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Chiara Redaelli

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* Research Fellow, Geneva Academy of International Humanitarian Law and Human Rights; Adjunct Professor, Catholic University of Lille and International University in Geneva; Author Email chiara.redaelli@graduateinstitute.ch. Research for this chapter has been supported by the Swiss National Science Foundation grant P2GEP1_184490. The author would like to thank Tom Dannenbaum, Ioannis Kalpouzos, Dustin Lewis, Frédéric Mégret, Naz Modirzadeh, and Vera Piovesan for their invaluable comments and feedback to previous versions of this article, as well as the reviewers for their useful suggestions. All errors are my own.

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I. INTRODUCTION

Nearly seventy years have passed since the Nuremberg trials, the last time the crime of aggression was the object of prosecution. The adoption of the Kampala Amendments to the Rome Statute (Kampala Amendments)[1] has been welcomed as an historic breakthrough, which may provide a landmark step forward for the prosecution of this crime.[2] Furthermore, the activation of the jurisdiction of the International Criminal Court (ICC) on the crime of aggression has raised the hope that the prosecution of this long-overlooked crime could again become a reality.

In the aftermath of the Second World War, and in parallel to discussions on the crime of aggression, the maintenance of peace was at the center of international legal debate. Accordingly, the Charter of the United Nations provides for the maintenance of international peace and security as the purpose of the United Nations. The decolonization era that followed the founding of the organization, and the consequent emergence of new members of the international community, nurtured discussions on the notion of peace and its significance to international law. Nevertheless, and similar to the crime of aggression, over the past decades the concept of peace within international has been pushed to the periphery of legal debate.

Since 1945, the international legal framework has changed dramatically. Notably, as human rights have gained importance, they have reshaped the legal landscape, a phenomenon referred to as the humanization of international law.[3] Peace and aggression have not remained immune from this pervading humanitarian sensitivity and this article investigates the effects of the humanization of international law on these key concepts. Specifically, it argues that a new trend is emerging, whereby human rights, more than the maintenance of peace per se, is increasingly seen as the foundational aim of the international legal framework. In turn, this article questions whether this is a welcomed development and highlights the risks of this approach.

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1. International Criminal Court, The Crime of Aggression, Resolution RC/Res.6, Annex I, art. 8*bis*, ICC Doc. RC/11 (June 11, 2010) [hereinafter Kampala Amendments].

2. Niels Blokker & Claus Kress, *A Consensus Agreement on the Crime of Aggression: Impressions from Kampala*, 23 LEIDEN JOURNAL OF INTERNATIONAL LAW 889 (2010).

3. *See especially* THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006).

To do so, this article focuses on the humanization of the crime of aggression. Aggression, as it is traditionally understood, is "the supreme international crime,"[4] and the prohibition on this crime aims to protect the sovereignty and the territorial integrity of States. Following World War II, the more recent humanization of international criminal law (ICL) has brought genocide, war crimes, and crimes against humanity to the fore of the international legal system. As the attention has shifted to the protection of human beings, the logical consequence was to focus on criminalizing acts that cause human suffering. Therefore, inasmuch as the aim of the criminalization of aggression is to protect State sovereignty, the crime of aggression has gradually lost its central role and has lived in a legal limbo.

Nevertheless, the crime of aggression did not evade the humanitarian sensitivity that has pervaded ICL. Notably, practice and scholarship alike have attempted to reframe the crime of aggression in terms of human rights.[5] On the one hand, it has been suggested that the reason why aggression should be criminalized is because of its consequences on individuals. Indeed, aggression is an unlawful use of force that causes human suffering and that is unjustified and could have been avoided. On the other hand, during the Kampala Conference a number of delegates propounded that genuine humanitarian intervention should not fall within the scope of application of the crime of aggression. This position, shared by several scholars, would suggest that the protection of other international crimes should be prioritized and would justify the commission of acts that could potentially amount to aggression. This raises the question of whether the crime of aggression is still the supreme international crime.

Part II examines the process of the humanization of peace. In the aftermath of World War II, peace was generally considered as the absence of international armed conflicts (negative peace). However, as international law has been humanized, so has the idea of peace. Critics of the concept of negative peace highlighted that the mere absence of war does not reflect the

4. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948) [hereinafter IMT Judgment]; *see also* Donald M. Ferencz, *Continued Debate Over the Crime of Aggression: A Supreme International Irony*, 58 HARVARD INTERNATIONAL LAW JOURNAL 24 (2017).

5. *See, e.g.,* Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE LAW JOURNAL 1242, 1278 (2017); Frédéric Mégret, *What is the Specific Evil of Aggression? A Three Way Typology, in* THE CRIME OF AGGRESSION: A COMMENTARY 1398, 1402 (Claus Kreß & Stefan Barriga eds., 2017).

complexities of the current legal framework, nor the values it seeks to protect: a just society that respects human rights. Therefore, positive peace emerged as a concept that "implies a social and political ordering of society that is generally accepted as just."[6] At the same time, the existence of a right to peace has been proclaimed at the international and regional levels.

Parts III and IV analyze the consequences of the parallel humanization of peace and aggression. This process brings to the fore the complex relationship between peace, justice, and human rights, a relationship that has informed the legal discourse on the *jus ad bellum* in general and on aggression in particular. Inasmuch as the primary purpose of the United Nations is the maintenance of international peace and security, as established by Article 1 of the U.N. Charter, it seems clear that the U.N. system prioritizes the absence of war over justice. Nevertheless, the mere absence of war does not seem to be accepted as the ultimate value and objective of the international community because this absence does not guarantee justice. Indeed, scholarship and practice alike have tried to push for the introduction of exceptions to the ban on the use of force that are considered just and legitimate, albeit unlawful.[7] The most emblematic examples concern humanitarian intervention and the responsibility to protect. However, we could also think of interventions to promote democracy and the provision of weapons and other support to armed groups that are fighting against regimes deemed illegitimate. Accordingly, we may wonder whether the humanization of peace and aggression has caused a shift of paradigm, whereby human rights have emerged as a parameter of justice and as the primary aim of the current legal framework.

6. MICHAEL HOWARD, THE INVENTION OF PEACE AND THE REINVENTION OF WAR 2 (2002).

7. Fernando R. Teson, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 1 AMSTERDAM LAW FORUM 42 (2008); Tania Voon, *Closing the Gap between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA JOURNAL OF INTERNATIONAL LAW & FOREIGN AFFAIRS 31 (2002).

II. THE HUMANIZATION OF AGGRESSION

A. Aggression as the "Supreme International Crime"

Efforts to control and limit war have been attempted for centuries.[8] Nevertheless, it was only in the aftermath of World War I that States engaged in multilateral endeavors to ban war. Institutionally, the League of Nations was created "to promote international co-operation and to achieve international peace and security"[9] through collective mechanisms. Nevertheless, its Covenant (1920) did not outlaw war per se, but simply distinguished between lawful and unlawful wars.[10] The Kellogg-Briand Pact (1928) went further and banned war with no exceptions.[11] Although these efforts constituted valuable attempts to prevent war, at the time legal scholars and practitioners were aware that, "unless coupled with meaningful sanctions, the interdiction of aggressive war was liable to be chimerical."[12] Notably, it was recognized that

8. The Islamic, Hindu, Egyptian, and Assyrian-Babylonian civilizations developed norms addressing the legitimacy of war. In the first century BCE, Cicero set forth the basis to distinguish between just and unjust war. In the Middle Ages, theologians such as Augustine, Thomas Aquinas, and Isidore of Seville elaborated sophisticated rules to determine when war is just, and thus legitimate. In more recent times, States have concluded a number of treaties aimed at prohibiting or at least limiting war, such as the Bryan treaties and the Hague Conventions of 1899 and 1907 on the pacific settlement of international disputes. *See* M. CHERIF BASSIOUNI & BENJAMIN B. FERENCZ, THE CRIME AGAINST PEACE AND AGGRESSION: FROM ITS ORIGINS TO THE ICC 208 (2008); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 80 (5th ed. 2011); Kurt A. Raaflaub, *Introduction: Searching for Peace in the Ancient World, in* SEARCHING FOR PEACE IN THE ANCIENT WORLD 1 (Kurt A. Raaflaub ed., 2007); Gregory A. Raymond, *The Greco-Roman Roots of the Western Just War Tradition, in* THE PRISM OF JUST WAR: ASIAN AND WESTERN PERSPECTIVES ON THE LEGITIMATE USE OF MILITARY FORCE 7, 17 (Howard M. Hensel ed., 2010).

9. Covenant of the League of Nations pmbl.

10. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY THE STATES 57 (1963); *see also* Edwin Borchard, *War, Neutrality and Non-Belligerency*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 618 (1941); James L. Brierly, *International Law and Resort to Armed Force*, 4 CAMBRIDGE LAW JOURNAL 308, 310 (1932); KIRSTEN SELLARS, "CRIMES AGAINST PEACE" AND INTERNATIONAL LAW 13 (2013).

11. In the treaty, the parties "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy in their relations with one another" and agreed "that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." General Treaty for Renunciation of War as an Instrument of National Policy arts. 1–2, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

12. DINSTEIN, s*upra* note 8, at 125.

State responsibility for waging an unlawful war was not enough and that individual criminal responsibility would have been crucial in this regard.[13]

The endeavor to prosecute the German Kaiser should be read against this backdrop.[14] Article 227 of the Treaty of Versailles expressly established that: "[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties."[15] The Kaiser found refuge in the Netherlands, which was not a party to the Treaty, thus the trial never took place.[16] While Article 227 does not have any reference to aggression or crimes against peace, as at the time they did not amount to a violation of international law,[17] this provision could be considered the antecedent of attempts to criminalize aggressive war.[18]

Following the dramatic experience of World War II, efforts to outlaw war and criminalize aggression gained momentum.[19] In June 1945, representatives of France, the United Kingdom, the United States, and the Soviet Union gathered in London to attend the Inter-Allied Conference on the Punishment of War Crimes. Their work led to the adoption of the London Agreement and the Charter of the International Military Tribunal.[20]

U.S. Supreme Court Justice Robert Jackson, the U.S. representative at the conference, was one of the major supporters of the idea of prosecuting

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13. William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes against Peace Became the "Supreme International Crime"*, *in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 17, 20 (Mauro Politi & Giuseppe Nesi eds., 2004).

