of the register of justice has legitimised the power to punish brings important insights for international criminal justice.[50] The second context against which Penal Humanitarianism has emerged is indeed that of the birth and consolidation of a modern international penal machinery to prosecute and punish acts of mass violence against civilians.

Although the modern system of international criminal justice is often seen as having emerged out of the ashes of the two world wars (Robertson, 2013), the idea of punishing offenders for war crimes and atrocities is not a 20th century invention. As noted by Koskenniemi (2019, p. vi), '[p]unishing unjust warriors has always been part of warfare and thinking about the just peace'. In the modern period, international efforts to combat piracy and abolish slave trade in the 18th and 19th led to the rise of the doctrine of universal jurisdiction, according to which these crimes could be prosecuted before the courts of any nation able to apprehend alleged perpetrators (Van Schaack & Slye, 2007, p. 10). The previous subsection also briefly mentioned the codification of international humanitarian law to regulate warfare. The existence of these rules notwithstanding, there was no international judicial institution in place to enforce them.

The first proposition of a permanent international criminal court is credited to Gustave Moynier, founder and first president of the International Committee of the Red Cross.[51] Moynier deplored the failure of most states to pass legislation to criminalise offenses prohibited under the Geneva Conventions. He therefore argued in 1872 that the creation of

[50] See for instance Drumbl (2005, p. 541), proposing to apply Foucault's heuristic to analyse supra-state punishment by international organisations.

[51] The first ad hoc international criminal tribunal is believed to have been established in 1474 to try Peter de Hagenbach for murder, rape, perjury and other crimes in violation of the 'laws of God and man'; it comprised judges from Alsace, Austria, Germany and Switzerland (Gordon, 2013; ICRC, 1949). It is important to note however that Gordon, as most ICL scholars, see the Hagenbach trials as playing 'an important role as an historic and conceptual pillar of international criminal law's *"pre-history"*', reinforcing the idea that ICL only emerged much more recently (Gordon, 2013, p. 15, my emphasis).

an international institution was necessary to supplement national courts (Hall, 1998). Moynier's proposal was not taken up by any government and quickly forgotten. Nonetheless, international calls to punish resurfaced several decades later in response to the atrocities committed during the first World War (WWI).

In the midst of WWI, and following reports of the genocide committed against Christian Armenians, France, Great-Britain and Russia condemned the 'new crimes of Turkey against humanity and civilization'. In a joint declaration released on 29 May 1915, the Allied governments publicly announced their intention to 'hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres' ("France, Great Britain and Russia Joint Declaration," 1915). In 1919, the Allied and victorious powers, joined by the United States, convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into culpable conduct by the Central Powers (the German, Austro-Hungarian, Bulgarian, and Ottoman Empires) during the war (Van Schaack & Slye, 2007). The Commission was mandated to inquire into and report upon 'the responsibility of the authors of the war'; 'the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies' and 'the degree of responsibility for these offences'; and the 'constitution and procedure of a tribunal appropriate for the trial of these offences' ("Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," 1920). The final report of the Commission proposed the establishment of an international 'high tribunal' composed of representatives of the Allied and Associated Powers to prosecute those responsible for violations of 'the laws and customs of war and of the laws of humanity' (Van Schaack & Slye, 2007). The United States initially opposed the idea of international prosecutions, favouring domestic trials instead. When they finally relented to put the German Kaiser (Wilhelm II) on trial for 'a supreme offense against international morality and the sanctity of treaties', the Kaiser had already fled to the Netherlands and requested asylum there. Faced with the Dutch's refusal to extradite the Kaiser, the Allied ultimately abandoned charges. Meanwhile, similar attempts to create a tribunal to punish alleged perpetrators of crimes and atrocities committed in the Ottoman Empire also floundered.

The first experiments with international justice in the aftermath of WWI have thus been described as a 'false start' or even 'fiasco' - to borrow the words of Henry Morgenthau,

then-US ambassador to the Ottoman Empire (Van Schaack & Slye, 2007). Still, the European jurists and diplomats of the 1919 Paris Peace Conference created a set of concepts which were then mobilised (used, expanded, and/or transformed) by the next generation of international penal entrepreneurs during the interwar era (Lewis, 2016, p. 4). These concepts – which Mark Lewis (2016) characterises as 'new justice' – included the belief in the validity of holding individuals criminally accountable for violations of international law; the possibility of prosecuting head of states, government officials and military officers for the offenses they committed; and the greater advantages, legitimacy and symbolic value attributed to international trials in opposition to domestic trials. Yet this shared toolbox of concepts and ideas did not mean that in the interwar era, a united front would emerge to deal with the legal problem of war and with violations of humanitarian law. Instead, multiple groups of jurists and organisations co-existed, often with very different goals, motivations, values and interests. Besides, these early international penal entrepreneurs did not all act 'out of humanitarian, pacific, reformist, or utopian motivations', but often supported the creation of war crimes tribunals for both political, moral and legal motives (Lewis, 2016).

Despite these disagreements and divergences of view, two major concerns dominated the agenda in the interwar period. The first one was the prevention of aggressive war. In 1920, the Advisory Committee of Jurists of the new League of Nations recommended the creation of a permanent international criminal court with jurisdiction over both war crimes and acts of aggression (Van Schaack & Slye, 2007). The draft statute was presented at the first International Congress of Penal Law, held in 1926 in Brussels, yet the proposition did not gather sufficient political support from states (Archibugi & Pease, 2018, p. 7). Meanwhile, led by the Romanian jurist Vespasian Pella, the *Association Internationale de Droit Pénal* sought to clarify the definition of the crime of aggression and made the case to hold individuals responsible for the commission of aggression (Douglas, 2019).

A second strand of interwar jurists seemed more preoccupied with violations of humanitarian law. The International Committee of the Red Cross (ICRC) attempted to create an international commission to investigate violations of the Geneva Conventions committed by all sides during the first world conflict; however, its preoccupation with protecting the rights of prisoners of war led the organisation to be more sceptical about the prospects of

putting some to trial.[52] In parallel to these efforts, the International Law Association in the 1920s drafted a plan for an international criminal tribunal empowered to prosecute war crimes (Bellot, 1924, p. 75). These debates during the interwar period led to important developments and refinements of ideas, arguments, plans and concepts in international criminal law. Yet it must be noted that the idea of setting individual criminal penalties for violating international law was still controversial between 1919 and 1950 and often represented a minority voice within the larger field of international law (Lewis, 2016).

These 'early precedents' are often contrasted, in standard historiographies of international criminal justice, with the 'watershed moment' of WWII, which marked the beginnings of the mainstreaming of international criminal law (Sands, 2003; Sewall et al., 2000; Van Schaack & Slye, 2007). In the immediate aftermath of WWII, the Allied powers established two international tribunals to prosecute high-level German and Japanese military and civilian authorities whose crimes 'had no particular geographic localisation' ("Declaration of the Four Nations on General Security," 1943): the International Military Tribunal for the Trial of German Major War Criminals (IMT or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal) (Van Schaack & Slye, 2007). It is important to stress that criminal prosecutions represented only one of several mechanisms implemented in the aftermath of WWII to address Axis actions. These measures included notably lustration policies to 'denazify' German society, reparations for war damages and losses, restitution of robbed and expropriated assets, compensation to Nazi victims, and memorialisation efforts (Romeike, 2016).

Although the legacy of the IMT and IMTFE remains tainted with critiques that they represented victor's justice, the Nuremberg and Tokyo tribunals occupy an important place in the contemporary imaginary of post-conflict justice.[53] Among the most oft-credited legacies of the post-WWII international tribunals is the famous dictum that 'crimes against international law are committed by men, not by abstract entities, and only by punishing

[52] As Lewis (2016, p. 296) notes, 'there was an interesting cultural and legal clash between the drive to establish prosecution as a standard (the "new justice") and the ICRC's [International Committee of the Red Cross] traditional determination to protect the POW, even if he were quite possibly a criminal'.

[53] See for instance Beth Van Schaack and Ronald Slye (2007, p. 34), arguing that '[i]t is difficult to overstate the significance of the post–World War II period to the field of ICL. Together, these legal proceedings established many core principles of the field, and modern tribunals continue to cite these proceedings as persuasive authority'.

individuals who commit such crimes can the provisions of international law be enforced' (IMT, 1946, p. 465) . Pronounced by the IMT in the *France et al. v. Goering et al* case, the statement is seen as having forcefully – and largely unproblematically – affirmed the supremacy of individual criminal responsibility, that would henceforth form the basis of ICL.[54]

The Nuremberg and Tokyo trials introduced two novel legal categories, 'crimes against humanity' and 'crimes against peace', yet it was the latter which monopolised most of the attention at the time (as will be discussed in Chapter 5). As noted by Frédéric Mégret (2019, p. 85), the 'entire normative architecture [of the IMT and IMTFE] was geared towards punishing "crimes against peace" as the "crimes of crimes"'. The jurisdiction of the IMT over crimes against humanity was restricted to those offenses that could be connected to Nazi aggression and war crimes. This so-called nexus requirement, introduced in the Charter of the IMT, effectively removed from the IMT's scrutiny the 'German-on-German' crimes; and resulted in the prosecutorial choice of portraying mass atrocity and exterminations as a technique integral to Nazi aggressive militarism and the project of territorial conquest (Douglas, 2019).[55]

The aggression paradigm which triumphed at Nuremberg and Tokyo would however be short- lived. With the adoption of the UN Convention for the Prevention and Punishment of Genocide in 1948, the status of crimes against peace as the foundational international offense was already destabilised. The Convention severed genocide from aggression, and thereby proclaimed that a sovereign's targeting of its own population groups constituted a fundamental, if not the ultimate, international crime (Douglas, 2019). The Genocide Convention did not create an international criminal tribunal to enforce its provisions, instead leaving states the responsibility to amend their national legislation and to provide effective

[54] Nevertheless, Frédéric Mégret (2019, p. 81) argues that in pronouncing this dictum, the IMT 'was not meant to exclude any form of state and collective criminal responsibility as much as to deny senior Nazis the ability to blame all their acts on the orders of their sovereign'.

[55] The National Military Tribunals – a series of twelve military trials held by the US between 1946 and 1949 – removed the requirement of a nexus between crimes against humanity and war crimes. As argued by Lawrence Douglas (2019, p. 69), especially 'in the *Einsatzgruppen* trial, we begin to detect the lineaments of a distinctive trope in the historiography of the Holocaust – that the extermination of European Jewry represented a crime *sui generis*, volatilizing conventional categories of criminal wrongdoing and upending faith in the notion of historical progress'.

penalties for the crime,[56] and it remained largely ignored for the subsequent five decades. The efforts of the International Law Commission in the early 1950s to define and codify the act of aggression initially appeared to entrench a vision of international criminal justice as centred on the defence of the jus contra bellum. These efforts, however, proved short-lived: with the start of the Cold War, the project of criminalising aggression was quickly aborted (Mégret, 2019).

Much has been said about international criminal law's 'silence', 'paralysis' or 'stasis' during the Cold War (Hathaway et al., 2019, p. 64; Rosen, n.d.). Yet neither mass violence nor protests against mass violations of international law stopped during that period. Albeit international criminal proceedings were barred by the Cold War rivalry between the Eastern and Western blocs, initiatives emerged both from transnational civil society and domestic stakeholders to address international crimes. In 1967, an unofficial war crimes tribunal set up by philosopher Bertrand Russell found the United States guilty of acts of aggression against Vietnam, unlawful attacks against civilians, unlawful treatment of prisoners of war and use of prohibited weapons (Zunino, 2016). Although drawing inspiration from the Nuremberg trials, the Russell Tribunal challenged legalism and aimed not at punishment, but rather at establishing 'the full truth' about what was happening in Vietnam to 'arouse the conscience of the world' (Duffet, 1968, pp. 15–16). Six years later, Bangladesh adopted the International Crimes (Tribunal) Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law (Bangladesh Code, 1973). Finally, shortly after the fall of the Cambodian Khmer Rouge Regime in 1979, the Revolutionary People's Tribunal convicted (in their absence) Pol Pot and Ieng Sara of genocide and sentenced them to death (International Crimes Database, n.d.-a).

In traditional historiographies of the discipline, ICL suddenly 'recovered' with the end of the Cold War. As the story continues, the international community, shocked by the atrocities in Yugoslavia and Rwanda, established two ad hoc international criminal tribunals, thereby re-awakening the Nuremberg tradition (Cassese, 2011). What this narrative largely erases, however, is that by the end of the 1990s international crimes would take a largely

[56] See article 5 of the Genocide Convention (United Nations General Assembly, 1948): 'The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.'

distinct meaning. Instead of crimes against peace leading down the road of atrocities (as in Nuremberg or Tokyo), it would be atrocities that threaten international peace and security (Mégret, 2019).

c. The birth of an anti-impunity movement: the human rights stream

The last stream which must be examined is that of the emergence of the (anti)impunity movement in the context of democratic transitioning in Latin America. The human rights movement, which successfully consolidated as a force of its own in the 1970s, initially concerned itself with the protection of individual civil and political rights (Engle, 2016; Moyn, 2012). To advocate and put pressure on states to end human rights abuses, transnational NGOs mostly relied on naming and shaming strategies (Engle, 2016). In the early days of the human rights movement, the criminalisation of states' political activity and the denunciation of the abuses of the criminal justice system were issues of top importance for NGOs' advocacy campaigns. One of the oldest and biggest civil society organisations, Amnesty International, was indeed established to campaign for the release of political prisoners ('prisoners of conscience'). In the 1970s, Amnesty expanded its work to include the defence of due process and improvement of the conditions of incarceration for all prisoners (Engle, 2016). Most human rights NGOs thus initially *supported* rather than opposed amnesties and impunity, advocating for the release of prisoners of conscience (Engle, 2016). In fact, for much of the 1970s amnesties represented a 'symbol of freedom' and a way to peacefully resist dictatorial regimes (United Nations Economic and Social Council, 1997b, p. 3).

The third wave of democratisation, beginning in the 1970s, would however progressively lead to new practices of accountability (Sikkink, 2011). Following the fall of the dictatorships in Greece and Portugal, former state officials were prosecuted for human rights abuses. These trials were seen as a true watershed moment in world politics, making what many thought as the impossible: holding state officials criminally accountable for human rights violations. In this context, the desirability of prosecutions and punishment as instruments to deal with past violence and to promote peace and justice came to be a subject of lively and heated among scholars, policy-makers and human rights advocates. These debates were particularly salient during Latin America's democratic transition in the 1980s.

Contrary to the Nuremberg model of justice, which 'simply assumed the legitimacy of punishing human rights abuses', the political transitions from dictatorships to democracies brought to the fore the tensions between punishment and amnesties (Teitel, 2003, p. 76). Criminal prosecutions were initially seen as one mechanism within a broader vision of justice and anti-impunity, which combined the corrective and backwards looking with the forward looking and reconstructive (Moyn, 2014). The equation of anti-impunity with criminal accountability would only happen later and meant the abandonment of the aim of transforming society from the top to bottom, as was initially intended in more popular visions (Moyn, 2014). That is, human rights prosecutions arose as a conservative alternative to a deep transformation of societies and the fight for equity (Moyn, 2014).

The late 1980s marked a critical juncture in that regard, with some human rights advocates starting to adopt more principled (absolutist) positions, forcefully rejecting amnesties and seeing criminal prosecutions as indispensable to combat impunity. In 1988, at the Aspen Institute Conference on state crimes, then-Director of Human Rights Watch Aryeh Neier argued that 'punishment is the absolute duty of society to honour and redeem the suffering of the individual victim' (Weschler, 1990, p. 244). Defending justice for its own stake, he dismissed other objectives (such as facilitating transitions to democracy) as either irrelevant or dubious. While Neier's position was quite the exception at the time, in the following years many human rights NGOs would come to adopt similar views. In 1991, Amnesty International (1991) released a 'policy statement on impunity' indicating the following:

> Amnesty International believes that the phenomenon of impunity is one of the main contributing factors to . . . continuing patterns of [human rights violations in many countries throughout the world]. Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice. . . International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice. . . When investigations are not pursued and the perpetrators are not held to account, a self-perpetuating cycle of violence is set in motion resulting in continuing violations of human rights cloaked by impunity'.

This statement testifies to the effort to transform human rights violations into an impunity issue – the persistence of a culture of impunity being portrayed not simply as a failure to remedy past human rights abuses, but also as a direct *cause* of these abuses (Engle, 2016). NGOs also started to raise the issue in international fora, and notably at the UN Commission on Human Rights. Starting from 1987, they insisted that impunity impeded

effective protection of human rights and undermined the rule of law in post-conflict or transitioning societies (Haldemann et al., 2018). In 1991, the issue appeared on the agenda of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which requested Louis Joinet and El Hadji Guissé to undertake a study on the question of impunity of perpetrators of human rights violations. Following a preliminary report by the two experts, the Sub-Commission decided to divide the study into two. Joinet was tasked with focusing on impunity for violations of civil and political rights (CPR), while Guissé would focus on impunity in relation to economic, social and cultural rights (ESCR).

Joinet released his final report on the question of impunity for violations of CPR in 1996. The report defined impunity as 'the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted' (Joinet, 1996, p. 9). The report, and its accompanying Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, identified three fundamental rights of victims: the right to know, incorporating both a right to the truth and a duty to remember; the right to justice, in the form of criminal prosecutions of the alleged perpetrators; and the right to reparation, including the right to restitution, compensation and rehabilitation as well as guarantees of non-repetition (Joinet, 1996). Both in his conception of impunity and in the measures to address this issue, Joinet therefore proposed a holistic vision where criminal prosecutions represented only one among several mechanisms to pursue justice. This contrasts with the close association of anti-impunity with criminal trials and punishment today. At the same time, the set of violations under scrutiny was rather conservative, Joinet placing special emphasis on combating impunity for 'serious crimes under international law' – that is, crimes against humanity and war crimes (Joinet, 1996, p. 10).

Meanwhile, Guissé submitted his final report on violations of ESCR in June 1997. Echoing the language of the Declaration for a New International Economic Order (United Nations General Assembly, 1974), Guissé's report foregrounded historical injustices which led to enduring abuses and rights violations in the present, including slavery, colonisation, apartheid and the pillage of the cultural heritage of former colonies (United Nations Economic and Social Council, 1997a, para. 36). The report stressed that the absence of redress for

slavery, colonisation, apartheid and cultural looting were immensely damaging to the economic development and lives of the peoples and countries that were victim of these practices (United Nations Economic and Social Council, 1997a, para. 51). On top of these historical sources of (still) unremedied large-scale violations of ESCR, Guissé denounced current sources of gross ESCR abuses, including debt and structural adjustment programmes. These massive and systemic violations required both preventive action, aimed at eliminating all practices leading to violations of ESCR, as well as remedial and/or repressive action, including restitution, compensation, reparation and the cancellation of debts (United Nations Economic and Social Council, 1997a, p. 117).

In sum, for Guissé, the root causes of violations of ESCR were to be found at the structural level, enshrined in processes of global governance and in the enduring legacies of slavery, colonialism and apartheid. Combating impunity for ESCR therefore required challenging global regimes of governance premised on racial, neocolonial and capitalist logics of extraction and exploitation, and which had relegated the third world to conditions of poverty, underdevelopment, exploitation and dependence. Where Guissé took issue with and denounced the illegitimacy and inadequacy of the global political and economic order, Joinet envisioned solutions compatible with and operating within liberal governance regimes. This would make Joinet's report less disruptive and therefore more acceptable to Western powers. Over the next few decades, the report by Joinet became a 'landmark document' and 'an authoritative reference point for efforts in the international fight against impunity' (Haldemann et al., 2018, p. 5). In contrast, Guissé's report was progressively forgotten, and with it, the potential for the language of anti-impunity to be applied to violations of ESCR fell into oblivion. This would lead to a form of historical amnesia, as anti-impunity would increasingly be equated with (and limited to) violations of a subset of CPR, as will be discussed in Chapter 5. Meanwhile, conceptions of global justice centred on redistributive justice and fairness in the context of deeply seated global inequalities would be increasingly marginalised (Schwöbel-Patel, 2021, p. 3).

This fixing of anti-impunity around CPR would go hand in hand with the increasing monopoly of international criminal law and its punitive approach in addressing situations of mass violence and gross human rights abuses. Indeed, the claimed inadequacy of criminal law to address violations of ESCR provided a justification to those seeking to exclude ESCR from

the anti-impunity agenda; and conversely, calls to end impunity for mass atrocities and gross human rights abuses would enable the expansion of penal power internationally and transnationally (Engle, 2016; Pinto, 2018, 2020a). In parallel to the work of practitioners, important scholarly work similarly endeavoured to reframe human rights violations and abuses as an impunity issue, mandating the deployment of penal tools domestically and internationally. A foundational work in that regards was Diane Orentlicher's article on 'Settling accounts: the duty to prosecute human rights violations of a prior regime'. Largely equating anti-impunity with criminal prosecutions, Orentlicher argued that 'the law [wa]s fairly interpreted to require, and not merely to authorise, states to punish crimes against humanity [and other atrocious acts] when committed in their own jurisdiction' (1991, pp. 2593–2594). More broadly, being 'for human rights' would progressively become synonymous with rejecting amnesties and fighting against impunity by promoting criminal accountability for alleged offenders of international human rights and humanitarian law (Engle, 2016, p. 15). This marks a crucial shift – or perhaps an 'end of history' for the human rights movement – since debates over the desirability and consequences of criminal prosecutions are no longer seen as relevant or needed.

Parallel to these debates on the question of combating impunity, the 1990s would see the rise of international accountability mechanisms, from ad hoc tribunals, hybrid courts and commissions of inquiry to the establishment of a permanent International Criminal Court. This globalisation of the anti-impunity discourse, and its association with the criminalisation and tribunalisation of mass violence, marks the emergence of the Penal Humanitarian paradigm of international justice. The next section briefly reviews these institutional developments to provide some background for the three empirical chapters that follow afterwards, and which successively examine the apparition, consolidation and transformation of each of the three meta-narratives of the Penal Humanitarian imaginary.

II) The rise of Penal Humanitarianism: institutional developments

The end of the Cold War opened new possibilities and opportunities at the global level, notably within the remit of the United Nations. In 1989, the UN General Assembly prophetically declared that the 1990s would be the 'decade of international law' (United

Nations General Assembly, 1989). With the fall of the Berlin Wall indeed came a new enthusiasm and optimism regarding the prospects for a global rule of law, cooperation on human rights, trade and environmental protection, or even the creation of a world police. To borrow from Koskenniemi's words (2007, p. 3), international law 'appeared to find its home in a. . . language of universal reason'. In this context, the Security Council played a more active role than ever before, authorising unpreceded military and judicial interventions in the name of human protection and peace (Peltonen, 2019, p. 224). Against the backdrop of the mass atrocities committed in the former Yugoslavia and later in Rwanda, international criminal justice was revived with the creation of two ad hoc tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Starting from the summer 1992, the atrocities committed in the territory of the former Yugoslavia were widely publicised. Roy Gutman (from *New York Newsday)* published the first reports of detention camps mid-July; he was soon joined by other American reporters. The printed photographs of starving victims and the testimonies of rampant rape and sexual violence contributed to mounting public pressure to stop the violence (Vinjamuri, 2013b). In October 1992, alarmed by multiple reports of mass killings and ethnic cleansing, the UN Security Council decided to establish an impartial Commission of Experts to investigate and analyse evidence of grave violations of international humanitarian law (United Nations Security Council, 1992a). The Commission found evidence of 'a consistent and repeated pattern of grave breaches of the Geneva Conventions and other violations of international humanitarian law', of crimes against humanity and found that some of the incidents investigated could likely be proved in court to constitute genocide (United Nations Security Council, 1994a, paras. 182; 194). The report of the Commission of Experts also highlighted that rape and sexual violence against women were pervasive, suggesting the existence of 'a systematic rape policy' (United Nations Security Council, 1994a, para. 253).

Meanwhile, several international NGOs were calling for the international community to intervene militarily to put a halt to the atrocities in Bosnia. Both Europeans and Americans were however highly reluctant to intervene militarily in the region (Vinjamuri, 2013b). To avoid taking a more active role to 'stop the slaughters', UN Security Council member states reached a compromise to create a war crimes tribunal to prosecute those deemed most

responsible for the atrocities. Resolution 827, adopted on 23 May 1993 under the Chapter VII powers of the Security Council, formally established the ICTY (United Nations Security Council, 1993b). The creation of the ICTY in the midst of the war in the former Yugoslavia marked a decisive moment, for it reversed the temporality of peace and justice which had hitherto prevailed. While historically justice had followed war (as in the Tokyoberg trials or domestic prosecutions following the fall of dictatorships in Latin America), in the Balkans the United Nations attempted to use international prosecutions *as a means* of bringing peace and reconciliation to the region. The punishment of the law, it was believed, would avoid 'the attribution of collective guilt to any nation or ethnic group' and thereby put a halt to 'old cycles of ethnic retribution' (Goldstone, 1995, para. 12; Teitel, 2014, pp. 83–84).

The creation of the ICTY arguably gave momentum for the establishment of a second ad hoc tribunal to investigate and prosecute alleged perpetrators of the genocide in Rwanda. Less than a year after the creation of the ICTR, human rights NGOs (notably Amnesty International and African Rights), raised the alarm of an ongoing genocide in Rwanda, calling for the need to 'put the culture of impunity on trial' (Engle, 2016, pp. 40–41). Despite multiple warnings, the international community was slow at best to respond, most states refraining from using the term genocide in the debates. Nonetheless, on July 1st 1994, the Security Council instructed the UN Secretary General 'to present a report as soon as possible on the investigation of serious violations of international humanitarian law committed during the conflict' (United Nations Security Council, 1994c, para. 18). The Preliminary Report of the Commission, released on 4 October 1994, found evidence of 'a pre-planned execution of severe human rights violations, including systematic widespread and flagrant breaches of international humanitarian law, large scale crimes against humanity and genocide' (United Nations Security Council, 1994b, para. 42). The report provided the 'seal of official authentication' (Prunier, 1995, p. 342) to the genocidal nature of events in Rwanda, preparing and legitimising the establishment of the ICTY by the UN Security Council on 8 November (United Nations Security Council, 1994d).

While the story of the establishment of the two had hoc tribunals has been told many times, the central focus is usually placed on the United Nations, and particularly on the role of the Security Council in creating these institutions. In examining the emergence of the Penal Humanitarian paradigm of international justice, however, two connections are worth making.

First, the 'rediscovery' of international criminal law in the context of mass atrocities unfolding in the former Yugoslavia and Rwanda was part and parcel of a larger move to criminal law in a number of different domains (Engle, 2016). With the end of the Cold War, the ascendancy of neoliberalism called for a strong punitive state, and criminal law played a crucial part in economic restructuring and in the diffusion of rule of law policies globally (Müller, 2012). Transnationally, the United States also worked throughout the 1990s to export its own domestic model for criminal justice to fight transnational crime (McLeod, 2010). Hence throughout the world, 'an almost irresistible pressure drove [governments] toward criminal justice reform and solutions, and to make use of "law and order" arguments to ensure that criminal justice actors will become involved' (Martin, 1998, p. 168). The criminalisation of mass violence on the international stage thus resonated with a larger trend towards the expansion of retributive justice in new territories and domains of practice.

Second, and also much less conspicuous in mainstream histories of international criminal justice, is the role played by feminist organisations in spurring judicial action in the former Yugoslavia, and their subsequent involvement with the ICTY, the ICTR and ultimately the ICC.[57] The conflict in the Balkans revealed widely publicised incidents of rape, sexual violence and humiliation of women. By 1993, feminists thus engaged in international criminal law both as a way to address these terrible atrocities and as a platform for feminist law-making (Halley, 2008, p. 8). Without establishing legal (criminal) accountability for the terrible wrongs that had been committed in the region, the feminists believed, 'there [was] every reason to believe that the cycle of retaliation [would] continue to spin out of control' (Women in the Law Project, 1994, p. 101), 'future efforts to rebuild civil society in the region [would] be thwarted and the international community's ability to enforce the rule of law in the world community [would] be seriously compromised' (Pratt & Fletcher, 1994, p. 79).

Though novel, the increasing investment of feminist advocates in international criminal justice was not surprising, considering the increasing concern of human rights advocates for ending 'the culture of impunity', and feminist organisations' growing promotion of criminal prosecutions in the context of domestic violence (Engle, 2018, pp. 139–140). In

[57] I here focus on the feminist political project which has, since the 1990s, fought for the recognition of sexual and gender-based violence as an international crime of concern for all humanity. This feminist political project, however, has been criticised by postmodernist feminist discourses, which question the desirability of fixating on sexual violence against women during conflict (Henry, 2014, p. 93).

the domestic context, criminal prosecutions offered a way to hold actors accountable for what had hitherto been regarded as private harms. Much in the same way, the feminists of the early 1990s regarded the 'annexation of human rights law to IHL [international humanitarian law] as a large structural reform that would enable them to use the criminal enforcement capacities of humanitarian law to reach the everyday' (Halley, 2008). Feminists saw the horrible acts of violence committed against women in the Balkans as 'an exaggerated reflection of sexual violence against women worldwide' (Lewin, 1993); and they believed that rethinking wartime rape in a continuum with rape in the peacetime context would contribute to changing attitudes in domestic societies and benefit women long after the end of the Yugoslav war.

