

Accountability for Violations of the Prohibition against the Use of Force at a Normative Crossroads

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For a brief period of time, between 1945 and 1947, public international law outlawed, sanctioned, and made judiciable breaches of the prohibition against the use of force in international relations as both a state act and a crime warranting individual penal liability. Ever since the Nuremberg trials, however—and despite the 1946 UN General Assembly affirmation of the principles of Nuremberg, which, it has authoritatively been argued, conferred upon these principles the status of customary law¹—the articulation of the prohibition against the use of force was abandoned in the international criminal sphere and left to the United Nations system of enforcement and maintenance of international peace and security. The relatively recent history of the normative development of the prohibition itself and the controversies surrounding the justiciability of breaches of this prohibition as crimes under international law are but two indicators of the chronic unpopularity that has accompanied efforts to outlaw and sanction armed conflict throughout modern history. After years of lengthy negotiations, in 2017 the international legal community will have the opportunity to reconsider its commitment to the precedent it established in Nuremberg. This might, in fact, be the year that the law on the use of force and international criminal law converge again after seventy years of separation and idiosyncrasy.² With accountability for violations of the prohibition against the use of force at a crossroads, this

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¹ Attorney Gen. of the Gov't of Isr. v. Eichmann, 36 I. L. R. 277 (Sup. Ct. 1962) (“[I]f there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law 'since time immemorial,' such doubt has been removed by two international documents”; citing G.A. Res. 95(I) and Res. 96). *See also* R v. Jones, [2006] UKHL 16 [12]–[18] (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 566 (5th ed., 1998) (“[W]hatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law.”)).

² In talking about “convergence” of the law on the use of force and international criminal law, the author refers strictly to the *normative* relationship between the two strands of public international law. The level of *substantive* overlap between the prohibition against war as articulated in the body of law regulating the use of force, and the prohibition against aggressive war as existing in international criminal law remains, in fact, a topic of lively scholarly debate. *See, e.g.,* Dapo Akande & Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, in THE CRIME OF AGGRESSION: A COMMENTARY 214–29 (Claus Kreß & Stefan Barriga eds., 2017).

contribution is dedicated to its normative history, and to the possibility of a normative convergence in the near future.

A brief period of overlap. The prohibition against the use of force has been recognized as the bedrock of public international law since the end of World War II. Although some have disagreed with this notion,³ the prohibition against the use of force is widely recognized a *jus cogens* norm of peremptory character, whose scope has been defined in multiple international legal instruments, including the founding document of the United Nations (UN), and in the jurisprudence of international tribunals.⁴ In 1945, article 2(4) of the United Nations Charter imposed an absolute prohibition against the use of force, requiring that all Member States “refrain in their international relations 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.” The sole exceptions to this rule were made for instances of the use of force in individual or collective self-defense and for the use of force to combat threats to international peace and security under the executive power of the newly established UN Security Council.⁵ Rising from the ashes of the most devastating conflict in history, states had finally outlawed war as a legitimate means of conducting themselves in the international arena.⁶ That principle underpinned the new system of international law and relations that still governs us today.

After the end of World War II and amidst much controversy,⁷ violations of the prohibition against the use of force were also recognized as crimes under international law warranting the adjudication of individual criminal responsibility as “crimes against peace.” Under the law of the International Military Tribunals at Tokyo and Nuremberg, the “planning, preparation, initiation or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” was recognized as the “supreme international crime” that differed from other international crimes only in that “it

³ James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215, 215–18 (2011).

⁴ Sondre Torp Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 NETH. INT’L L. REV. 167 (2014); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT’L L. 72 (2005).

⁵ U.N. Charter art. 2 para. 4, art. 39, art. 42 & art. 51.