14. SELLARS, *supra* note 10, at 1; *see also* WILLIAM A. SCHABAS, THE TRIAL OF THE KAISER (2018).

15. Treaty of Peace between the Allied and Associated Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188.

16. Andreas L. Paulus, *Peace through Justice – The Future of the Crime of Aggression in a Time of Crisis,* 50 WAYNE LAW REVIEW 1, 9 (2004).

17. Schabas, *supra* note 13*,* at 29.

18. *See, e.g.,* Geneva Protocol on the Pacific Settlement of International Disputes pmbl. (Oct. 2, 1924), *reprinted in* 19 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 9 (1925) (stating "a war of aggression constitutes . . . an international crime"). Nevertheless, the Protocol did not enter into force. *See* BASSIOUNI & FERENCZ, *supra* note 8, at 210; DINSTEIN, *supra* note 8, at 125.

19. Paulus, *supra* note 16, at 7 ("The history of the crime of aggression is closely associated with the efforts to cope with the experiences of two World Wars in the 20th century.").

20. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]; *see also* Schabas, *supra* note 13, at 27.

the defendants for the crime of aggression.[21] Coincidentally, he formally presented his proposal to include aggressive war in the crimes prosecuted by the Tribunal on June 26, 1945, the same day as the San Francisco Conference banned the use of force in the U.N. Charter.[22] As Jackson wrote, "it is high time that we act on the judicial principle that aggressive war-making is illegal and criminal."[23] While the French delegate André Gros stated that France did not consider aggressive war as a crime, thus suggesting that its inclusion in the Charter of the International Military Tribunal would violate the *nullum crimen, nulla poena sine lege* principle, the British and Soviet representatives manifested enthusiasm for the proposal. Accordingly, on August 8, 1945, crimes against peace were introduced in the Charter. Soon thereafter, they appeared in Article II(1)(a) of Control Council Law No. 10 and in Article 5(a) of the Charter of the International Military Tribunal for the Far East, albeit with minor changes.[24]

The inclusion of the crime of aggression in the statutes of the tribunals was criticized on two grounds. First, it is highly debatable whether waging aggressive war was a crime before the adoption of the London Agreement. Indeed, while the Tribunal relied heavily on the Kellogg-Briand Pact, the latter does not criminalize aggression.[25] Further, the content of the crime of

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21. Henry T. King Jr., *Nuremberg and Crimes Against Peace*, 41 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 273, 274–75 (2009).

22. Benjamin B. Ferencz, *Defining Aggression: Where It Stands and Where It's Going,* 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 491, 492 (1972).

23. REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 52 (1949) [hereinafter JACKSON REPORT]; *see also* BASSIOUNI & FERENCZ, *supra* note 8, at 213.

24. *See* M. Cherif Bassiouni, *The "Nuremberg Legacy," in* INTERNATIONAL CRIMINAL LAW 195 (M. Cherif Bassiouni ed., 1999); David Luban, *The Legacies of Nuremberg,* 54 SOCIAL RESEARCH 779 (1987).

25. DINSTEIN, *supra* note 8, at 127. It is beyond the scope of this article to exhaustively address the debate on the *nullum crimen sine lege* principle with regard to the crime of aggression. This question was discussed briefly by the IMT. *See* IMT Judgment, *supra* note 4, at 39. For an in-depth analysis of the issue, see, for example, NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008); George A. Finch, *The Nuremberg Trial and International Law*, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 20 (1947); Michael J Glennon, *The Blank-Prose Crime of Aggression,* 35 YALE JOURNAL OF INTERNATIONAL LAW 71 (2010); Oscar Solera, *The Definition of the Crime of Aggression: Lessons Not Learned,* 42 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 801 (2010); Quincy Wright, *The Law of the Nuremberg Trial,* 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 38 (1947).

aggression was not clear and no criteria were provided to guide the interpreter.[26] Therefore, Garcia-Mora concluded that: "the most conspicuous facts about crimes against peace are both their vague and general description, and the utter lack of agreement regarding their criminality under international law."[27]

While is seems clear that aggression was not a crime under customary international law when the London Charter was concluded,[28] it nonetheless played a paramount role during the Nuremberg trials. Indeed, during his opening address Jackson affirmed that: "[t]his inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times—aggressive war."[29] Furthermore, he expressed the idea that aggression is "the crime which comprehends all lesser crimes."[30] The judgment adopted at Nuremberg reflects this view. Notably, it specifies 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."[31] The implications of this approach were clearly expressed by Schick in 1947, who stated: "everything else in the Nuremberg trial, however dramatic, however sordid, however shocking and revolting to the feelings of civilized peoples, is only incidental, or subordinate to the supreme crime against peace."[32]

According to the traditional view, aggression is "a crime by one state against another that consists of a violent attack on the latter's sovereignty."[33]

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26. Manuel R. Garcia-Mora, *Crimes Against Peace,* 34 FORDHAM LAW REVIEW 1, 3 (1965).

27. *Id.* at 9.

28. Leo Gross, *The Criminality of Aggressive War,* 41 AMERICAN POLITICAL SCIENCE REVIEW 205, 218–20 (1947).

29. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947) [hereinafter JACKSON OPENING ADDRESS].

30. JACKSON REPORT, *supra* note 23, at 51.

31. IMT Judgment, *supra* note 4, at 427.

32. Franz B. Schick, *Crimes Against Peace,* 38 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 445, 447 (1948); *see also* ROBERT CRYER, HÅKAN FRIMAN & DARRYL ROBINSON, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 114 (2010) (noting that "the prosecution, in particular the U.S. section, saw the trial as being primarily one of aggression, rather than of the Holocaust"); DINSTEIN, *supra* note 8, at 128 ("It is virtually irrefutable that present-day positive international law reflects the [Nuremberg] Judgment. War of aggression currently constitutes a crime against peace. Not just a crime, but the supreme crime under international law.").

33. Mégret, *supra* note 5, at 1402.

Indeed, the judgments adopted at Nuremberg and by the International Military Tribunal for the Far East stress that crimes against peace consist of waging aggressive wars against other countries. In the same vein, Control Council Law No. 10 focuses on "initiation of invasions of other countries."[34] The centrality of sovereignty to the legality of the use of force is evident also in Article 2(4) of the U.N. Charter, which emphasizes "the territorial integrity or political independence of any State."[35] This position has been reiterated and confirmed in key international instruments that followed the Charter. For instance, the United Nations General Assembly (UNGA) Resolution on the Definition of Aggression states, "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."[36] Likewise, the Kampala Amendments define aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."[37]

The understanding of aggression as a crime whose prohibition is directed at protecting State interests is vastly accepted in the legal scholarship. For instance, Kahn finds that the criminalization of aggression at the Nuremberg trials led to the emergence of "a new legal regime founded on protecting state sovereignty through the prohibition on the use of force."[38] Similarly, Stahn contends that the crime of aggression "extends criminalization from its current focus on gross human rights violations and victims' rights to interstate relations, the protection of state interests ('sovereignty', 'territorial integrity', 'political independence'), and the preservation of peace – that is, the absence of the unlawful use of armed force."[39] This characteristic is unique to aggression and distinguishes it from other international crimes. In its traditional understanding, aggression is ultimately a crime that violates the sovereignty and territorial integrity of States. Therefore, its focus is on State

34. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter IMTFE Charter]; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), 3 OFFICIAL GAZETTE, CONTROL COUNCIL FOR GERMANY 50 (1946).

35. U.N. Charter art. 2, para 4.

36. G.A. Res. 3314 (XXIX), Definition of Aggression art. 1 (Dec. 14, 1974).

37. Rome Statute of the International Criminal Court art. 8*bis*, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *see also* Kampala Amendments, *supra* note 1.

38. PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 55 (2008).

39. Carsten Stahn, *The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression,"* 23 LEIDEN JOURNAL OF INTERNATIONAL LAW, 875, 877 (2010).

interests per se, irrespective of the consequences of the unlawful use of force on the population. As we shall see, this view came to be criticized in light of the humanization of international law.[40]

B. The Humanization of International Criminal Law

Following the end of World War II, human rights have emerged as the cornerstone of the U.N. system. Not only is "promoting and encouraging respect for human rights" one of the stated purposes of the United Nations,[41] but several human rights treaties have been adopted this approach at the international and regional level.[42] As human rights have gained importance, international law has "shifted away from a regime rooted exclusively in state sovereignty and toward a regime that privileges human rights and human values."[43] The International Criminal Tribunal for the former Yugoslavia (ICTY) acknowledged this evolution in a well-known passage: "[A] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well."[44]

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40. Mégret, *supra* note 5, at 1403.

41. *See, e.g.*, U.N. Charter art. 3, para 1.

42. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3. At the regional level, see, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter of Human and Peoples' Rights, June 26, 1981, 21 INTERNATIONAL LEGAL MATERIALS 59 (1982); Arab Charter of Human Rights, May 22, 2004, *reprinted in* 12 INTERNATIONAL HUMAN RIGHTS REPORTER 893 (2005).

43. Dannenbaum, *supra* note 5, at 1278.

44. Prosecutor v. Tadic; Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); *see also* ROBERT SCHUTTE, CIVILIAN PROTECTION IN ARMED CONFLICTS: EVOLU-

The effects of the humanization of international law are particularly visible with regard to international humanitarian law (IHL) and the *jus ad bellum*. On the one hand, the Geneva Conventions shifted the focus from the conduct of hostilities—the object of the Hague Conventions—to the protection of the victims of war.[45] The use of the term "international humanitarian law," as opposed to "the law of armed conflict" or "the law of war," is emblematic of this shift.[46] On the other hand, in the 1990s the genocides that took place in Rwanda and the Balkans triggered a debate on the duties of States toward their own people and on the responsibility of the international community when States forfeit their duties. Accordingly, the doctrines of humanitarian intervention and the Responsibility to Protect (R2P) emerged as attempts to answer to these dilemmas.

Against this backdrop, ICL has gradually shifted its focus toward crimes against humanity, war crimes, and genocide, that is, crimes committed against individuals.[47] What happened to the crime of aggression? In his famous statement, Jackson affirmed that:

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.[48]

TION, CHALLENGES AND IMPLEMENTATION 135 (2015); BARBARA VON TIGERSTROM, HUMAN SECURITY AND INTERNATIONAL LAW: PROSPECTS AND PROBLEMS 67 (2007); EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 207 (2016).

45. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* LOUIS HENKIN, THE AGE OF RIGHTS 2 (1996); MERON, *supra* note 3; Yoram Dinstein, *The Interaction of International Law and Justice,* 16 ISRAEL YEARBOOK ON HUMAN RIGHTS 9, 41–42 (1986).