The importance paid to sexual violence against women in the Yugoslav war would have long-standing repercussions for feminist engagements with human rights and international law. Although feminists initially defended a holistic perspective to address situations of mass violence – insisting on the importance of reparation and support for the survivors, and of implementing the right to truth – international criminal justice soon became a political (if not moral) priority for many feminists seeking to affirm the women's rights agenda in the midst and aftermath of conflicts. Feminists would come to regard sexual and gender-based violence in conflict not merely as human rights violations, but as crimes requiring the mobilisation of international criminal law to prosecute alleged perpetrators (Engle, 2018). Feminists would thus largely support the rapid proliferation of international criminal justice institutions, actively lobbying for the creation and becoming closely involved in the work of the two ad hoc tribunals, and later of the ICC. This feminist mobilisation was particularly acute in the preparation and negotiations of the draft statute of the International Criminal Court. In 1998, women's rights NGOs and activists joined forces to create the Women's Caucus for Gender Justice (WCGJ), which became a coherent platform for feminist reform and demands (Halley, 2008, p. 23). The collective, reuniting 'women's rights activists . . . of every political stripe, faith, sexual orientation, nationality, and ethnicity' mobilised and lobbied hard at every step of the Rome Statute negotiations (Human Rights Watch, 2002).

Much alike the trajectory of feminist movements, in the post-1990s period the Penal Humanitarian paradigm would progressively become the hegemonic framing for defining issues of justice, conflict resolution and addressing gross human rights abuses, thereby

monopolising global justice (Nouwen & Werner, 2015, p. 157). The adoption of the Rome Statute establishing the ICC would be heralded as a 'logical endgame of a strengthening struggle against impunity in different parts of the globe' (Nesiah, 2016, p. 95). In the Hague 'the forces of anti-impunity. . . succeeded in creating a new normative common sense in the world of international law and policy' (Nesiah, 2016, p. 109). This rise of the Penal Humanitarian paradigm would be manifest not only in the proliferation of international and hybrid criminal courts and tribunals, but also in the increasing legalisation and judicialisation of fact-finding bodies.

Since the beginning of the 1990s, more than 70 international Commissions of Inquiry have indeed been deployed across the globe in response to outbursts of mass violence and widespread human rights abuses, including in Yugoslavia, Liberia, Georgia, Rwanda, Guatemala, Congo, Cambodia, Libya, Syria or Myanmar, to quote a few only (United Nations, n.d.).[58] These bodies have been tasked with investigating, monitoring and reporting on patterns of violations of human rights and humanitarian law – and, increasingly, with identifying specific categories of international crimes or even individual alleged perpetrators, thereby paving the way for criminal prosecutions (Schwöbel-Patel, 2017; Stahn & Jacobs, 2016). The strong focus on the legal and accountability dimensions in post-Cold War commissions of inquiry stands in stark contrasts to earlier uses of fact-finding. The classical fact-finding model of voluntary dispute resolution mechanism between states rested on a shared understanding of 'horizontal state coexistence' (Mégret, 2016, p. 28) and was driven by an intent to 'appease and calm animosities' (van den Herik, 2014, p. 519). This classical model can be contrasted with the functioning of contemporary commissions of inquiry, which are based on a vertical model of intervention from the international community and increasingly have an alerting and accountability function (on top of the more classical 'fact-finding' or information function).

By going beyond state responsibility and increasingly seeking to establish individual responsibility for the atrocities that were committed, commissions of inquiry already prepare and justify the call for criminal law responses. Whilst investigative bodies often emphasise

[58] These entities, established by various UN subsidiary organs, are known under a myriad of different names, including (High-Level) Fact-Finding mission, Commission of Inquiry, Group/Commission/Panel of Experts, Assessment Mission, Special Commission, Mapping Exercise, Investigative Mission or else Independent Investigative Mechanisms (OHCHR, 2015, p. 7).

that it is not their role to draw definite conclusions as to the culpability or liability of individual agents, they often privilege a legal – if not ICL – stance. This creates 'functional synergies' with international criminal courts and tribunals (Stahn & Jacobs, 2016, p. 258). Indeed, many (though not all) recently established fact-finding bodies have adopted methodologies and evidentiary standards closer to those used in criminal investigations, with the hope that their findings may be used in a court of law (Alston & Knuckey, 2016, p. 14).[59] Commissions of inquiry have therefore de facto acted as 'quasi-tribunals', or for the least as investigative arms of international criminal courts and tribunals (Schwöbel-Patel, 2017, p. 156). The last innovation to date in the series of international accountability mechanisms is the creation of three 'evidence-gathering' mechanisms: the International, Impartial and Independent Mechanism for Syria (IIIM); the Investigative Team to promote accountability for crimes committed by Da'esh/ISIL (UNITAD); and the Independent Investigative Mechanism for Myanmar (IIMM). These evidence-gathering bodies reflect a similar concern of the international community for addressing mass violence through 'accountability processes aimed at bringing about justice for the victims of serious international crimes' (IIIM, n.d.). They have been heralded as innovative tools 'to keep the hope for eventual justice alive' (Whiting, 2017, p. 237) in the absence of a comprehensive jurisdictional path forward. At the same time, they are uniquely crafted as 'quasi-prosecutorial office[s]', supporting criminal prosecutions and applying criminal justice methodologies in their work (United Nations General Assembly, 2018a, pp. 4–6).

This proliferation of international judicial and quasi-judicial institutions since the 1990s therefore marks the emergence and consolidation of Penal Humanitarianism in world politics. The preceding chapters have established the nature of Penal Humanitarianism as a social imaginary shared by international justice-makers, and which operates through three prevailing meta-narratives. In this chapter, I have examined the historical and material roots of this Penal Humanitarian paradigm. The second part of the dissertation traces the discursive antecedents, plural visions and neglected alternatives which have accompanied the

[59] See also the OHCHR Guide on Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: 'international human rights investigations have furnished crucial elements to judicial procedures. They have done so in the inquiries of ad hoc international tribunals and of the international Criminal Court' (OHCHR, 2015, p. 7).

(re)constitution of the *ending impunity for international crimes*, *justice for victims* and *justice as pacification* narratives.

Chapter 5 – Punishment for whom? Defining international crimes

Introduction

As noted in chapter 4, processes of international criminalisation – and the development of a penal apparatus to prosecute and punish such offences – is a liberal response to the growing aversion to violence, suffering and cruelty in modern societies (see also Han & Nantermoz, 2022). The term international crimes generates expectations about the gravity and scope of violence, as well as what needs to be done in response: they are constructed as those crimes which are deemed so serious and significant that they warrant international condemnation, prosecution and punishment (McMillan, 2020, p. 62). International crimes are understood as representing the most horrific, cruel and heinous manifestations of violence and suffering (McMillan, 2020, p. 3; Stolk, 2015; Tallgren, 2002) which 'deeply shock the conscience of humanity' (A/CONF.183/9, 1998, Preamble). International crimes are also believed to infringe on a different and distinctive space (the international), a distinctive state of affairs (international peace and security or the international status quo) and a distinctive constituency (be it conceptualised as the international community, humanity or civilisation) (McMillan, 2020, p. 24). International crimes are therefore assumed to be substantively different from 'ordinary crimes' codified in the domestic context: they are harms 'whose sheer ugliness places them beyond the pale of ordinary criminality' (Luban, 2004, p. 99). They are seen as so abhorrent, extreme and exceptional – a manifestation of such 'radical evil' (Arendt, 1992) and cruelty – that they require no definition, appearing as self-evident and intuitively recognisable (DeFalco, 2022).

Yet not all manifestations of extreme violence and cruelty have been codified in international criminal law, nor has the content and scope of international crimes remained constant historically. In fact, as Cherif Bassiouni has observed, there exists no 'agreed-upon definition of what constitutes an international crime, the criteria for international criminalization, and how international crimes are distinguished' (2014, p. 139). This is evident when comparing the offences covered during the discussions on a Draft Code of Crimes Against the Peace and Security of Mankind between 1949 and 1956 (which included colonial domination, apartheid, terrorism, environmental destruction, economic aggression, and drug

and people trafficking),[60] with the four crimes under the jurisdiction of the International Criminal Court (crimes against humanity, genocide, war crimes and aggression) (Rome Statute of the International Criminal Court, 1998). There is therefore a tension inherent in the notion of international crime, between its assumed self-evidence (international crime as referring to something incontestable and immediately recognisable) and its legal and socio-political ambiguity (international crime as contextually, historically and politically constructed and situated) (McMillan, 2020, p. 67).

This chapter examines the discourses and narratives surrounding the social construction of international crimes, paying particular attention to normative arguments advanced to justify the inclusion or exclusion of a given offence amongst the list of international crimes.[61] I was particularly attentive to how the nature, definition, and scope of international crimes were constructed – in other words, how international criminal justice discourses and narratives make international crimes into being. Drawing from Foucauldian discourse analysis and discourse-theoretical analysis (as outlined in Chapter 2), I was guided by the following questions:

- Which qualities or attributes are associated with the notion of international crimes, and how (if at all) has this changed over time?
- Are these attributes and qualities ever contested or challenged, and if so, how?
- Which narratives and arguments are advanced to justify the inclusion or exclusion of a given offence amongst the list of international crimes?
- Is there an (implicit or explicit) hierarchisation of international crimes, and if so, on which criteria is it based?
- How are narratives surrounding anti-impunity and the definition of international crimes connected to penal and humanitarian logics?

[60] Between 1949 and 1956, the International Law Commission worked on creating a draft international criminal code, resulting in a first draft code which codified thirteen crimes. The International Law Commission subsequently resumed its work on the Draft Code from 1982 to 1996, narrowing down the list of crimes to five (aggression, crimes against humanity, genocide, war crimes and crimes against United Nations and associated personnel). The Code never became an international treaty, nor did it result in any notable institutional development that would provide an enforcement apparatus, but it informed the preparatory work surrounding the creation of the ICC (International Law Commission, 1996; Johnson, 1955; McMillan, 2020, pp. 62–66).

[61] I do not however examine the selectivity or double standards that characterise the application of ICL by international judicial institutions – that is, the fact that only a limited number of situations and alleged perpetrators are investigated and prosecuted. For a critical analysis of the geographical selectivity of international criminal justice (and notably of the ICC), see Robert Cryer (2005) and Richard Falk (2015).

- What do these representations and narratives make possible and what do they occlude or elide?

Empirically, I examined the debates and discussions surrounding the establishment of the Nuremberg and Tokyo tribunals, of the ICTY and ICTR, and finally of the ICC, which represent 'historically significant points' from which to observe and compare the evolution of discourses and narratives surrounding the construction of international crimes (Foucault, 1978, p. 8; Hansen, 2006, p. 70). I looked for regularities and recurring patterns or representations in statements. This, in turn, enabled me to identify through an iterative coding process the basic themes and patterns which are examined more closely in the rest of the chapter. At the same time, I also attended to instances of contestation, counter-discourses and statements which challenged or undermined various elements of the dominant narratives.

I was able to document how processes of international criminalisation have been marked by elements of both historical continuity and change. One major line running from Nuremberg and Tokyo to Rome is ICL's role in maintaining, and possibly legitimating, the current international status quo. This has notably manifested itself through the privileging of crimes that do not implicate Western actors or the very structure and legitimacy of the international system, as well as ICL's tendency to relegate to the background the role of economic actors in enabling, facilitating or even actively participating in mass violence and atrocities. At the same time, the focus of international criminalisation efforts has shifted over time from crimes against peace towards large-scale, visually arresting forms of predominantly physical violence.

The rest of the chapter is structured as follows: I start by showing how in the aftermath of WWII, the paradigm that prevailed was one which prioritised peace over justice. Crimes against peace were indeed placed at the apex of the hierarchy of crimes, justified by the articulation of aggressive war as an attack on the international order as such, and therefore on the world as a whole. By contrast, atrocities (encompassed under the category of crimes against humanity) were constructed as *not* being of international but domestic concern, except where they could be directly connected to the Axis conspiracy and waging of an aggressive war. This hierarchy of crimes revealed a concern for preserving the international

status quo, with its injustices and stratifications, and for shielding the Allied powers from scrutiny over their own questionable domestic policies. The short-lived attempt to hold Axis industrialists and financiers accountable for their role in enabling the war evidenced the potential for ICL to grapple with a more complex and holistic understanding of the drivers and enablers of aggressive war. The quick abandoning of the charges against the industrialists relegated economic wrongs to the margins of humanitarianism. Second, the chapter shows that the resurgence of ICL after the Cold War came with a new focus on atrocities, and with it, an increasing emphasis on the spectacular and visually arresting character of international crimes. The expectation that international crimes manifest themselves as visually arresting displays of violence, which give rise to humanitarian outrage, was particularly manifest in the argumentative strategies of delegations at Rome. Indeed, those wishing to include contested crimes (such as aggression or the prohibition of the use of nuclear weapons) in the jurisdiction of the ICC pointed to the destructive consequences, cruelty and harm resulting from these practices. In contrast, those opposing the inclusion of these offences pointed to their ambiguous scope, controversial legal status and to the risk of politicisation, therefore problematising the self-evidently criminal character of these offences. The chapter concludes by critically examining the biases and limits of international criminal law at present.

I) Peace above justice: the Tokyoberg model

a. Criminalising aggressive war, cementing the status quo

In its judgment of 30 September 1946, the International Military Tribunal (IMT) at Nuremberg noted that '[t]o initiate a war of aggression. . . is not only an international crime; it is the *supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole' (IMT, 1947c, p. 426).[62] During the trials in Nuremberg and later in Tokyo, the criminalisation of aggressive war – crimes against peace, as it was called – appeared to be more significant and important than the criminalisation of crimes against humanity and war crimes. This prioritisation of crimes against peace over atrocities is particularly manifest when looking at the transcript of the IMT proceedings, which

[62] My emphasis.

contains 3049 references to aggressive war in its various expressions, compared to only 196 references to crime(s) against humanity and 96 references to the final solution.[63]

The notion of crimes against peace originated from the work of Aron Trainin, a legal scholar who represented the Soviets at the London Conference (Hirsch, 2008, p. 707). In his academic work, Trainin had taken issue with the League of Nations' failure to make aggressive war a criminal act and had advocated for the recognition of war as a punishable criminal offense – the gravest of all international offences (Hirsch, 2008, pp. 705–707; Porter, 2019, p. 102). Trainin's work on crimes against peace was later circulated among the British and American delegations at the London Conference, shaping the Allied response to Axis crimes (Hirsch, 2008, p. 708). The Soviets therefore played a key role in the status of aggressive war as the chief crime in Nuremberg. Yet during the London International Conference on Military Trials, it was the Americans and British who most forcefully defended the vision of aggressive war as representing 'the heart of the case' against Axis leaders, therefore justifying its status as the 'supreme international crime' (Schick, 1948, p. 447). For Justice Jackson (U.S. representative at the London Conference), 'the crime of making unjustifiable war' was indeed 'the crime which comprehend[ed] all lesser crimes' (cited in Taylor, 2013, p. 54), and the very reason for the involvement of his country in the war against Axis powers (Jackson, in Department of State, 1949c, p. 384). Similarly, the British saw 'the common plan or conspiracy to dominate Europe' as '[t]he chief crime. . . the leaders in Germany [we]re guilty' of (Sir David Maxwell Fyfe, in Department of State, 1949g). For the British and Americans, the focus on crimes against peace was therefore justified both by the gravity of the crime and by its scope, aggression being the reason and cause for the violations committed during the conduct of war itself. Besides, what justified the primary status of crimes against peace was its scale: by jeopardising the very idea of peace, aggressive war was an attack on the entire world, and on all the nations and peoples it comprises. The United States explained that at stake in the post-WWII trials was 'our whole attitude towards the waging of aggressive war . . . We envisaged it as a trial of the master planners in which the criminality consists of making and executing the master plan to attack the international peace' (Jackson, in Department of

[63] This includes 1527 references to aggression, 677 references to war(s) of aggression, 649 references to aggressive war(s) and 196 references to crime(s) against peace (Moyn, 2020, p. 351, fig. 14.1).

State, 1949k, pp. 126–127). This vision would later be enshrined in the IMT's *Nazi Conspiracy and Aggression* Judgment, which stressed that:

> War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole' (1947, p. 16).

Similarly, the Majority Judgment at the International Military Tribunal for the Far East (IMTFE) affirmed that 'no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it' (Pritchard & Zaide, 1981, para. 49769).

The focus on aggressive war as the foremost offence was however not unanimous. The French were more concerned about war crimes and crimes against humanity (T. Taylor, 2013, p. 80), arguing that it was 'what is in the aggression, what comes after the aggression, that ma[de] really the necessity and the right of judging [Axis] men' (Professor Gros, in Department of State, 1949a, p. 386). The divergence between France and the other Allied Powers as to which offense should take priority (or be the core concern of the IMT) reflected a deeper controversy regarding the legal status of aggression in international law. Professor Gros (representing France) insisted that whilst international law prohibited the planning and waging of aggressive wars, this should not be equated with the criminal responsibility of the individuals that would launch an aggressive war. In other words, although aggression had been outlawed as an instrument of foreign policy, it did not entail the right to convict and punish those individuals acting on behalf of the state (Department of State, 1949m, pp. 295–296, 1949i, p. 361). Professor Gros captured this difference of views when noting that 'the Americans want to win the trial on the grounds that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits' (Department of State, 1949c, p. 386). The French delegation was committed to ensuring that the Charter did not 'declare new international law; it [wa]s made to punish war criminals and the basis [ought to] be a safe one' (Department of State, 1949m, p. 297, 1949h, pp. 335–336). The same arguments were in fact later mobilised by the defence during the trials, who criticised the very possibility of trying and sentencing individuals for 'unleashing [an] unjust war', as it '[was] not as yet valid international law' (IMT, 1947b, p. 168).

Despite the French objections to including crimes against peace, criminalising aggressive war became the chief focus in the Charters of the IMT and later of the IMTFE. Nuremberg and Tokyo were therefore 'peace projects' rather than 'justice projects' (Mégret, 2018), predominantly concerned with the preservation and 'protecti[on of] the Westphalian system from the destabilizing effects of unprovoked warfare' (Douglas, 2012, p. 280). Indeed, it is precisely because aggressive war resulted in a disruption of the status quo international order that the Allied nations saw aggression as legally and politically unacceptable. Outlawing and criminalising aggression indeed contributed to 'freezing' the existing international order, with its embedded historical power hierarchies and stratifications (Han & Nantermoz, 2022). Whilst at Nuremberg the legitimacy of criminalising aggressive war was called into question for creating an ex post facto law, in Tokyo judges themselves put forward a more fundamental critique of the crimes against peace charge, that challenged the prevailing status quo (Sellars, 2013, pp. 260–261).

Departing from the Majority Judgment, three judges of the IMTFE took issue with the validity and legitimacy of criminalising aggressive war. Justice Pal in particular advanced the most trenchant critique. Pal saw the criminalisation of aggressive war as premature, since the concept of international crimes presupposed the presence of an international community 'brought under the reign of law' (International Military Tribunal for the Far East, 1999, p. 51). From his perspective, the Nuremberg and Tokyo trials set a dangerous precedent whereby 'the fear of punishment attendant upon a particular conduct d[id] not depend upon law but only upon the fact of defeat in war' (International Military Tribunal for the Far East, 1999, p. 71). More fundamentally, Pal saw the criminalisation of crimes against peace as 'absolutely untenable' in the current states of affairs, as it would require 'dominated nations of the present day "status quo" . . . to submit to eternal domination only in the name of peace' (International Military Tribunal for the Far East, 1999, p. 116). In the absence of effective rules and mechanisms for peaceful change, the introduction of penal responsibility for aggressive war would therefore entrench a deeply unjust status quo, and leave part of humanity unable to escape from political domination and 'the *actual plague* of imperialism' (International Military Tribunal for the Far East, 1999, p. 117). Whilst appealing to universal values and ideals of peace, justice and humanity, Western nations were in fact defending their own interests by maintaining 'the very "status quo" which might have been organized and hitherto

maintained only by force' by these same nations. Judith Shklar would later advance a similar view, arguing that the criminalisation of aggressive war (in the existing geopolitical conditions) amounted to an 'ideological defence of colonialism', by preventing the subaltern and subjugated from using war as an instrument to bring about emancipation and change (Shklar, 1946, pp. 180; 187).

At stake in the question of criminalising crimes against peace was therefore the prioritisation of peace over justice, and by implication, the outlawing and criminalisation of anti-colonial struggles for freedom, independence and self-determination (Han & Nantermoz, 2022; Sellars, 2013, p. 237). The criminalisation of aggressive war reflected a concern for preserving and defending the *international status quo*. Below I show how the Allied powers' concern for removing questionable domestic policies from scrutiny influenced the scope and definition of crimes against humanity.

b. Crimes against Whose Humanity? The nexus requirement and the racial question

Whilst the Charter of the IMT and IMTFE provides for all three groups of offences (crimes against peace, war crimes and crimes against humanity) to come under the jurisdiction of the tribunals, crimes against humanity could only be prosecuted when found to be committed 'in execution of or in connection with' crimes against peace or violations of the laws and customs of war (Charter of the International Military Tribunal, 1945, art. 6; Charter of the International Military Tribunal for the Far East, 1946, art. 5). This required nexus between crimes against humanity on the one hand, and crimes against peace or war crimes on the other (that is, with the armed conflict) limited crimes against humanity to 'the persecution of minorities [and other inhumane acts against civilian population] for the purpose of clearing the road to war' (Department of State, 1949e, p. ix). The prosecution of the Axis officials indicted in front of the IMT, and subsequently in front of the IMTFE, therefore had to start with the common plan or conspiracy to plan, initiate and wage wars of aggression, and link the systematic commission of crimes against humanity to 'the plan for preparing and prosecuting aggressive or illegal wars' (IMT, 1947a, p. 29).

France proposed an additional wording of article 6, which defined the crimes that would come under the jurisdiction of the IMT. The alternative wording would consider 'the policy of atrocities and persecutions against civilian populations' as a crime in its own right, thereby removing the requirement of an established connection with the war (Department of State, 1949l, p. 293). France was indeed wary that such a nexus would make it excessively difficult to condemn the atrocities committed against the Jews, which had no apparent link to aggression against other nations. As Professor Gros argued, 'it would be easy for German counsel to submit to the court that the Nazis' plan against the Jews is a purely internal matter without any relation whatsoever to aggression as the text stands' (Department of State, 1949i, p. 361). For the Americans however, removing the nexus was unthinkable as it would compromise the principles of sovereignty and non-interference in the domestic affairs of other states. As explained by Justice Jackson:

> [i]t has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. . . Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities (Department of State, 1949h, p. 331).[64]

American jurists were indeed wary that an expansive definition of crimes against humanity – and notably persecution on racial grounds – could backfire, by creating a universal juridical instrument which could be turned against them (Mouralis, 2019). The American administration was well aware that detaching crimes against humanity from the war would allow the concept to be mobilised to denounce treatment of the racial segregation regime in the US, thereby opening the door to international scrutiny and condemnation (Mouralis, 2019). In a memorandum addressed to the President in September 1944, U.S Secretary of War Henry Stimson made a parallel between the atrocities committed in Germany and the racial violence and segregationist regime at home:

> I have great difficulty in finding any means whereby military commissions may try and convict those responsible for excesses committed within Germany both before and during the war which have no relation to the conduct of the war. . . [External] courts would be without jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our own country (Stimson, 1944).

[64] For an argument contra, see Professor Gros, noting the many examples of humanitarian intervention over the past centuries, which evidenced the practice of interfering in the internal affairs of other states to protect persecuted minorities (Department of State, 1949i, p. 380).

Justice Jackson similarly acknowledged during the London Conference that the USA had 'some regrettable circumstances at times in [their] country in which minorities [we]re unfairly treated', though emphasising that 'ordinarily we do not consider that the acts of a government towards its own citizens warrant our interference' (Department of State, 1949h, p. 333). As Graham Cox notes, the hypocrisy and irony of the Americans, who 'protected and extended racial persecution at home while . . . simultaneously claimed it an international crime in Europe', was not missed by the Black American community (2008, p. 19). When Jackson was quoted celebrating the London Charter for 'bring[ing] a new force to the support of civil liberties and minority rights',[65] the *Pittsburgh Courier* was quick to denounce the irony of the situation (cited in Cox, 2008, p. 467).

Hence the construction of atrocities as a domestic rather than international concern enabled their marginalisation in the trials. The denomination of crimes against humanity appears at odds with the treatment of the question in Nuremberg and Tokyo. To the extent that crimes against humanity were recognised as international crimes, it was not because of their specific nature (such as their barbaric or inhuman character that would make them of concern to all of humanity). Rather, and paradoxically, crimes against humanity only became of concern to humanity and the international community in so far as they could be connected to aggressive war.

c. The economic case: missed opportunities and lost histories

The role of domestic interests in shaping the content of international crimes – and therefore the ways through which ICL furthers an international status quo – is equally visible when looking at the treatment of the 'economic case' in Nuremberg and Tokyo, which covered the role of the industrialists and financiers in giving Axis powers the means to wage an aggressive war against the Allied nations (T. Taylor, 2013, pp. 80–81).[66] As the trials

[65] Jackson's statement alluded to the fact that in the London Charter of the IMT, '[r]acial and religious persecution by a government against its own people, in some circumstances, may rise to the magnitude of crimes against international society' (cited in Cox, 2008, p. 467).

[66] The terminology of the 'economic case' was first used by Francis Shea, who oversaw this aspect of the case for the Americans, in a memorandum to Jackson dated from 23 July 1945 (Taylor, 2013, p. 81).

progressed, the economic case was relegated to the margins, while the industrialists became integral to the new global economic order led by the Americans.

In preparing for the prosecution of the major Axis war criminals, the Allied nations explicitly discussed the role industrialists had played in the war and therefore how they should be treated. Already in the fall of 1943, Trainin had underlined the criminal responsibility of German industrialists and financial magnates for what he described as 'grievous violations of the principles of international intercourse and human ethics' (cited in Hirsch, 2020, p. 32).[67] In a report sent to President Truman a few weeks before the London Conference, Justice Jackson confirmed his commitment to include amongst the accused those individuals 'in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals' (Department of State, 1949g, p. 47). Meanwhile, back in the US a Congressional Subcommittee on war mobilisation was investigating the '[c]onspirators of the International Farben Cartel who Manufacture Wars' (Dubois, 1952, pp. 14–15, as cited in Baars, 2013, p. 165), who were shown to be 'fully aware of, and in complete agreement with, Hitler's plans for aggressive war', and 'completely responsible for Hitler's policy' (War Department, 1945, p. 957, as cited in Baars, 2013, p. 166).

Whilst during the London Conference the focus was largely on the provisions to be included in the Charter of the IMT itself, Tedford Taylor notes in his memoir that 'informal discussions made it clear . . . that Jackson, and the French and Soviet delegates as well, were planning to expand the list of defendants to include, among others, several "economic" defendants' (T. Taylor, 2013, p. 86). The latter were seen as encompassing both prominent companies and cartels of Nazi Germany – such as Krupp, I.G. Farben and Siemens – and German high finance for their role in organising and enabling the German war efforts (K. C. Priemel, 2013, p. 91). The British, however, were less enthusiastic about the prospects of the economic case, fearing that the latter could create unnecessary complications and ultimately result in 'embarrassing acquittals' (T. Taylor, 2013, p. 86).[68] The list of the twenty-four

[67] Trainin was then working on the question of the criminal responsibility of the 'Hitlerites'. Trainin would later write that the German financial and industrial heads 'were the masters for whom the Fascist State machine was zealously working', emphasising that they 'must also be sent for trials as criminals' (Trainin, 1945, pp. 84–85).

[68] This is not to say that in the other delegations a unanimous support existed for trying German industrialists. Notably, within the US legal team several members had been vocal about their disapproval of the 'economic case', which they believed would 'overload things' and transform a war crimes trial into an 'anti-trust case' (T. Taylor, 2013, pp. 81–82).

defendants to be tried in front of the IMT was ultimately announced on 29 August 1945 (T. Taylor, 2013, pp. 89–90).[69] Notwithstanding the efforts of the Americans, French, and Soviets to add business and finance defendants, ultimately Gustav Krupp was the sole industrialist indicted, alongside several former ministers.[70] Gustav Krupp, however, was seventy-five years old and in ill-health, and thus unable to stand trial. The Americans suggested replacing Gustav Krupp with his son, but the British objected out of fear that it would delay the start of the trials. Gustav Krupp was not tried in absentia, though the charges laid against him in the indictment were retained and read at the opening of the trial (Baars, 2013, pp. 171–172; Bush, 2009, pp. 1111–1112).

The indictment presented the economic aspects of the case as follows: the defendants mobilised 'Germany's economy to give effect to their political aims', using 'German business[es] as instruments of economic mobilization for war' and 'direct[ing] Germany's economy towards preparation and equipment of the military machine' (IMT, 1947a, p. 35). Jackson tasked Francis Shea with preparing the economic aspects of the case against Axis war criminals (T. Taylor, 2013, p. 80). Shea was Assistant Attorney General with the US Justice Department and served as one of Jackson's close associates at Nuremberg. As Shea saw it, the industrialists and financiers had 'given Hitler the material means to rearm Germany, *with full knowledge* that Hitler planned to use these armaments to carry out his program of German aggrandizement by military conquest' (T. Taylor, 2013, p. 81).

