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The Crime of Aggression in International Criminal Law

Historical Development, Comparative Analysis and Present State

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Foreword

The subject of this monograph is the act of aggression—a topic, which lies at the very heart of both public international law and international criminal law. Acts of aggression are, on the one hand, a State's internationally wrongful acts that violate the prohibition of the use of force, and, on the other hand, the conduct of leaders of a State for which they can be held individually criminally responsible. The talented young researcher comprehensively addresses these two concepts.

The first part of the book discusses the act of aggression as an internationally wrongful act by a State. The Author introduces this first part by reaching back far into the history of mankind, to that of Ancient Greece and China. The more detailed recent history benefits from the Author's Uzbek background in that he also analyses, for example, the Soviet Union's policies with respect to the act of aggression, and, as such, delves into a diversity of sources in the Russian language. When addressing the *ius ad bellum* as it stands today, the Author, in line with prevailing legal theory, gives the United Nations Charter, and especially the Security Council's powers under Chapter VII of this Charter, the central role in maintaining peace. He also refers to recent conflicts and analyses newly developed doctrines and concepts, such as the humanitarian intervention or the "pro-democratic intervention", which expose weaknesses in this system.

The main focus of this work lies in the second part, which is entitled "The Individual Crime". The Author recalls the crucial role that the judgment of the Nuremberg Military Tribunal played in the development of international criminal law in that it established that individuals may be criminally responsible for crimes that affect the international community as a whole. The Author also discusses the historically central role of "crimes against peace", which are a source of the present day "most serious crimes of concern to the international community as a whole", as expressed in Article 5 of the Rome Statute, and include crimes against humanity, genocide and war crimes.

The Author recalls and discusses the relevant aspects of this judgment and of that by the Tokyo Military Tribunal as well as of those delivered under the Control Council Law No. 10. On that basis, he carries out an insightful analysis of the codification of this crime in national systems and of the customary international law view on the crime of aggression.

The codification of the crime of aggression at the international level only took place in June 2010 at the First Review Conference of the Rome Statute. An amendment to the Rome Statute was adopted that endows the International Criminal Court with jurisdiction over this crime as of 2017 at the earliest. States have now started to ratify this amendment. The Author's analyses culminate in a discussion of the *actus reus* and the *mens rea* elements of the crime of aggression as laid down in Article 8*bis* of the Rome Statute, as well as in an explanation of the complex mechanism that will allow the International Criminal Court to exercise its jurisdiction.

This monograph is based on a thorough study of the available English, German and, in particular, Russian academic sources relevant to the crime of aggression and addresses in-depth all relevant aspects of the subject, while also demonstrating clarity of expression and quality of analysis. It is a highly commendable work, not only for academics and students in this area, but also for practitioners in this field of law. It is hoped that the Author will continue to contribute as a researcher to this field of law.

The Hague, Summer 2013

Anita Ušacka
Judge, Appeals Division, International Criminal Court
Professor, Dr. iur, LL.D (Lewis and Clark Law School)
Former Judge, Constitutional Court of Latvia

Preface

Since after the Second World War, the crime of aggression is – along with genocide, crimes against humanity and war crimes – a "core crime" under international law. However, despite a formal recognition of aggression as a matter of international criminal law and the reinforcement of the international legal regulation of the use of force by States, numerous international armed conflicts occurred but no one was ever prosecuted for aggression since 1949.

This book examines the evolution of aggression as an internationally wrongful act of State and a corresponding individual crime. After a cross-cultural historical introduction to the subject, it offers an overview of contemporary international law on the use of inter-State armed force, and makes an original proposal for the development of Draft Articles on the use of force by States. The book makes a case for a judicial review of the inter-State use of force – by the International Court of Justice or, as the case may be in the future, by the International Criminal Court. It further scrutinises in a detailed manner the relevant jurisprudence of the Nuremberg and Tokyo Tribunals as well as of the Nuremberg follow-up trials, and makes proposals for a more successful prosecution for aggression in the future. In identifying customary international law on the subject, the volume draws upon a wealth of applicable sources of national criminal law and puts forward a useful classification of States' legislative approaches towards the criminalisation of aggression at the national level. It also offers a detailed analysis of the current international legal regulation of the use of force and of the Rome Statute's substantive and procedural provisions pertaining to the exercise of the International Criminal Court's jurisdiction with respect to the crime of aggression, after 1 January 2017.