46. MERON, *supra* note 3, at 1 (stating that "[a]lthough initially, in the 1950s, international humanitarian law or IHL referred only to the Geneva Convention on the protection of war victims, it is now increasingly employed to refer to the entire law of armed conflict").

47. Dannenbaum, *supra* note 5, at 1280; ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 175 (2013).

48. JACKSON OPENING ADDRESS, *supra* note 29, at 154.

However, as the humanization of ICL has brought to the fore genocide, war crimes, and crimes against humanity, the crime of aggression has gradually lost its central role in ICL and has lived in a legal limbo.[49] Indeed, the statutes of the ad hoc tribunals in the Former Yugoslavia and Rwanda did not mention it among the offenses that could be prosecuted.[50] Moreover, while Article 5(1) of the Rome Statute includes aggression in the jurisdiction of the ICC, [51] Article 5(2) adds:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[52]

This provision is the result of a compromise between those in favor of the inclusion of the crime of aggression within the jurisdiction of the ICC and those who argued against it, because "it is a crime of States more than a crime of individuals."[53] Finally, while convening in Uganda on June 11, 2010, the First Review Conference on the Rome Statute reached an agreement on the

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49. ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 287 (2010) ("There can be no contention . . . that the crime of aggression had gradually disappeared from international law simply because it had not been incorporated in a subsequent multilateral treaty following its birth in the aftermath of WW II."); SELLARS, *supra* note 10, at 262 (noting that "the *ad hoc* charge of crimes against peace as a component of the 'Nürenberg Principles' quietly expired in the bosom of the United Nations").

50. DINSTEIN, *supra* note 8, at 129–31; Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression,* 8 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1179, 1182 (2010); Mégret, *supra* note 5, at 1399; WILLIAM A. SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 200 (2012).

51. *See* Rome Statute, *supra* note 37, art. 5(1)(d); *see also* 1 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT annex I, at 72–73 (2002)

> The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the State Parties in accordance with the relevant provisions of this Statute.

52. Rome Statute, *supra* note 37, art. 5(2).

53. MERON, *supra* note 3, at 154.

crime of aggression. This "remarkable breakthrough"[54] led to the adoption of Article 8*bis* of the Rome Statute. On July 17, 2018, with over thirty ratifications of the Kampala Amendments on the Crime of Aggression, the activation of the jurisdiction of the ICC over this crime became reality.[55] Nevertheless, the adoption of Article 8*bis* seems to raise more questions than it answers. Notably, the amendments adopted at Kampala suggest tension between the traditional, sovereignty-focused understanding of intervention and a human rights sensitivity that has influenced the development of the international legal framework generally, and of ICL specifically.

C. Reconciling Aggression with Humanized International Criminal Law

The traditional understanding of the crime of aggression, the prohibition of which is aimed at protecting the sovereignty and territorial integrity of States, inevitably find tension with *humanized* ICL,[56] which could explain why the crime of aggression has been confined to a legal limbo for decades. This development might lead one to wonder whether this crime still makes sense, or whether it should simply be abandoned. Indeed, it has been noted that there are compelling reasons as to why the crime of aggression should not have been added to the Rome Statute. Bassiouni, for example, affirmed that:

> [A]ggression has been a crime in the minds of many for such a long time that they have come to take it for granted, as if it were a legal reality. Unfortunately it was not, and there does not seem to be much of a reason to continue that illusion.[57]

In his view, not only have international armed conflicts become rare compared to non-international ones, but the "classical form of aggression" witnessed during the two World Wars is unlikely to play a crucial role in the future. Indeed, cyber technology and autonomous weapons have dramatically changed the way States engage in military operations and armed conflict. The development of new means to wage war and the central role played by non-State actors in the international arena pose unprecedented challenges

54. Kreß & von Holtzendorff, *supra* note 50, at 1180.

55. Tom Ruys, *Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC,* 29 EUROPEAN JOURNAL OF INTERNATIONAL LAW 887, 888 (2018).

56. Dannenbaum, *supra* note 5, at 1280.

57. M. Cherif Bassiouni, *The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization*, 58 HARVARD INTERNATIONAL LAW JOURNAL 87, 88 (2017).

that the crime of aggression seems unfit to address. Therefore, he concludes, the focus should be "on these new forms of violence and the more traditional, and well-established, crimes, for example, war crimes and crimes against humanity."[58]

Similarly, Creegan also concludes that the crime of aggression should not have been included in the Rome Statute.[59] She argues that aggression is a political crime "committed by the leadership of one state, directed against the abstract interests of another state, both states being political entities and actors."[60] Due to its nature, the crime of aggression can be committed even if no single human being is harmed. Unlike war crimes, crimes against humanity, and genocide, the crime of aggression does not necessarily entail "serious, pervasive human suffering."[61] Furthermore, an act of aggression could even be committed to prevent human suffering, such as in case of humanitarian interventions. Creegan thus concludes:

> Without adversely affected human victims, it is hard to put a crime like aggression in a category similar to war crimes or crimes against humanity or genocide. And it does not seem to belong next to them; it almost demeans them. While aggression can lead to these most incredible forms of harm, it may be better to punish those acts instead.[62]

While some scholars posit that the crime of aggression should not have been included in the Rome Statute, other scholars believe that criminalizing aggressive war is not unreasonable. Notably, some authors propound that the sovereignty-based understanding of aggression does not completely ignore the people living within the State. Sovereignty and the corollary ban on the use of force protect the right to self-determination of people.[63] By criminalizing the unlawful use of force against another State, the crime of aggression de facto protects people's right to "freely determine their political status

58. *Id.* at 89.

59. Erin Creegan, *Justified Uses of Force and the Crime of Aggression,* 10 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 59, 59–60 (2012).

60. *Id.* at 62.

61. *Id.*

62. *Id.* at 63.

63. Mégret, *supra* note 5, at 1404 (finding that "aggression is a form of subjugation and oppression of a population"); Christopher Kutz, *Democracy, Defence, and the Threat of Intervention, in* THE MORALITY OF DEFENSIVE WAR 229, 262 (Cécile Fabre & Seth Lazar eds., 2014) (noting that "to protect a state from intervention . . . is to protect the condition of self-formation of a people").

and freely pursue their economic, social and cultural development."[64] This is deemed valuable in itself, regardless of the form of government and respect of "standards of democracy."[65] For Walzer, one of the main supporters of this approach, "the state is still the critical arena of political life."[66] Accordingly, acts that result in the disruption of the State amount to a loss of the individuals:

> [A] loss of something valuable, which they clearly value, and to which they have a right, namely their participation in the "development" that goes on and can only go on within the enclosure. Hence the distinction of state rights and individual rights is simplistic and wrongheaded. Against foreigners, individuals have a right to a state of their own. Against state officials, they have a right to political and civil liberty. Without the first of these rights, the second is meaningless: as individuals need a home, so rights require a location.[67]

Accordingly, some scholars affirm that the crime of aggression should not be abandoned. However, to have a meaningful impact it should be reframed in terms of human rights. For instance, Ferencz suggested that acts of aggression could be prosecuted as a crime against humanity.[68] The Rome Statute offers a list of acts that amount to crime against humanity—such as murder, enslavement, and rape—and adds that "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health" could amount to crimes against humanity as well.[69] Therefore, Ferencz propounded that: "any person responsible for the illegal use of armed force in violation of the UN Charter, *which unavoidably and inevitably results in the death of large numbers of civilians*, should be subject to punishment for his individual criminal responsibility in the perpetration of a crime against humanity."[70] Ferencz put forward the possibility to

64. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

65. Kutz, *supra* note 63, at 236.

66. Michael Walzer, *The Moral Standing of States: A Response to Four Critics,* 9 PHILOSOPHY AND PUBLIC AFFAIRS 209, 227 (1980).

67. *Id.* at 228.

68. Benjamin B. Ferencz, *The Illegal Use of Armed Force as a Crime Against Humanity*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 187 (2015).

69. Rome Statute, *supra* note 37, art. 7(1)(k).

70. Ferencz, *supra* note 68, at 195 (emphasis added); *see also* Manuel J. Ventura & Matthew Gillett, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes against Humanity,* 12 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 523 (2013); Manuel J. Ventura, *The*

include aggression within the category of crimes against humanity in 2015; but at the time, aggression was still an offense in waiting.[71] Indeed, while the Kampala compromise had been adopted, it entered into force only in September 2016, following the thirtieth ratification of the Kampala Amendments on the Crime of Aggression.[72]

Ferencz was not the only scholar to attempt to humanize aggression, as a number of authors have questioned why aggression deserves to be included in the current legal framework. Several authors have suggested that aggression is wrong because of its consequences. By starting an illegal war, the aggressor causes death, destruction, and suffering, all things that could have been avoided if the State had not engaged in acts of aggression. For instance, Mégret acknowledges that considering aggression as a crime against sovereignty is "out of tune with contemporary humanitarian sensitivities"[73] and makes the case that aggression should be conceptualized as primarily a crime against human rights:

> What is problematic is that the aggressing state is, thanks to its aggression, "gaining" the ability to kill combatants and civilians legally under the laws of war that it would have had no right to kill otherwise, and that it only gets to kill as a result of "unfairly" (from a broader moral or human rights standpoint) benefiting from the regime of the laws of war.[74]

Similarly, according to Dannenbaum an act of aggression does violate the sovereignty and territorial integrity of the victim State. However, this is not why aggression is wrong. Instead, it is the "widespread killing and the infliction of human suffering without justification" that constitutes the reason why it should be criminalized.[75] Indeed, Dannenbaum concludes:

> What is unique about illegal war among violations of states' rights—what makes *it* criminal, when no other sovereignty violation is—is the fact that it entails the slaughter of *human* life, the infliction of *human* suffering, and the erosion of *human* security. . . . [I]t is the unjustified killing and infliction

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Illegal Use of Force (Other Inhumane Act) as a Crime Against Humanity: An Assessment of the Case for a New Crime at the International Criminal Court, in SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 386 (Leila Nadya Sadat ed., 2018).

71. BANTEKAS, *supra* note 49, at 287.

72. *See* Kampala Amendments, *supra* note 1.

73. Mégret, *supra* note 5, at 1444–45.

74. *Id.* at 1437.