Despite the ultimate absence of industrialists among the defendants, the economic aspects of the war still featured prominently in the proceedings and judgment of the IMT, notably through the narrative and evidence presented by the American prosecution team (T. Taylor, 2013, p. 81). The IMT judgment notably recalled the direct involvement of the industrialists in the Holocaust and the benefits they reaped from the aggressive war. Ultimately, Funk (who had occupied the functions of head of the Reichsbank and Minister of

[69] Krupp was until 1943 the owner and head of Friedrich Krupp A.G., a munition and military equipment company which contributed heavily to the German war machine. Among the ministers listed in the indictment was Hjalmar Schacht, former head of the Reichsbank and Minister of Economics and who had prior to the war enabled the financing needed to expand war production; Walter Funk, who had occupied the same functions after Schacht; Hermann Göring, Hitler's second in command, who had worked to mobilise all sectors of the German economy for war; Fritz Sauckel, who played a key role in the foreign labour programme; and Albert Speer, Minister of Armaments and Munitions (Baars, 2013, p. 170; Taylor, 2013, pp. 86–92).

[70] French prosecutors had notably suggested adding Heinrich Koppenberg (who headed the aircraft firm Junkers) and Hans Hemmen (who served as a Foreign Office financial specialist) to the list of defendants (Bush, 2009, p. 1113).

Economics) was convicted of crimes against peace for his role in the economic preparations for the war. Schacht (Funk's predecessor) and Speer (who had served as Minister of Armaments and Munitions) were acquitted (Baars, 2019, p. 154).[71]

Reporting to President Truman on the IMT judgment, Justice Jackson stressed that much remained to be done to deal with the 'very large number of Germans who ha[d] participated in the crimes [and who] remain[ed] unpunished', adding that '[t]here [we]re many industrialists, militarists, politicians, diplomats, and police officials whose guilt d[id] not differ from those who ha[d] been convicted except that their parts were at lower levels and ha[d] been less conspicuous' (Department of State, 1949d, p. 435). Jackson noted that his appointed successor, Brigadier General Telford Taylor, had assembled a plan with a view to prosecute a significant number of individuals from various segments of the Third Reich, including industrialists and financiers (Department of State, 1949d, p. 435). Jackson was aware that the other Allied nations may be unwilling to conduct another four-power, international trial to prosecute another set of defendants, including the industrialists. Jackson therefore suggested that the US carry forward with trying their own cases in accordance with the plans prepared by Taylor (Department of State, 1949d, pp. 435–436). However, the US stance and early enthusiasm on prosecuting the industrialists quickly changed along with the shifting geopolitical landscape and the new US goal of 'rebuilding a strong Germany as a buffer against Communism' (McKinzie, 1973, as cited in Baars, 2013, p. 174). The Allied nations – led by the United States – indeed soon came to realise that European security, as well as the political and economic stability of the continent, would require a functioning German industry 'run by the same managers, regardless of culpability' (Bush, 2009, pp. 1120–1121).

As a result, the trials under the Nuremberg Military Tribunals soon turned into a 'theatre of the absurd', characterised by an extraordinary clemency shown towards the defendants (Baars, 2013, 2019, p. 197; Bush, 2009, pp. 1218–1222). This clemency took multiple forms, including a particularly generous application of exculpatory legal doctrines, along with a more general tendency from judges to ignore or take as 'unproven' facts

[71] Schacht, who had defected prior to the beginning of the war, was acquitted as the Tribunal could not establish that he was aware of Hitler's intentions; Speer's acquittal was due to the fact that the actions he stood accused of only happened after the war was already well underway (Baars, 2019, p. 154).

admitted by the defendants themselves, and to accept the defendants' ignorance of the aggressive war plans and of the Holocaust. This was accompanied by the delivery of remarkably light sentences, some of which were further reduced in subsequent extrajudicial reviews, resulting in the reinstatement of many industrialists in their former positions (Baars, 2013, p. 179). As Jonathan Bush has aptly summarised it, 'with conspiracy charges cut back, corporate charges not utilized, and the political currents running so decisively in favor of rebuilding the West German economy and cultivating its support, the predictable result was near-total impunity for big business' (Bush, 2009, p. 1240).[72] In fact, some of the very companies that had been at the heart of the cases against the industrialists (including IG Farben' BASF, Bayer and Hoechst) would quickly resume the production of military equipment which the US used in its war against Korea (Baars, 2013, p. 178).

The trials on the Eastern Front followed a similar pattern. The economic aspects of the war were initially the object of close attention from the Allied prosecutors (Baars, 2019, p. 197). An appendix to the IMFTE Indictment presenting key elements to be used by the prosecution in support of the crimes against peace charge included a section on 'economic aggression in China and Greater East Asia' (Harry S. Truman Library and Museum, n.d., sec. 3). As the document explains:

> [d]uring the period covered by this Indictment, Japan established a general superiority or rights in favour of her own nationals, which effectively created monopolies in commercial, industrial and financial enterprises, first in Manchuria and later in other parts of China which came under her domination, and exploited those regions not only for the enrichment of Japan and those of her nationals participating in those enterprises, but as part of a scheme to weaken the resistance of China, to exclude other Nations and nationals, and to provide funds and munitions for further aggression' (Harry S. Truman Library and Museum, n.d., sec. 3).

Yet the trials were marked by the conspicuous absence of Japan's major industrialists (who led the biggest Japanese monopolies, the *zaibatsu)* (Piccigallo, 1979, p. 147). The Soviets in particular saw the IMTFE as participating in the exoneration of the Japanese who were most responsible for the war, that is, the emperor Hirohito and the major industrialists who had worked closely with the militarists in service of Japan's imperialist plans (Piccigallo, 1979, p. 148). The absence of the industrialists was no accident, but 'the results of a carefully

[72] Others have also pointed that the change of attitude regarding the trial of the industrialists was at least partially driven by the need of the Americans to reassure industrialists at home that the production for the Korean war (and other potentially aggressive wars) would not leave them open to prosecution (Baars, 2013, p. 178).

calculated plot engineered by the *zaibatsu*'s counterparts on "Wall Street"' (Raginsky & Rozenblit, 1948, p. 421, as cited in Piccigallo, 1979, p. 148). For the Soviets, the Americans were:

> doing their utmost to whitewash and justify the aggressive policy of the Japanese imperialists. Wall Street and its agents, who direct US policy, are resurrecting militarism in Japan and converting the country into a base for the promotion of their insensate plans of world domination' (Berezhkov, 1948, as cited in Piccigallo, 1979, p. 148).

The soon aborted effort in Nuremberg and Tokyo to try the industrialists and businessmen implicated in the war ultimately moved the focus away from the role of economic actors in enabling the Axis war machine, shielding industrialists and financiers from international criminal responsibility. The industrialists, once depicted as guilty by association to the Axis war machine, soon became allies in the diffusion of a new global economic order dominated by the Americans. Once more, we see how international criminal law is used to legitimate and protect the status quo. In the aftermath of Tokyoberg, the role of economic actors in the enabling and perpetration of atrocities would be relegated to the background of ICL.

II) A spectacle of atrocities: the ad hoc tribunals for the former Yugoslavia and Rwanda

Whilst in the immediate aftermath of WWII the focus was on punishing and ultimately ending aggressive war, the re-emergence of international criminal tribunals in the 1990s would come with a new focus on atrocities, aggression becoming little more than an afterthought (Mégret, 2018). In contrast with the contested debates that had taken place in London in 1945 on the question of the criminality of aggressive war and its definition, in the context of the former Yugoslavia little, if any, discussion focused on defining which offences would come under the jurisdiction of the tribunal to be established. There indeed seemed to be a wide consensus over the inclusion of 'grave breaches' of international humanitarian law and crimes against humanity. This relative absence of contestation or even discussion over the substance of the crimes was enabled by normative developments in international humanitarian law and human rights law – with the 1949 Geneva Conventions and 1977 Additional Protocols (ICRC, n.d.-a, n.d.-b), the 1948 Genocide Convention (United Nations

General Assembly, 1948) and the work of the International Law Commission on a *Draft Code of Offences against the Peace and Security of Mankind* (International Law Commission, 1996). Indeed, as noted by US ambassador Madeleine Albright, '[u]nlike the world of the 1940s, international humanitarian law [had become] impressively codified, well understood, agreed upon and enforceable' (in United Nations Security Council, 1993d, p. 11).[73] This emphasis on the atrocities occurring in the midst of situations of mass violence and conflict would orient international criminal justice in a much more interventionist direction (Mégret, 2018, p. 844). Crimes which occurred purely domestically could be labelled as international crimes – not only because they would be constructed as a threat to international peace and security, but also because the scale and gravity of the harms would make them of concern to all of humankind.

During debates surrounding the establishment of the Commission of Experts on the former Yugoslavia and subsequently the ICTY, delegations often underlined the spectacular, visually arresting, and shocking character of the violence committed in the region. As has been noted in Chapter 4, starting from the summer 1992 the conflict and atrocities in the former Yugoslavia were widely publicised. The printed photographs of starving victims and the testimonies of rampant rape and sexual violence contributed to mounting public pressure to stop the violence, in what has been dubbed the 'CNN effect' (Bahador, 2007). The highly mediatised and publicly salient conflict in Yugoslavia fed into the focus on highly visible and easily recognisable instances of violence and atrocity, the emphasis being placed on large scale manifestations of bodily harm and attacks to bodily integrity. As shown in Table 3 below, during discussions on the establishment of an international tribunal for the former Yugoslavia, the most frequently mentioned offences included rape and sexual violence (especially against women), mass killings and massacres, torture and ethnic cleansing.

[73] See also the report from the Committee of French Jurists on the establishment of an international tribunal for the former Yugoslavia, which noted that 'the four Geneva Conventions of 1949. . . have been ratified by nearly every State in the world' (United Nations Security Council, 1993a, para. 64, p. 20).

Type of offence	Count
Mass killings/massacres	6
Torture/inhumane treatment	6
Rape/abuse of women	6
Ethnic cleansing	6
Forced displacement	2
Blockading of humanitarian aid	2
Forcible surrender or destruction of property (looting)	2
Destruction of cultural or religious heritage /property	1
Genocide	1

Table 3– Incidence of offences in the Security Council 3175th meeting on the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (United Nations Security Council, 1993d).[74]

This is not to say that the discussions only referred to acts which caused bodily harm or violence. Delegates indeed directed attention to acts such as the obstruction of humanitarian aid, the destruction of key non-military infrastructures, or the destruction of cultural and religious sites. Morocco, for instance, spoke of 'crimes against people and property, and against a culture and civilization' (Mr Snoussi, in United Nations Security Council, 1992, p. 14). Venezuela referred to the Additional Protocol I to the Geneva Conventions which 'prohibits the destruction of infrastructures basic to life, such as electricity, drinking water, sewage and other basic public services', noting that such crimes were being committed in the Republic of Bosnia and Herzegovina (Mr Arria, in United Nations Security Council, 1992, p. 9). The UK deplored the 'deliberate obstruction of humanitarian relief convoys' and the 'forcible surrender of property' (Sir David Hannay, in United Nations Security Council, 1993c, p. 17), whilst Hungary denounced the withholding of water to civilians and the destruction of cultural and religious property (Mr Erdos, in United Nations Security Council, 1993c, p. 21). Similarly, the United States mentioned 'the blockading of aid to sick and starving civilians' (Warren Christopher, in United Nations Security Council, 1993b, p. 12). This inclusion of less spectacular and shocking crimes, however, was more pronounced early in the debates, during the time surrounding the establishment of the Commission of Experts and the discussion of its conclusions. The debates surrounding the creation of the ICTY were marked by the relative absence of such crimes, with the blockading of humanitarian

[74] 15 delegations were present in the meeting, with 11 offering statements. Where a delegation made several references to the same type of offence in their statement, it was only counted once.

aid, the destruction of property or of cultural and religious heritage only gathering a few mentions, as evidenced in Table 3.

A lexicon of unspeakable horror and cruelty was pervasive in the discussions. The French representative spoke of 'the horror that the crimes daily being reported inspire[d] in us', crimes which were described as 'impermissible violations of international humanitarian law' (Mr Mérimée, in United Nations Security Council, 1992, p. 16). Echoing the French, Morocco spoke of 'unpardonable crimes' (Mr Snoussi, in United Nations Security Council, 1992, p. 14). Hungary stressed the importance of prosecuting 'those who massacre and burn children, women and elderly people; who, with diabolical regularity, shell innocent civilian populations; who practice "ethnic cleansing" . . . who cut off the water supplies of besieged communities; who deliberately destroy cultural or religious property' (Mr Erdos, in United Nations Security Council, 1993c, p. 21). Venezuela denounced the 'savage policy of raping women as a technique of war' (Mr Arria, in United Nations Security Council, 1993b, p. 17), whilst Brazil expressed its indignation at the ''widespread violence against women of all ages, including a horrifying pattern of sexual assault against Muslim women' (Mr Sardenberg, in United Nations Security Council, 1993c, p. 34). The spectacular and exceptional character of these crimes was accentuated through their portrayal as a thing of the past: for Morocco, these acts of violence were so inadmissible that nations 'had thought [they] belonged to a bygone age' (Mr Snoussi, in United Nations Security Council, 1993b, p. 27). Similarly, Hungary stated that not '[s]ince the end of the Second World War [had] Europe. . . known such terrible upheavals or human-rights violations of such magnitude and such cruelty' (Mr Ergos, United Nations Security Council, 1993b, p. 18).

Similar dynamics were present in the Rwandan case. The preliminary report of the Commission of Experts on Rwanda spoke of 'systematic, widespread and flagrant breaches of international humanitarian law, large-scale crimes against humanity and genocide' (United Nations Security Council, 1994b, para. 42, p. 12). Delegations overwhelmingly put the emphasis on acts of killings, as the most spectacular and arresting dimension of the genocide and wider atrocities committed in Rwanda.[75] Delegations repeatedly emphasised the sheer

[75] For an exception, see the statement from the Czech Republic, which condemns (in addition to the murdering of civilians) 'the uncontrolled marauding of bandits, and . . . the incendiary broadcast of Radio Mille Collines' (Mr Kovanda, Czech Republic, in United Nations Security Council, 1994, p. 4).

scale of the violations committed, as well as the level of cruelty and horror they demonstrated. State representatives spoke of an 'orgy of killing and brutality [which] ha[d] engulfed Rwanda' (Mr van Bohemen, New Zealand, in United Nations Security Council, 1994, p. 6), of a 'barbarity defy[ing] explanation' (Mr Marker, Pakistan, in United Nations Security Council, 1994a, p. 10), of 'tragic results' and a 'whole nation laid to waste' (Mr Sardenberg, Brazil, in United Nations Security Council, 1994b, p. 8) and of 'large scale. . . killings, massacres, and. . . genocide' (Mr Al-Khussaiby, Oman, in United Nations Security Council, 1994g, p. 16).

This emphasis on the spectacular and visually arresting was reinforced by the use of numbers to signal the sheer scale of the violence. During discussions surrounding the establishment of a Commission of Experts to investigate grave violations of international humanitarian law being committed in Rwanda, the United States noted that 'over 200, 000 people ha[d] been hunted down and killed in politically motivated ethnic violence and genocide' (Mr Gnehm, in United Nations Security Council, 1994a, p. 3). During subsequent debates on the establishment of an international tribunal for Rwanda, New Zealand spoke of '[b]etween 500,000 and 1 million people [which] may have been slain in Rwanda in a little over three months' (Mr Keating, in United Nations Security Council, 1994c, p. 4). The Russian Federation reminded those present that 'hundreds of thousands of people ha[d] perished' (Mr Lavrov, in United Nations Security Council, 1994c, p. 2), and Brazil highlighted the 'hundreds of thousands of innocent people killed, [and] millions of others internationally displaced or forced to cross the borders' (Mr Sardenberg, in United Nations Security Council, 1994c, p. 8).

III) Rome: determining the 'most serious crimes of concern to the international community'

Much like the dynamics present in the discussions surrounding the establishment of the ICTY and ICTR, at Rome the negotiations evidenced an expectation that international crimes would be of a certain scale and level of gravity and would give rise to humanitarian outrage and a visceral reaction to these harms. Hence war crimes, crimes against humanity, and genocide were portrayed as self-evidently criminal, reflecting a widespread consensus for their inclusion in the Rome Statute. The more contested status of nuclear weapons or

aggression, in contrast, revealed different argumentative strategies. Those seeking to include the crime of aggression and the prohibition of nuclear weapons within the jurisdiction of the ICC pointed to their destructive consequences and to the violence and cruelty they led to, therefore mobilising humanitarian sensibilities in support of their position. The appeal to humanitarian sentiments was also connected to an intuitive aversion to suffering, a visceral rejection of cruelty, and portrayed as separate from politics. In contrast, those opposing the inclusion of nuclear weapons and aggression pointed to its ambiguous and controversial legal status, to the risk of politicisation and, in the case of aggression, to the absence of an established definition of the offence – all of which contributed to representing the status of aggression and nuclear weapons as all but self-evident and intuitively apprehensible. At the same time, the penal driver was carefully bounded to specific offences, which were typically associated with a lack of domestic will to prosecute and punish. This justified the exclusion of so-called 'treaty crimes' from the statute of the ICC.

a. Appealing to humanitarian sensibilities: visibility, affects and the self-evidently criminal

During the negotiations of the Rome Statute, atrocity crimes were by far the least controversial, generating a quasi-universal consensus over their inclusion though some controversies remained over the exact scope and definition of some of these crimes. The uncontroversial inclusion of crimes against humanity, genocide, and war crimes reflected a widespread consensus over the criminality of these categories of harm. As Qatar noted, these were crimes which 'mankind categorically condemned' (Mr Al-Thani, in United Nations, 1998j, p. 110). At the same time, this consensus was facilitated by the association of crimes against humanity, genocide, and war crimes with the worst forms of violence and cruelty. In other words, these harms appeared as self-evidently criminal and so egregious as to be particularly worthy of international attention. The Republic of Korea spoke of heinous crimes' (Mr Chung Tae-ik, in United Nations, 1998a, para. 81, p. 69), whilst Colombia qualified these three crimes as 'horrendous crimes' (Mr Zalamea, in United Nations, 1998b, para. 26, p. 84). Crimes against humanity, war crimes and genocide were seen as amounting to the 'worst criminal assaults on mankind' (Mr Richardson, USA, in United Nations, 1998c, para. 57, p. 95), justifying their designation as 'crimes of international concern' (Mr Kleopas, Cyprus, in United Nations,

1998e, para. 44, p. 117). They were described as the 'most serious crimes' (Mr Gotsev, Bulgaria, in United Nations, 1998c, para. 54, p. 95),[76] as 'core crimes' (Mr Asamoah, Ghana, in United Nations, 1998b, para. 38, p. 85; Mr Abdullah, Afghanistan, in United Nations, 1998b, para. 60, p. 87; Mr Mutale, Zambia, in United Nations, 1998c, para. 28, p. 93), and as 'major crimes' (Mr Fall, Guinea, in United Nations, 1998f, p. 92).

Within the category of war crimes, however, the inclusion of nuclear weapons was arguably most controversial. A broad coalition of states supported the criminalisation of nuclear weapons – for the most part non-nuclear states, joined by India, who despite being a nuclear state, believed in the importance of establishing criminal responsibility for acts related to the use of nuclear weapons.[77] To advocate for the inclusion of nuclear weapons amongst the list of prohibited weapons of mass destructions, these delegations appealed to senses and emotions, pointing to the immense destructive power of nuclear weapons. Nuclear weapons were described as 'the most devastating weapons of mass destruction' (Mr Daihim, Islamic Republic of Iran, in United Nations, 1998c, para. 71, p. 161) and as 'the most pernicious of all weapons' (Mr Shukri, Syrian Arab Republic, in United Nations, 1998h, para. 33, p. 322). The impact of nuclear weapons was depicted graphically, with Nicaragua reminding delegations that nuclear weapons and anti-personnel landmines 'continued to cause loss of life and limb in his country' (Mr Castellon Duarte, in United Nations, 1998o, p. 342). Delegations also argued that nuclear weapons were equally harmful and destructive as other weapons of mass destruction – and should therefore not be treated any differently (Mr Momtaz, Islamic Republic of Iran, in United Nations, 1998i, para. 61, p. 331). As Jordan explained, 'it [would be] hard to explain to anyone why bullets which expanded or flattened were prohibited while nuclear weapons. . . were not' (Mr Said, in United Nations, 1998i, para. 80, p. 331). The nefarious effects and humanitarian catastrophe that nuclear weapons could

[76] See also Mr Nazarov (Tajikistan, in United Nations, 1998c, para. 17, p. 92), speaking of 'serious international crimes'; Mr Derycke (Belgium, in United Nations, 1998d, para. 2, p. 97), speaking of 'particularly serious crimes'; and Mr Ibrahim (Nigeria, in United Nations, 1998d, para. 85, p. 111), referring to 'serious crimes'.

[77] The countries supporting the criminalisation of the use of nuclear weapons included: Algeria; Australia; Bangladesh; Brazil; Chile; Costa Rica; Cuba; Egypt; India; Indonesia; Iraq; Islamic Republic of Iran; Kuwait; Lebanon; Libyan Arab Jamahiriya; Mexico; Nigeria; Philippines; Samoa; Senegal; Slovenia; Slovakia; South Africa; Sri Lanka; Sudan; Sweden; Switzerland; Syrian Arab Republic; Thailand; Tunisia; Ukraine; United Arab Emirates; Venezuela, joined by the Non-Aligned Movement. Madagascar also advocated for the inclusion of the deposit of toxic or nuclear waste within the territory of a state.

cause, in turn, made them an 'overwhelming concer[n] of the majority of mankind' (Mr Zamir, Bangladesh, in United Nations, 1998k, para. 100, p. 128).

States opposing the inclusion of the use of nuclear weapons in the list of crimes under the jurisdiction of the International Criminal Court, meanwhile, pointed to the lack of clarity of the law on that question. The prohibition of nuclear weapons, for this camp, was not immediately evident. Contrasting with the predominantly affective vocabulary mobilised by the other side, these delegations adopted a legalistic tone. United States representative David Scheffer argued that 'the inclusion of nuclear weapons. . . was not consistent with the current state of international law but was "legislative" in nature', which would be especially problematic 'in matters involving criminal responsibility' (United Nations, 1998c, para. 53, p. 159). For the USA, the addition of what was regarded as a 'highly contentious weapon to the list was counter-productive and unhelpful to the negotiating process' (United Nations, 1998c, para. 53, p. 159). Similarly, the Russian Federation explained that 'it did not believe that international law contained any direct prohibition of the use of nuclear weapons' (Mr Panin, in United Nations, 1998f, para. 36, p. 164), whilst Brazil pointed that 'international law was still evolving on that question' (Mr Vergne Saboia, in United Nations, 1998f, para. 46, p. 165).

The crime of aggression would also be the subject of intense discussions and debates. As explained above, already at Nuremberg and Tokyo the charge of crimes against peace had come under heavy criticism, dissenters questioning either or both the notion that aggressive war was an (international) crime, and that individuals could be held personally responsible for it. The vast majority of states present at Rome advocated for the inclusion of aggression in the statute of the ICC. They did so by emphasising the destructive effects of aggression and appealing to humanitarian sentiments or emotions.[78] Since the violence and harm of

[78] The following delegations made statements in support of the criminalisation of aggression in the Rome Statute: Afghanistan; Albania; Angola; Armenia; Austria; Azerbaijan; Bahrain; Belarus; Belgium; Botswana; Brunei Darussalam; Bulgaria; Cameroon; Cape Verde; China; Costa Rica; Cuba; Cyprus; Czech Republic; Denmark; Ecuador; Egypt; Estonia; Ethiopia; France; Gabon; Georgia; Germany; Greece; Guinea; Hungary; India; Ireland; Islamic Republic of Iran; Italy; Japan; Jordan; Kazakhstan; Kenya; Latvia; Lebanon; Libyan Arab Jamahiriya; Lithuania; Madagascar; Malta; Mexico; Netherlands; New Zealand; Niger; Nigeria; Oman; Paraguay; Philippines; Poland; Portugal; Qatar; Republic of Korea; Republic of Moldova; Russian Federation; Samoa; Saudi Arabia; Senegal; Sierra Leone; Slovakia; Slovenia; Spain; Sri Lanka; Sudan; Sweden; Syrian Arab Republic; Tajikistan; Tunisia; Trinidad and Tobago; Uganda; Ukraine; United Arab Emirates; United Kingdom; Venezuela; Vietnam; Yemen; former Yugoslav Republic of Macedonia; Zambia. The League of Arab States and the Coordinated Bureau of the Non-Aligned Movement joined their voices in support of the inclusion of aggression as an international crime.

aggression is arguably less immediately obvious than that of atrocities (not least because aggression targets the body of the state rather than the individual or communities), delegates portrayed aggression as the root cause and enabler of the atrocities and cruelty resulting from war (Han & Nantermoz, 2022). Echoing the USA's vision in Nuremberg, Belgium reminded other delegations that the crime of aggression was 'the first crime that opened all armed conflict' and therefore pointed to the incongruity of prosecuting war crimes without criminalising aggression (Mr Dive, in United Nations, 1998i, p. 174). Lithuania noted that 'experience showed that an act of aggression often led to genocide, crimes against humanity and war crimes' (Mr. Pakalniskis, in United Nations, 1998b, para. 50, p. 76). Similarly, the representative of the Russian Federation argued that '[c]rimes against humanity were often committed as part of wars of aggression', which made 'the inclusion of aggression in the jurisdiction of the Court. . . of particular importance' (Mr Panin, in United Nations, 1998h, para. 106, p. 177). Speaking on behalf of the Movement of Non-Aligned Countries, the Representative of the Islamic Republic of Iran named aggression 'the mother of crimes' (Mr. Mirzaee Yengejeh, in United Nations, 1998k, para. 17, p. 321), whilst Sri Lanka stressed that '[i]t would be unrealistic to ignore aggression, which was often the root cause of many other crimes and humanitarian abuses falling within the Court's purview' (Mr. Palihakkara, in United Nations, 1998h, para. 105, p. 177).

Delegations also stressed the severity of the crime, with some placing aggression at the apex of a constructed hierarchy of crimes. For instance, Egypt qualified the crime of aggression as 'the worst crime against humanity', which therefore ought to be included under the Statute (Mr El Maraghy, in United Nations, 1998a, para. 79, p. 69), whilst the Syrian Arab Republic reminded delegations that the Nuremberg Tribunal had recognised aggression 'as the supreme international crime' (Mr Shukri, in United Nations, 1998k, para. 29, p. 322). Finally, delegations appealed to humanitarian sentiments. This was done for instance by associating the imperative to criminalise aggression with the need to defend the interests of victims. For Cyprus, the failure to include aggression would 'discriminate against victims' (Ms Kleopas, in United Nations, 1998j, para. 44, p. 117). Delegations further emphasised the cruelty resulting from aggressive war. Hence, Gabon stressed that failing to include the crime of aggression 'within the jurisdiction of the Court. . . would be to ignore the cruel reality of such acts' (Mr Moussayou Moussayou, in United Nations, 1998k, para. 81, p. 288).

In contrast, the small minority of powerful states opposing the inclusion of aggression, led by the United States and Israel, pointed to the risk of politicisation, the absence of a clear legal/criminal status and the difficulty of defining the offence. Implicit in these arguments was the notion that the criminal status of aggression was neither self-evident nor had a solid legal basis. Notably, the United States argued that it was 'premature to attempt to define a crime of aggression in terms of individual criminal responsibility', since the offence was 'not clearly criminalized under international law' (Mr Richardson, in United Nations, 1998e, para. 61, p. 95). The United States therefore wanted to avoid '[v]ague formulas that [would leave] the Court to decide on the fundamental parameters of crimes' (Mr Richardson, in United Nations, 1998e, para. 61, p. 95). In deploying its arguments, the United States steered clear of references to previous jurisprudence and especially to that of the Nuremberg International Military Tribunal. As shown above, in Nuremberg the Americans had focused their prosecution strategy on the criminalisation of crimes against peace, arguing that the prohibition and illegality of aggressive war was then already well-established in international law. The conclusion, fifty years later, that including aggression in the Statute of the permanent International Criminal Court was too 'premature', would therefore appear unconvincing if not hypocritical. In fact, the last surviving U.S. Nuremberg prosecutor (Benjamin Ferencz) reminded delegations that aggression had, since Nuremberg, undeniably been an international crime (United Nations, 1998b, para. 120, p. 80).

A second argument advanced against the inclusion of aggression in the Rome Statute pointed to the political sensitivity of the matter and to the risk of politicisation of justice: for Israel, the 'lack of consensus regarding an acceptable definition of that crime, together with the political sensitivity inherent in any attempt to reach such a definition, gave rise to the fear that it could be too easily manipulated for political ends' (Mr Rubinstein, in United Nations, 1998f, para. 41, p. 99). Similarly, Pakistan saw the inclusion of aggression as too 'controversial', especially given that the 1974 definition adopted by the General Assembly was 'of a non-binding nature, and more political than legal' (Mr Mahmood, in United Nations, 1998h, para. 41, p. 173). Pakistan further noted that aggression had traditionally been considered as 'a crime committed by States', which 'raised the complex problem as to how an individual might be prosecuted and punished for aggression' and could lead to situations

'which threatened the concept of sovereignty of States' (Mr Mahmood, in United Nations, 1998h, para. 42, p. 173).