⁶ The first international legal instrument to impose a binding legal obligation to “renounce war as an instrument of national policy” was the Kellogg-Briand Pact of 1928. Although important as an early effort by states at self-restraining, the treaty was however a weak instrument that did not envision either sanctions for failing to abide or an enforcement mechanism, and as such, it has been highly criticized. See Kellogg-Briand Pact, Aug. 27, 1928, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁷ On the constitutive elements of “crimes against peace,” and the controversy surrounding the criminalization of breaches of the prohibition against the use of force, see Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 527 (2007).

contains within itself the accumulated evil of the whole.”⁸ The criminalization of the illegal use of force was hailed as a step forward for accountability and as a “safeguard [of] the future peace and security of this war-stricken world.”⁹ Nuremberg itself and the subsequent trials¹⁰ have been defined as the most successful “plea of humanity to law”¹¹ and “one of the most significant tributes that Power has ever paid to Reason.”¹²

Between idiosyncrasy and symbiosis: from Nuremberg to Kampala. Despite the enthusiasm at the time, and notwithstanding the consistent best efforts of a committed group of individuals, including the indefatigable Benjamin Ferencz, criminal liability for violations of the prohibition against the use of force was relegated to the status of a memory from the recent past for the next seventy years.¹³ In the 1950s, at the request of the General Assembly, the International Law Commission (ILC) drafted two statutes for a permanent international court that would have received jurisdiction over breaches of the prohibition against the use of force, or “aggression,” as it had come to be known, but these were shelved during the Cold War, which made the establishment of such court politically unrealistic.¹⁴ In 1974, the UN General Assembly adopted by consensus a resolution defining the “crime of aggression,” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” Article 5(2) of the resolution clearly stated

⁸ Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19, 1946, 4 Bevans 20; 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 427 (1948).

⁹ 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 93 (1947).

¹⁰ See Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10 (Dec. 20, 1945), 3 Official Gazette Control Council for Germany 50–55 (1946).

¹¹ Opening Statement of Benjamin B. Ferencz at Nurember, Proceedings, Sept. 29, 1947, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 30 (1950).

¹² See Opening Statement of Robert H. Jackson, Proceedings, Nov. 21, 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 99 (1947).

¹³ It should be noted that the tribunals have not received an overwhelmingly positive response, however. Many have criticized the tribunals as constituting an imposition of “victor’s justice,” and the prosecution of “crimes against peace” specifically has been criticized on grounds that it violated the principle of “legality.” See generally ANTONIO A. CASSESE, GUIDO G. ACQUAVIVA, MARY D. FAN & ALEX A. WHITING, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY (2011); MAHMOUD CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2nd ed., 2013).

¹⁴ See D. H. N. Johnson, *The Draft Code of Offences against the Peace and Security of Mankind*, 4 INT’L & COMP. L. Q. 445 (1955).

that “a war of aggression is a crime against international peace,” and that “aggression gives rise to international responsibility.”¹⁵

The definition built both on the Nuremberg and Tokyo Charters and on the language and scope of article 2(4) of the UN Charter. Interestingly, however, and contrary to the International Military Tribunal statutes, it avoided specifying whether the responsibility for this “crime” ought to lay with the individual; moreover, unlike the UN Charter, it did not recognize the “threat” of the use of force as aggression pursuant to its own definition. The resolution went into some detail, however, by fleshing out which breaches of the prohibition against the use of force did constitute “acts” of aggression (invasion, including occupation and annexation, bombardment, blockade, violation of status of forces agreements, the “sending” of armed groups, or any other form of armed attack by sea, air, or land, including the use of one’s territory to launch it),¹⁶ and by recognizing that “aggression is the most serious and dangerous form of the illegal use of force.”¹⁷

These notions were, of course, picked up by the International Court of Justice (ICJ) in much of its reasoning and jurisprudence on the subject of the legality of the use (or threat of the use) of force,¹⁸ even though only a handful of cases have come before the ICJ on this issue throughout the years.¹⁹ Although the Court has “never found that a state has committed aggression,” nor has it “set out a definition of the concept of aggression” or “analyzed the concept in any detail,” nevertheless, “allegations of aggression have occasionally found their way before

¹⁵ Definition of Aggression art. 1, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974).

¹⁶ *Id.*, art. 3 (“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”).

¹⁷ *Id.*, preamble.