75. Dannenbaum, *supra* note 5, at 1263.

> of human suffering, and not the violation of sovereignty, that are the wrongs at the heart of aggression.[76]

III. THE HUMANIZATION OF PEACE

A. The Invention of Peace

Since its inception, the crime of aggression has been defined as a crime against peace. Nevertheless, a central conceptual challenge is that there is no generally accepted definition of peace in international law.[77] While the definition of international and non-international armed conflicts has gripped scholarship and practice for decades,[78] the notion of peace has received scant attention. A possible reason for this oversight is that, while "[w]ar can be seen as a distinct event, confined to a relatively narrow time frame and space, and involves primarily military interactions,"[79] peace is a complex relationship, whose content is highly unclear. As explained by McDougal:

> [t]he conception of peace, as contraposed to war, in the historic literature of international law is most imprecise. The words "peace" and "war" are characteristically employed, in high ambiguity, to make simultaneous reference both to the presence or absence of the facts of transnational violence and coercion and to the legal consequences to be attached by authoritative decision to different intensities in violence and coercion.[80]

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76. *Id.* at 1270.

77. Anna Spain Bradley, *Deciding to Intervene,* 51(847) HOUSTON LAW REVIEW 847, 898 (2014).

78. *See, e.g.*, ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW (2010); Lindsay Moir, *The Concept of Non-International Armed Conflict, in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 391 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT (2012).

79. GARY GOERTZ, PAUL F. DIEHL & ALEXANDRU BALAS, THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM 3 (2016); *see also* HOWARD, *supra* note 6, at 1–2.

80. Myres Smith McDougal, *Law and Peace,* 18 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 1, 5 (1989); *see also* Richard Hart Sinnreich, *Conclusion: History and the Making of Peace, in* THE MAKING OF PEACE: RULERS, STATES, AND THE AFTERMATH OF WAR 356, 359 (Williamson Murray & Jim Lacey eds., 2009)

> [T]here is not even uniform agreement on how one might define peace: whether simply as the momentary absence of war, as the by-product of an international order satisfying some normative theological or ideological criterion, or as a sociologically unnatural condition,

In the middle of the nineteenth century, Sir Henry Maine noted that "[w]ar appears to be as old as mankind, but peace is a modern invention."[81] Now, it is generally accepted that "peace is the normal order of human affairs."[82] However, this has not always been the case. In his *History of the Peloponnesian War*, Thucydides contends:

> It will be enough for me . . . if these words of mine are judged useful by those who want to understand clearly the events which happened in the past and which (human nature being what it is) will at some time or other and in much the same ways, be repeated in the future.[83]

It is fairly clear that Thucydides had no expectation in the possibility of a lasting peace, "human nature being what it is."[84] Indeed, he found that war is endemic, inevitable, and expected.[85] Historical example seems to confirm this view, as war has been a constant presence in people's lives for centuries, with few exceptions.

As one such exception, from 30 BCE to 250 CE, the Roman Empire experienced a period of relative peace: the *Pax Romana*. Historian Edward Gibbon described with clarity this exceptional moment:

> In the second century of the Christian era, the empire of Rome comprehended the fairest part of the earth, and the most civilized portion of mankind. The frontiers of that extensive monarchy were guarded by ancient renown and disciplined valour. The gentle, but powerful, influence of laws and manners had gradually cemented the union of the provinces. Their peaceful inhabitants enjoyed and abused the advantage of wealth and luxury.[86]

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which thus requires deliberate creation and can survive only through constant and painstaking attention.

81. HOWARD, *supra* note 6, at 1 (quoting Henry Maine).

82. Williamson Murray, *Introduction: Searching for Peace, in* THE MAKING OF PEACE: RULERS, STATES, AND THE AFTERMATH OF WAR 3 (Williamson Murray & Jim Lacey eds., 2009).

83. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 48 (Rex Warner trans., Penguin Books 1954) (431 BCE).

84. *Id.*; *see also* Murray, *supra* note 82, at 2.

85. MICHAEL HOWARD, WAR AND THE LIBERAL CONSCIENCE 5 (2008) (noting that "even those who saw [war] as evil normally considered it is a necessary evil").

86. 1 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 1 (J.B. Bury ed., Heritage Press 1946) (1776).

Albeit the fact that peace was substantially maintained through tyranny, it is remarkable to think that only 150,000 legionaries, divided into thirty legions, and supported by 150,000 auxiliaries were sufficient to protect an empire of approximately 60 million inhabitants.[87] However, it has been observed, and rightly so, that this was an exceptional circumstance: an anomaly at a time where war was the norm.[88] Indeed, with the collapse of the *Pax Romana* under the pressure of the barbarian invasions, Europe became characterized by near-constant conflict.[89] Nevertheless, efforts to achieve lasting peace continued. Perhaps most notably, the Peace of Westphalia (1648) ended the Thirty Years' War and is considered the benchmark that marks the beginning of the modern international system. As Gross notes, it was "the first of several attempts to establish something resembling world unity on the basis of states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority."[90] It is also significant as it helped establish important practices for peace negotiations. Specifically, direct bilateral dialogue and facilitated mediation emerged as two crucial methods to conduct future peace negotiations.[91]

As Sir Michael Howard has demonstrated in his seminal works, it was only in Victorian Britain that the idea of a lasting peace began to emerge.[92] In the nineteenth century, States started to include a prohibition on the use of force in nearly all bilateral treaties. Instead of resolving differences using force, the parties assumed the obligation to seek the peaceful settlement of

87. Murray, *supra* note 82, at 7.

88. *Id.*

89. *Id.* at 8.

90. Leo Gross, *The Peace of Westphalia, 1648-1948, in* SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 3, 20 (Leo Gross ed., 1993). *But see* Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?,* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148 (2000); Derek Croxton, *Peace of Westphalia of 1648 and the Origins of Sovereignty,* 21 INTERNATIONAL HISTORY REVIEW 569 (1999); Brendan Simms, *"A False Principle in the Law of Nations": Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia, in* HUMANITARIAN INTERVENTION: A HISTORY 89 (Brendan Simms & D.J.B. Trim eds., 2011).

91. Similarly, the Congress of Vienna (1814–15) was an attempt to establish peace after prolonged conflicts. In both cases, the negotiators were aware of "the perils and the damage that prolonged conflicts inflict on all." Murray, *supra* note 82, at 15–16; *see also* Heinz Duchhardt, *Peace Treaties from Westphalia to the Revolutionary Era, in* PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 45, 52 (Randall Lesaffer ed., 2004).

92. HOWARD, *supra* note 6; HOWARD, *supra* note 85; *see also* Murray, *supra* note 82 at 12.

disputes.[93] However, the treaties presented limitations both *ratione personae* and *ratione temporis*, as they were applicable only between the contracting parties and had a fixed time limit.[94] It was only with the Hague Peace Conferences (1899 and 1907) that "[t]he preservation of peace [had] been put forward as the object of international policy."[95] As noted in the Russian proposal to initiate the peace conference: "The maintenance of general peace and a possible reduction of the excessive armaments which weigh upon all nations present themselves, in the existing condition of the whole world, as the ideal towards which the endeavors of all Governments should be directed."[96]

The creation of the League of Nations and the Kellogg-Briand Pact constitute further attempts to promote peaceful settlement of disputes and limit war. Notably, the Covenant of the League of Nations provided that, in case a dispute arose between members of the League, the States concerned were bound to submit the case "either to arbitration or to inquiry by the Council,"[97] and, after the adoption of the decision, States had to wait three months before resorting to war.[98] Going further, Article 1 of the Kellogg-Briand Pact states, "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."[99] The Kellogg-Briand pact did not constitute a replacement of the League of Nations; rather, it attempted to fill the gaps of the League's Covenant, most notably the absence of a more general proscription to wage war. Regardless, the concomitant application of the two treaties did not have the force to prevent the outbreak of World War II.

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93. J.L. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 21 (1944).

94. *See, e.g.*, Treaty of Friendship, Commerce and Extradition, Hond.-Nicar., Mar. 13, 1878, 152 Consol. T.S. 415; Washington Treaty for the Establishment of a Permanent Commission of Enquiry, Guat.-U.S., Sept. 20, 1913, 218 Consol. T.S. 373; Treaty of Mutual Guarantee, Oct. 16, 1925, 54 L.N.T.S. 289 (referred to as the Locarno Treaty, the parties were Belgium, France, Germany, Great Britain and Italy); Teheran Treaty of Friendship and Security, Persia-Turk., Apr. 12, 1926, 106 L.N.T.S. 2613; *see also* DINSTEIN, *supra* note 8, at 80.

95. THE HAGUE CONVENTIONS OF 1899 AND 1907, at xiv–xvi (James Brown Scott ed., 1915).

96. *Id.*

97. Covenant of the League of Nations, *supra* note 9, art. 12.

98. *Id.*

99. Kellogg-Briand Pact, *supra* note 11, art. 1.

It is remarkable that, in spite of the two World Wars, the idea of a lasting peace persisted and culminated in the creation of the United Nations.[100] Indeed, with the carnage it wrought, World War II could be considered "the tipping point in the international system's movement toward more peace."[101] The adoption of the U.N. Charter should be read against this backdrop. In light of the devastating consequences of the two World Wars, the delegates at the San Francisco conference "were convinced that force was simply too destructive to be considered an acceptable means of pursuing changes or advancing other policy."[102] The United Nations was considered an instrument to promote and maintain peace among nations. Notably, Article 1(1) of the U.N. Charter specifies that the objective of the organization is:

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. [103]

Interestingly, the U.N. Charter does not establish an obligation upon States to promote peace per se.[104] Instead, it prescribes a series of obligations aimed at avoiding the use of force among States. Fox example, Article 2(3) specifies that "[a]ll Members shall settle their international disputes by peaceful means" in such a manner that peace, security, and justice are not endangered.[105] Further, Article 2(4) famously prohibits the use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[106] Finally, the Security Council is identified as the primary organ tasked with the

100. Philip Alston, *Peace as Human Right,* 11 BULLETIN OF PEACE PROPOSALS 319 (1980) ("noting that the period following the Second World War . . . was a period which witnessed the establishment of the United Nations as a world organization committed to the securing and maintenance of world peace, the advancement of economic and social development, and the promotion of respect for human rights").

101. GOERTZ, DIEHL & BALAS, *supra* note 79, at 8.

102. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 33–34 (2014).