The question of how aggression would be defined was also the source of recurring debates. Three possibilities were considered: using Nuremberg's conception of crimes against peace; borrowing the definition of the UN General Assembly 1974 Resolution;[79] or introducing a new definition.[80] Whilst the Global South largely favoured the definition of Resolution 3314 (XXIX), the latter was initially conceived to address acts of aggression from States, rather than the individual accountability of individuals. In fact, the International Law Commission had stressed in its commentary on its 1994 draft Statute for an International Criminal Court that resolution 3314 (XXIX) 'deal[t] with aggression by States, not with the crimes of individuals, and [wa]s designed as a guide for the Security Council, not as a definition for judicial use' (International Law Commission, 1994, p. 38). Ultimately, the inability to reach an agreement on a specific definition of aggression led to the listing of aggression in the crimes under the jurisdiction of the International Criminal Court, with an additional clause specifying that 'the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 110 and 111 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime' (Kostic, 2011; United Nations, 1998p).[81]

b. Drivers and limits of the will to punish: debates surrounding the (non)inclusion of treaty crimes

Whilst discussions over an International Criminal Court had stalled during the Cold War era, the question of establishing a permanent court was brought back to the agenda at

[79] The resolution defined aggression as follows: 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' (United Nations General Assembly, 1947, art. 2, p. 143).

[80] The following definition was suggested: 'armed attacks undertaken in violation of the Charter of the United Nations, which had the objective of, or resulted in, the military occupation or annexation of the territory of another State or part thereof' (Mr Westdickenberg, Germany in United Nations, 1998h, para. 20, p. 171).

[81] These questions were put on the agenda of the 2010 Review Conference held in Kampala (Uganda), leading to the successful adoption of article 8 bis (defining the crime of aggression) and articles 15 bis and ter (on the exercise of jurisdiction by the Court over that crime). The amendment was activated on 17 July 2018, granting the ICC jurisdiction over the crime of aggression, but not without important limitations – the Court being unable to exercise jurisdiction over the crime of aggression when the latter has been committed by a national or on the territory of a state that has neither ratified nor accepted the Kampala amendments (ICC ASP, 2017, para. 2; Rome Statute of the International Criminal Court, 1998).

the request of Trinidad and Tobago. Not surprisingly, Trinidad and Tobago therefore supported efforts to extend the jurisdiction of the future court to the activities of drug traffickers, which they saw as amounting to the 'most serious crimes of international concern' and therefore posing a serious international threat (Mr Maharaj, in United Nations, 1998a, para. 27, p. 66). Support for the inclusion of drug trafficking and terrorism, referred to as 'treaty-based' crimes, was especially strong amongst states in the Global South.[82] Supporters argued that the inclusion of treaty-based crimes would help build momentum and support around the Statute of the ICC: for instance, Sri Lanka voiced support for the inclusion of the crime of terrorism and crimes related to illicit trafficking in narcotic drugs as they 'believed that an inclusive approach would promote more broad-based support for the Statute and the universality of its jurisdiction' (Mr Palihakkara, in United Nations, 1998h, para. 103, p. 176). These states also stressed the international impact of the treaty-based crimes, which justified inclusion amongst the list of offences to come under the jurisdiction of the ICC. Turkey noted that '[s]ystematic and prolonged terrorism was a crime of international concern', adding that since 'terrorism was often sustained by large-scale drug trafficking, which had an undeniable international impact', these two crimes should be included in the Rome Statute (Mr Güney, in United Nations, 1998i, para. 11, p. 106).

Others, however, saw the inclusion of treaty-based crimes as unnecessary (since they were already covered in international instruments); or worse, as hampering efforts to combat these crimes and creating an additional burden for the Court. Indeed, Japan stressed that although treaty-based crimes were of international concern, 'it was not necessary to include them in the Statute [as a] framework of cooperation had already been established for the prosecution and punishment of these crimes' (Mr Matsuda, in United Nations, 1998f, para. 59, p. 174). Besides, the United States feared that '[c]onferring such jurisdiction on the Court might hamper essential transnational efforts at effectively fighting such crimes' (Mr Scheffer, in United Nations, 1998o, para. 31, p. 123), while Ukraine noted that '[a]ssigning terrorism and traffic in narcotic drugs to the jurisdiction of the Court might overburden it with cases

[82] Albania, Algeria, Armenia, Costa Rica, Cuba, India, Kyrgyzstan, the Libyan Arab Jamahiriya, Madagascar, New Zealand, Nigeria, the former Republic of Macedonia, Sri Lanka, Tajikistan, Tunisia, Turkey and the League of Arab States supported the inclusion of terrorism-related offences; Algeria, Argentina, Costa Rica, Kenya, Kyrgyzstan, the Libyan Arab Jamahiriya, Madagascar, Nigeria, the former Republic of Yugoslavia, Samoa, Sri Lanka, Tajikistan, Thailand, Trinidad and Tobago and Turkey supported the inclusion of illicit trafficking in narcotic drugs and/or psychotropic substances.

that could be successfully dealt with by national courts' (Ms Vinogradova, in United Nations, 1998h, para. 96, p. 176).

The presence of a domestic will to punish such crimes was thus used as a justification for not including them in the jurisdiction of the ICC. Ultimately, in the absence of consensus over the question of inclusion of these offences and over their definition, the Diplomatic Conference passed a resolution recommending that a Review Conference consider terrorism and drug crimes to arrive at an acceptable definition and include them in the list of crimes the Court has jurisdiction over.

Conclusion

Tracing the codification of international crimes from the post-WWII trials in Nuremberg and Tokyo to the establishment of the International Criminal Court, as this chapter has shown, simultaneously exposes the shifting understandings of the role of ICL in addressing mass atrocities and conflict, and the evolving relationship between penal and humanitarian drivers in international criminal justice. The post-WWII paradigm which triumphed at Nuremberg and Tokyo foregrounded crimes against peace over atrocities, ICL being seen as an instrument to preserve the international order. In doing so, ICL further entrenched, if not legitimised, the power hierarchies embedded within the existing status quo. Early attempts to prosecute the industrialists and financiers for their role in enabling the Axis war machine demonstrated the potential for ICL to hold accountable economic actors for their participation in conflict and mass violence. The economic case was however soon abandoned, and with it, the focus on economic actors would quickly fade away. The resurgence of international criminal law in the 1990s came with a new focus on atrocities, and notably on spectacular and highly visible instances of violence. Such displays of horrific acts of violence and abuse indeed facilitated the mobilisation of humanitarian affects in support of the deployment of international penal tools.

Similar dynamics were reproduced during the negotiations of the statute of the ICC. What differed at Rome was the contested status of some of the offences being considered, notably aggression and 'treaty crimes'. Whilst delegations supporting the inclusion of these crimes appealed to humanitarian sensibilities and emphasised the destructive consequences

of these crimes, those opposing their inclusion pointed to the controversial legal status of these offences and to the risk of politicisation, in an effort to disrupt their characterisation as self-evident international crimes. This reveals the role of humanitarianism in driving and legitimising processes of international criminalisation: the more visible and intuitively apprehensible mass violence and suffering manifest themselves as, the more it resonates with external audiences and facilitates calls to deploy punitive tools internationally. This emphasis on the spectacular and visually arresting has however gone hand in hand with the deprioritisation of the role of economic actors in enabling, facilitating and/or participating in mass atrocities. This is not to say that economic actors are completely shielded from international accountability today. Under the aiding and abetting provisions of the Rome Statute, for instance, an accused person can be held liable for 'facilitating the commission of such a crime', whether that person 'aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission' (Rome Statute of the International Criminal Court, 1998, art. 25(3)(c)). Just recently, the International Residual Mechanism for Criminal Tribunals started the trial of Félicien Kabuga for establishing and funding the RTLM radio,[83] and contributing to financing the *Interahamwe militia.* Still, such attempts to hold economic actors criminally liable for their acts remain the exception and are relegated to the margins of the international justice agenda.

Despite significant differences in the priorities and processes of international criminalisation from the aftermath of WWII to the present, the codification of international crimes has therefore consistently served as a status quo preserving exercise, further reproducing and entrenching existing global power hierarchies and injustices. The current prioritisation of large displays of physical, and particularly destructive, forms of violence evidences a 'hierarchy of harms' in international criminal justice. The emphasis on the spectacular can indeed be contrasted with the absence of the structural and systemic factors at the root of mass violence and atrocities (Krever, 2015; Meiches, 2019). Whilst ICL is admittedly not best suited to address the range of structural and systemic ills and resulting violence in the international system, it has today monopolised global justice (Nouwen & Werner, 2015). Celebrating the end of impunity or the triumph of accountability therefore

[83] *Radio Télévision Libre des Mille Collines* (RTLM) played a key role in the genocide by disseminating anti-Tutsi messages, inciting hatred and violence against Tutsis and those that supported them.

not only promotes an uncritical celebration of ICL's progressive role in ending outbursts of mass violence and atrocities, but it also risks naturalising and legitimising the 'indignities and suffering of daily life in a poor country or conflict zone, . . . [seen] as largely inescapable and unchangeable' (Miller, 2016, p. 169).

The prioritisation of physical violence indeed creates a 'politics of distraction' which works to preserve the status quo and reproduce structural global inequalities and injustices, whilst keeping them hidden from sight (Schwöbel-Patel, 2020a, 2021).[84] That is, ICL constrains consciousness, by shaping narratives about mass violence and harm, its ca²uses and solutions, 'highlighting some relations and "spiriting away" others; concealing what must remain hidden' (Baars, 2019, p. 108). It is precisely this power of simultaneously revealing and concealing, making present and absent, that makes ICL a status quo preserving exercise. The belief that atrocities manifest themselves as intuitively recognisable instances of violence and abuse makes the construction and determination of the 'most serious crimes of concern to the international community as a whole' (Rome Statute of the International Criminal Court, Preamble, 1998) appear self-evident and natural, as opposed to socially constructed categories. The brief historical review of the debates and contestation surrounding the determination of international crimes however shows this is far from the case. Comparing the four 'core' crimes of the Rome Statute with the crimes that would fall under the proposed jurisdiction of the African Court of Justice and Human Rights is equally illustrative in that regards. The Malabo Protocol indeed covers a much wider range of harms, including (but not limited to) corruption, mercenarism, money laundering, terrorism, trafficking in persons, in drugs and in hazardous waste, and the illicit exploitation of natural resources. Whilst the Malabo protocol has to date not entered into force, its existence is still illustrative of the fact that ICL could have been – and could still be – otherwise.

[84] See Tor Krever (2013, p. 702): the 'celebration of an end to impunity for individual criminal perpetrators. . . risk[s] naturalizing the structural and systemic sources of conflict and violence and obfuscating the inherent limits to ICL's progressive potential for ending violence and atrocity'.

Chapter 6 – In whose name? The injured body(ies) of international criminal justice

Introduction

Contemporary international criminal justice institutions often portray their mandate as one of achieving 'justice for victims', and frequently emphasise their 'victim-centred', 'victim-friendly' or 'survivor-centred' approach. The 'victim' has indeed become a key figure in international criminal justice, serving to promote and legitimise an ever-contested field. Bringing justice to victims has been described as 'the sole raison d'être'[85] and very 'mandate'[86] of the ICC. Conversely, failure to open an investigation into alleged international crimes, or failure to secure a conviction of the accused, is often portrayed as a betrayal of victims and even as a negation of their suffering (Amnesty International, 2018; Human Rights Watch, 2019). Whilst the central place of the victim in the discursive imagination of international justice-making may appear common-sensical and natural, it has not always been so. As Gilbert Bitti (2018, p. 6) has noted, '[v]ictims of crime are missing from the history of international criminal justice. Conventional accounts of the relationship between international criminal justice and victims indeed tell a story marked in the early days of the field by absences, exclusions and missed opportunities (Karstedt, 2010). The creation of the ICC in the late 1990s would – as the story goes – lead to a complete shift in paradigm, creating a new model combining retributive and restorative justice, and putting victims' rights at the core of international criminal justice (Findlay & Henham, 2005).

This chapter interrogates how narratives of victimhood and references to an injured humanity or international community have come to play a central role in the legitimation and promotion of an international penal apparatus. In doing so, I build on a growing body of scholarship which has critically examined how victims are discursively constructed, imagined and made intelligible by international criminal justice institutions and international justice advocates more broadly (Kendall & Nouwen, 2014; Koomen, 2013; Lohne, 2018; Schwöbel-

[85] See International Criminal Court (2013): 'the sole raison d' être of the Court's activities...is the victims and the justice they deserve'.
[86] See International Criminal Court (2008): '[O]ur mandate is justice, justice for the victims: the victims of Bogoro; the victims of crimes in Ituri; and the victims in the DRC.'

Patel, 2016, 2018). Victimhood is indeed not self-evident, pre-figured or fixed (Schwöbel-Patel, 2020). Rather, it is through the discursive work of 'victiming' that the subjectivity of the victim is enacted and constantly (re)constructed (Elander, 2018, p. 11). Whilst representations of victimhood are therefore always unstable and subject to change, the constant (re)articulation of the subjectivity of the victim creates consistency, predictability, and stability through the construction of the figure of the 'ideal victim'– one associated with innocence, purity, blamelessness, and moral superiority (Bouris, 2007, pp. 9–10; Christie, 1986).

Existing scholarship has so far largely focused on contemporary international criminal justice institutions, critically examining how victimhood is (re)presented through the present operation of ICL. This chapter broadens its focus by incorporating a genealogical component, that is, by examining the historical conditions of possibility and discursive roots of the current victim-centred paradigm of international criminal justice. I do so by tracing the historical evolution of understandings and representations of 'injured body(ies)' in international criminal justice. I use the term 'injured body(ies)' to refer to the constituencies or subjects harmed by international crimes and atrocities, whether they be local communities and survivors or abstract subjects such as humanity, the state, or the international community. The term 'injured body(ies)' therefore accommodates the various historical configurations of the subject(s) harmed by international crimes – including the figure of the victim, which has come today to represent the most visible and tangible manifestation of ICL's injured body.

In tracing representations of the 'injured body(ies)' in international criminal justice, I focused on three analytical dimensions, following the Foucauldian tradition of discourse analysis: the formation of objects, such as law or justice; the formation of subject positions and identities, such as the victim or perpetrator; and the relationship between these different subjects and objects, as well as how they connect to penal and humanitarian logics. This led me to formulate the following questions:

- How is the figure of the injured body(ies) constructed and represented in the corpus of documents examined?
- Is this representation of injured body(ies) ever contested or challenged, and if so how?

- How is the relationship between international criminal justice and injured body(ies) portrayed?
- How are narratives of *justice for victims* connected to penal and humanitarian logics?
- What assumptions – about the characteristics of those perpetrating and harmed as a result of mass atrocities, the needs, interests and preferences of victims/survivors, and the power of the law – make possible such narratives?
- What type of justice is enabled through these narratives?
- Who is represented as benefitting from these narratives, and to what extent are these represented beneficiaries truly served by these narratives?
- What do these representations and narratives make possible and what do they occlude or elide?

I argue that injured bodies in international criminal justice – and in particular the relatively recent rise of the figure of the victim – represent a key marker of the transformation of the relationship between penal and humanitarian elements within the field. The growing emphasis on victims has indeed gone hand in hand with a desire to recast the telos of international criminal justice away from retribution, and towards a humanitarian or restorative mission to provide 'justice for victims'. Michel Foucault once noted that contemporary 'criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-juridical systems' (Foucault, 1977a, p. 22). As Sara Kendall has noted, the figure of the victim has provided this 'something other' for international criminal justice: at a time where retributive justice is no longer enough to legitimate the political and material commitment to international criminal justice, the figure of the victim provides a much-needed humanitarian supplement (Kendall, 2015, p. 375). At the same time, the humanitarian logic of protecting victims is conditional on, and constrained by the operation of, penal logics of prosecution and punishment of alleged perpetrators of international crimes. For instance, reparations to victims at the ICC are conditional on the securing of a conviction, and are only available to communities found to be directly affected by the crimes recognised by the Court. The rise of humanitarianism as a justification for and driver of international criminal justice has therefore not displaced the

punitive element. Rather, penal logics become the mechanism through which humanitarian objectives are to be achieved.

In the remainder of this chapter, I successively examine representations of injured bodies in the discussions preceding the establishment of the IMT, of the ICTY and ICTR, and finally of the ICC. I show how post-WWII, the state was represented as the primary body injured by the acts of aggression committed against the Allied nations. In the early 1990s, the figure of the victim came to play an important rhetorical role in justifying and legitimating the establishment of the two ad hoc tribunals – though this was not accompanied by a material investment in the protection of the needs, rights and interests of victims. The documented failings of the two ad hoc tribunals in respect to victims, combined with the advocacy efforts of civil society organisations, created a new momentum in Rome for incorporating victims' rights at the core of the Statute of the International Criminal Court, and for reframing victims as the *raison d'être* of international criminal justice. This new 'victim-centred' paradigm of international criminal justice, however, does not displace penal and retributive logics in favour of a humanitarian and restorative paradigm working in service of victims. Instead, the latter are dependent on the operation of the former. Finally, I critically examine the effects and limits of contemporary representations of victimhood in international criminal justice. In doing so, my aim is to rethink how victimhood is represented and performed in dominant discourses of international justice-making, and to encourage new ways of conceptualising victimhood that may be less pre-determined and generic, and instead more contextualised and individualised.

I) Injuries against the state and civilisation: the post-WWII paradigm

In his personal memoir covering his days as Chief US prosecutor in Nuremberg,[87] Telford Taylor notes that during the trials 'the defendants were the main focus of public attention, and the press was full of commentary on their personalities, their comparative degrees of guilt, and the fairness of the tribunals' judgments' (T. Taylor, 2013, p. 4). The

[87] In October 1946, Taylor succeeded Jackson as Chief prosecutor for the United States at the International Military Tribunal (Columbia 250, n.d.).

emphasis on defendants is often contrasted with an absence and invisibility of the victims of Axis crimes (Karstedt, 2010). The prosecution's strategy of overwhelmingly relying on documentary evidence, as opposed to statements from victims and witnesses (Danieli, 2006), indeed led Sam Garkawe to qualify the proceedings under the International Military Tribunal (IMT) of 'victim-free trial[s]' (2006, p. 93).[88] Whilst the suffering of Nazi victims was discernible through the material presented by the prosecution, civilian victims and survivors appeared as ancillary to the trials. The narrating of the horrors and cruelty endured by individual victims and communities would serve an instrumental function, enabling the conviction and punishment of Axis leaders.

Earlier discussions between Allied countries regarding the treatment to be reserved to Axis war criminals alluded to the suffering of victims and the importance of ensuring such atrocities did not remain unpunished. In a statement from October 1942, the Soviet government referred to victims as justifying the need for trials and for strong retributive measures, noting that:

> it [was] obliged to regard the stern punishment of the aforesaid leaders of the criminal Hitlerite clique as its immediate duty to the countless widows, orphans, relatives and friends of all those innocent people who have been brutally tortured and killed by order of the criminals named (cited in Department of State, 1949, pp. 16–17).

A US Press release from December 1942 on the 'German policy of extermination of the Jewish race' similarly drew attention to the 'hundreds of thousands of entirely innocent men, women and children' victims of the 'bloody cruelties' orchestrated by the Nazi regime (cited in Department of State, 1949, pp. 9–10), and a resolution passed by the Congress in 1943 condemned 'the atrocities inflicted upon the civilian population in the Nazi occupied countries, and especially the mass murder of Jewish men, women, and children', and the 'brutal and indefensible outrages against millions of helpless men, women, and children' (cited in Department of State, 1949, p. 10).

Yet when the Allied powers met at the International Conference on Military Trials in 1945, their discussions included only cursory mention of the interests and situation of civilian victims and survivors. When the United States appealed to the dead to justify the need for

[88] This qualification may however be overstated. As Maria Elander (2018, p. 17) has noted, the quasi-absence of survivors as witnesses and in the audience does not mean that the victims of the atrocities committed by Axis powers were not recognised. Indeed, victims figured through the evidence and material presented in the trials (notably by the prosecution).

international criminal justice, it was in the name of the deceased American heroes, rather than the European victims of Nazi crimes, that judicial action was called for, with Justice Jackson noting that 'it ha[d] cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living' (Department of State, 1949g, p. 46). In a memorandum written in June 1945, Tedford Taylor shares that a crucial purpose of the Nuremberg trials is:

> To give meaning to the war against Germany. To validate the casualties we [the United States] have suffered and the destruction and casualties we have caused. To . . . make the war meaningful and valid for the people of the Allied Nations and, it is not beyond hope, for at least some people of the Axis nations (cited in T. Taylor, 2013, p. 50).

The Potsdam Declaration of 26 July 1945, which set the terms for Japanese surrender to the United States, the Republic of China and Great Britain, likewise referred to the 'war criminals. . . who ha[d] visited cruelties upon our prisoners' (National Diet Library, 2003, para. 10). In these statements, the primacy is put on the state, which had to bear a heavy human 'cost' and 'suffer' casualties in the fight against the Axis powers. Even the fallen, who lost their life in service of the state, are only recognised through their attachment to the state. The true injured bodies, evidenced in Taylor's use of the 'we' or the use of 'our' in the Potsdam declaration, are indeed the Allied states themselves.

The representation of the state as the injured party is not so surprising bearing in mind the hierarchy of crimes at Nuremberg. As noted in Chapter 5, the 'crime of crimes' at Nuremberg was not crimes against humanity or war crimes, but the crime of aggression. In Justice Jackson's word, 'the crime which comprehends all lesser crimes is the crime of making unjustifiable war' (as cited in T. Taylor, 2013, p. 54). The injured body of aggressive war, in turn, is the state whose territory has been violated and against which the war has been waged – in other words, the Allied nations. The requirement of a nexus between crimes against humanity on the one hand, and crimes against peace or war crimes on the other, meant that the treatment of the Jews and other minorities would only be of concern for the Tribunal insofar as it could be connected to the preparation or conduct of an aggressive war waged by Axis powers (Charter of the International Military Tribunal , 1945, art. 6; Department of State, 1949c, p. 331). As noted by Justice Jackson:

> [t]he reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal

> war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities (Department of State, 1949h, p. 331).

Hence the figure of the Holocaust victim, which has today become central to our understanding and memory of WWII, was only a backstage character in the negotiations of the London Charter and subsequent trials under the IMT.

The state was not the only injured party represented at Nuremberg. References to civilisation and to the conscience of humanity imbued the establishment of the Tribunal and its proceedings with a broader purpose. The trial would not only represent the injured nations present at Nuremberg, but further reaffirm the existence of a common humanity and morality in the wake of extraordinary evil. Consider for instance the opening statement of Benjamin Ferencz in the *Einsatzgruppen* trial: '[t]he conscience of humanity is the foundation of all law. We seek here a judgment expressing that conscience and reaffirming under law the basic rights of man' (1947). Similarly, reflecting on the value of the Nuremberg Trials, Henri Stimson wrote in 1947 that:

> [i]t was not a trick of the law which brought them [the defendants] to the bar; it was the massed angered forces of common humanity. . . Our anger, as righteous anger, must be subject to the law. We therefore took the third course and tried the captive criminals by a judicial proceeding. . . By preventing abuse and minimizing error, proceedings under law give dignity and method to the ordinary conscience of mankind (1947, pp. 179–180).

Meanwhile, French prosecutor François de Menthon argued that 'the conscience of the peoples, who only yesterday were enslaved and tortured both in soul and body, calls upon you to judge and to condemn the monstrous attempt at domination and barbarism of all times' (Robert H. Jackson Center, n.d.).

Notwithstanding these references to a broader constituency, at Nuremberg it was therefore the figure of the state (and more precisely the Allied nations) which represented the core injured body justifying the prosecution and punishment of Axis leaders. The trials were also marked by a strong retributive impulse. This is not to say, however, that the humanitarian element was absent. Indeed, appeals to a broader, common force uniting all of humankind provided both support and justification for retribution against Axis perpetrators. Whilst references to a global constituency above individual states and communities would not disappear after Nuremberg and Tokyo, they would be accompanied by the rise of the figure of the individual victim. This figure of the victim, largely equated with innocent civilians,

would indeed progressively displace (though not completely replace) the emphasis on the state and its combatants.

II) The ad hoc tribunals: justice for whom?

Contrasting with the Nuremberg paradigm which had largely equated international criminal justice's injured body(ies) with the figure of the state, the establishment of the two ad hoc tribunals saw the increasing mobilisation of the figure of the war victim. This section shows how such a discursive investment in the figure of the victim served to justify and legitimate international judicial intervention in the midst and aftermath of atrocities in the former Yugoslavia and Rwanda. Indeed, retribution against alleged perpetrators of atrocities in the former Yugoslavia and Rwanda was no longer portrayed as an end in itself, but rather as a mean to fulfil victims' desire for justice. This rhetorical and discursive investment in the figure of the victim was however not accompanied by an equivalent material and tangible commitment to protecting the needs and rights of victims and witnesses, creating a gap between the rhetoric (with the expectations raised by such discourses) and the reality of the functioning of the tribunals. Besides, the figure of the local war victim appeared as secondary to that of the international community, which was itself portrayed as harmed by the atrocities committed.

a. A discursive (but not material) investment in the figure of the war victim

In the summer of 1992, media reports of the atrocities committed in the former Yugoslavia contributed to mounting public pressure to intervene and put an end to the ongoing violence and suffering in the region (Vinjamuri, 2013a). In the media, photographs of starving victims featured alongside graphic accounts of sexual violence and abuses in the Serb-led detention camps and beyond. Meanwhile, human rights and feminist organisations exerted pressure on the international community to unequivocally condemn these atrocities and ensure accountability and redress for the crimes committed in the region (Pratt & Fletcher, 1994). In this context, activists and NGOs mobilised around the cause of the victims

and the atrocities they endured, calling for international investigations and prosecutions of the alleged perpetrators.

The establishment of the ICTY – and subsequently of the ICTR – was indeed justified in reference to the perceived desires, interests and needs of victims. For US Ambassador Madeleine Albright, the creation of the ICTY would send a message to victims that their suffering had been heard: '[t]o these victims we declare by this action that your agony, your sacrifice, and your hope for justice have not been forgotten' (United Nations Security Council, 1993e, p. 13). Meanwhile, Brazil emphasised the 'cry for justice [being] voiced by each of the victims of the crimes committed in the conflict in the former Yugoslavia' (Mr Sardenberg, in United Nations Security Council, 1993, pp. 34–35). The USA pointed to the crucial importance of 'ensur[ing] that the voices of the groups most victimised are heard by the Tribunal', and regarded the creation of Tribunal as an opportunity to '[l]et the tens of thousands of women and girls who courageously survived the brutal assault of cowards who call themselves soldiers know [that their] dignity survives, as does that of those who died' (Ms Albright, in United Nations Security Council, 1993, p. 13). The creation of the ICTR was similarly justified by the need to show victims that justice would be delivered: referring to the importance of bringing to justice those responsible for the atrocities committed in Rwanda, the United Kingdom stated the following: 'We owe no less to the hundreds of thousands of victims of this tragedy. No one should believe that such acts can be committed with impunity' (Sir David Hannay, in United Nations Security Council, 1994e, p. 7). In a similar vein, Argentina noted that the establishment of the ICTR would 'contribute to the process of reconciliation in Rwanda . . . [by] show[ing]. . . the victims. . . that justice exists and. . . that justice will be applied with impartiality and independence' (Ms Cañas, in United Nations Security Council, 1994b, p. 8).

Victims were typically presented as vulnerable, innocent and defenceless figures. Hence Venezuela argued that '[h]istory [was] being repeated today against the equally defenceless civilian population of the Republic of Bosnia and Herzegovina' (Mr Arria, in United Nations Security Council, 1992, p. 7), whilst the Czech Republic noted the 'continuing terror in the eyes of the survivors' (Mr Kovanda, in United Nations Security Council, 1994b, p. 6). Brazil denounced the 'crimes against women and children and other defenceless victims' (Mr de Araujo Castro, in United Nations Security Council, 1993a, p. 4), which led to 'hundreds of

thousands of innocent people killed' (Mr Sardenberg, in United Nations Security Council, 1994b, p. 8). The emphasis on atrocities committed against civilians served to further underline the innocence of those caught in the outbursts of violence. The USA condemned the 'prolonged shellings of innocents in Sarajevo and elsewhere;. . . and the blockading of relief to sick and starving civilians' (Ms Albright, in United Nations Security Council, 1993a, p. 12), whilst Oman noted that the atrocities in Yugoslavia had thus far produced 'an estimated death toll of thousands of people, mostly innocent civilians' (Mr Al-Khussaibv, in United Nations Security Council, 1994b, p. 16). Finally, the Russian Federation hoped that the establishment of the ICTY would bring to reason those 'who are ready to sacrifice for the sake of their political ambitions the lives and dignity of hundreds and thousands of totally innocent people' (Mr Vorontsov, in United Nations Security Council, 1993a, p. 16). In these statements, the chain of equivalence running from victims to civilians, and from civilians to innocence, suggests that victims are not only seen as blameless (innocent from wrongdoing), but their innocence also takes on a broader moral significance – that is, victims are regarded as morally pure and superior (Bouris, 2007, pp. 36–37). This is reinforced by the emphasis placed on women, children, or the sick as the archetypical victims of the atrocities – and as themselves typically associated with characteristics of purity, innocence and powerlessness.