¹⁸ Christine Gray, *The International Court of Justice and the Use of Force, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* (Christian J. Tams & James Sloan, eds., 2013).

¹⁹ Examples of such cases are *Nicaragua v. United States*, the *Oil Platforms Case*, *Cameron v. Nigeria*, *Democratic Republic of Congo v. Uganda*, *Yugoslavia v. United States*, and two ICJ Advisory Opinions on the Construction of a Wall in the Occupied Palestinian Territory and on the Legality of the Threat or Use of Nuclear Weapons. For a discussion, see generally Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14 EUR. J. INT’L L. 867 (2003).

the ICJ.”²⁰ Even in cases in which aggression was not alleged *as such*, the Court’s analysis of the legality of the use of force has helped “develop[] the law both in relation to the prohibition of the use of force, and in relation to the exceptions to that prohibition.”²¹

Towards normative convergence in Kampala. The ICJ reasoning on what constitutes and does not constitute an act of aggression was duly taken into consideration during the Kampala negotiations and in the lead up to the negotiations during the *travaux préparatoires* of the Working Group on Aggression.²² The drafters were sensitive to the debate surrounding the level of overlap between the substantive and constituent elements of the notion of the illegal use of force as it had developed with respect to state responsibility, as well as to the constituent elements of the penal offense as it was recognized in and subsequent to Nuremberg (including the 1974 definition of aggression). Because of the lack of systematic treatment of the concept of “aggression” by the ICJ, however, several positions existed in Kampala as to what should or should not be included in the definition. Article 8 *bis* of the Rome Statute eventually came to distinguish between an *act* of aggression and a *crime* of aggression. For the purpose of the Rome Statute, a crime of aggression was defined as an “act of aggression, which by its *character, gravity and scale*, constitutes a *manifest violation* of the Charter of the United Nations.”²³ An act of aggression, for the purposes of the Statute, is thus a constituent element of a crime of aggression and, coherently with the 1974 definition of aggression, is any of the following acts: invasion (including occupation and annexation), bombardment, blockade, violation of Status of Forces agreements, the “sending” of armed groups, or any other form of “armed attack” by sea, by air, or by land, including the use of one’s territory to launch it.²⁴

The “manifest” threshold for the criminal offense concerning the gravity, scale, and character of the violations (as cumulative elements) was intended to exclude “borderline cases” (as it would be the case, for example, with border skirmishes). It was also intended to exclude cases falling within a gray area both factually (when the act of state does not meet the required “gravity” or “scale,” such as in minimal border incursions), as well as legally (that is, debatable cases, where the act of state does not constitute a manifest violation of the Charter due to its “character”). This language is, of course, fruit of diplomatic compromise and has been harshly criticized,²⁵ but it ought to be understood in light of the

²⁰ Akande & Tzanakopoulos, *supra* note 2, at 215.

²¹ *Id.*

²² See generally THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION (Steffan Barriga & Claus Kreß, eds., 2012).

²³ Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90, rev. 2010 [hereinafter Rome Statute].

²⁴ *Id.* (emphasis added).

²⁵ See, e.g., Harold H. Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 265 (2015).

“different speeds” at which states mature and develop their own understanding of what the prohibition against the use of force in international law prescribes or proscribes, particularly with respect to exceptions to the prohibition. The controversy in Kampala over so-called “unilateral humanitarian interventions” is an emblematic example of this.

Humanitarian interventions (that is, non-UNSC sanctioned use of military force in the territory of a non-consenting state to halt or prevent war crimes, crimes against humanity, genocide, and ethnic cleansing) were discussed as possible exceptions falling under the latter category of non-manifest violations, and a memorandum of understanding to this extent was proposed by the United States to the Assembly in Kampala. Ultimately, however, the memorandum of understanding was not adopted because unilateral humanitarian interventions have not crystallized as exceptions to the prohibition against the use of force under international law.²⁶ To the contrary, although the 2001 International Commission on Intervention and State Sovereignty’s Final Report theorized that a “responsibility to protect” civilians from atrocity crimes exists, both the 2004 High-Level Panel on Threats, Challenges and Change, and the Secretary-General’s own 2005 Report in Larger Freedoms concluded that under existing law, such responsibility can be exercised *only* under the authority of the Security Council.²⁷