103 U.N. Charter art. 1.

104. Bradley, *supra* note 77, at 899.

105. U.N. Charter art. 2, para 3.

106. *Id.* art. 2, para 4.

maintenance or restoration of peace and security.[107] The landmark role of the Charter in the maintenance of peace was confirmed by the UNGA on several occasions. For instance, in its Resolution *Essentials of Peace* the UNGA affirmed that:

> [T]he Charter of the United Nations, the most solemn pact of peace in history, lays down basic principles necessary for an enduring peace; that disregard of these principles is primarily responsible for the continuance of international tension; and that it is urgently necessary for all Members to act in accordance with these principles in the spirit of co-operation on which the United Nations was founded.[108]

Since then, the promotion of peace has been considered the central purpose and *raison d'être* not only of the U.N. system, but also of international law.[109] Nevertheless, the meaning of peace remains unclear.

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107. *Id.* art. 24, para 1. ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."); art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."); art. 26

> In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Further, Chapter VI of the U.N. Charter allows the Security Council to call upon the parties to resolve threats to or breaches of the peace, as well as acts of aggression, with peaceful and coercive measures. *See* U.N. Charter art. 39.

108. G.A. Res. 290 (IV), Essentials of Peace (Dec. 1, 1949).

109. Alston, *supra* note 100, at 325 ("The quest for peace is more than simply a proper juridical concern of international law. It is, in the last resort, its *raison d'etre*."); Bradley, *supra* note 77, at 891 (finding that "international law's central purpose, the reason for which it was created and exists, is and always has been the promotion of peace"); Katarina Tomasevski, *The Right to Peace,* 5 CURRENT RESEARCH ON PEACE AND VIOLENCE 42, 44 (1982) ("Peace is a supreme value of mankind and if not the supreme value cherished by international law, then certainly one of its supreme values.").

B. Reframing Peace in Terms of Human Rights

Since Grotius, and especially the publication of *De Jure Belli ac Pacis* (On the Law of War and Peace), international law has been based on a "binary distinction,"[110] where war and peace constitute the pivotal dichotomy in the international legal framework.[111] This distinction can be traced back to the intellectual tradition that emerged in the sixteenth century, which considered peace "merely to the absence of armed conflict among organized and sovereign groups."[112] Similarly, Hobbes defined peace in negative terms:

> WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of Time, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together; So the nature of Warre, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.[113]

Although the U.N. Charter does not provide a definition of peace, it has been suggested that it implicitly endorses an understanding of peace in the negative sense. Inasmuch as the pivotal purpose of the U.N. system is "to maintain international peace and security" through the prevention and suppression of the use of force—as expressly established by Article 1 of the U.N. Charter—it seems fair to deduce that the pivotal objective of the Charter is to avoid war.[114]

In its traditional understanding, the prohibition on the crime of aggression is directed at protecting the sovereignty and territorial integrity of States.

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110. GOERTZ, DIEHL AND & BALAS, *supra* note 79, at 25; *see also* Myres S. McDougal and & Siegfried Wiessner, *Law and Peace in a Changing World,* 22 CUMBERLAND LAW REVIEW 681, 682 (1992).

111. HUGO GROTIUS, DE JURE BELLI AC PACIS (A.C. Campbell trans., Batoche 1901) (1625).

112. Daniele Archibugi, Mariano Croce & Andrea Salvatore, *Law of Nations or Perpetual Peace? Two Early International Theories on the Use of Force, in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 56, 59 (Marc Weller ed., 2015).

113. THOMAS HOBBES, LEVIATHAN 64 (1914); *see also* Martin Gerwin, *Peace, Honesty and Consent: A Hobbesian Definition of "Peace,"* 23 CANADIAN JOURNAL OF PEACE AND CONFLICT STUDIES, May 1991, at 75.

114. *See* U.N. Charter art. 1.

As outlawing aggression was ultimately aimed at avoiding war, it was substantially a crime against *negative* peace. During the two World Wars, millions of people were killed and wounded, most of them civilians. The international community was thus aware of the "shattering potential of aggression"[115] and concerned foremost with avoiding the outbreak of another devastating conflict.[116] Sovereignty, the prohibition on the use of force, and the criminalization of aggression were all pieces of the same puzzle, to which the ultimate aim was peace in its negative conception.

The U.N. Charter reflects this approach. Article 1 famously establishes that the paramount purpose of the United Nations is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[117]

Thus, the U.N. system entails "a state of affairs in which attempts to change the status quo by violence are unlawful and doomed to frustration through opposition in overwhelming force."[118] As such, the Charter establishes the supremacy of peace over justice.[119] Kelsen recognized the secondary role of justice and highlighted that the U.N. Charter does not provide guidance in case of conflict between justice and other values protected therein.[120] Specifically, he maintains that, according to Article 1, respecting the principle of

115. Mégret, *supra* note 5, at 1414.

116. Thomas M. Franck, *The United Nations as Guarantor of International Peace and Security, in* THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE 25, 26 (Christian Tomuschat ed., 1995).

117. U.N. Charter art. 1.

118. Josef L. Kunz, *The Idea of "Collective Security" in Pan-American Developments,* 6 WESTERN POLITICAL QUARTERLY 658, 659 (1953).

119. Clyde Eagleton, *The Jurisdiction of the Security Council Over Disputes,* 40 AMERICAN JOURNAL OF INTERNATIONAL LAW 513 (2012); Franck, *supra* note 116, at 26; ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 18 (2011).

120. Hans Kelsen, *The Preamble of the Charter–A Critical Analysis,* 8 THE JOURNAL OF POLITICS 134, 155 (1946).

justice is required only for the settlement of disputes.[121] Accordingly, in the U.N. system the prevention of war is paramount.

Nevertheless, with the humanization of international law uneasiness emerged toward the mere absence of war as a valuable end per se. Over the past decades, States have been increasingly accountable with regard to human rights vis-à-vis the people under their jurisdiction: "International Organizations, civil society activists and NGOs use the international human rights norms and instruments as the concrete point of reference against which to judge state conduct."[122] As such, sovereignty seems limited by human rights, as the emergence of the latter would inevitably lead to an erosion of the former.[123] According to several scholars this paradigm shift should be welcomed. For example, Koskenniemi finds the "withering away [of sovereignty]" a positive development,[124] while Henkin states, "the 'S word' was a mistake built upon mistakes, which has barnacled an unfortunate mythology."[125] Other scholars are less enthusiastic about this development, noting that sovereignty can serve as "defence of the weak facing off with the strong. . . . Thus, the removal of the sovereignty barrier at this historical moment necessarily has ambiguous consequences."[126]

Following this debate, the R2P doctrine sought to recharacterize sovereignty "from sovereignty as control to sovereignty as responsibility"[127] and shift the focus from the rights of States to the protection of the people under

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121. Hans Kelsen, *Security and Collective Self-Defense Under the Charter of the United Nations,* 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 783, 788–89 (1948).

122. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 14 (2001) [hereinafter RESPONSIBILITY TO PROTECT].

123. *See, e.g.,* Christian Tomuschat, *Obligations Arising for States without or against Their Will,* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 195, 241 (1993); Hélène Ruiz Fabri, *Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?, in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 33 (Philip Alston & Euan Macdonald eds., 2008); Louis Henkin, *The Mythology of Sovereignty, in* ESSAYS IN HONOUR OF WANG TIEYA 351 (Ronald St. J. Macdonald ed., 1994).

124. Martti Koskenniemi, *The Wonderful Artificiality of States,* 88 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEDURES PROCEEDINGS 22 (1994).

125. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM LAW REVIEW 1, 31 (1999).

126. Karima Bennoune, *Sovereignty vs. Suffering? Re-Examining Sovereignty and Human Rights through the Lens of Iraq,* 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 243, 248 (2002); Justin Conlon, *Sovereignty vs. Human Rights or Sovereignty and Human Rights?,* 46 RACE AND CLASS 75, 86 (2004); Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REVIEW OF INTERNATIONAL STUDIES 519, 537 (2001).

127. RESPONSIBILITY TO PROTECT, *supra* note 122, at 13.

their jurisdiction.[128] R2P is emblematic of the conundrum between negative peace and justice. While the U.N. Charter is clear in determining the primacy of peace over justice, the humanization of international law has highlighted that the maintenance of the *status quo* is not always desirable.

Soon after the adoption of the U.N. Charter, the emergence of human rights and the process of decolonization determined the necessity of redefining peace.[129] Peace quickly came to be understood as meaning more than the mere absence of war. Indeed, the negative understanding of peace fails to recognize the complexities of this concept. While war is an event, peace is foremost a relationship. As Goertz explains:

> Peace involves many different kinds of interactions; many are diffuse, involve different actors, and are less subject to easy observation than are military encounters. . . . Because peace is a relationship as well, we leverage the concept of rivalry to think about peace in terms of positive, cooperative relationships between states.[130]

Therefore, a number of authors have propounded the idea of *positive* peace, consisting not only as the absence of war, but also the promotion and development of equality and social justice.[131] If interpreted as mere absence of war, peace would "not preclude the presence of various forms of indirect or

128. R2P was endorsed by the General Assembly in the World Summit Outcome document, which established the primary responsibility of each individual state "to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity." G.A. Res. 60/1, ¶ 138, 2005 World Summit Outcome (Oct. 24, 2005). Furthermore, it recognized a parallel, subsidiary responsibility of the international community to use "appropriate diplomatic, humanitarian and other peaceful means" to help protect populations from such heinous crimes. *Id.* ¶ 139. Should these measures be deemed insufficient, the World Summit Outcome document envisages the possibility of a collective military action with the authorization of the Security Council. *Id.*; *see also* LUKE GLANVILLE, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY 197 (2014); Claus Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on The Use of Force,* 1 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 11, 19 (2014); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?,* 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 99, 102 (2007).