Victims, in turn, were described as demanding justice, truth and punishment for the accused. Brazil spoke of a 'cry for justice [which] breaks from every heart', a cry which could not 'go unheeded' (Mr de Araujo Castro, in United Nations Security Council, 1993d, p. 4). France explained that the use of international penal proceedings was 'comforting for victims, in that they can be sure that everything possible will be done to punish the guilty' (United Nations Security Council, 1993a, para. 6, p. 5). In its final report, the Commission of Experts explained that it was:

> particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. . . The Commission would be remiss if it did not emphasize the high expectations of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, non-governmental organizations, the media and world public opinion (United Nations Security Council, 1994a, para. 320, p. 72).

Despite the emphasis on victims' yearning for justice, the notion of justice itself was often left ambiguous.[89] On the one hand, justice was equated with judicial proceedings and punishment – the creation of the ad hoc tribunals being seen as 'a vehicle of justice' (Mr Kovanda, Czech Republic, in United Nations Security Council, 1994c, p. 6). The very expression of 'bring[ing] to justice' alleged perpetrators of atrocities exemplifies this equation of justice with international prosecutions.[90] Hopes that 'justice is served' (Mr Mérimée, France, in United Nations Security Council, 1994c, p. 3) and that 'justice . . . [is] done' (Mr Keating, New Zealand, in United Nations Security Council, 1994c, p. 4) further reveal a desire for successful convictions and imprisonment of these perpetrators. This equation of justice with judicial proceedings is also manifest in the statement from France, for whom '[p]rosecuting the guilty is necessary if we are to do justice to the victims and to the international community' (Mr Mérimée, in United Nations Security Council, 1993b, p. 8), and from Argentina, who insisted that investigations of serious violations and the determination of responsibility 'must be done in the name of justice' (Mr Cárdenas, in United Nations Security Council, 1994b, p. 8).

On the other hand, justice also appeared as a broader value that the international community should defend. Under this conception, justice was defined largely in the negative, in opposition to revenge or retribution. Hence New Zealand stressed that 'the aim of the resolution [establishing a Commission of Experts for Rwanda was] not retribution, but justice' (Mr van Bohemen, in United Nations Security Council, 1994b, p. 6), while the Russian Federation stressed that the ICTY was:

> not a place for summary justice, nor a place for settling scores or for seeking vengeance, but an instrument of justice which is called upon to restore international legality and the faith of the world community in the triumph of justice and reason (Mr Vorontsov, in United Nations Security Council, 1993e, p. 44).

More broadly, the notion of justice was associated with positive qualities, such as healing or reconciliation. Hence Venezuela argued that 'only justice will be able to contribute to healing,

[89] This ambiguity still persists today. As Frédéric Mégret (2015, p. 78) has noted, the project of international criminal justice 'has less of a theory of its global justice than a theory of its fairness to, notably, defendants'. It has been mainly understood as 'the theory of its institutions (primarily the tribunals) and its legal practices, rather than something that needs to be specifically understood in terms of justice' (Ibid).

[90] Consider for instance the following statement from Mr Lavrov (Russian Federation, in United Nations Security Council, 1994c, p. 2): 'We hope that the leadership of the country will react positively to the establishment of the tribunal and will actively cooperate with it in order to *bring to justice* all of the offenders and those guilty of violating the norms of international humanitarian law in Rwanda' (my emphasis). See also Sir David Hannay (United Kingdom, in United Nations Security Council, 1994c, p. 6): 'offenders must be brought to justice'.

in time, the deep wounds caused by the losses of human life and all the spiritual and moral injuries that the war in the former Yugoslavia has inflicted on all the parties involved' (Mr Taylhardat, Venezuela, in United Nations Security Council, 1993a, p. 16). Meanwhile, Oman stressed that bringing to justice alleged perpetrators of atrocities was 'necessary for the achievement of national reconciliation' (Mr Al-Khussaibv, in United Nations Security Council, 1994c, p. 16).

Despite the importance of victims in justifying the establishment and operation of the ad hoc tribunals, relatively little concern was given to the protection of their rights and interests in the statutes of the tribunals and subsequently during the judicial proceedings. No provision was made for formal representation of the direct victims of the crimes committed and of their interests. Instead, the prevailing assumption was that the preferences and interests of victims would be akin to those of the prosecutor – and therefore that victims did not need an independent voice or to speak for themselves (Ferstman, 2010, p. 408).[91] The participation of victims of the crimes under investigation by the ad hoc tribunal was therefore limited to serving as witnesses during the proceedings, which itself came with important limitations and controversies. French ICTY judge Claude Jorda indeed regretted that victims were 'reduced' to instrumentalised witnesses (Jorda & de Hemptinne, 2002, p. 1387).

Besides, when serving as witnesses, victims would have to present their stories in accordance with the demands and conventions of the judicial process. As noted by Jonneke Koomen (2013, p. 260) with respect to the ICTR, 'witness statements do not speak for themselves. The stories [shared by witnesses] . . . are always and necessarily heavily mediated narratives produced to fit the tribunal's needs'. The emotions, pain and suffering told through witnesses' stories indeed have to be translated into a legalistic and juridical language concerned about facts, dates, timelines of events, names and places (Koomen, 2013, pp. 260–264).[92] The lack of sensitivity and awareness regarding tribunal-produced retraumatisation and psychological harm led to important failings of victims and witnesses. In the *Butare* case

[91] See also Binaifer Nowrojee (2005, p. 4), noting that '[i]n this era of international justice, it has been remarkable how little of the debate has included the voices of the victims for whom these tribunals have ostensibly been formed'.

[92] This is further complicated by the fact that victims of mass atrocities often struggle to establish a clear chronology of the violence and suffering they endured. Acts of violence are indeed often long-lasting and repetitive, contrary to the judicial process' emphasis on isolated incidents from which evidence can be gathered to convict perpetrators of international crimes (Koomen, 2013).

at the ICTR, a rape victim was asked over one thousand questions by the defence – many of which involved recounting detailed aspects of the sexual assault – with no intervention from the judges (Haddad, 2011, p. 116; Moffet, 2014, p. 80). In another instance, the judges were found laughing during the cross examination of a rape victim and never offered an apology to the victim (Nowrojee, 2005, p. 24). This reveals that whilst penal logics are portrayed as an instrument to achieve humanitarian objectives for victims, these two logics can in practice enter in tension. This prioritisation of the interests of the prosecution and of the judicial process in general over those of victims and witnesses left many with 'a burning anger, deep frustration, dashed hopes, indignation and even resignation' (Nowrojee, 2005, p. 4).

The failing of victims and witnesses was also particularly marked in respect to protective measures. The rules of procedure and evidence of the two ad hoc tribunals included one article regarding measures for the protection of victims and witnesses, which read as follows:

> A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused (United Nations, 2015, art. 75A; United Nations International Residual Mechanism for Criminal Tribunals, 2015, art. 75A).

The security and protection of victims and witnesses, however, was regarded as secondary to the rights of the defendants: as affirmed by the Trial Chamber in the *Milošević* case, the Statute and Rules of the ICTY made it clear that 'the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one' (*Prosecutor vs Slobodan Milošević, Decision on Protection Motion for Provisional Protective Measures Pursuant to Rule 69*, 2002, para. 23).[93] In practice, the implementation of protective measures for victims and witnesses was imperfect at best. In the ICTY's *Milošević* case, the identity of protected witnesses was repeatedly leaked – intentionally by Milošević himself, accidentally by a judge on one occasion and even published in a pro-Milošević media (Klarin, 2005). In the *Haradinaj et al* case, at least nine witnesses related to the case were murdered between 2003 and 2007, with another witness surviving an assassination attempt (Serbia's War Crimes Prosecutor Vladimir Vukcevic, cited in Sadović

[93] The Trial Chamber cited in support of this interpretation Rule 20.1 of the ICTY Statute which required Trial Chambers to ensure that trials are conducted 'with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses' (emphasis in original).

& Roknić, 2008). These were not isolated incidents, and dozens of witnesses and victims were killed prior to and after their testimony at the Tribunal. Many victims and witnesses were acutely aware of the failings of the witness protection programme, and the risk of testifying in front of the tribunals. One witness who later refused to testify shared the following: '[protective] measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside of it' (cited in Moffet, 2014, pp. 78–79). Similarly, an ICTR witness noted that tribunal officials:

> only worried about us [the victims] before and during the hearings. Once back at Kigali airport, it was the last goodbye. Do you think they know or care where and how we are today? (cited in Ruvugiro, 2020).

Yet another witness shared that 'this protection is just words, nothing but words (cited in Ruvugiro, 2020).

The question of compensation and reparations was similarly a source of disappointment for victims. In a letter addressed to the UN Secretary General regarding the establishment of an ad hoc international tribunal for the former Yugoslavia, seven countries representing the members of the Organization of the Islamic Conference had urged for the establishment of a victim compensation scheme (United Nations General Assembly & United Nations Security Council, 1993, part III, para. 4). The proposal stressed the need for the Tribunal to 'have authority to order confiscation and/or restitution of the proceeds of the criminal conduct and to order damages to compensate victims for their injuries and losses arising from the criminal conduct' (United Nations General Assembly & United Nations Security Council, 1993, part IV, para. 3). Morocco and Djibouti also brought the question of compensation – the former stressing that the ICTY 'should not ignore appropriate compensation for victims and their families' (Mr Snoussi, in United Nations Security Council, 1993d, pp. 27–28); and the latter noting that 'bringing the guilty to justice. . . and compensating the victims must be considered as two factors that are indissolubly linked and are the ultimate goal of the resolution' establishing the ICTY (Mr Olhaye, in United Nations Security Council, 1993d, pp. 42–43). Yet instead of setting up a mechanism for compensation as part of the two ad hoc tribunals, the Rules of Procedure and Evidence stipulated that victims, or individuals claiming compensation on behalf of victims, could bring an action for compensation in front of domestic courts or other national competent bodies (United Nations, 2015, rule 106b; United Nations International Residual Mechanism for Criminal

Tribunals, 2015, rule 106b). This provision proved largely ineffective and hard to invoke for victims due to poor domestic legal frameworks (Bassiouni & Manikas, 1996, p. 704; Ferstman, 2010, p. 415).

Hence whilst the local communities and direct victims of the crimes committed in the former Yugoslavia and Rwanda were at the core of the discourses and narratives mobilised in support of the establishment of the two ad hoc tribunals, this concern for victims did not translate in a significant material apparatus for the protection of their interests, needs and preferences. Below I examine another figure of the injured body that played a central role in the negotiations and implementation of the ad hoc tribunals: that of the international community (and more broadly, the global constituency(ies)) harmed by the atrocities committed in the former Yugoslavia and Rwanda.

b. Global constituencies as injured bodies and hierarchies of the injured

Paralleling the discussions at Nuremberg and Tokyo, the debates surrounding the establishment of the two ad hoc tribunals for the former Yugoslavia and Rwanda portrayed international and global constituencies as harmed and injured by the atrocities committed in these regions – and therefore as constituencies on whose behalf judicial intervention was required. These international and global constituencies encompassed references to (inter alia) the 'international community', 'humanity' and '(hu)mankind', 'civilisation' or the 'world public opinion'. To give a few examples only, Morocco described the crimes committed in the territory of the former Yugoslavia as 'crimes against people and property, and against a culture and a civilization' (Mr Snoussi, in United Nations Security Council, 1992, p. 14); France argued that such atrocities represented 'an affront to the conscience of all humanity' (United Nations Security Council, 1993b, para. 23b, p. 9); and the Russian Federation saw these atrocities as 'grossly violating not only the norms of international law but even quite simply our human concepts of morality and humanity' (Mr Vorontsov, in United Nations Security Council, 1993d, p. 44). Similarly, the UK stressed that the crimes committed 'in Rwanda extended far beyond that country – they concerned the international community as a whole' (Sir David Hannay, in United Nations Security Council, 1994c, p. 6), whilst New Zealand

explained that the decision to establish the ICTR was 'of great significance to Rwanda', but 'of *even more fundamental importance* to the international community as a whole' (Mr Keating, in United Nations Security Council, 1994c, p. 5).[94]

The international community was in turn constituted as the agent which bore the responsibility to react to these atrocities – by investigating, prosecuting and punishing the perpetrators of these crimes. Prosecuting and punishing the guilty was described both as 'a matter of high moral duty' (Mr de Araujo Castro, Brazil, in United Nations Security Council, 1993c, p. 5) and as an obligation for 'the conscience of Europe and the world' (Mr Erdos, Hungary, in United Nations Security Council, 1993c, p. 19). Similarly, Nigeria emphasised 'the need to punish collectively criminal acts against humanity' (Mr Gambari, in United Nations Security Council, 1994c, p. 13). References to global morality or a global constituency watching states (and especially members of the United Nations Security Council) accompanied calls for international action, which were themselves described as undertaken in the name of peoples worldwide. Venezuela indeed noted that the resolution establishing a Commission of Experts to investigate atrocities committed in the former Yugoslavia was:

> a specific reflection of the will and determination of the Security Council, as expressed in the preamble to the Charter of the United Nations, which begins, "We, the peoples of the [world], determined to save succeeding generations from the scourge of war. . . and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small." (Mr Arria, in United Nations Security Council, 1992, p. 9).[95]

Meanwhile, France stressed that '[a] well-informed international public opinion expects effective action to be taken to put an end to the present situation' (United Nations Security Council, 1993b, para. 5, p. 5), the French Minister of Foreign Affairs further arguing that 'the absence of real penalties' for the perpetrators of atrocities would amount to 'an affront on public consciences, [and] could encourage the perpetrators of these crimes to pursue their regrettable course of action' (Roland Dumas, as cited in United Nations Security Council, 1993b, para. 19, p. 8). Justice therefore had to be achieved not only on behalf of individual victims but also 'on behalf of all mankind' (Mr Mérimée, France, in United Nations Security Council, 1994c, p. 3). Taking action to condemn and react to the atrocities committed in the

[94] My emphasis.
[95] Bracketed insertion in original.

former Yugoslavia, in turn, would reaffirm the values and purposes of the international community, values which had been violated by the ongoing violence and crimes.

This generalisation and universalisation of experiences of suffering and harm at the global level, however, risks overshadowing the significance of local and lived experiences in the former Yugoslavia and Rwanda, and of the individual suffering of the direct victims of these atrocities (McMillan, 2020, p. 6). The suffering and injuries of individual victims are reframed as belonging to others: they are crimes against *humanity as a whole*; and as existing elsewhere: they contravene an *international* order (McMillan, 2020, p. 7). Indeed, the recognition of the suffering of victims is dependent on a 'zooming out', whereby atrocities and crimes committed against discrete individuals can be understood as parts of a broader pattern of crimes, and individuals can be seen as forming part of a wider victimised community (McMillan, 2020, p. 81). This simultaneously creates a normative hierarchy between the interveners – representing the international community – and those to be saved or to be punished. What is more, the international or global status of atrocities is linked to their consequences for others living elsewhere. In so doing, the lives and experiences of individuals and communities affected by atrocities are marginalised; the complex causes and processes behind conflict and international crimes is ignored; and the ability for external audiences to relate to and connect with other forms of violence and their victims is compromised (McMillan, 2020, pp. 41; 82).

This creates a hierarchy between injured bodies, with the suffering, needs and desires of the international community often taking precedence over those of the local communities and individuals directly affected by the atrocities. As seen above in the statement from New Zealand, international criminal prosecutions are seen as being of '*even more fundamental importance* to the international community' than to local communities (Mr Keating, in United Nations Security Council, 1994c, p. 5). This prioritisation of the interests of the international community over those of local victims did not go uncriticised or unnoticed. Rwanda saw the proposed ad hoc tribunal as 'so ineffective. . . [that it] would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular' (Mr Bakuramutsa, in United Nations Security Council, 1994c, p. 15). Rwanda had indeed advocated for the temporal jurisdiction of the ICTR to extend from 1 October 1990 to July 1994, to fully capture the causes and planning of the

genocide. For Rwanda, the rejection of this proposal by the international community meant that the ad hoc tribunal ultimately would not be able to fulfil its objectives or 'be of any use to Rwanda, because it w[ould] not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation' (Mr Bakuramutsa, in United Nations Security Council, 1994g, p. 15). Rwanda's demands also included an increase in the number of Trial Chamber judges as well as the appointment of a prosecutor and the creation of an Appeals Chamber that would be specific to the ICTR, instead of being shared with the ICTY. The rejection of these requests ultimately led Rwanda to vote against the resolution establishing the ICTR.

Debates and discussions surrounding the establishment of the two ad hoc tribunals were therefore marked by a tension or ambiguity in the determination of who would come to represent the 'true' subject harmed as result of international crimes. This tension pit those directly harmed by such human rights violations and atrocities against international/global constituencies, such as the international community or humankind. Whilst most delegations recognised these two categories of injured bodies, a hierarchy was often implied with international constituencies appearing as the most important or truly injured subject. The fact that the crimes committed in the former Yugoslavia and in Rwanda were seen as crimes against a global constituency helps explain the resolution of the international community to lead judicial intervention against alleged perpetrators of international crimes. Hence the statutes of the ad hoc tribunals were inspired by practice from established criminal justice systems in the West, and from the Nuremberg and Tokyo tribunals established by Allied powers to some extent, rather than by the local realities and practices, something which was especially contested in the case of Rwanda. The international character of these tribunals, in turn, was associated with the ability to deliver impartial justice, and therefore seen as superior to domestic alternatives, particularly in Rwanda.[96] At the same time, the reliance on the figure of the victim served to justify and legitimate the deployment of an international penal apparatus. Indeed, retribution against alleged perpetrators of atrocities in the former Yugoslavia and Rwanda was no longer portrayed as an end in itself, but rather as a mean to

[96] Consider for instance the following statement from the United Kingdom, in reference to the situation in Rwanda: 'prosecutions for serious crimes committed during the armed conflict would be better undertaken by an international rather than a domestic tribunal because in [the UK's] view an international tribunal would best meet the objectives of independence, objectivity and impartiality' (Sir David Hannay, in United Nations Security Council, 1994c, p. 6).

fulfil victims' desire for justice. This rise of the figure of the victim here connects to the shift documented in the previous chapter from a crimes against peace paradigm to an atrocity crimes paradigm of international justice. This rhetorical use of the victim as a justification for retributive justice would become even more marked with the creation of the ICC, as shown below.

III) The ICC: an institution for victims?

a. Justice for victims

Discussions surrounding the establishment of the ICC often portrayed the Court as being established for, and safeguarding the interests and rights of, victims.[97] In fact, delegations present at the Rome Conference stressed their duty to protect not only the interest of past and present victims, but also those of future and potential victims. Australia argued that 'the Conference must not be diverted from its central task of establishing a court that would honour past generations and protect future generations' (Mr Downer, in United Nations, 1998a, para. 12, p. 65), while Burkina Faso reminded delegations that '[t]he establishment of an international criminal court was now a matter of urgency and a duty towards present and future generations' (Mr Kafando, in United Nations, 1998b, para. 32, p. 84). The figure of the victim also helped justify the need for a strong, independent, and effective Court. Richard Goldstone, speaking as the first Chief Prosecutor for the ad hoc Tribunals, reminded delegations that 'it was the victims who would suffer the most if the Court were not independent and effective' (United Nations, 1998c, para. 77, p. 96). The figure of the victim would also serve after the establishment of the Court as a mean to deflect criticisms, especially accusations of neo-imperialism. This is evident in the following statement from Kofi Annan in 2009:

> The African opponents of the international court argue that it is fixated on Africa because its four cases so far all concern alleged crimes against African victims. One must begin by asking why African leaders shouldn't celebrate this focus on African victims. Do these leaders really

[97] See inter alia Mr Baudin (Senegal, in United Nations, 1998, para. 16, p. 83): '[t]he Court. . . [should] safeguard the interests of victims; Mr Dabor (Sierra Leone, in United Nations, 1998d, p. 87): '[t]he Court must be sensitive to and respect the rights of victims'; Mr Imbiki (Madagascar, in United Nations, 1998j, p. 107): '[t]he International Criminal Court . . . must have jurisdiction to rule in the interests of victims and ensure the safety of witnesses'.

> want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?' (2009)

It is therefore the humanitarian logic of protecting victims that justified the strengthening of the penal logics of prosecution and punishment of alleged perpetrators of international crimes.

In line with the dominant representation of victims at the ICTY and ICTR, discourses on victims at Rome established a chain of equivalence between victims and civilians, and civilians and innocence – as manifested in the recurring reference to 'innocent civilian(s)'.[98] Besides, women and children were frequently singled out as important categories of victims. Women and children were indeed portrayed as most vulnerable,[99] 'disproportionately affected' by armed conflict,[100] having 'special needs' (Ms Trotter, New Zealand, in United Nations, 1998e, para. 66, p. 100) and requiring 'special protection' (Mr Frieden, Luxembourg, in United Nations, 1998e, p. 101; United Nations, 1998d, para. 86, p. 168). The 'interests of victims', in turn, were often equated with providing 'justice for victims' – and conversely, victims were seen as demanding justice. For instance, Colombia stated that '[t]he Conference had a historic responsibility and faced a considerable challenge in meeting the legitimate desire for justice of peoples who had suffered from horrendous crimes such as genocide, war crimes or crimes against humanity' (Mr Zalamea, in United Nations, 1998c, para. 26, p. 84). Justice would therefore be rendered in victims' name: as stressed by the Observer for the Victims' Rights Working Group, 'there would be no justice without justice for victims' (Ms McKay, in United Nations, 1998c, para. 77, p. 90). The establishment of the ICC was further seen as a way to send a message to victims that justice will be done. Kofi Annan urged international justice-makers to do their part to end impunity for human rights abuses, explaining that:

[98] See for instance Giovanni Conso (Italy, in United Nations, 1998a, para. 21, p. 62); Mr Leanca (Republic of Moldova, in United Nations, 1998d, para. 50, p. 94); Mr Perera (Sri Lanka, in United Nations, 1998f, para. 45, p. 339).

[99] See for instance Ms Mariscal de Gante y Miron (Spain, in United Nations, 1998c, para. 63, p. 88); Ms Halonen (Finland, in United Nations, 1998e, para. 33, p. 98).

[100] See the statements from Mr Friec (Slovenia, in United Nations, 1998b, para. 91, p. 70); Ms Obando (Observer for the Women's Causus for Gender Justice in the International Criminal Court, in United Nations, 1998d, para. 71, p. 96); Mr. Lewis (Observer for the United Nations Children's Fund, in United Nations, 1998f, para. 95, p. 112); Mr. Okoulatsongo (Congo, in United Nations, 1998h, para. 12, p. 344).

> [o]nly then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished' (1997).

As summarised by Benjamin Ferencz, the establishment of the ICC would ensure that crimes would be condemned, the guilty would be convicted, and victims would not be mocked (United Nations, 1998c, para. 121, p. 80).

As evidenced in Annan's statement, victims' desire for justice was largely reduced to judicial proceedings and the punishment of perpetrators of international crimes. Whilst this is not surprising given the specific aim of the Conference and the nature of a criminal court, the high hopes placed in the permanent International Criminal Court that would be established meant that alternative conceptions of justice and non-judicial instruments were almost completely absent from the discussions, consolidating a legal/prosecutorial paradigm of justice in the aftermath of mass violence. Justice was thus largely reduced to judicial redress, as manifest in the following statement from Bangladesh: 'the Conference offered a rare opportunity for the international community to put in place a system of justice to redress unspeakable crimes' (Mr Zamir, in United Nations, 1998g, para. 25, p. 107). Similarly, speaking in advance of the Rome Diplomatic Conference, Kofi Annan stressed that 'true justice demand[ed] no less' than 'the swift and complete arrest of all indicted [war] criminals', so the latter could be brought to justice (1997). In fact, the original Arabic version of the draft Rome Statute had translated the English expression 'to bring persons to justice' as 'presenting persons to court', therefore equating justice with criminal proceedings.[101] The delegation of Afghanistan was one of the few to emphasise that there may be circumstances when criminal prosecutions were not desirable, noting that '[i]n some cases, amnesties could provide a mechanism to facilitate the restoration of the rule of law and the normalization of situations of conflict and hostility' (Mr Abdullah, in United Nations, 1998d, para. 62, p. 87). Afghanistan therefore defended the importance of respecting '[a]greement among the parties to a conflict based on the "forgive and forget" principle for the purpose of national reconciliation. . . since there were times when even justice might not serve its own purpose' (Mr Abdullah, in United Nations, 1998d, para. 62, p. 87). Still, by opposing 'justice' to the 'forgive and forget' principle, the statement reinforces an understanding of justice as diametrically opposed to amnesties,

[101] This was brought to the attention of the Committee of the Whole by the representative of the Syrian Arab Republic (see Mr Shukri, in United Nations, 1998f, para. 10, p. 170).

even when the latter are carefully thought with the aim of facilitating reconciliation and the cessation of hostilities.

b. Ensuring the rights of victims

Whilst the rhetorical investment in victims was not matched by provisions to protect the needs and interests of victims in the ICTY and ICTR, the Rome Statute has been celebrated for giving a central place and voice to victims in international judicial proceedings. Yet the inclusion of victims' rights as a core element of the Rome Statute was not evident from the start, and earlier drafts presented by the International Law Commission did not include such provisions (Moffet, 2014, p. 88). Dissatisfaction with the lack of involvement and protection for victims in the ad hoc tribunals, combined with strong NGOs advocacy, ultimately created momentum for the inclusion of numerous provisions on victims' rights. Shortly before the Rome Diplomatic Conference (in 1997), a Victims' Rights Working Group (VRWG) was formed to ensure respect and protection of the rights and interests of victims and witnesses. As a network of over 300 national and international civil society organisation and experts, the VRWG was created under the umbrella of the Coalition for the International Criminal Court (Victims' Rights Working Group, n.d.). The Victims' Rights Working Group insisted that 'the establishment of an international criminal court was an important symbol for survivors of heinous crimes, but that there would be no justice without justice for victims' (Ms McKay, in United Nations, 1998d, para. 77, p. 90). The VRWG stressed the need for a 'strong and effective victims and witnesses unit', with 'appropriate structures [and] personnel with gender expertise to ensure [the] proper respect and treatment [of women victims]' (Ms McKay, in United Nations, 1998d, para. 77, p. 90). The VRWG pointed to the *1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and to the *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, both established by the Commission on Human Rights, as providing important models with regards to the right to reparation (United Nations General Assembly, 2005). The Basic Principles heavily influenced the final provisions adopted under the Rome Statute. The provisions on the personal interests and participation of victims, governed under Article 68(3) of the

Statute, were reproduced almost word by word from the Basic Principles. This is despite the fact that the UN declaration was never meant to introduce clear and specific legal norms to govern the appearance of victims in front of an international judicial body (van den Wyngaert, 2011, pp. 477–478; Vasiliev, 2009, pp. 651–652).[102]

The ambition of victims' advocates at Rome was – in the words of French Minister of Justice Elisabeth Guigou – 'to put the individual back at the heart of the international criminal justice system, by giving it the means to accord the victims their rightful place. . . [as they] are both the reason for and objective of international criminal justice' (cited in Moffet, 2014, p. 87). The rights of victims, in the vision of participants to the Rome Diplomatic Conference, ought to cover five main facets: 1) the right to participation of victims during proceedings; 2) the protection of victims and witnesses; 3) rehabilitation; 4) compensation, reparation and restitution; 5) and the right to truth. Ensuring the protection of victims and witnesses and access to reparation and restitution was especially key to delegations – not least because these aspects were seen as important failings of the ad hoc tribunals.[103] Some delegations such as Argentina went even further, suggesting that victims and victims' associations should have the possibility of requesting that the Prosecutor initiates investigations, subject to safeguards to guarantee the appropriateness and seriousness of the investigations (Mr Granillo Ocampo, in United Nations, 1998f, para. 103, p. 103).

These rights of victims, however, are conditional on the penal logics of prosecution and punishment of perpetrators of international crimes. To benefit from the victim participation regime, an individual must demonstrate how their interests are affected by the current stage of the judicial proceedings. During the trial proceedings for instance, only victims who have suffered harm as a result of crimes for which the accused is charged can

[102] As noted by Sergey Vasiliev, the drafting history of the declaration's paragraph 6b (which was reproduced almost identically in the Rome Statute) in fact testifies to the controversies and disagreements surrounding the language of the paragraph, the final wording reflecting the absence of consensus between drafters rather than a coherent and collective choice.