Of course, academic, policy, and ethical disagreement over humanitarian interventions continue to date.²⁸ Other international law “doctrines” might be equally invoked in future debates over “gray areas” in the definition of *acts* of aggression concerning, for example, the “protection of nationals abroad” (most often taking shape in the form of “non-combatant evacuation operations,” or NEOs) and self-defense against non-state armed groups. Insofar as the *crime* of aggression is concerned, however, the manifest threshold introduced in the definition intentionally excludes all such instances of the use of force. It is exactly for this reason that those with a restrictive view on the law on the use of force—including, notably Benjamin Ferencz—have argued that the definition agreed upon in Kampala did not go far enough if we consider deterrence from the illegal use of force the ultimate goal of the criminalizing aggression in the first place. Alternative theories have been advanced, arguing that the illegal use of force may be prosecuted as a war crime in some circumstances (of disproportionate attack, for example)²⁹ or as a crime against humanity in and of itself.³⁰ Whether these

²⁶ THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION, 2003-2009, 51 (Steffan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser, eds., 2009).

²⁷ See INTERNATIONAL COMMISSION OF INTERVENTION AND STATE RESPONSIBILITY, THE RESPONSIBILITY TO PROTECT (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; Follow-up to the Outcome of the Millennium Summit, Note by the Secretary General, U.N. Doc. A/59/565 (Dec. 2, 2004).

²⁸ Koh, *supra*, 25.

²⁹ See Rachel E. VanLandingham, *Criminally Disproportionate Warfare: Aggression as a Contextual War Crime*, 48 CASE W. RES. J. INT’L L. 215 (2016).

³⁰ Manuel J. Ventura & Matthew Gillet, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, 12 WASH. U. GLOBAL STUD. L. REV. 523 (2013); Benjamin B. Ferencz, *The Illegal Use Of Armed Force As A Crime Against Humanity*, 2 J. USE OF FORCE & INT’L L. 187 (2015).

theories will gain support among scholars and experts is yet to be seen. Early reactions to these ideas, however, do not seem to preclude the coexistence of such theories and the framework agreed upon at Kampala. The specific arguments, moreover, cannot be discounted as being without merit.

In conclusion, the substantive aspects of the debate surrounding criminal accountability for the illegal use of force are not marginal. The legislative history of aggression from Nuremberg to the Kampala negotiations is illustrative of the symbiotic but idiosyncratic relationship that has characterized the various strands of public international law that deal with questions concerning the legitimacy and lawfulness of the use of force. From a normative perspective, the observance of how developments in the law on the use of force have influenced and may or may not influence again the definition of the *crime* of aggression, or may be conducive to an expansive interpretation of other judiciable offenses, is fascinating. And if normative developments demand that standing definitions of crimes or interpretations of these definitions be changed, surely the international community will have future opportunities to revisit the issue. Indeed, perhaps the international community will revisit the most appropriate penal characterization for the illegality of the use of force that results in the death of score of innocent civilians.³¹ At the current stage, however, the question is whether or not the international community will honor its original commitment to make the “supreme international crime” again a judiciable offense—or, as this essay ponders, whether 2017 will be the year that the law on the use of force and international criminal law converge again after seventy years of separation. Even if no convictions are obtained under the current definition of the crime of aggression, the symbolic power of completing the Nuremberg legacy—and the prospect of adding a further tool for deterring military adventurism, contributing to the maintenance of international peace and security in a manner compatible with the requirements of the UN Charter—seems a worthwhile endeavor, especially in a nuclear age.

³¹ The 2022 review conference could be one such moment to reconsider whether developments in the normative prohibition against the use of force have changed the internationally agreed definition of what constitutes a crime of aggression, and every year the Assembly of State Parties has the opportunity to reconsider amendments to the definition of other offenses.