129. Tomasevski, *supra* note 109, at 45.

130. GOERTZ, DIEHL & BALAS, *supra* note 79, at 3-4.

131. *See, e.g.*, Ved P. Nanda, *Nuclear Weapons and the Right to Peace under International Law,* 9 BROOKLYN JOURNAL OF INTERNATIONAL LAW 283, 287 (1983); Bradley, *supra* note 77, at 901.

structural violence within society."[132] Instead, positive peace aims at creating conditions of equality and social justice, hence addressing the root causes of the recourse to violence.[133] The idea that peace and human rights are strictly intertwined is expressly stated in an early draft of the Universal Declaration of Human Rights, which establishes that: "there can be no peace unless human rights and freedoms are respected . . . there can be no human dignity unless war and the threat of war is abolished."[134] In other words, peace is interpreted as encompassing the respect of human rights and as a crucial premise for their enjoyment. As noted by Eide, "it does not take much reflection to recognize that violence and war negatively affect the enjoyment of human rights."[135]

Against this backdrop, the right to peace emerged. In 1981, the African Charter on Human and Peoples' Rights proclaimed, "[a]ll peoples shall have the right to national and international peace and security."[136] A few years later, the UNGA adopted the same position. In its *Declaration on the Right of Peoples to Peace*, it affirmed that "the peoples of our planet have a sacred right to peace" and that "the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State."[137] Therefore, peace is not only "the purpose of all purposes,"[138] but it

132. Patrick Hayden, *Constraining War: Human Security and the Human Right to Peace,* 6 HUMAN RIGHTS REVIEW 35, 43 (2004).

133. Johan Galtung, *Violence, Peace, and Peace Research,* 6 JOURNAL OF PEACE RESEARCH 167, 183 (1969); Alston, *supra* note 100, at 323; Djacoba Liva Tehindrazanarivelo & Robert Kolb, *Peace, Right to, International Protection,* ¶ 12, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated Dec. 2006), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e858; Kjell Anderson, *The Universality of War:* Jus ad Bellum *and the Right to Peace in Non-International Armed Conflicts, in* THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE 52, 54–56 (David Keane & Yvonne McDermott eds., 2012).

134. U.N. Econ. & Soc. Council, Comm. on Human Rights, Draft Outline of International Bill of Rights, pmbl., U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

135. Asbjørn Eide, *"Article 28," in* UNIVERSAL DECLARATION OF HUMAN RIGHTS 597, 620 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

136. African Charter of Human and Peoples' Rights art. 23, June 27, 1981, O.A.U. Doc. CAB/LEG/6713/Rev. 5, 21 INTERNATIONAL LEGAL MATERIALS 58 (1982).

137. G.A. Res. 39/11, Declaration on the Right of Peoples to Peace (Nov. 12, 1984).

138. Rüdiger Wolfrum, *Purposes and Principles, Article 1*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

is also a human right pertaining to each individual.[139] Since then, the right to peace has been reaffirmed both at the international and regional level.

Building on this understanding, in 2002 the U.N. Commission on Human Rights proclaimed "that the peoples of our planet have a sacred right to peace" and that "the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state."[140] The following year, the UNGA echoed this position in its resolution, the *Promotion of the Right of Peoples to Peace*.[141] Soon thereafter, the Commission on Human Rights adopted a similar resolution, the *Promotion of Peace as a Vital Requirement for the Full Enjoyment of all Human Rights by All*,[142] which was in turn followed by a UNGA resolution reaffirming the right to peace.[143] Likewise, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted resolutions where it concluded, "International peace and security is an essential condition for the enjoyment of human rights, above all the right to life."[144] Further, the General Conference of UNESCO adopted the *Declaration of Principles of Tolerance*, which recognized that human beings have "the right to live in peace and to be as they are."[145]

The right to peace is traditionally mentioned among the third generation of human rights, or solidarity rights.[146] And while this right has been proclaimed and reaffirmed in several official documents adopted both at the international and regional level, these sources do not seem sufficient to claim the existence of a right to peace per se, although they provide a solid basis

139. G.A. Res. 39/11, *supra* note 137; *see also* Katarina Tomasevski, *The Right to Peace after the Cold War,* 3 PEACE REVIEW, Fall 1991, at 14.

140. Comm. on Human Rights Res. 2002/71, Promotion of the Right of Peoples to Peace, ¶¶ 1, 2, U.N. Doc. E/CN.4/RES/2002/71 (Apr. 25, 2002).

141. G.A. Res. 57/216, Promotion of the Right of Peoples to Peace (Feb. 27, 2003).

142. Comm. on Human Rights Res. 2005/56, Promotion of Peace as a Vital Requirement for the Full Enjoyment of all Human Rights by All, U.N. Doc. E/CN.4/RES/2005/56 (Apr. 20, 2005).

143. G.A. Res. 60/163, Promotion of Peace as a Vital Requirement for the Full Enjoyment of All Human Rights by All (Dec. 16, 2005).

144. *See, e.g.*, Sub-Comm. on Prevention of Discrimination and Protection of Minorities Res. 1996/14, at 44, U.N. Doc. E/CN.4/Sub.2/1996/41 (Nov. 23, 1996).

145. Janusz Symonides, *New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks*, *in* HUMAN RIGHTS: NEW DIMENSIONS AND CHALLENGES 1, 8 (Janusz Symonides ed., 1998).

146. Alston, *supra* note 100, at 319.

to claim the emergence of this right. Nevertheless, this development is valuable inasmuch as "it links the very structural condition that aggression is said to disrupt with a notion of individual and collective rights."[147]

C. The Peace versus Justice Conundrum

"No peace without justice" is a slogan that has been widely used in recent times.[148] The idea that justice and peace are intertwined and that there cannot be one without the other has now become commonplace. Accordingly, the notion of negative peace has been criticized as it is not necessarily just. If peace means absence of war, it is clear that it does not provide any guarantees as to whether there is justice. As Schabas correctly notes, "There are many examples of lasting peace where there is no accountability for atrocities, just as there are examples of conflicts that recur even when some justice has been delivered."[149]Against this background, positive peace has emerged as an attempt to reconcile peace with justice, whereby peace "implies a social and political ordering of society that is generally accepted as just."[150]

What does ICL have to say on the relationship between peace and justice? The Preamble of the Rome Statute acknowledges that the two concepts are closely connected. First, it "[r]ecogniz[es] that such grave crimes threaten the peace, security and well-being of the world."[151] Furthermore, it:

> Reaffirm[s] the Purposes and Principles of the UN Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[152]

Clearly, the most unambiguous confirmation that peace is relevant for the ICC is the introduction of the crime of aggression. It is thus unsurprising

147. Mégret, *supra* note 5, at 1439; *see also* Asbjørn Eide, *The Right to Peace*, 10 SECURITY DIALOGUE 157, 159 (1979) (concluding that "[w]ithout the realization of the right to peace, all other rights remain uncertain, unfulfilled, or precarious").

148. SELLARS, *supra* note 10, at 288.

149. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 44 (2d ed. 2016).

150. HOWARD, *supra* note 6, at 2.

151. Rome Statute, *supra* note 37, pmbl., para. 3.

152. *Id.* para. 7.

that the Preamble of the Kampala Declaration posits, "[t]here can be no lasting peace without justice . . . peace and justice are thus complementary requirements," while also emphasizing that "justice is a fundamental building block of sustainable peace."[153] Furthermore, a panel discussion during the Kampala Conference acknowledged, "there is now a positive relationship between peace and justice although tensions between the two remained that needed to be acknowledged and addressed."[154]

Notwithstanding the numerous references to the relationship between peace and justice in ICL, and particularly within the ICC, challenges remain. The debate on the meaning of interest of justice is one well-known example of this conundrum. According to Article 53(1)(c) of the Rome Statute, the Prosecutor can decline to investigate or prosecute when "there are nonetheless substantial reasons to believe that [the investigation or prosecution] would not serve the interests of justice."[155] However, the Rome Statute does not define "interest of justice," nor does it provide guidance regarding its interpretation.

In 2007, Prosecutor Luis Moreno-Ocampo issued a policy paper where it offered his interpretation.[156] There, he recognized that interest of justice "represents one of the most complex aspects of the Treaty."[157] Indeed, "[i]t is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly)."[158] Furthermore, he propounded that "there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor."[159] He then reiterated this point, affirming that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[160]

Of course, this position is not the only possible interpretation of the relationship between peace and justice. And the drafting history of the Rome Statute suggests the opposite position, whereby several references to the maintenance of peace can be found in the Rome Statute. Moreover, it is

153. *Id.* para. 3.

154. Kampala Amendments, *supra* note 1, ¶ 25; *see also* SCHABAS, *supra* note 149, at 44.

155. Rome Statute, *supra* note 37, art. 53(1)(c).

156. OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON THE INTERESTS OF JUSTICE (2007).

157. *Id.* at 2.

158. *Id. at 2.*

159. *Id.* at 1.

160. *Id.* at. 9.

worth recalling that the UNSC created the ad hoc tribunals under its mandate to promote peace and security and invoked Chapter VII of the U.N. Charter in support.[161] This interpretation is further confirmed by the first annual report of the ICTY, which stated:

> It would be wrong to assume that the Tribunal is based on the old maxim *fiat justitia et pereat mundus* (let justice be done, even if the world were to perish). The Tribunal is, rather, based on the maxim propounded by Hegel in 1821: *fiat justitia ne pereat mundus* (let justice be done lest the world should perish). Indeed, the judicial process aims at averting the exacerbation and aggravation of conflict and tension, thereby contributing, albeit gradually, to a lasting peace.[162]

IV. THE IMPLICATIONS OF THE HUMANIZATION OF PEACE AND AGGRESSION

A. Is Aggression Still the "Supreme International Crime"?

On June 6, 1945, Justice Jackson put forward the idea that aggression should be a crime and insisted on its inclusion in the Nuremberg Tribunal.[163] His proposal was accepted, albeit with some hesitation, and the crime of aggression was approved at the London Conference.[164] As famously known, the Tribunal later held that the initiating a war of aggression was "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[165] Nevertheless, the outcome of the Tribunal suggests certain unease with regard to convictions for the crime of aggression. While some of the defendants found guilty for international crimes other than aggression were sentenced to death, nobody convicted only for crimes against peace was sentenced to capital punishment.[166] For instance, Rudolph Hess, who was convicted for the crime of aggression and acquitted for crimes against humanity and war crimes, was

161. SCHABAS, *supra* note 50, at 191.

162. First Annual Report of the International Criminal Tribunal for the former Yugoslavia, Annex, ¶ 18, U.N. Doc. A/49/342 S/1994/1007 (Aug. 29, 1994); *see also* William A. Schabas, *Aggression and International Human Rights Law*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 351, 359 (Claus Kreß & Stefan Barriga eds., 2016).