[103] For instance, France 'considered that the Statute should include specific provisions on the access of victims to all stages of the proceedings and on their protection against reprisals - in the light of shortcomings that had become apparent in the International Tribunals - and in connection with their right to reparations' (Mr Védrine, in United Nations, 1998f, para. 74, p. 101). Other examples include Samoa, noting that '[t]here should also be a provision for the special needs of victims, including payment of compensation, as well as provision for the welfare and security of witnesses' (Mr Slade, in United Nations, 1998g, para. 61, p. 109); and Sweden, who emphasised that '[e]ffective measures to protect witnesses and victims were needed and appropriate ways of making reparation to victims must be found' (Ms Freivalds, in United Nations, 1998b, para. 58, p. 68).

participate.[104] Victims are furthermore represented by common legal representatives, who often reside thousands of kilometres away from the communities affected by the crimes – communities who may be living in remote areas, or even in active conflict zones, which makes communication near-impossible (van den Wyngaert, 2011). Even where legal representatives are able to communicate with and listen to the needs and preferences of the victims they represent, relaying these instructions in court is often difficult at best (van den Wyngaert, 2011, p. 489). The physical distance and sheer number of victims represented by a legal representative therefore impedes effective and meaningful legal representation. Representation of victims at the ICC often becomes merely symbolic, with the interests of victims assumed to overwhelmingly coincide with those of the Prosecutor: securing a conviction of the accused. More broadly, it is by prosecuting and punishing alleged perpetrators of atrocity crimes that justice will be done for the victims. The needs and interests of victims are therefore largely equated with successful prosecutions. In fact, an acquittal or failure to convict perpetrators on some counts is often portrayed as a betrayal of the victims.

Even the reparation component, which seems at first sight mainly driven by humanitarian impulses, is in fact conditioned by penal logics. Indeed, reparations are only available following a successful conviction and they are limited in scope to the communities found to be directly affected by the crimes recognised by the Court. The reparations are to be paid by the perpetrator(s), or by the Trust Fund where this is not possible. Whilst the provision of reparations is governed under article 75 of the Rome Statute (which itself is included in Part VI - The Trial), the creation of the Trust Fund is provided by article 77, which falls under Part VII on penalties. Similarly, during the negotiation process, the working group on Penalties dealt with the question of the Trust Fund, which suggests that reparations are at

[104] The requirement for the 'personal interests' of victims to be affected has meant that an individual can qualify as victim under the ICC's participation regime at one stage of the proceedings but not at others (Haslam, 2011, p. 316).

least as much a tool for the punishment of perpetrators as a true tool of rehabilitation and reparation for victims.[105]

The narrative of *justice for victims* therefore reveals the interconnection between penal and humanitarian logics: penal logics are the driver or the causal mechanism through which the humanitarian objective is to be achieved. The ICC is best understood not as a truly restorative justice mechanism (which would involve questioning the very notion of a retributive rationale), but as a 'victim-oriented model of justice' (Vasiliev, 2009, p. 677). This victim-oriented model is geared towards providing victims with participatory and compensation rights, but without displacing the traditional retributive goals of international criminal justice. In other words, the victim-oriented approach is deferential to the penal nature of ICL (Dignan & Cavadino, 1996; Vasiliev, 2009). Below I critically reflect on the effects and limits of the prevailing representations of victims in ICL today.

IV) Representations of victimhood: effects and limits

I have shown above how the figure of the victim is used to justify and legitimate the deployment of an international penal apparatus in situations of mass violence. The prevailing discursive construction of the victim is an abstract one, which erases the diversity of (and individuated) lived experiences, needs and interests of actual victims (Kendall & Nouwen, 2014, p. 253). This figure of the 'ideal victim' indeed 'draws out victimhood from all victims – dead or alive, past, present, or future – and consolidates this as one' (Kendall & Nouwen, 2014, p. 241), therefore reducing a plurality of victims to a singular and homogenous figure.[106] As aptly summarised by Mark Drumbl, '[j]udicial accounts tend to be austere. Victims are to be pure and ideal, perpetrators are to be unadulterated and ugly' (2016, p. 218). This is because international criminal law, through its judgments, 'must give an answer: innocent or

[105] During sessions of the Preparatory Committee (which met in advance of the Rome Conference), delegations were divided as to whether the issue of reparations to victims should be dealt with in connection to penalties, or as part of the work of the Working Group on Procedural Matters. The final provisions in the Rome Statute therefore arguably provide a middle ground between these two approaches (United Nations General Assembly, 1997, fn. 9, p. 69).

[106] As noted by Pierre Bourdieu, this creation of a unified figure 'enables what was merely a collection of several persons, a series of juxtaposed individuals, to exist in the form of a fictitious person, a *corporatio*, a body, a mystical body incarnated in a social body, which itself transcends the biological bodies which compose it' (Bourdieu, 1991, p. 208, as cited in Kendall & Nouwen, 2014, p. 254).

guilty. It must condemn, or not' (Drumbl, 2016, p. 243). The victim is represented as innocent and blameless, passive and defenceless, morally pure and good, and is introduced in opposition to the figure of an evil, barbaric and powerful perpetrator (as noted in chapter 3). This archetypical understanding of victims and perpetrators creates figures so extreme that they are hardly recognisable or relatable. Instead, victims and perpetrators are 'being defined by their relation to the incomprehensible, inhumane, and heinous' (McMillan, 2020, p. 77). What's more, this binary opposition between victims and perpetrators hardly captures the messiness and blurriness of the empirical world, and the fluidity of experiences of victimhood and perpetratorhood (McEvoy & McConnachie, 2012).

Consider for instance the case of Dražen Erdemović, the first individual sentenced by the ICTY. Erdemović was a Croatian who joined the Bosnian Serb army reluctantly and out of necessity to provide for his family and obtain identity papers *(Sentencing Judgement, Prosecutor v. Erdemovic*, 1996; Yee, 1997). Erdemović was initially given command over a small unit of the Bosnian Serb Army, but lost his rank following his refusal to carry out orders that would likely result in civilian losses (*Sentencing Judgement, Prosecutor v. Erdemovic*, 1996, para. 79). In July 1995, Erdemović was ordered to execute Bosnian Muslims who had surrendered to the Bosnian Serb army and police. Erdemović initially refused to comply with the order, but was threatened with death, and ultimately proceeded with killing an estimated seventy civilians (*Sentencing Judgement, Prosecutor v. Erdemovic,* 1996, para. 80). Erdemović subsequently opposed orders to execute five hundred Muslim men, with the support of three of his colleagues. A few days after these events, Erdemović claims that one of his army comrades attempted to kill him and two other unit members in retribution for their refusal to execute the orders they had received (*Sentencing Judgement, Prosecutor v. Erdemovic,* 1996, para. 81). Erdemović survived the attempt on his life but was left seriously wounded and traumatised, and contacted a journalist to share his story. Shortly after, Erdemović was arrested by the Serbian authorities and transferred in March 1996 to The Hague for an international trial. He immediately confessed to his crimes and entered a guilty plea, repeatedly expressing remorse for his actions and emphasising his loathing of war and nationalism. In his plea statement, Erdemović shared the following:

> I feel sorry for all the victims in the former Bosnia and Herzegovina regardless of their nationality. I have lost many very good friends of all nationalities only because of that war, and I am convinced that all of them, all of my friends, were not in favour of a war. I am

> convinced of that. But simply they had no other choice. This war came and there was no way out. The same happened to me. . . Because of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it (ICTY, 1996).

The Appeals Chamber ruled that duress could not constitute a full defence that would release the accused of criminal responsibility, but it could be a mitigating factor for sentencing purposes (ICTY, 1997). The Appeals Chamber reduced Erdemović's sentence from ten to five years of imprisonment (International Crimes Database, n.d.-b). In August 1998, Erdemović was transferred to Norway to serve his sentence and was granted early release a year later (International Crimes Database, n.d.-b). He then entered the ICTY's witness protection programme, testifying ten times in subsequent ICTY trials (Sense Transitional Justice Center, 2013). Erdemović is therefore a tragic example of a 'victim-perpetrator' whose story and experience largely defy ICL's distinction between the mutually exclusive identities of victimhood and perpetratorhood (Drumbl, 2016).

Child soldiers are another case in point, being at once depicted as passive victims, and as autonomous, and hence criminally responsible, agents (Derluyn et al., 2015). Child soldiers are indeed often portrayed in transnational discourses as helpless, blameless, and powerless victims, who are used as 'instruments of war' or even weapons by evil warlords and militias (Drumbl, 2012, p. 7). Child soldiers are also often assumed to be irredeemably marked and damaged by the violence and trauma they were submitted to (Drumbl, 2012). Yet such assumptions become hard to sustain when child soldiers are in the box of the accused, for ICL is ill-equipped to confront victims turned into perpetrators – that is, individuals who, having been subject to atrocities, come to participate in the commission of international crimes.

The unfolding of the trial proceedings of Dominic Ongwen is especially revealing of these tensions and ambiguities. Ongwen was captured by the Lord's Resistance Army (LRA) as a child (allegedly when he was only nine), enduring brutal treatment for years, including frequent beatings and cruel punishment, and was forced to torture and punish other children (Drumbl, 2016, p. 237; McDermott, 2017). Ongwen rose in the ranks of the LRA and later became commander. He was threatened with death on multiple occasions by LRA leader Joseph Cony, and ultimately defected and escaped the LRA before surrendering to US Special Forces in 2015. Ongwen was himself a victim of some of the crimes he was charged with inflicting on others, including cruel treatment, conscription and use of child soldiers, and enslavement (Drumbl, 2016, p. 236). This unusual situation was recognised by ICC Prosecutor

Fatou Bensouda, who acknowledged that '[t]he evidence of many of the child victims in this case could be, in other circumstances, the story of the accused himself' (cited in McDermott, 2017). Yet Bensouda was quick to stress that 'having suffered victimisation in the past is not a justification, nor an excuse to victimise others', and to emphasise that Ongwen's actions were the product of his choosing (cited in McDermott, 2017). In the *Lubanga* case, ICC judges had considered that child soldiers were left with permanent scars that prevented them from functioning normally, and therefore saw child soldiering as defining the subsequent life of victims, including in their adult age (Drumbl, 2021). In the *Ongwen* case however, the judges rejected the argument that growing up in the LRA created an institutionalised duress that would exclude criminal responsibility; instead, Ongwen's agency and behaviour as an adult was seen as separable from his experience as a child soldier, coming of age in the brutal environment of the LRA (Drumbl, 2016, p. 242). Ongwen was sentenced to twenty-five years of imprisonment by one of the ICC's trial chambers.[107]

Erdemović and Ongwen's convictions are symptomatic of the failure of ICL in the face of 'complex' victims and perpetrators, which disrupt or resist the association of victimhood with innocence, passivity, lack of agency and blamelessness, and do not fit with the stereotype of the 'ideal' victim or perpetrator.[108] In both cases, judges were confronted with individuals whose stories and experiences could not be captured through the opposition between victimhood and perpetratorhood, and between oppressed and oppressor. Yet rather than recognising the limits of the law and of existing judicial categories, or the existence of a victim-perpetrator continuum, the judges accentuated the perpetrator side of Erdemović and Ongwen whilst deflating their victim side. The emphasis was placed on the defendants' moral agency and free will, not on the circumstances they found themselves in (Drumbl, 2021). In other words, convicting Erdemović and Ongwen required the performance of 'an artifice of sorts', through which the defendants would be 'shoehorned into one box a reductionism of sorts' (Drumbl, 2021). It is important to note that this failure to grapple with the complex identity, experiences, and actions of these two defendants is not specific to international criminal law, but rather relates to the very nature of criminal law itself, which vitally depends on the binary opposition between a victim and a perpetrator.

[107] The case is currently under appeal; a separate process is ongoing to provide reparations for victims (ICC, n.d.).
[108] For a critique of the dominant image of the victim, and a demonstration of the importance and stakes of making space for complex political victims, see Erica Bouris (2007).

Yet the categories of victims and perpetrators, while fixed, mutually exclusive and consequential in law, are often much less evident in practice. As noted by Cheryl Lawther, the categories of victimhood and perpetratorhood and the hierarchies constructed as a result of these categories appear as 'thinly veiled ideological constructs', which work to legitimise specific interpretations of the past by labelling some subjects as 'ideal victims' and others as 'ideal perpetrators' (2022, pp. 532–533). These identity-positions can in turn be contested and re-appropriated by the key protagonists, involving what Himadeep Muppidi calls the 'politics of meaning fixing' (1999). In other words, victimhood often becomes 'the terrain on which the political contests of the past are fought' (Lawther, 2022, p. 533). Some alleged perpetrators of international crimes have attempted to portray themselves as heroes or martyrs, and as themselves victims of victors' justice. Standing in the box of the accused at the ICTY, Slobodan Milošević claimed the role of the persecuted hero, denouncing the whole trial as a fraud and preferring to accuse his accusers rather than to defend himself. He depicted himself as a victim and martyr, not solely for 'his' people (the Serbs) but for all those oppressed by Western imperialism and corporate greed (Armatta, 2010). In his defendant statement, Milošević indeed shared the following:

> If I'm guilty for having prevented hundreds of thousands of Serbs from being slaughtered in Bosnia and Croatia, then with the greatest pride I can take upon myself this guilt, that is to say the prevention of this kind of massacres. These are also historical facts, and I think it was only natural and just for me to advocate that kind of things. And it was certainly not to the detriment of the other side (2002, at 22'17'')

This attempt to be the 'champion of the world's oppressed' at least partly succeeded, since Milošević became 'the advocate or "megaphone" of those [in the region] who saw themselves as primarily victims who experienced harm' from the West (Dembour & Kelly, 2007).

Conclusion

This chapter has traced representations of the injured body(ies) of international criminal justice, from the post-WWII era to the establishment of the ICC at the end of the twentieth century. Whilst in the early days of ICL the state figured as the archetypical subject harmed by international crimes, the figure of the victim has progressively risen to prominence. This is not to say that the figure of the injured state has disappeared or been fully displaced. In fact, the state has resurfaced in discussions surrounding the inclusion of the

crime of aggression in the Rome Statute. Besides, references to an injured global constituency – whilst taking various forms depending on the time period – have had a constituting presence in ICL. What we see is therefore not so much a disappearance or replacement of some figures of the injured body in ICL, but rather a situation whereby the same figures remain present throughout time, albeit with varying salience.

This chapter has also shown how the more recent rise of the figure of the victim has coincided with and arguably enabled a recasting of the telos of international criminal justice away from retribution and towards a broader humanitarian mission of providing justice for past, present and even future victims of mass atrocities. The lexicon of retribution and punishment is far from absent from the current discourses and practices of international criminal justice. As shown above, the establishment of the ICC was openly associated with and even justified by the importance of punishing alleged perpetrators of international crimes. Yet such retributive impulses are connected to a broader humanitarian purpose, driven by the assumption that victims themselves are demanding prosecutions and punishment of perpetrators of international crimes.

At the same time, the 'victim-centred' approach increasingly promoted by international criminal courts and tribunals has not been accompanied by a significant recognition of the varied (and sometimes conflicting or antagonistic) interests and needs of individual victims. The figure of the victim that dominates ICL is indeed an abstract one or, as described by Sarah Nouwen and Sara Kendall, 'a deity-like and seemingly sovereign entity' serving to legitimate the work of international penal institutions (Kendall & Nouwen, 2014, p. 241). This archetypical victim typically appears as powerless, passive, innocent and defenceless, therefore relying on an intervention from the international community to ensure that justice is done, and the victim's dignity is restored. Only rarely are the specific interests and preferences of individual victims and survivors mentioned – and even rarer is the admission that not all victims desire prosecution and punishment, or that justice may come without international judicial proceedings and imprisonment of a few select perpetrators. As the former Chief Prosecutor of the Special Court for Sierra Leone noted, the type of international justice sought and imposed by the international community may not always correspond to the justice that the victims of a conflict seek:

We [international justice-makers] simply don't think about or factor in the justice the victims seek. . . We approach the insertion of international justice paternalistically. I would even say with a self-righteous attitude that borders on the ethnocentric. . . We consider our justice as the only justice. . . We don't contemplate why the tribunal is being set up, and for whom it is being established. . . After set up, we don't create mechanisms by which we can consider the cultural and customary approaches to justice within the region (Crane, 2006, p. 1686).

Chapter 7 - Dreamworlds of peace: conflict reduction and deterrence narratives in international criminal justice

Introduction

We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.

Benjamin Ferencz, chief Prosecutor, *Einsatzgruppen Trial* (U.S. Government Printing Office, 1950, p. 494)

Since the International Criminal Court became operational in 2002, we have witnessed an unprecedented integration between peace and security and international justice.

Fatou Bensouda, then-Prosecutor of the International Criminal Court (ICC) (2013)

We know that peace is the product of justice. . . we see today's resolution [establishing the International, Independent and Impartial Mechanism for Syria] as an opportunity to protect human lives and discourage the use of violence as a political instrument until a definitive solution to this hateful conflict can be reached and justice rendered to thousands of victims. . . Our responsibility to future generations is to bequeath them a future of peace and security.

Mr. Skinner-Klee (Guatemala, in United Nations, 2016, p. 31)

International criminal justice as a project and field of practice has long been connected to peace. As the quotes above reveal, peace appears as both an aspiration that international criminal justice should reaffirm in the aftermath of mass violence and as produced by justice. ICL is often portrayed as having pacifying effects both in terms of its capacity to prevent atrocities and crimes (deterrence) and in terms of its positive effects on conflict reduction (encompassing both conflict resolution and conflict prevention). These different facets of the alleged pacifying effects of international criminal justice are interrelated and interdependent, often coming in tandem in public statements and promotional discourses from international justice-makers.[109]

Despite their prevalence in international criminal justice discourses, peace, deterrence, and conflict reduction are generally left undefined. They represent what Mark Drumbl has termed ICL 'buzzwords', which are 'so frequently invoked as to signal their

[109] Such statements also at times refer to the role played by international criminal trials in facilitating reconciliation at the individual, interpersonal, community and/or national levels. Compared to deterrence and conflict reduction, the reconciliation rationale has appeared more recently, and featured less prominently, in international criminal justice discourses. For this reason, this chapter mainly focuses on conflict reduction and deterrence narratives.

undertheorized nature': '[t]he tendency is not to discuss, unwrap, or methodologically assess' the actual pacification potential and record of international criminal prosecutions (Drumbl, 2020, p. 246). Rather, peace, deterrence and conflict reduction are seen as self-evidently good and therefore requiring no validation or defence (Moyn, 2016). They imbue international criminal justice with a humanitarian purpose, providing support for the idea that prosecutions are driven not by a will to punish or retaliate but rather by a restorative and humanitarian logic of helping past, present, and future (imagined) victims.

Whilst narratives about the pacifying effects of international criminal justice abound and continue to be used to justify the deployment of an international penal apparatus globally, they have not gone uncontested nor uncriticised. Scholars and practitioners have questioned, on a theoretical level, whether international criminal courts and tribunals should be concerned about peace in the first place; and on an empirical level, whether the pacifying effects of international criminal justice indeed exist. On the one hand, the mandate of international criminal courts and tribunals is often described as one of adjudicating international crimes independently of political considerations and of the potential effects of international judicial action on peace negotiations.[110] The ICC's first Prosecutor, Luis Moreno-Ocampo, famously characterised his role as one of applying the law without bending to political considerations, stressing that '[p]eace is not the responsibility of the prosecutor. The prosecutor has the responsibility to do justice, and judges will review in accordance with critical law' (cited in International Peace Institute, 2012).

On the other hand, the empirical record of international justice is mixed at best when it comes to deterrence and conflict reduction. The deterrent potential of international criminal courts and tribunals (and notably of the ICC) is arguably one of the most contested issues in international criminal justice scholarship. Whilst some find evidence of a modest prosecutorial deterrence effect (Jo & Simmons, 2016), others have shown more scepticism, pointing to the lack of empirical evidence and faulty assumptions of the deterrence argument (Buitelaar, 2016; Cronin-Furman, 2013; Klabbers, 2001; Rothe & Collins, 2013; Wippman,

[110] See e.g., Juan E. Méndez and Jeremy Kelley (2015): 'Many accounts of the International Criminal Court (ICC) treat it as an isolated legal institution tasked with adjudicating international crimes. The project of international criminal accountability is taken to be separate from peace processes'.

1999), even suggesting that international criminal prosecutions may have an 'anti-deterrent effect' (Mégret, 2020).[111]

Scholarship on the effects of international prosecutions on conflict reduction is similarly divided between those who find positive effects, even if limited (Mendes, 2019), those who suggest that international tribunals have little effect on conflict prevention (Meernik et al., 2010), and those who point to how the ICC's involvement may undermine resolution of a conflict (Prorok, 2017). These disagreements on the existence and extent of the pacifying effects of international prosecutions can at least partly be explained by the controversies surrounding the conceptualisation and measurement of deterrence and conflict reduction.[112]

What these debates often miss, however, is an understanding of where the narratives on the pacifying effects of international criminal justice come from, and how they have evolved and transformed over time.[113] This chapter therefore departs from the existing literature in two respects. First, it focuses on the discursive roots of ICL's pacifying effects. Second, the chapter examines the historical conditions of possibility for this association of ICL with pacification, interrogating the emergence, consolidation and transformation of the narratives surrounding deterrence and conflict reduction in international criminal justice. In doing so, the chapter is not concerned with the pacifying effects of international criminal courts and tribunals or how to increase the pacifying potential of international trials. Rather, my aim is to shed light on how the concepts, narratives, and discursive practices, which make international criminal justice thinkable and knowable as a project of pacification, have formed.

[111] It is worth noting that Mégret's argument is intended as a theoretical probe into the possible criminogenic effects of international criminal justice, rather than as an empirical demonstration of such effects.

[112] On the difficulties of accurately estimating deterrence, see Kate Cronin-Furman (2013); John Dietrich (2014); Hyeran Jo and Beth Simmons (2016). On the need to create a stronger analytical framework to assess the ICC's effects on peace processes, see Mark Kersten (2016).

[113] A notable exception in that regard is Frédéric Mégret (2018), who proposes to historicise the relationship between international criminal justice and peace, distinguishing between three overlapping historical configurations: international justice as an integral component of attempts to end all (interstate) wars; justice as a condition for internal peace; and international criminal justice as potentially participating in the permanence of violence and conflicts.

Empirically, I focused on statements which connected international criminal justice to the idea of peace and pacification, of ending/preventing conflict and/or of deterring and preventing atrocities. More particularly, I was guided by the following questions:

- How are peace, deterrence and conflict prevention articulated, discussed, or challenged in the documents examined?
- How are these different elements related to one another?
- How are international prosecutions (and the operation of ICL more broadly) related to peace and pacification?
- How are these narratives of peace and pacification connected to penal and humanitarian logics?
- What assumptions – about the nature of atrocities and mass violence or conflicts, the role of the law, and the functions of punishment – make possible such narratives of pacification?
- Who is served by this project of pacification?
- What do these representations and narratives make possible and what do they occlude or elide?

I show how narratives about the pacifying effects of international trials have proved remarkably endurant and over time increasingly important to defining the purpose(s) of international criminal justice and justifying the deployment and consolidation of a global penal apparatus. The emphasis of such narratives has however changed over time. Whilst the Nuremberg model largely equated pacification with the prevention of war (crimes against peace), in the context of the former Yugoslavia and Rwanda and later with the ICC, the focus shifted towards ending ongoing conflicts and deterring atrocity crimes in the immediate and/or far future. In the remainder of this chapter, I successively examine how ICL is discursively connected to peace and pacification, from the discussions surrounding the establishment of the IMT and IMTFE, to the ad hoc tribunals for the former Yugoslavia and Rwanda, and finally to the ICC.

I) The Nuremberg trials, between retribution and utilitarianism

The post-WWII trials of Axis leaders are often thought of as motivated by strong retributive impulses. This does not mean however that humanitarian objectives of world peace and pacification were absent from the discussions. Indeed, the use of judicial repression was seen as an instrument to make true a vision of world peace and freedom.

Calls for retribution against Axis leaders were at the forefront of the discussions between Allied powers. As early as December 1942, a US State Department statement affirmed the resolution of the French National Committee and the Belgian, Czechoslovak, Greek, Luxembourg, Dutch, Norwegian, Polish, Soviet, British, American, and Yugoslav Governments to '[e]nsure that those responsible for these crimes shall not escape retribution and to press on with the necessary practical measures to this end' ('German Policy of Extermination of the Jewish Race', cited in Department of State, 1949a, p. 10). Roosevelt insisted that '[a]ll who share the guilt shall share the punishment' (cited in Department of State, 1949a, pp. 12–13), whilst the Soviet Government similarly stressed 'its inflexible determination that the criminal Hitlerite Government and all its accomplices must and shall suffer deserved, stern punishment for the crimes perpetrated . . . [and] be handed over to judicial courts and prosecuted' ('Reply by the Soviet Government', cited in Department of State, 1949a, pp. 16–17). In fact, for the USSR, the punishment of WWII criminals was the very object of the trial: the task of the IMT was not to assess the criminality of Nazi policies and actions, but 'only to determine the measure of guilt of each particular person and mete out the necessary punishment – the sentences' (Department of State, 1949j, pp. 105–106).

This emphasis on retribution as an explicit and core purpose of the trials was accompanied by a desire for severe sentencing. Notably, the Charter of the International Military Tribunal established death penalty as the default sentence, by providing that '[t]he Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just' (Charter of the International Military Tribunal, 1945, art. 27). Recourse to the death penalty was justified by the high profile of defendants appearing in front of the tribunal: for the United Kingdom, '[i]t would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity'

(Department of State, 1949b, p. 18). Among the nineteen defendants convicted by the IMT, twelve of them were sentenced to death, three received lifelong imprisonment sentences, and four received shorter sentences (ranging from ten to twenty years of imprisonment) (Museen der stadt Nürnberg, n.d.).[114] Judicial retribution was therefore advanced as the preferred response to deal with the guilty.

Such retribution, however, was carefully and insistently distinguished from vengeance or punishment for the sake of punishment. The USA stressed that it was 'not [their] intention . . . or [the intention] of the Governments associated with [them] to resort to mass reprisals'; rather, they aimed to ensure 'that just and sure punishment [was] meted out' to those responsible for the atrocities committed (Department of State, 1949a, p. 9). Reflecting on the legacy of the Nuremberg trials, Robert Jackson further claimed that '[i]ndiscriminate vengeance and killings without hearings [had been] made obsolete by Nuremberg' (1946). Instead, the USA in particular justified prosecutions (and punishment of those responsible for the atrocities committed during WWII) in reference to expressivist and utilitarian rationales. The punishment of those responsible for the crimes committed during WWII was related to the dictates of humanity and of the public conscience, as well as to the law of civilised peoples, which all demanded a punishment commensurate with the offenses committed (Department of State, 1949a, pp. 12–13). At stake in the trial and punishment of Axis leaders was, in Henry Stimson's words, to 'bring [the] law in balance with the universal moral judgment of mankind' (1947, p. 185). The force of the law – and of the judgments pronounced in Nuremberg – relied on its capacity to express the conscience of humanity. Hence in his opening statement in the *Einsatzgruppen* case, Benjamin Ferencz affirmed that '[t]he conscience of humanity is the foundation of all law. We seek here a judgment expressing that conscience and reaffirming under law the basic rights of man' (U.S. Government Printing Office, 1950, p. 32). Associating punishment with the normative imaginaries of humanity and humankind in turn helped to justify and legitimise the use of judicial repression, the latter becoming the expression of a broader goal or value supposedly shared (quasi)universally.

For the Americans, the Nuremberg trials would represent an instrument of progress, provided that punishment was 'carried out in a manner which world opinion w[ould] regard

[114] Additionally, three defendants were found not guilty.

as progressive and as consistent with the fundamental morality of the Allied cause' (Department of State, 1949f, p. 34). This ruled out a political decision to dispose of the leaders of the Axis nations without trial, which would amount to adopting the very methods of the Axis, methods that were 'repugnant alike to Anglo-American and Continental traditions' (Department of State, 1949f, p. 34). Furthermore, summary executions without a fair trial for the accused would amount to negating the 'democratic principles of justice' to the vanquished, and thereby 'retard progress towards a new concept of international obligations' (Department of State, 1949f, p. 34). On the other hand, bringing war criminals to justice would be more likely than any other method to 'command [itself] to the judgment of history', thereby facilitating a future where world peace and security would prevail (Department of State, 1949f, p. 35). As the Americans argued, a judicial determination of the guilt of Axis leaders would 'certainly induce future government leaders to think before they act in similar fashion', and 'bring home the truth to those Germans who remain incredulous about the infamies of the Nazi regime' (Department of State, 1949f, p. 35).

The desire for punishment of war criminals was thus directly connected to broader pacification objectives (especially conflict prevention). The United States associated punishment of those responsible for the 'acts of savagery' committed during the war with visions of a future world where 'tyranny and aggression cannot exist; a world based upon freedom, equality and justice; a world in which all persons regardless of race, color or creed may live in peace, honor and dignity' (Department of State, 1949a, p. 12). Such visions reflected a broader belief in multilateralism and in the values and principles espoused in the Atlantic Charter and UN Charter. As Taylor put it, the 'prime purpose was to bring the weight of law and criminal sanctions to bear in support of the peaceful and humanitarian principles that the United Nations was to promote by consultation and collective action' (2013, p. 42). The justifications advanced for the punishment of war criminals pointed to a belief in the transformative and preventive value of international trials: even prior to the establishment of the Nuremberg International Military Tribunal, a US memorandum stressed that '[p]unishment of war criminals should be motivated primarily by its deterrent effect, [that is] by the impetus which it gives to improved standards of international conduct and . . . by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends' (Department of State, 1949f, p. 34). The trials of Axis leaders were therefore seen as

having a signalling value, both making clear the offenses which would not be tolerated by the international community and warning future perpetrators that they would not escape punishment. As argued by Justice Jackson, the Nuremberg trials ought to 'establish that a process of retribution by law awaits those who in the future similarly attack civilization' (Department of State, 1949g, pp. 48–49), leading to 'unmistakable rules and [a] workable machinery from which any who might contemplate another era of brigandage would know that they would be held personally responsible and would be personally punished' (Department of State, 1949g, p. 50).

It is important to note that the major offence prosecuted at the International Military Tribunal in Nuremberg, the International Military Tribunal for the Far East (in Tokyo) and during the subsequent trials of Axis officials was crimes against peace, and not crimes against humanity or war crimes. The focus on crimes against peace – the equivalent of the crime of aggression today – meant that the emphasis was placed on the prevention and elimination of aggressive war itself, rather than of the atrocities committed during the waging of war. The notion of crimes against peace originated from Soviet legal scholar Aron Trainin, who represented the Soviets at the London Conference (Hirsch, 2008, p. 707). Trainin's 1937 book on *The Defense of Peace and Criminal Law* took issue with the League of Nations' failure to make aggressive war a criminal act and to establish an international criminal body tasked with punishing aggressors (Hirsch, 2008, p. 705). In his next book *On the Criminal Responsibility of the Hitlerites*, Trainin advocated for the recognition of war as a punishable criminal offense (Porter, 2019, p. 702), the gravest of all international offences (Hirsch, 2008, p. 707).[115] Trainin's work on crimes against peace was later circulated among British and American delegations present at the London Conference, suggesting that the Soviets were also, and even earlier, discussing the role of (international) criminal law in defending international peace and preventing war (Hirsch, 2008, p. 708).

The legacy of the Nuremberg trials would similarly be described in reference to aspirations towards international peace. In front of the UN General Assembly after the conclusion of the trials, then-UN Secretary General Trygve Lie insisted that:

[115] Then-Procurator General of the USSR Andrei Vyshinskii endorsed the book and contributed with an introduction in which he argued that 'criminal law must be utilized for defending peace, must be mobilized against war and against the instigators of war' (cited in Marrus, 1997, p. 706).

> [i]n the interests of peace, and in order to protect mankind against future wars, it [would] be of decisive significance to have the principles which were employed in the Nurnberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible. From now on the instigators of new wars must know that there exist both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalized system of international law (United Nations General Assembly, 1946, pp. 10–11).

Reflecting on the legacy of the Nuremberg International Military Tribunal, Henry Stimson noted that the record of the Tribunal became 'one of the foundation stones of . . . peace' (1947, p. 186), whilst Benjamin Ferencz argued that 'by defining, prohibiting, and punishing crimes against peace, international criminal law can play an important role in helping to maintain a more secure and tranquil world society' (1960).

Notwithstanding this belief in the pacifying effects of prosecuting and punishing Axis leaders, international trials were never seen as the sole or magic solution to the problem of war. Most participants and observers to the Nuremberg trials were indeed acutely aware of the limits to the deterrence potential of trials. For instance, President Truman explained that:

> [T]wenty-three Members of the United Nations have bound themselves by the Charter of the Nurnberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as States shall be tried before the bar of international justice. The basic principles upon which we are agreed go far, but *not far enough*, in removing fear of war from the world. There must be agreement upon a *positive, constructive course of action* as well (United Nations, 1946, p. 684).[116]

Hence from Truman's perspective, deterrence – the threat of punishment by the law – provided a *negative* incentive for peace, and ought to be complemented by a *positive, constructive* incentive. This positive incentive required a broader conception of peace, centred on the notion of equity between nations regardless of their power status (United Nations, 1946). In a similar vein, Justice Jackson recognised:

> it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance. . . By the Agreement and this trial, we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution (Department of State, 1949d, p. 439).

Jackson acknowledged, however, that putting international law on the side of humanity and peace would never 'be enough to prevent future aggressions when the stakes are so high that men will risk any sanction if they think their armadas will prevail' (Department of State, 1949e,

[116] My emphasis.

p. xii). Judicial action, for Jackson, was at once the best option available and in itself insufficient:

> I too am well aware of the weakness of juridical action alone to contend that in itself your decision under this Charter can prevent future wars. Judicial action always comes after the event. . . Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible. But the ultimate step in avoiding periodic wars make . . .is to make statesmen responsible to law (1946, pp. 171–172).

This awareness and explicit recognition of the limits of the law and international trials in bringing about world peace would fade away with the subsequent development of international criminal justice. The expansion of international criminal law institutions would indeed come with a growing emphasis on pacification as a core goal and expected effect of international prosecutions.

II) The ad hoc tribunals: the consolidation of ICL as an instrument for international peace and security

With the end of the Cold War came a renewed enthusiasm and optimism about international law and institutions and their role in the global protection and diffusion of human rights, the rule of law and democratic regimes. In this context, the Security Council came to play a more active role than ever, authorising unprecedented military and judicial interventions in the name of human protection and global peace and security (Peltonen, 2019, p. 224). Against the backdrop of the mass atrocities committed in the former Yugoslavia and later in Rwanda, international criminal justice was revived with the creation of the ICTY and ICTR.

The situation in the former Yugoslavia represented a particular conundrum for the UN Security Council, since its permanent members were unwilling to intervene on the ground through military action. The establishment of an ad hoc tribunal therefore provided a way to react to atrocities without a full deployment of troops, and as some have argued, diverted attention away from calls for military intervention (Bass, 2000, pp. 207; 214–215; Neier, 1998,

p. 112; Power, 2002, pp. 484; 491).[117] The creation of the ICTY by the Security Council, acting under Chapter VII, required the existence of a nexus with the preservation and restoration of international peace and security. Hence the Security Council signalled its conviction that the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of humanitarian law 'would contribute to the restoration and maintenance of peace' (United Nations Security Council, 1993f, p. 2). The fact that the establishment of the ICTY was conditional on it facilitating the restoration of international peace in the region was made clear in an earlier proposal by the French Committee of Jurists on the possibility of establishing such a tribunal. The proposal indeed noted that 'the establishment of a Tribunal would be an appropriate measure if, in the circumstances obtaining at the time, it seems likely to attain or facilitate the objective of restoring international peace and security' (United Nations Security Council, 1993, para. 39, p. 13). The narrative on the pacifying effects of the ICTY therefore helped provide a legal basis for the UNSC's unprecedented decision to establish an ad hoc tribunal.

This narrative also had a political justification: the ICTY (and the Commission of Experts which preceded the Tribunal) were envisaged as a means of putting pressure on the Serbs to stop ongoing atrocities and to de-escalate the conflict. The establishment of the tribunal was in fact used as a bargaining chip in the peace talks (Terris, 2019, p. 153). The Russian Federation, for instance, regarded the establishment of a Commission of Experts on the former Yugoslavia 'as an additional means to influence the opposing parties. . . to bring about the quickest possible solution of the Yugoslav conflict' (Mr Vorontsov, in United Nations Security Council, 1992, p. 14).

The creation of the Tribunal in the midst of the ongoing war in the former Yugoslavia reversed the temporality of peace and justice. Historically justice had followed war, as in the Tokyoberg model of international prosecutions. However, in the Balkans the United Nations sought to use international prosecutions *as a means* to bring peace and reconciliation to the region. In other words, the establishment of an international criminal tribunal compensated for the lack of successful preventive action and full military presence on the ground to

[117] For an opposing view, however, see David Scheffer (2004, p. 354): '[t]he failure to act militarily resulted from decisions and circumstances that had nothing to do with the ICTY, and should be critiqued on their own merits. Those decisions would have been the same with or without the existence of the ICTY in 1993, and for some time thereafter.'

mitigate ongoing violence and atrocities – an approach which Payam Akhavan has termed 'spectator's justice' (2013, p. 530).[118] Similar justifications were advanced in the case of the ICTR. The Security Council resolution establishing the Tribunal linked the latter to the preservation of international peace and security. Security Council members expressed their conviction 'that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace' (Mr Mérimée, France, in United Nations Security Council, 1994, p. 3). France further added that 'the Tribunal should in its own way contribute to restoring civil peace to the territory of Rwanda' (United Nations Security Council, 1994g, p. 3).

If the establishment of both ad hoc tribunals was justified in reference to international peace and the alleged pacifying effects of international trials, the emphasis was no longer on preventing wars themselves (as was the case in Nuremberg) and varied between the two ad hoc tribunals. With respect to the ICTY, deterrence and the ending of conflict were major and recurring themes in the discussions. In contrast, deterrence and conflict reduction were mentioned less often in discussions surrounding the establishment of the ICTR. Instead, the question of facilitating reconciliation was at the forefront of the discussions. The relegation of deterrence and conflict reduction to the background can be explained by the difference in the temporality of the judicial intervention. By the time the ICTR was established in November 1994, genocidal violence had largely subsided in Rwanda.[119] This meant that the attention of international justice-makers would be placed less on mitigating ongoing violence, and more on how international justice could participate in building foundations for lasting peace and reconciliation. Notwithstanding these differences, the underlying logic behind these different

[118] This model, according to Akhavan, consists of 'watching as civilians are slaughtered only to half-heartedly prosecute genocidaires afterwards' (2013, p. 530).

[119] On April 6, 1994, an aircraft carrying then-Rwandan president Juvenal Habyarimana (a Hutu) was shot down, marking the start of the genocide. Over the next 100 days, 800, 000 people were slaughtered by Hutu extremists. In July 1994, the Rwanda Patriotic Front (RPF, formed by Tutsis and backed up by Uganda) took over the capital Kigali, killing thousands of Hutus as they took power and pursued the Hutu militiamen in the Democratic Republic of Congo. This reprisal violence is however often left out of accounts of the Rwandan genocide (BBC News, 2019).

pacifying effects is strikingly similar in that judicial repression is believed to further humanitarian values and aspirations towards world peace and an end to atrocities.[120]

Particularly in the case of the ICTY, the alleged pacifying effect was justified first and foremost by the assumed deterrent effect of international prosecutions, that would both mitigate ongoing atrocities and prevent future crimes. During UNSC debates, deterrence was indeed repeatedly mobilised by the state delegations represented as both a justification and important purpose for the ICTY. Even prior to the establishment of the Tribunal, in the context of the creation of a Commission of Experts to investigate violations of international humanitarian law, some delegations had already pointed to the deterrent potential of international investigations. Venezuela had argued that the creation of an investigative body would 'constitute an important deterrent in the context of the process the United Nations has undertaken to bring peace to the population of the former Yugoslavia' (Mr Arria, in United Nations Security Council, 1992, pp. 7–8), whilst the United States had expressed their hope that the resolution would 'act as a deterrent to those in other parts of the world who may be contemplating similar violations and crimes' (Mr Perkins, in United Nations Security Council, 1992, p. 11). These statements point to two different understandings of deterrence. One is exemplified by the statement from the Venezuelan delegation, which sees international prosecutions as having the strongest deterrent effect in the specific locale under investigation (i.e., in the former Yugoslavia or Rwanda). That is, prosecutions are seen as providing specific deterrence or atrocity mitigation. The second understanding of deterrence is illustrated by the United States' position that deterrence has a more universal reach, beyond the specific temporal and geographical context under examination. In other words, prosecutions are believed to result in general deterrence or atrocity prevention.

Some delegations linked deterrence to the 'signal' sent to perpetrators that violations of international law would not go unaddressed or unpunished. Belgium for instance believed that the creation of a Commission of Experts 'sent an even clearer signal to the perpetrators of these violations of humanitarian law . . . by making more operational the principle contained in the Geneva Conventions regarding the personal responsibility of war criminals'

[120] As the first international tribunal created by the UNSC, the ICTY was preceded by much lengthier discussions between Security Council members. The discussion below therefore deliberately includes more statements referring to the situation in the former Yugoslavia than to the situation in Rwanda.

(Mr Noterdaeme, in United Nations Security Council, 1992, p. 12). France insisted the Security Council should 'send a clear warning to the perpetrators of those violations, who must understand that their personal responsibility is involved' (Mr Mérimée, in United Nations Security Council, 1992, p. 16). In a similar vein, Argentina argued that 'the establishment of the ICTR [was] a clear message that the international community [was] not prepared to leave unpunished the grave crimes committed in Rwanda' (Ms. Cañas, in United Nations Security Council, 1994, p. 8). This signal would moreover not be limited to those involved in the situations under scrutiny. As stressed by the representative of the Russian Federation, 'it [would] also [be] a warning to all who violate the norms of international humanitarian law in other spheres of conflict' (Mr Vorontsov, in United Nations Security Council, 1992, p. 16). For others, the establishment of the truth would support deterrence. For instance, the Commission of Experts noted that '[e]stablishing the truth is the best method of enhancing deterrence. . . The combination of investigation and prosecution makes deterrence more effective, thereby reducing possible violations in the future' (United Nations Security Council, 1994a, fn. 88, p. 84).

These justifications, as shown above, are not grounded in (systematic) empirical studies of deterrence on perpetrators of mass violence and atrocities (McAuliffe, 2012). Rather, they rely on assumptions about the role of international criminal law and punishment. Similarly, the question of why ad hoc tribunals would be any more successful than the post-WWII tribunals in establishing an expectation of accountability for atrocities and international crimes was not discussed. In fact, once the ICTY started its operations, the deterrence rationale progressively faded away from the justifications advanced by international justice-makers. Whilst the first annual report of the ICTY mentioned deterrence as one of the three core objectives of the Tribunal (United Nations General Assembly – Security Council, 1994, para. 13, pp. 11–12), starting from 1995, references to deterrence started to disappear from the ICTY's annual reports and reported achievements. Similarly, ICTY judges progressively reoriented their argumentation away from discussions of the preventive effects of international trials, and towards the importance of ensuring accountability for international crimes (United Nations General Assembly – Security Council, 1994, pp. 234–235). In 2011, ICTY President Patrick Robinson stressed in a letter to the UN Security Council that '[t]he Tribunal cannot, through the rendering of its judgements alone, bring peace and

reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved' (United Nations Security Council, 2011, para. 90, p. 21). This may have reflected a realisation that the establishment of an ad hoc tribunal did little to halt atrocities in the region (Wippman, 1999). The Srebrenica massacre, which saw the slaying of 8,000 Bosniaks (BBC News, 2020), happened two years after the adoption of Resolution 827 establishing the Tribunal, and eight months after the ICTY issued its first indictment (ICTY, n.d.; McAuliffe, 2012, p. 234). Some of the alleged perpetrators indicted by the ICTY went on to commit further crimes. For instance, Ratko Mladić planned an attack on a United Nations' safe haven and the shelling of Sarajevo subsequent to his indictment by the Tribunal (McAuliffe, 2012, p. 234). Similarly, the existence of the ICTY and even the direct warning addressed at Slobodan Miloševic did little to dissuade him from his plan of invading and ethnically cleansing Kosovo (McAuliffe, 2012).

On top of the deterrence rationale, the ad hoc tribunals were seen by state delegations as playing an important preventive function in the short and long term by contributing to the restoration of peace and/or by facilitating the consolidation of lasting peace. Some delegations argued that no settlement of the conflict would be possible in the absence of conviction of those responsible for the violations. For instance, Hungary expressed its conviction that:

> it is impossible to envisage a lasting settlement of the conflict in the former Yugoslavia . . . without the prosecution of those who massacre and burn children, women and elderly people; who, with diabolical regularity, shell innocent civilian populations; who practice "ethnic cleansing", the true tragic implications of which have not yet been fully appreciated; who cut off the water supplies of besieged communities; who deliberately destroy cultural or religious property, and so on (Mr Erdos, in United Nations Security Council, 1993e, p. 21).

Several reasons were advanced for this alleged role of prosecutions in conflict resolution and conflict prevention. First, the individualisation of responsibility was believed to enhance prospects for peace. By avoiding the attribution of collective responsibility or guilt to an entire group, international criminal justice was associated with the potential of ending the cycle of revenge, violence and retaliation (Hazan, 2004, p. 533). As Spain argued in the case of Rwanda, this would in turn 'allow the people . . . to recover their faith and hope for a better future, free of the demons of the recent past' (Mr Yañez-Barnuevo, in United Nations Security Council, 1994b, p. 2). Second and relatedly, by providing a fair and impartial justice, international prosecutions would prevent violence originating out of a desire for revenge or

anger. As Antonio Cassese, first president of the ICTY, explained in the first annual report of the ad hoc tribunal:

> [t]he only civilized alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty. If no fair trial is held, feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence (United Nations General Assembly – Security Council, 1994, para. 15, p. 12).

Similarly, the United States stressed how trials could serve to 'transform revenge into justice, affirm the rule of law and, hopefully, bring this horrible cycle of violence to a merciful close' (Mr Gnehm, in United Nations Security Council, 1994b, p. 4).

Third, international prosecutions would enable a reckoning with atrocities, and in turn facilitate peace and healing, the latter being seen as impossible to attain without international criminal justice. As Venezuela argued:

> only justice w[ould] be able to contribute to healing, in time, the deep wounds caused by the losses of human life and all the spiritual and moral injuries that the war in the former Yugoslavia has inflicted on all the parties involved. Peace and reconciliation w[ould] be lasting only if justice prevail[ed] and if every abuse, without distinction, [was] brought to the Tribunal's attention and those responsible are tried (Mr Taylhardat, in United Nations Security Council, 1993a, p. 2).

Similarly, Goldstone noted that '[a] peace accepted by a society with the willingness and ability to heal, with the willingness and capacity to move itself beyond the abuses of the past, is the only really viable peace' (1998, p. 204).

Not all delegations, however, were equally optimistic regarding the prospects of re-establishing peace through international prosecutions. Morocco (Mr Snoussi, in United Nations Security Council, 1993c, p. 27) and Cape Verde (Mr Barbosa, in United Nations Security Council, 1993c, p. 29), for instance, pointed that the creation of the ICTY would not be enough to restore international peace and security in the region and should therefore be one element of a broader plan to end atrocities and restore peace and stability in the former Yugoslavia. Morocco indeed argued that 'an international tribunal must be but one element of a plan, based on the principles of the United Nations Charter, to put an end to Serb aggression, to demand the return of territory acquired by force and "ethnic cleansing" and fully to restore the territorial integrity, unity and sovereignty of Bosnia and Herzegovina' (Mr Snoussi, in United Nations Security Council, 1993c, p. 27). In a similar vein, the Czech Republic

(Mr Kovanda, in United Nations Security Council, 1994c, p. 7) reminded delegations that whilst necessary, justice would 'not undo the tragedy' that had occurred in Rwanda:

> Even if all the perpetrators of the heinous crimes in Rwanda were identified, rounded up, tried and sentenced, it would not bring back to life the hundreds of thousands of their victims, it would not dispel the continuing terror in the eyes of the survivors, it would not return family love to the thousands of orphans. Still, justice is necessary (Mr Kovanda, in United Nations Security Council, 1994c, p. 7).

Discourses and narratives surrounding the pacifying effects of international criminal justice therefore featured prominently in the justifications advanced for the establishment of the ICTY and ICTR. Contrary to the Tokyoberg model which put the emphasis on conflict prevention, with the two ad hoc tribunals the focus was on atrocity prevention and mitigation. The lack of grounding in scientific or empirical evidence however meant that such claims regarding the pacifying effects of international trials would remain assumed rather than soundly established. This trend would continue with the negotiation process of the Rome Statute of the ICC.

III) The establishment of the ICC: global and permanent pacifying effects?

The creation of a permanent international criminal court with global reach was accompanied by a sense of renewed optimism and high hopes that the Court would contribute to international peace and security. During the Rome Diplomatic Conference, Swaziland indicated that they 'attached great importance to the Conference in helping to create a world in which peace and justice reigned supreme' (Mr Simelane, in United Nations, 1998b, para. 40, p. 108), whilst the United Kingdom expressed its conviction that 'a truly effective, permanent court would make the world a more just, safer and more peaceful place' (Mr Lloyd, in United Nations, 1998a, para. 31, p. 66). The nature of the ICC would indeed mean that the expected pacifying effects would not be limited to a specific temporal and geographical context.

Peace and justice were often closely connected in the speeches of those present at Rome. In advance of the Rome Conference, Kofi Annan had stressed that '[p]eace and justice are indivisible. . . The international criminal court is the symbol of our highest hopes for this unity of peace and justice' (Annan, 1997). Senegal similarly believed that the 'values of justice

and peace la[id] at the heart of the initiative to establish an international criminal court – peace as the key to stability and the consolidation of democracy and the rule of law, and justice as a deterrent against acts of revenge committed when crimes were seen to go unpunished' (Mr Baudin, in United Nations, 1998b, para. 17, p. 83). Meanwhile, the Islamic Republic of Iran stressed that 'the establishment of an international criminal court, independent, universal, effective and impartial, would be a milestone towards achieving peace with justice' (Mr Zarif, in United Nations, 1992c, para. 23, p. 92). Other delegations saw justice as a precondition or enabler of peace. For instance, Norway argued that '[j]ustice and legal order were increasingly perceived as prerequisites for lasting peace' (Ms Johnson, in United Nations, 1998a, para. 17, p. 65), and the Observer for the Lawyers Committee for Human Rights believed that the Court 'would strengthen peace by offering justice through law and would contribute to the process of reconciliation' (Mr Dorsen, in United Nations, 1998e, para. 77, p. 119).

The mission of the International Criminal Court was often seen as one of deterring would-be perpetrators of atrocities. For instance, Jordan believed that 'the goal was to create a credible juridical deterrent to those who intended to commit grave breaches of international humanitarian law', hence the challenge was 'to protect the innocent by building a court so strong, universal and effective that it w[ould] deter even the most determined of despots' (Mr Said, in United Nations, 1998e, para. 6, p. 114). Most delegations appeared optimistic that this deterrent purpose would be fulfilled, albeit not always explaining why or how this would be the case. The rationale advanced for the alleged deterrent effect of the Court can be grouped under three main types of justification. First, it would send a credible threat to potential perpetrators that impunity would no longer be tolerated and punishment would follow the commission of atrocities. Second, this message would be strengthened by the permanent and near-universal character of the Court. Third, the stigmatisation of perpetrators would deter others from committing international crimes.

The threat of punishment was the most frequently advanced explanation for the deterrent effect of an international criminal court. For instance, the Observer for the Lawyers Committee for Human Rights explained that '[a]n effective court would deter gross human rights violators by confronting them with the real risk of punishment' (Mr Dorsen, in United Nations, 1998e, para. 77, p. 119), while the representative of the United States stressed that

‘the creation of an international criminal court would . . . send a clear and unmistakable warning to would-be tyrants and mass murderers that the international community would hold them responsible for their actions’ (Mr Richardson, in (United Nations, 1998c, para. 57, p. 95). The representative of Brunei Darussalam insisted that it was particularly important to establish ‘an international criminal court to prosecute individual lawbreakers and thus break the cycle of violence‘ (Mr Hashim, in United Nations, 1998c, para. 12, p. 91), while the United Nations High Commissioner for Human Rights noted that ‘[t]he means, the political will and an effective weapon against the culture of impunity had all been lacking. To break with the past required the establishment of a court which would be truly fair and compellingly effective and would earn universal respect’ (Ms Robinson, in United Nations, 1998a, para. 99, p. 70).

The credibility of this threat, and thus the deterrent potential of the International Criminal Court, was expected to be much stronger due to its permanent nature and its ability to prosecute near-universally. This represented a notable progress compared to the ad hoc tribunals established in response to specific situations, and therefore having a limited temporal and geographical scope. In Benjamin Ferencz’s words, the ‘limited ad hoc courts created after an event were hardly the best way to ensure universal justice: a permanent court was needed for permanent deterrence’ (United Nations, 1998b, para. 120, p. 80). Similarly, Norway believed that ‘[a] permanent court with unquestionable legitimacy might be more conducive to peace-making than an ad hoc tribunal because no warring party could reasonably portray such a court as being politicized and mass murderers could not expect impunity' (Ms Johnson, in United Nations, 1998a, para. 19, p. 65). The United Arab Emirates also linked the limited deterrent potential of previous international initiatives to ‘the lack of permanent mechanisms to establish deterrent sanctions. The creation of the International Criminal Court would ensure that persons responsible for serious human rights violations would be prosecuted and punished’ (Mr. Al Noaïmi , in United Nations, 1998d, para. 6, p. 91). So did Burkina Faso: ‘[t]he limitations of the ad hoc tribunals set up in connection with those tragedies had demonstrated the need for a permanent international court, which would also serve as a deterrent to potential criminals’ (Mr Kafando, in United Nations, 1998c, para. 31, p. 84). Years later, when recounting the historical development of international criminal justice, then-ICC President Philippe Kirsch also noted the limitations of the two ad hoc

tribunals, which had ‘diminish[ed] the possible deterrent effect of ad hoc tribunals’; hence ‘[a] permanent, truly international criminal court [was] necessary for the punishment of international crimes. Equally important, only a permanent, readily available court c[ould] most effectively deter future crimes’ (2006, p. 4). Thus, whilst some delegations noted the limited achievements of previous international courts and tribunals in respect to deterrence, this served as an argument to support greater investment in international criminal justice, driven by the belief that more convictions and a more permanent institution would enhance deterrence. The establishment of the ICC, in this line of argumentation, would facilitate not only specific deterrence but also general deterrence, that is, have a preventive effect that would reach the whole globe.

The last justification on the stigmatisation of perpetrators was much less prominent, yet appeared in a statement from Canada, for whom ‘by isolating and stigmatizing those who committed war crimes or genocide, [the Court] would help to end cycles of impunity and retribution’ (Mr Axworthy, in United Nations, 1998a, para. 63, p. 68).

The logic of deterrence therefore presupposes that punishing present perpetrators of international crimes will change the calculus of would-be perpetrators in the future or of those involved in ongoing violence and atrocities, dissuading them from engaging in mass violence and atrocities. Yet despite the central role of punishment (both in its actualised and expected forms) in deterrence, statements from international justice-makers made only superficial and rhetorical references to punishment, with no discussion of how the severity and probability of punishment could influence the deterrence potential of the International Criminal Court. Whilst the imperfection and limits of deterrence in previous international criminal justice institutions were acknowledged, these served as a further justification for the importance of establishing a permanent international criminal court (as noted above), rather than as a sign of the potential issues in expecting deterrence to follow from international trials.

Instead, it was hoped that the Court would prevent and end atrocities. To give a few examples, Oman asserted that ‘the establishment of an international criminal court . . . would help to put an end to bloodshed (Mr. Sayyid Said Hilal Al-Busaidy, in United Nations, 1998e, para. 67, p. 110), while the representative for Bosnia and Herzegovina ‘hoped that the Court's independence, its complementarity with national courts and its jurisdiction over the most

serious crimes would put an end to slaughter, brutal torture, rape and other crimes against humanity' (Mr. Prlič, in United Nations, 1998f, para. 16, p. 115). Similarly, the Observer for the Asian Centre for Women's Human Rights saw the creation of the ICC as 'an essential step in ending the cycle of violence against women in war and armed conflict' (Ms Sajor, in United Nations, 1998f, para. 81, p. 119), whilst Kofi Annan (referring to the Rwandan genocide) linked the 'will to prevent the repetition of such a catastrophe anywhere in the world' with the need to 'ma[k]e clear that such crimes would be punished' (United Nations, 1998a, para. 7, p. 61). Poland suggested another mechanism through which the ICC would help prevent and mitigate atrocity crimes: 'the establishment of the International Criminal Court would strengthen the rule of law by addressing the individual responsibility of perpetrators of the most serious international crimes. It would constitute a mechanism to combat genocide, war crimes and crimes against humanity' (Ms Suchocka, in United Nations, 1998e, para. 37, p. 93). Still, the statement left unspecified the underlying mechanisms of how the creation of the ICC would strengthen the rule of law and in turn help prevent atrocities.

The notion of preventing and ending conflict itself was not completely absent from the discussions. Andorra, for instance, 'hoped that the establishment of the Court would serve to contain and eradicate the bloody conflicts which debased mankind and caused much unnecessary suffering' (Mr. Minoves Triquell, in United Nations, 1998d, para. 3, p. 81). Yet war or conflict itself as the object of prevention was considerably less mentioned than atrocities themselves. This is not to say that the question of criminalising war itself (more specifically aggressive war) was absent from the debates at the Rome Conference. As noted in Chapter 5, the crime of aggression was the subject of intense debates and controversies, between the large majority of supporters and a small group of powerful states vehemently opposed to the criminalisation of aggressive war. Whilst aggression was listed as a core crime under the Rome Statute, no consensus could be found between states as to how to define the crime or under which conditions the ICC would exercise jurisdiction with respect to the crime of aggression (Kostic, 2011). In contrast, the inclusion of atrocity crimes (genocide, crimes against humanity and war crimes) was largely uncontroversial.

Conclusion

This chapter has sought to interrogate the construction of international criminal justice as a pacification project. It has done so by tracing the emergence, consolidation and transformation of discourses and narratives surrounding deterrence and conflict reduction (encompassing both conflict resolution and conflict prevention) in ICL. I have shown that the post-WWII international criminal tribunals were marked by strong retributive impulses, manifested notably in the demand for severe sentences and punishment to be meted out against Axis leaders. Whilst the Americans in particular associated the trials with visions of a more peaceful and just world order, they were also aware of the limits of international criminal law in addressing the problem of war. Decades later, in response to atrocities committed in the former Yugoslavia and then Rwanda, the Security Council connected the establishment of two ad hoc tribunals with the restoration and maintenance of international peace and security. The creation of the ICTY in the midst of an ongoing conflict (and with minimal military involvement of Western powers on the ground) meant that the tribunal was associated with ambitious goals of conflict reduction and atrocity mitigation and prevention – with little indication that these goals would be realised once the tribunal was operationalised. The establishment of a permanent international criminal court entrenched the association of international criminal justice with peace, the alleged pacifying effects of international criminal justice being abstracted and universalised beyond a specific temporal or geographical context. At the same time, these pacification narratives came to play an increasingly important role in legitimating the operation of international criminal justice, progressively displacing the retributive justifications that dominated the early history of international criminal law.