163. Schabas, *supra* note 13, at 27–28.

164. SELLARS, *supra* note 10, at 84–112.

165. IMT Judgment, *supra* note 4, at 427.

166. Schabas, *supra* note 13, at 28; Wright, *supra* note 25, at 44.

condemned to life imprisonment. Conversely, Juluis Streicher, who was convicted of crimes against humanity and acquitted for crimes against peace, was condemned to death.[167]

This disconnect between the idea that aggressive war was the supreme international crime and the hesitation in imposing the "supreme penalty"[168] to those found guilty of the crime might be explained by the different views of the judges sitting at Nuremberg. While Jackson enthusiastically supported the idea that aggression is the supreme international crime, his European colleagues were more hesitant, as acknowledged by Jackson himself during the London Conference:

> It is probably very difficult for those of you who have lived under the immediate attack of the Nazis to appreciate the different public psychology that those of us who were in the American Government dealt with. Our American population is at least 3,000 miles from the scene. Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order.[169]

During the Nuremberg conference, there were already debates as to why the crime of aggression should have been prosecuted and its position to other international crimes. Unlike the European population, the United States was thousands of miles removed from World War II battlefields and did not directly experience the atrocities committed by the Nazi regime. This resulted in two concurring views. First, the crime of aggression was defined as the "supreme international crime," and second, this crime was considered morally wrong and evil also because of its consequences. This dichotomy is not only reflected in the different convictions for the crime of aggression and the other two international crimes—crimes against humanity and war crimes—but it is further confirmed by the reference to the crime of aggression in the Nuremberg judgments. For instance, the U.S.-administered Nuremberg Military Tribunals defined aggression as "the "pinnacle of criminality" due to its infliction of "horror, suffering, and loss."[170] Similarly, in the judgment of the Tokyo trials it was affirmed that aggression is the gravest

167. SELLARS, *supra* note 10, at xi.
168. Schabas, *supra* note 13, at 28.
169. JACKSON REPORT, *supra* note 23, at 219.
170. Dannenbaum, *supra* note 5, at 1284.

crime because of the "death and suffering . . . inflicted on countless human beings."[171] Furthermore, it was specified that:

> If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful, then this involves unlawful killings . . . at all places in the theater of war and at all times throughout the period of the war.[172]

Accordingly, while the crime of aggression first entered the international legal framework as the "supreme crime," Nuremberg came to be primarily remembered "as a trial of atrocities rather than of aggression."[173] At the Nuremberg and Tokyo trials, crimes against humanity were defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war* . . . ."[174] The nexus between aggression and crimes against humanity was thus explicit in the Tribunals' Charters.[175] However, after Nuremberg this relationship has been abandoned. The tragedies that affected Cambodia and Rwanda clearly showed that aggression is not necessary to commit genocide and crimes against humanity. Accordingly, ad hoc international criminal tribunals discarded the link between aggression and other crimes.[176] We can thus conclude that the legacy of the Nuremberg and Tokyo trials has more to do with genocide, crimes against humanity, and war crimes, than with the crime of aggression.

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171. *Id.*

172. *Id.* at 1285.

173. CRYER, FRIMAN & ROBINSON, *supra* note 32, at 114–15; *see also* Creegan, *supra* note 59, at 68 ("Time has proven the importance of the Nuremberg trials in many ways, but the more enduring lesson from World War II is the need to prevent atrocities against civilians"); Mégret, *supra* note 5, at 1405 ("Today . . . the Holocaust is seen as the emblematic crime of the Nazis, and one of the worst crimes ever perpetrated by mankind"); Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo,* 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1085, 1092 (2010) ("Although the judges at Nuremberg declared *crimes against peace* to be the 'supreme international crime', it was in fact the existence of the death camps that formed the moral core of the Allies' case against the Nazi leaders.").

174. IMT Charter, *supra* note 20, art. 6(c); IMTFE Charter, *supra* note 34, art. 5(c).

175. Anderson, *supra* note 133, at 52 (noting that "at Nuremberg all the crimes charged required a nexus with the waging of a war of aggression").

176. Mégret, *supra* note 5, at 1416.

The humanization of ICL and the legal limbo where the crime of aggression was secluded for decades confirms this point. As discussed above, several scholars have suggested that the crime of aggression is morally wrong because of its heinous consequences, not because it entails a violation of sovereignty and territorial integrity. As noted by Quincy Wright:

> Though aggressive war may result in larger losses of life, property and social values than any other crime, yet the relationship of the acts constituting the crime to such losses is less close than in the case of crime against humanity. The latter implies acts indicating a direct responsibility for large-scale homicide, enslavement or deportation of innocent civilians. The initiation of aggressive war, on the other hand, implies only declarations or other acts of political or group leadership.[177]

Indeed, he adds that, while some of the acts of aggression prosecuted before the Nuremberg and Tokyo tribunals "resulted in [the] loss of millions of lives . . . others, such as the invasion of Austria and Czechoslovakia, resulted immediately in little loss of life."[178] Further, inasmuch as "aggression is [a] relatively 'cold" crime,"[179] the prohibition of which is directed at protecting State sovereignty and territorial integrity, it seems destined to play a secondary role in a *humanized* ICL.[180]

This rationale underpins discussions on humanitarian intervention and the crime of aggression. Humanitarian intervention is the use of force by one or more States to prevent or stop the commission of grave violations of human rights and humanitarian law.[181] When conducted without the authorization of the U.N. Security Council, such interventions constitute an unlawful use of force and can amount to aggression. During the Kampala Conference some delegates pushed to exclude humanitarian intervention from the scope of application of Article 8*bis* of the Rome Statute, but these efforts failed

177. Wright, *supra* note 25, at 44.

178. *Id.*

179. Mégret, *supra* note 5, at 1406.

180. *Id.* at 1405.

181. Jeff L. Holzgrefe, *The Humanitarian Intervention Debate, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 18 (Jeff L. Holzgrefe & Robert O. Keohane eds., 2003).

efforts, and no exception was included in the provision.[182] Nevertheless, several scholars have since tried to demonstrate that humanitarian intervention would be excluded from the crime of aggression.

This position is not unreasonable. Article 8*bis* of the Rome Statute defines the crime of aggression as:

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, *by its character, gravity and scale*, constitutes a manifest violation of the Charter of the United Nations.[183]

Therefore, it could be argued that humanitarian intervention would be excluded from the crime of aggression because, by their "character, gravity, and scale," they would not constitute "a manifest violation of the Charter of the United Nations."[184]

In light of the foregoing, it seems that the crime of aggression is no longer "the supreme international crime." On the one hand, it has lived in a legal limbo for decades, while genocide, war crimes, and crimes against humanity were included in the ad hoc criminal tribunals. On the other hand, it has been suggested that humanitarian intervention would not qualify as a crime of aggression because it is directed at preventing or halting the commission of other international crimes. We can thus concur with Mégret that: "The inter-state lens with which international crime was initially apprehended and that made aggression such a likely candidate for indignation has

182. Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women,* 11 INTERNATIONAL CRIMINAL LAW REVIEW 477, 482–83 (2011); SCHABAS, *supra* note 50, at 203.

183. Rome Statute, *supra* note 37, art. 8*bis* (emphasis added).

184. *See* Surendran Koran, *The International Criminal Court and Crimes of Aggression: Beyond the Kampala Convention,* 34 HOUSTON JOURNAL OF INTERNATIONAL LAW 231, 251 (2012); Vito Todeschini, *The Place of Aggression in the Responsibility to Protect Doctrine*, *in* BEYOND RESPONSIBILITY TO PROTECT: GENERATING CHANGE IN INTERNATIONAL LAW 297 (Richard Barnes & Vassilis P. Tzevelekos eds., 2016); Jennifer Trahan, *Defining the "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, But Is Not the Crime of Aggression*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 42 (2015); Elise Leclerc-Gagne & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 379 (2009). *But see* Ruys, *supra* note 55, at 895.

thus gradually been replaced by a more cosmopolitan lens that makes genocide and crimes against humanity – crimes that are typically committed domestically – the ultimate scandal of our times."[185]

B. Peace, Justice, and the Question of Humanitarian Intervention

The tension between the need to limit resort to armed force and to respond to the urgent requirements of justice finds one of its maximum expressions in the crime of aggression. At its inception, crimes against peace were interpreted as limiting the use of force, ultimately protecting sovereignty and the status quo. With the humanization of international law, the decolonization process, and shocking tragedies such as the genocides in Cambodia, Rwanda, and Kosovo, the focus of the international community and scholars alike shifted to other crimes, thus confining "the supreme international crime" to a legal limbo. As the crime of aggression reemerged, it had to fit in a profoundly changed world. In the past decades, the tension between negative peace and considerations of justice and human rights has reshaped the legal debate on the *jus ad bellum*. Accordingly, the challenge emerged to reconcile the crime of aggression, anchored to an outdated view of the world, to recent developments concerning the legality of the use of force.

This tension is most visible in the debates on humanitarian intervention. During the Kampala Conference, the United States proposed to exclude interventions aimed at preventing or halting heinous violations of human rights and humanitarian law from the scope of application of the crime of aggression, even when such interventions take place without the authorization of the Security Council.[186]

The starting point of the discussion is that "not every act of aggression is a crime of aggression."[187] Article 8*bis* of the Rome Statute provides a

185. Mégret, *supra* note 5, at 1405.

186. SCHABAS, *supra* note 50, at 203.

187. Koran, *supra* note 184, at 254. On the difference between "act of aggression" and "crime of aggression," see DINSTEIN, *supra* note 8, at 135 (noting that the General Assembly definition of aggression "differentiates between aggression as such (which only 'gives rise to international responsibility') and war of aggression (which is 'a crime against international peace'). The drafters of the [d]efinition thereby signaled clearly that not every act of aggression constitutes a crime against peace: only war of aggression does."); *see also* Tom Ruys, *The Impact of the Kampala Definition of Aggression on the Law on the Use of Force,* 3 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 187, 189 (2010)

> [T]he approach adopted at the Kampala conference further entrenches the notion of an 'act of aggression' as a legal concept, which is not identical to the 'use of force' (in contravention of Article 2(4) UN Charter), and which may give rise to state responsibility. It confirms, in

"threshold clause,"[188] where an unlawful use of force can amount to a crime of aggression if it constitutes a manifest violation of the UN Charter, in light of its "character, gravity, and scale."[189] While gravity and scale refer mainly to "the size of the violation,"[190] the world "character" is considered to have a qualitative connotation. Specifically, its aim would be to exclude grey areas from the scope of Article 8*bis*, namely instances of use of force whose illegality is not "reasonably uncontroversial."[191] This interpretation seems to find confirmation in the *travaux préparatoires* of the Kampala Amendments, where a number of delegates expressed the idea that "no borderline cases would fall under the Court's jurisdiction due to the threshold requirement."[192] Therefore, it has been concluded that genuine humanitarian interventions would be excluded from the scope of the crime of aggression.[193]

> other words, the existence of a cascading relationship between 'uses of force', some of which may qualify as 'acts of aggression' (i.e. the 'most serious and dangerous' forms of the illegal use of force), some of which may in turn amount to 'crimes of aggression' (that is, if they constitute a 'manifest' violation of the UN Charter).