Whilst the empirical record of international criminal courts and tribunals is mixed at best when it comes to their pacifying effects, references to deterrence and conflict reduction still abound in the field of international criminal justice. The resilience of these narratives, especially in the absence of conclusive evidence, raises the question of which purpose(s) they serve. The growing discomfort in contemporary international society with punishment for its own sake requires international criminal justice to find a justification and purpose higher than retribution itself to legitimate its operation (Klabbers, 2001). References to peace, deterrence

and conflict reduction provide this higher utilitarian purpose and imbue international criminal justice with humanitarian aspirations and values.

Chapter 8 – Conclusion

> To help beat back President Putin's heinous attempts to destroy peace in Europe, it is time for us to create such a Special Tribunal. By doing so we act in solidarity with Ukraine and its people, and signal our resolve that the crime of aggression will not be tolerated, and that we will leave no stone unturned in bringing to an end the terrible events we are now seeing, thereby ensuring that those who have unleashed such horrors are subject to personal accountability under the criminal law, so that justice can be done.
>
> Statement calling for the creation of a Special Tribunal for the punishment of the crime of aggression against Ukraine (Brown et al., 2022)

> We very much hope that while Ukraine is fighting day and night for its right to exist, the international legal doctrine will finally work. Or, this world will simply be doomed. This is a question for the whole world. If we don't follow through on these principles, . . . [a]re we ready to accept the death of tens of thousands of dead innocent people, including many women and children? . . . The strategic need to prosecute the leadership of Russia is to prevent future wars unleashed by crazed dictators. Any evil must be punished and the function of international law, among other things, has a preventive function – as warning and demonstration of unacceptable behavior and actions. There is no doubt that the creation of the International Special Tribunal will also affect the speed of ending the war.
>
> Deputy Head of the Office of the President in Ukraine Andrii Smyrnov (2022)

> We must act now, not waiting for the war to end, to bring to justice all those who unleashed it and to prevent any repetition of aggression. This will be the most effective protection of freedom, human rights, the rule of law and other common values.
>
> Ukrainian President Volodymyr Zelensky (cited in Psara, 2022)[121]

Just over a week after the Russian invasion of Ukraine that began on 24 February 2022, a joint statement signed by Gordon Brown and dozens of eminent international justice practitioners and scholars called for the establishment of a Special Tribunal for Ukraine.[122] This statement followed the news of the opening of an ICC investigation into the situation in Ukraine to 'ensur[e] accountability for the crimes falling within ICC jurisdiction' (International

[121] Zelensky addressed the European Parliament upon receiving the Sakharov Prize for Freedom of Thought awarded in 2022 to the Ukrainian people.

[122] The statement had 38 signatories, including Professor Philippe Sands, Professor Dapo Akande, Benjamin Ferencz and Richard Golstone.

Criminal Court, 2022).[123] This proposal was supported by the Ukrainian government, which has since repeatedly called for the creation of such a tribunal to hold accountable those responsible for the aggression and atrocities committed against the Ukrainian people. Yet as evidenced in the statements above, the value of international investigations and prosecutions is seen as much broader than merely ensuring individual criminal accountability for mass violence and atrocities. Indeed, international trials are associated with hopes that 'justice can be done' for 'Ukraine and its people' (Brown et al., 2022), that the present war can be speedily ended, that 'future wars' (Smyrnov, 2022) and 'any repetition of aggression' can be prevented (Zelensky, cited in Psara, 2022), and more largely, that values such as 'freedom, human rights, the rule of law' can be protected and reaffirmed (Zelensky, cited in Psara, 2022). The instrument to achieve these goals, as the deputy head of the Office of the President in Ukraine has put it, is 'a fair trial and legal retribution' (Smyrnov, 2022). The deployment of penal tools internationally is therefore seen as the vehicle for the achievement of a broad set of humanitarian goals and values, ranging from peace and justice to freedom and atrocity prevention.

Such demands for criminal accountability and legal retributivism have become commonplace in the midst and aftermath of situations of mass violence and gross human rights abuses. As I have shown in this thesis, in the past few decades a growing number of commissions of inquiry, investigative mechanisms, courts and tribunals have been deployed internationally and transnationally to investigate, prosecute and punish alleged perpetrators of international crimes. The emergence and consolidation of an international penal apparatus has further been justified in reference to humanitarian objectives, whether it be the need to deliver justice to victims, or the belief that international criminal justice will be a vehicle for the prevention of conflict and atrocities. I have developed the concept of Penal Humanitarianism to refer to this dominant paradigm of international criminal justice, which rests both on a punitive element (the logic of repression) and on a humanitarian element (the logic of compassion). This contemporary mode of governing situations of mass violence and

[123] The ICC can investigate and prosecute crimes of genocide, crimes against humanity and war crimes committed in Ukraine, following an agreement by Ukraine to accept the exercise of jurisdiction by the Court. The crime of aggression, however, operates alongside different rules, which prevent prosecutions of nationals of states which are not parties to the Rome Statute of the ICC. Given that Russia has not ratified the Rome Statute and the effective blockage of a referral of the situation by the UN Security Council, the ICC cannot currently exercise its jurisdiction over the crime of aggression in the Ukraine situation (Hathaway, 2022).

atrocity has contributed to redefining the meaning of justice through the prosecution and punishment of a select number of individuals seen as bearing the most responsibility for mass violence. Yet as I have noted, meting out punishment against perpetrators of atrocity is not self-evident or obvious, whether from a historical or philosophical point of view. Perpetrators have indeed long been celebrated as heroes rather than criminals, whilst victims were traditionally seen as sacrificiable objects. Neither is criminalisation logically and necessarily tied to the idea of punishment. The prevalence of penality today is indeed 'the result of a historical shift from an active economy of the debt to a moral economy of punishment and from a logic of compensation for the damage caused to a rationale of retribution for the wrong done' (Fassin, 2018, pp. 121–122). Besides, at the domestic level, many fierce advocates of criminal justice – starting with human rights advocacy groups – actively resist the expansion of state's penal power. Yet when deployed internationally, the same repressive apparatus is no longer seen as cruel and abusive but as compassionate and emancipatory.

I have therefore proposed to critically interrogate the combination of punitive and humanitarian sensibilities in international justice-making. *What narratives have legitimated this Penal Humanitarian paradigm to enable its dominance? How do these narratives structure conceptions of criminality and victimhood as well as peace and justice, and with what effects?* To answer these questions, this thesis has critically examined the shared set of ideas, assumptions and values through which international criminal justice and its associated concepts and objects (from the idea of crime, violence and punishment to the figures of the victim and perpetrator) 'become thinkable, desirable, and [often] even natural' (Wedeen, 2008, p. 213). That is, in the chapters above I have explored the processes of representation and interpretation through which the Penal Humanitarian paradigm of international justice is constructed, sustained, and legitimated, and traced its (trans)formation over time.

I have argued that the deep structure of Penal Humanitarianism is made of a social imaginary shared by international justice-makers, and which enable them to make sense of the situations they are confronted with, interpret events and their chains of causality, attribute responsibility and blame, predict future outcomes and evaluate the desirability of different policy options. This social imaginary thus represents a shared set of assumptions and worldviews which shapes what is seen as feasible and legitimate in the international justice field. The presence of a social imaginary shared by international justice-makers helps explain

why the same tools and solutions are near universally offered in response to outbursts of mass violence, despite the extraordinary variance in geographical, cultural, socio-political contexts, and in the unfolding of conflict and atrocities. The presence of a common imaginary and meta-narratives shared by international justice-makers also explains why the Penal Humanitarian paradigm of international criminal justice is often taken for granted, its legitimacy and desirability being assumed rather than critically examined. I have also shown how the Penal Humanitarian imaginary in turn operates through (meta)narratives and stories, which give meaning and significance to what would otherwise appear as an incoherent and chaotic collection of events, experiences, and protagonists. I have focused in particular on three key meta-narratives of the Penal Humanitarian imaginary: *ending impunity for international crimes*, *justice for victims* and *justice as pacification*. The first meta-narrative provides a description of the problem – interpreted as the absence of accountability for mass violence and in particular atrocity crimes – and of its solutions – ending impunity through international prosecutions and punishment of alleged perpetrators of these acts. The second meta-narrative gives a rationale or call to arms motivating the need for international judicial intervention by appealing to the figure of the innocent, suffering victim. Last but not least, the third meta-narrative legitimates the deployment of penal tools internationally by connecting international trials with deterrence, conflict and atrocity prevention, and therefore with a broader project of world pacification.

These three meta-narratives operate in symbiose, providing meaning to situations of mass violence, atrocity and suffering. By imbuing specific representations and interpretations with the status of the real or common-sensical, these narratives 'have the power to enact extraordinary fictions [and] . . . enable them to create real effects in the world' (Clarke, 2009, p. 28). At the same time, they also conceal or restrain alternative representations and interpretations of the phenomenon of mass violence and its solutions. For instance, I have shown how the Penal Humanitarian imaginary tends to rely on sharp, binary oppositions between right and wrong, victims and perpetrators, or guilt and innocence, which hardly capture the messiness, blurriness and complexities of the situations on the ground. Notably, the figure of the victim is often associated with characteristics of innocence, blamelessness, purity, helplessness, vulnerability and dependence. The victim is also seen as demanding justice in the form of criminal punishment of the perpetrators of international crimes. In

relying on a largely fictional figure of the victim, international justice narratives tend to miss the diversity of the needs, interests and preferences of the actual injured communities, and risk ignoring those not corresponding to this stereotypical figure of the ideal victim. The analytical reconstruction and critical examination of the three meta-narratives of the Penal Humanitarian imaginary therefore provides a window into the assumptions, shared understandings and representations which underpin the practice of international criminal justice at present. The presence of a common imaginary and meta-narratives shared by international justice-makers also explain why the Penal Humanitarian paradigm of international criminal justice is often taken for granted, its legitimacy and desirability being assumed rather than critically examined. This leaves open, however, the questions of where this Penal Humanitarian imaginary comes from and how it has emerged, consolidated and (trans)formed over time to become the internationally dominant mode of thinking about justice in the midst and aftermath of outbursts of mass violence.

To address these questions, the thesis has mobilised genealogical tools, following the Foucauldian tradition of writing 'histor[ies] of the present' (Foucault, 1991). Writing a genealogy is about exploring the conditions of possibility for the Penal Humanitarian present – that is, explaining how and why we have arrived at the contemporary paradigm of international criminal justice which combines retributive and humanitarian elements. I have argued that the Penal Humanitarian paradigm has emerged at the confluence between three different streams: the humanitarian stream, manifested by the growing concern for preventing and alleviating suffering in international society; the international penal stream, capturing the birth and consolidation of a modern international penal machinery to prosecute and punish mass violence and widespread rights abuses; and the human rights stream, marked by the emergence of an anti-impunity movement. It is the progressive convergence and incomplete conflation of these three streams starting from the 1990s which has marked the emergence of Penal Humanitarianism. This paradigm rapidly consolidated and diffused afterwards, becoming the dominant framing for addressing situations of mass violence and delivering post-conflict justice. This has resulted in the proliferation of international justice mechanisms, from international commissions of inquiry and investigative mechanisms to international and hybrid criminal courts and tribunals. Tracing the historical roots and antecedents of the Penal Humanitarian paradigm of international justice not only helps

explain how we have arrived at the current situation, but also reveals important, and often forgotten or less visible, alternatives to the present model. It thereby helps denaturalise and challenge key concepts and assumptions in the field — for instance, the fact that punishment is equated to imprisonment, or accountability with criminal prosecutions of individual perpetrators.

Having examined the broader pathways, currents and events out of which and against which the Penal Humanitarian paradigm has emerged, I have proceeded with tracing the apparition, propagation and transformation of the *ending impunity for international crimes*, *justice for victims* and *justice as pacification* meta-narratives. In Chapter 5, I have examined discourses and narratives surrounding the construction and determination of international crimes, following the legal, political and normative arguments advanced to support the inclusion or exclusion of certain offences. International crimes are often portrayed as representing the gravest, most cruel and devastating forms of violence and abuse, their criminal nature appearing as self-evident and intuitively recognisable. Yet only a limited number of acts have historically been recognised amongst the list of core international crimes. From the end of WWII to the present, ICL has indeed largely worked to maintain, further and at times legitimate the international status quo, whether through the marginalisation of the role of economic actors in enabling and partaking in mass violence and atrocities, or through the exclusion of offences implicating the Global North such as colonial domination, environmental destruction or corruption. At the same time, efforts to codify and prosecute international crimes have seen an important shift from a focus on crimes against peace in the post-WWII trials, to a focus on atrocity crimes since the 1990s. This has been accompanied by a growing tendency to equate international crimes with large-scale, visually arresting spectacles of predominantly physical violence and abuse.

These shifts have been reflected in discourses and representations of victimhood in international criminal justice, which have been the object of Chapter 6. In the aftermath of WWII, the emphasis was placed on the state as the primary body injured by the aggressive war waged by Axis powers. From the 1990s onwards, the figure of the individual victim or survivor of atrocities began to replace the state as the primary referent of international criminal justice, justifying the investment in international trials. This figure of the victim, however, often remains an abstract and idealised one, which hardly does justice to the

complex identities and experiences of actual victims of mass violence, or to the diversity of needs, preferences and interests amongst communities of survivors. Alongside the two figures of the state and the victim as direct bodies injured by war and the atrocities committed therein, international criminal justice discourses also consistently refer to indirect injured bodies, such as humanity and (hu)mankind, civilisation, the international community or world public opinion. In re-inscribing suffering as belonging and mattering to a more global constituency, such representations risk downplaying the local significance and lived experiences of those directly affected by the violence. Adapting what Geoffroy de Lagasnerie (2018, p. 148) wrote in reference to the domestic context:

> When a crime occurs, the [international community] dispossesses the victim. . . and takes his or her place; the [international community] positions itself as the victim — and even, more precisely, as the primary victim. . . [International criminal justice] creates two crimes where only one existed: one committed against the victim, the other against the [international community].

Finally, Chapter 7 has examined discourses and narratives surrounding peace and pacification in international criminal justice. As I have shown, international trials are generally assumed to prevent future crimes and atrocities, facilitate the ending of an ongoing conflict as well as prevent future conflicts. Whilst in the aftermath of WWII international justice was already connected to a broader humanitarian agenda of ensuring world peace and preventing aggressive wars, this was accompanied by an awareness of the limits of international trials, which could only represent one tool amongst many in a broader pacification project. Conversely, the post-1990s period would see considerably more ambitious goals assigned to international criminal trials, with decreasing willingness to acknowledge the inherent limits of international criminal courts and tribunals in bringing about lasting peace and atrocity prevention or mitigation. Despite the lack of conclusive empirical evidence as to the actual pacifying effects of past international criminal courts and tribunals, such narratives continue to abound in the field, justifying the continued material investment in the project and institutions of international criminal justice.

More broadly, the reconstitution and critical examination of the historical evolution and consolidation of these three meta-narratives sheds light on the shifting modes of legitimation, priorities and purposes of international criminal justice. This is most visible when looking at the evolving relationship between the penal and humanitarian elements. Whilst both elements have been present throughout the entire history of the field, their relative

visibility has evolved over time. The post-WWII paradigm of international justice was characterised by a strong and explicit emphasis on retribution as a core driver and source of justification for international trials, with further humanitarian purposes appearing as secondary and more limited in their effects. Conversely, the 1990s saw a reversal of this relationship, with the humanitarian element taking increasing prominence and visibility, manifesting a growing discomfort with the idea of punishment for its own sake. This rise of the humanitarian element is intimately linked with the changes in the meta-narratives outlined above. The shift to an atrocity paradigm defined through spectacular, highly visible and intuitively apprehensible forms of violence indeed creates direct resonance with external audiences, sparking humanitarian outrage and resonating with calls to deploy ICL tools internationally and globally. Similarly, the rise of the figure of the victim has coincided with attempts to recast the telos of ICL away from retribution and towards a humanitarian or restorative mission geared towards providing justice for victims. This is not to say that the penal element has disappeared or even weakened over time. In fact, the humanitarian purposes of international criminal justice — whether it be securing convictions in the name of victims, providing reparations to affected communities, deterring future atrocities or preventing conflict — remain fundamentally dependent on the smooth operation of penal logics of prosecution and punishment.

Historicising the key narratives which drive, sustain and legitimate international criminal justice-making at present can in turn help us rethink elements that are otherwise taken-for-granted — such as the association of justice with criminal punishment/imprisonment, the appropriation of the figure of the victim to justify and legitimate international trials, or the prioritisation of spectacular atrocities over slow and less visible processes of destruction and violence. In the thesis, I have outlined how discursive and narrative tools, in the Foucauldian discourse analysis and discourse-theoretical analysis traditions, can be combined with genealogical tools to study the process of construction, consolidation and legitimation of meaning(s) attached to international criminal justice. I have focused my attention on the logic of *repressive compassion*, that is, how humanitarianism is used to drive, expand and lend legitimacy to the deployment of penal tools internationally. The other side of that coin, as I have shown in Chapter 3, is the logic of *compassionate repression*, which generates expectations about how punishment is to be meted out and how

alleged perpetrators of international crimes ought to be treated. More recently, a growing body of scholarship, notably within the legal field, has examined the development of standards for fair trials and the rights of the accused, as well as submitted the sentencing practices of international criminal courts and tribunals to critical scrutiny. Still, more systematic research could be undertaken by deploying the methodological and analytical tools presented in this dissertation to uncover the discursive and narrative roots of this phenomenon, as well as its historical underpinnings and evolution. Such an approach would also enable the mapping out of enduring areas of contestation. One such example can be found in debates surrounding the inclusion or exclusion of the death penalty from the sentencing practices of international criminal courts and tribunals. During the negotiations of the Rome Statute of the ICC, Caribbean states were adamant that the death penalty for capital offences should not be ruled out (United Nations, 1998j, para. 104, p. 113).[124] Whilst death penalty was ultimately excluded from the Rome Statute, the lack of consensus on the question was reflected in the adoption by the Diplomatic Conference of a statement clarifying that such exclusion was without prejudice to national policies and legislations with regard to the death penalty (United Nations, 1998q, para. 53, pp. 124-125). More recently, the adoption of the terms of reference and operationalisation of UNITAD was repeatedly delayed due to Iraq's recourse to death penalty in sentencing, which conflicted with UN procedures preventing the sharing of evidence with jurisdictions applying the death penalty (Security Council Report, 2022; Van Schaack, 2018).

At the same time, the thesis has highlighted important limits and issues in this mobilisation of humanitarianism to justify, legitimate and expand penality internationally and globally. If international punishment often fails to provide relief and justice to affected communities, if international crimes only represent the visible face of the mass violence iceberg, and if the alleged pacifying effects of international trials aren't supported by empirical evidence, what are the alternatives to this Penal Humanitarian paradigm of international justice? Whilst this thesis has dedicated most attention to uncovering and critically rethinking the common sense provided by international criminal justice at present, the three meta-narratives of the Penal Humanitarian imaginary remain open to challenge and

[124] The ultimate decision to exclude the death penalty from the Rome Statute was in fact the most important reason why Trinidad and Tobago declined to sign the Statute, even though it had been the driving force behind renewed efforts to establish a permanent international criminal court (United Nations, 1998q, para. 73, p. 126).

resistance. In tracing the emergence and consolidation of each narrative, I have highlighted some of the plural visions and alternative conceptions that once co-existed or were offered in reaction or rejection of the assumptions and representations enshrined within the mainstream meta-narratives. Future research could further investigate why these alternative ideas and visions were left behind or discarded by international justice-makers and assess their feasibility and political potentiality today. This is especially important given the perception of international criminal justice as a field embroiled in crisis (García Iommi, 2020; Mégret, 2016b; Vasiliev, 2020). Notably, the anti-impunity norm, which represents the normative core of international criminal accountability, has increasingly been contested, not least due to its uneven application and a perceived targeting of the African continent by the ICC.[125] This has spurred accusations of double standards, neo-imperialism and 'white justice' (Vilmer, 2016, p. 1320). In response, South Africa, Burundi and the Gambia have announced their decision to withdraw from the Rome Statute, later backed by a resolution from the African Union which referred to a mass withdrawal strategy (African Union, 2017).[126]

Whilst this pan-African, anti-imperialist and anti-ICC rhetoric is often traced back to the UN Security Council's decision to refer the situation in Darfur to the ICC in 2005 (Vilmer, 2016, p. 1321), a closer examination of the historical debates surrounding anti-impunity reveals that similar concerns and critiques predated the creation of the ICC. The current resistance to the ICC (and to the uneven application of the anti-impunity norm) in Africa indeed echoes earlier discussions on combating impunity for economic, social and cultural rights. As shown in Chapter 4, Guissé's 1997 report had indeed condemned the enduring historical injustices, deep inequalities and cleavages sustained by the Western-dominated global liberal and neo-colonial order. It is precisely this perception of the ICC as an imperial and neo-colonial tool controlled by the West which has crystallised much of the resistance to the Court today. Reacting to the indictment of Sudan's President Omar al-Bashir, then-African Union chairperson Muammar Gaddafi described the ICC as an 'attempt by [the West] to re-colonise their former colonies', and 'a practice of First World terrorism' (cited in BBC News, 2009). More recently, a Gambian minister provocatively referred to the Court as 'an

[125] Indeed, until 2016 all situations investigated by the ICC were on the African continent.

[126] The resolution, of a non-binding nature, was opposed by Nigeria, Senegal and Cape Verde (Keppler, 2017). Gambia later announced its decision to re-join the ICC (Coalition for the International Criminal Court, 2017), whilst South Africa's High Court ruled that the decision to leave the ICC was unconstitutional and invalid (BBC News, 2017).

International Caucasian Court for the persecution and humiliation of people of colour, especially Africans' (cited in Al Jazeera, 2016).[127] These instances reflect a desire from African states to emancipate themselves from a global judicial order largely controlled by Western powers, and allegedly operating at the expense of African countries – echoing discussions in the Sub-Commission on the Prevention of Discrimination and Protection of Minorities following the release of Guissé's final report. Meanwhile, the inclusion of socio-economic abuses – notably corruption, trafficking in drugs and hazardous wastes, illicit exploitation of natural resources and money laundering – and of corporate liability in the Malabo Protocol for the proposed African Court of Justice and Human Rights resonate with Guissé's earlier proposal on recognising socio-economic rights violations as international crimes (African Union, 2014, para. 28A). Inquiring into the reasons behind the failure or erasure of alternative ways of imagining international justice and accountability can therefore not only illuminate current developments and discussions, but also help ascertain the promise and potential of similar proposals today.

Finally, future research could focus on changes(s) in/of the Penal Humanitarian imaginary. As I have explained in Chapter 2, whilst the Penal Humanitarian imaginary represents the dominant paradigm through which the phenomenon of mass violence and its solutions is interpreted, it is neither fixed nor unchangeable. In particular, the discourses and narratives mobilised by international justice-makers may be subject to change as a result of new empirical circumstances, institutional developments or deliberate reflection and promotion of new ways of thinking and acting by the actors themselves. Such changes may lead to the transformation of elements of existing narratives, the apparition of new narratives and the disappearance or fading away of narratives which had played a structuring role in the Penal Humanitarian imaginary. In turn, the new narratives and accompanying practices that are emerging may be transforming Penal Humanitarianism from within, or work to displace or even replace this paradigm entirely. In the former case, the new narratives and discourses aim to reform or transform our understandings and approaches to justice-making, whilst remaining committed to, and inscribing themselves within, the existing field of international criminal justice, with its associated actors and institutions. One can cite here as examples efforts to adopt a survivor-centred approach which values, empowers and addresses the real

[127] My translation.

needs of communities affected by violence and abuse; attempts to build synergies between transitional justice mechanisms, through a more holistic understanding of justice; and reflections or acknowledgment of the inherent limitations of international criminal law in dealing with mass violence and its aftermath. In the latter case, counter-narratives emerge in rejection of the project of international criminal justice, advocating for a divestment from ICL and for reimagining our responses to mass violence and injustice otherwise. One can mention here proposals to rethink accountability and punishment so as to sever the link between punishment and trials/imprisonment or calls for re-investing in alternative emancipatory projects. I briefly expand on each of these points below.

As was noted in Chapter 6, the approach of international criminal courts and tribunals in working with and for victims has traditionally come with important limitations and failings, whether stemming from an idealised, empirically ungrounded understanding of the varied needs, preferences and interests of victims, or from the difficulty of reconciling these needs and preferences with the demands and structure of international trials. More recently, international justice mechanisms have however renewed efforts in centring victims and survivors in their work, in an attempt to address some of these historical limitations and challenges. The three investigative mechanisms for Syria (IIIM), Iraq (UNITAD) and Myanmar (IIMM) are especially notable in that respect. These mechanisms have indeed strived to mainstream a survivor-centred approach through recognition of the diverse needs and preferences of affected communities, a real desire to empower survivors and bring in categories of victims-survivors which had previously remained largely invisible or marginalised, and enhanced engagement with local civil society. For instance, the IIIM has established institutional mechanisms to regularly engage with Syrian civil society organisations. Contrary to the oft-seen generalisation and abstraction of victims, these discussions between the IIIM and Syrian civil society have brought to light 'the diverse range of victims and the importance of avoiding generalizations, and the need to take into account religious, gender, cultural and other parameters', with the Mechanism committed to engaging 'with all actors, minority groups and underrepresented voices specifically, as essential to an inclusive justice process' (United Nations General Assembly, 2019, para. 36, p. 10). Similarly, UNITAD has established a Dialogue Forum to enhance collaboration and facilitate frequent exchange with Iraqi civil society (UNITAD, 2021), and has worked with

religious leaders on the adoption of an Interfaith statement on the victims of Da'esh/ISIL (UNITAD, 2020).[128]

Investigative mechanisms have also increasingly sought to build synergies between their investigative and quasi-prosecutorial work, and a broader transitional justice agenda involving truth-seeking, the search for the missing, reparations, institutional and legal reforms, and guarantees of non-recurrence (United Nations General Assembly, 2017, para. 8, p. 3). For instance, the IIIM has sought to integrate the search for the missing into their evidence collection and preservation work, to facilitate the timely and efficient mobilisation of information that can ease these searches (IIIM, 2020, p. 1). Besides, whilst international criminal courts and tribunals have often been criticised for over-promising and under-delivering, the investigative mechanisms have strived for more transparency and humility, explicitly acknowledging the limits of their mandates and the long and uncertain pathway to justice. The IIMM spoke of the importance of 'dialogue with victims to listen to what they have to say and to have them better understand what the Mechanism can and cannot do for them in their pursuit of justice and accountability' (IIMM, 2021, p. 3). Meanwhile, the IIIM, in a public-facing bulletin addressing the intersection between accountability and the search for the missing, stressed that it was 'important to be realistic about the limitations and to communicate clearly with affected families and communities about that' (IIIM, 2020, p. 5).

While the approaches mentioned above have sought to address ICL's historical biases within existing institutional arrangements and the structural constraints of the international penal field, other counter-narratives propose a more fundamental reimagining of accountability, redress and justice. If ICL can't be reformed and transformed from within, such proposals call for investing theoretically, materially and politically in alternative endeavours. For instance, Mark Drumbl (2020, p. 255) has recently proposed to re-envision anti-impunity and punishment not as mere synonymous for criminal trials and imprisonment, but as involving a broader range of measures, including recrimination, shame, sanctions, lustration, public disclosures and transparency. Re-imagining punishment not only provides a more elastic approach that acknowledges the diversity of victims' needs and preferences when it

[128] The statement was signed in March 2020 by his Eminence Sheikh Abdul Mahdi Al-Karbala'i, His Holiness Baba Sheikh Khurto Hajji Ismail Yazidi Supreme Spiritual Leader, and His Beatitude Louis Raphaël I Sako, Patriarch of Babylon of the Chaldeans and Head of the Chaldean Catholic Church.

comes to post-conflict justice and redress, it also facilitates broader involvement in the fight for accountability (Drumbl, 2020, pp. 257–260). More radically – and more rarely found in international justice – are calls to abolish international criminal law. [129] Abolitionist projects do not simply call for dismantling of the existing penal institutions and practices, but also for rebuilding (Davis et al., 2022). Rebuilding may involve promoting alternative justice systems founded on restoration rather than punishment, by reinvesting in social support programs and social safety nets (Illing, 2020). It may also take the form of investing in alternative emancipatory projects, that would promote accountability, justice and repair not through the state or state-driven institutions, but rather through local community interventions, transnational networks of solidarity or broader socio-economic reforms that address the underlying factors that lead to violence and abuse (Pinto, 2022, p. 195). Whether any of these proposals will fundamentally transform the Penal Humanitarian paradigm of international justice remains to be seen.

[129] See Gerry Simpson (2020, p. 845), noting that even the fiercest critics of ICL often fall short of advocating for abolition.

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