Sean D. Murphy, *The Crime of Aggression at the International Criminal Court, in* THE OXFORD HANDBOOK OF THE USE OF FORCE, *supra* note 112, at 533, 552.

188. Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression, in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2008, at 8 (Stefan Barriga, Wolfgang F. Danspeckgruber, and & Christian Wenaweser eds., 2009); Marina Mancini, *A Brand New Definition for the Crime of Aggression: The Kampala Outcome* 81 (227) NORDIC JOURNAL OF INTERNATIONAL LAW 227, 235 (2012).

189. Trahan, *supra* note 184, at 56.

190. *Id.* at 57.

191. Kreß & von Holtzendorff, *supra* note 50, at 1193.

192. International Criminal Court, Assembly of State Parties, Informal Inter-sessional Meeting on the Crime of Aggression, ¶ 21, ICC-ASP/8/INF.2, app. II (July 10, 2009), https://crimeofaggression.info/documents//6/2009_Princeton.pdf.

193. Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1129, 1141 (2009) ("The [manifest] 'qualifier' would enable the Court to recognize that the legal evaluation of a genuine humanitarian intervention raises difficult and controversial issues of identifying and weighing the more recent pertinent international practice in light of fundamental principles which underlie the present evolution of international law in general."); David Donat Cattin, *Intervention of Humanity or the Use of Force to Halt Mass-Atrocity Crimes, the Peremptory Prohibition of Aggression and the Interplay between* Jus ad Bellum*,* Jus in Bello *and Individual Criminal Responsibility on the Crime of Aggression, in* INTERNATIONAL LAW AND THE PROTECTION OF HUMANITY: ESSAYS IN HONOR OF FLAVIA LATTANZI 353, 393 (Pia Acconci ed., 2017)

> [A]lmost two-third [sic] of UN Member States, the States Parties to the Rome Statute of the ICC, agreed unanimously that this type of use of force [humanitarian interventions] does not fall under the definition of the crime of aggression. In fact, we have demonstrated

Several scholars have criticized this position. Indeed, it is unclear when a humanitarian intervention would qualify as *genuine*. Furthermore, it has been highlighted that this interpretation could "strengthen the perception that such interventions are not 'unambiguously unlawful' and give further impetus to the [humanitarian intervention] doctrine."[194] While we shall not attempt to resolve this question here, the suggestion that *bona fide* humanitarian interventions are excluded from the scope of application of the crime of aggression underscores the extent to which the humanization of international law has reshaped the crime of aggression.

Particularly relevant on this point is the approach adopted by a number of non-governmental organizations (NGOs) at the Kampala Conference. While several human rights NGOs have been "enthusiastic supporters of the criminal justice project,"[195] they have not demonstrated the same interest toward the crime of aggression. Amnesty International explained that it did not intend to engage with discussions on the crime of aggression "because its mandate – to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards – does not extend to the lawfulness of the use of force."[196] Similarly, Human Rights Watch stated:

> [Its] institutional mandate includes a position of strict neutrality on issues of jus ad bellum, because we find it the best way to focus on the conduct of war, or jus in bello, and thereby to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law. Consistent with this approach, we take no position on the substance of a definition of the crime of aggression.[197]

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that only aggressive wars "*which, by [their] character, gravity and scale, constitute a manifest violation of the Charter of the United Nations*" fulfil such a definition, adopted by the Kampala Review Conference in June 2010.

194. Ruys, *supra* note 55, at 900.

195. Schabas, *supra* note 162, at 357.

196. AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: CONCERNS AT THE SEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES 22 (2008).

197. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH MEMORANDUM FOR THE SIXTH SESSION OF THE ASSEMBLY OF STATES PARTIES OF THE INTERNATIONAL CRIMINAL COURT 11 (2007).

In a footnote, it then added that: "The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s."[198]

The hostility, or at least indifference, of human rights NGOs toward the crime of aggression fits well within the framework described so far. As gross and systematic violations of human rights and humanitarian law have raised the issue of military interventions aimed at stopping such heinous crimes, human rights have entered into discourses on the use of force. As Schabas notes, "[a] militaristic tendency has infiltrated the human rights movement in recent years, encouraged by talk of 'humanitarian intervention' and the 'responsibility to protect.'"[199]

V. CONCLUSION: GOING BACK TO MOVE FORWARD?

The analysis conducted so far has highlighted a stark divide between the sovereignty-based approach and the human rights-focused understanding of international law. According to the traditional sovereignty-based account, negative peace is the ultimate aim of the U.N. system and arguably of the international community. At the same time, aggression is fundamentally a crime whose prohibition is directed at protecting sovereignty and territorial integrity. Therefore, the ultimate aim would be the avoidance of war and the maintenance of the status quo, while disregarding or at least minimizing considerations of human rights and justice. Interpreted as a crime against negative peace, aggression is destined to be seen with suspicion and will inevitably clash with a humanized international law. Similarly, the mere absence of war seems to have lost value, while a number of scholars and members of the international community have used the protection of human rights as a justification to wage war. Debates on humanitarian interventions and interventions in the name of an emerging right to democratic governance are just two examples of the ways that human rights have permeated the *jus ad bellum*.

In light of the foregoing, a human rights-focused understanding of international has emerged. On the one hand, aggression does not seem to be the supreme international crime anymore, as the focus has shifted to genocide, crime against humanity, and war crimes, that is, crimes directed at the protection of individuals. On the other hand, the promotion of justice and

198. *Id.* at 11 n. 26.

199. Schabas, *supra* note 162, at 358.

human rights has gained a paramount position in the current legal framework, as confirmed by the notion of positive peace. The humanization of international law has thus reshaped the relationship between peace, aggression, and justice.

This situation underscores a challenging, and perhaps unresolvable, tension within international law. While international human rights law is not per se opposed to peace, it has "increasingly been instrumentalized to justify war."[200] At the same time, the humanization of the *jus ad bellum*, IHL, and ICL has the paradoxical effect of pushing peace to the periphery.[201] Admittedly, human rights law has never expressed an unconditioned condemnation of war. Further, the question of the legality of interventions to protect foreign populations from a tyrant did not emerge *ex abrupto* during the twentieth century, as it was already present in the Middle Ages. Indeed, scholars and jurists as influential as Hugo Grotius, Francisco de Victoria, and Francisco Suarez argued for what we could call a humanitarian intervention *ante litteram*. Nevertheless, the current situation is paradoxical: arguably, the reason why peace is the most important value of the international community is that it is the crucial premise necessary to enjoy human rights.

Consequently, it seems that negative peace is no longer the primary aim of the international community. Values are thus judged though the lenses of the humanized international legal framework. When these values appear in contrast with the latter, they are subjected to attempts to reconcile them with human rights. Therefore, the crime of aggression would deserve to be included in the Rome Statute inasmuch as it "involves unjustified, direct attacks on the lives and physical integrity of human beings."[202] Similarly, a negative conceptualization of peace does not seem adequate to the current conditions: peace has to promote justice and equality. Accordingly, the ultimate objective of the *jus ad bellum* in particular—and of international law in general—would be the protection and respect of human rights.

This shift of paradigm largely determines how we view the crime of aggression. Indeed, it seems that aggression no longer is considered a crime against *negative* peace and that it has been reframed as crime against *positive* peace, albeit implicitly. The claims that the real evil of aggression—and thus why it should be criminalized—is the consequent loss of human life, the attempts to exclude humanitarian intervention from the scope of application of Article 8*bis* of the Rome Statute, and the uneasiness toward the idea that

200. Mégret, *supra* note 5, at 1433.
201. Schabas, *supra* note 162, at 366.
202. Dannenbaum, *supra* note 5, at 1317.

the criminalization of aggression protects State sovereignty, are all endeavors to reframe the crime of aggression in terms of human rights. So understood, the dichotomy between peace and aggression on the one hand, and justice and human rights on the other hand, would be reconciled.

At first sight, the humanization of peace and aggression seems a positive development. However, a closer look reveals the dangers of this approach. Indeed, this approach entails significant risks related to the human rights-based understanding of peace and aggression. First, it is at least debatable whether the positive acceptance of peace serves the cause of human rights and helps making peace more just. While it is true that the mere absence of war does not guarantee the respect of human rights, and hence is not concerned by considerations of justice, negative peace could be a value per se. On the one hand, the idea of positive peace seems too broad and vague to serve as a feasible objective. On the other hand, it seems clear that the absence of war is a crucial premise to enjoy human rights. Even in case of gross and systematic violations of human rights and humanitarian law, it is questionable whether a military intervention would prove capable of preventing or halting the commission of atrocities.

Second, we may wonder whether there is a need to reframe aggression in terms of human rights. Even if interpreted as a crime to protect sovereignty, the crime of aggression deserves to be included in positive international law. While a common view sees sovereignty as a shield used by States to disregard human rights within their borders, a number of scholars has highlighted that sovereignty can serve as a shield to protect the human rights of the population against external forcible interventions.[203] As Koskenniemi notes, "sovereignty was originally taken as a progressive, egalitarian principle and . . . it still carries these connotations."[204] Nor does viewing sovereignty with a necessarily negative connotation that inevitably conflicts with human rights reflect reality. The truth is more nuanced, and as May notes, "aggression is morally wrong because it destabilizes States that generally protect human rights more than they curtail them."[205]

Lastly, there is a certain degree of relativity inherent in any discussion on what is just. As long as there is no general agreement within the international community as to what extent human rights have replaced negative peace as

203. Bennoune, *supra* note 126, at 248–49; ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004).

204. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 237 (2006).

205. LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 6–7 (2008).

the ultimate aim of the international legal framework, this relativity appears inevitable. Moreover, the situation is complicated by the essentially political nature of the use of force in international relations. The risk that States would use justice and human rights in an instrumentalized fashion either disingenuously or at least without careful consideration as to the values that deserve to be protected is significant. Ultimately, we may wonder whether human rights law would better serve its cause if reconciled with a pacifist sensibility of international law that appreciates the absence of war as a value per se.