It is hoped that the book would be useful to both practitioners and students of international law and relations in that it brings together, in a comparative fashion, the normative experience of various States representing the major legal systems of the world, and of relevant international organs, and seeks to identify ways for reinforcing individual criminal responsibility for the use of inter-State force in contravention of international law.

Tashkent, December 2013 Sergey Sayapin

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Finally – but no less importantly – I thank my mother, Ms. Olga Sayapina, for her being a fantastic mom and friend. I would not have succeeded without her love, support, attention and smile.

Obviously, any omission in the book remains entirely my responsibility. I will be pleased to receive readers' comments and advice at: sergey.sayapin@yahoo.com.

Contents

Abbreviations

ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention on Human Rights
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALER	American Law and Economics Review
ASP	Assembly of States Parties
AUILR	American University International Law Review
AULR	American University Law Review
Asian JIL	Asian Journal of International Law
BCICLR	Boston College International and Comparative Law Review
BYIL	British Yearbook of International Law
Case Western Reserve JIL	Case Western Reserve Journal of International Law
Chinese JIL	Chinese Journal of International Law
CIS	Commonwealth of Independent States
Columbia JTL	Columbia Journal of Transnational Law
CLF	Criminal Law Forum
CSTO	Collective Security Treaty Organisation
Duke JCIL	Duke Journal of Comparative and International Law
Duke LJ	Duke Law Journal
ECHR	European Convention on Human Rights
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
Fordham ILJ	Fordham International Law Journal
German YIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Hastings ICLR	Hastings International and Comparative Law Review
HuV-I	Humanitäres Völkerrecht—Informationsschriften
Indiana ICLR	Indiana ICLR
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law

ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILP	International Law and Politics
ILQ	International Law Quarterly
IRPL	International Review of Penal Law
IRRC	International Review of the Red Cross
JCS	Journal of Church and State
JCSL	Journal of Conflict and Security Law
JICJ	Journal of International Criminal Justice
LCP	Law and Contemporary Problems
Leiden JIL	Leiden Journal of International Law
McGill LJ	McGill Law Journal
Michigan JIL	Michigan Journal of International Law
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
Pace ILR	Pace International Law Review
RC	Review Conference
Rome Statute	Rome Statute of the International Criminal Court
SULR	Seattle University Law Review
UN	United Nations
UN GA	United Nations General Assembly
UNTS	United Nations Treaty Series
UPJIL	University of Pennsylvania Journal of International Law
US	United States
USA	United States of America
USSR	Union of the Soviet Socialist Republics
WGCA	Working Group on the Crime of Aggression
WUGSLR	Washington University Global Studies Law Review
Yale JIL	Yale Journal of International Law
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Introduction

Wars have been plaguing humanity since time immemorial, and even now, at the beginning of the twenty-first century, a statement made in 1880 by the Institute of International Law appears to be an unfortunate truism: "War holds a great place in history, and it is not to be supposed that men will soon give it up—in spite of the protests which it arouses and the horror which it inspires […]".[1] Throughout history, war has, over and over again, been condemned, rationalised and idealised. As John Keegan has commented so passionately, "[w]arfare is almost as old as man himself, and reaches into the most secret places of the human heart, places where self dissolves rational purpose, where pride reigns, where emotion is paramount, where instinct is king".[2] Having probably been among men's strongest passions, war has certainly been one of their most important occupations. According to Jean S. Pictet (1914–2002), of the past 3,400 years, no more than 250 years were entirely peaceful, and around 14,000 wars occurred during the past 5,000 years.[3] Over millennia, wars were waged for plunder and booty, to acquire new territories and subjects, for religious reasons or, more recently, out of a desire to implant particular political, ideological or economic systems on new grounds.[4] Historically, in some cultures, warfare was indeed part of the respective civilisations themselves.[5] Unlike in the past, when wars were almost always regarded as a natural business of States and their sovereigns and could be waged, with not too many formalities, as soon as a suitable *casus belli* presented (or invented) itself, today's wars do usually require rather sophisticated pretexts, and their conduct is increasingly formalised by the written *jus in bello*[6] and customary international humanitarian law.[7]

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[1] Institute of International Law, Preface to the Manual on the Laws of War on Land 1880, quoted in: Neff (2005, p. vi).

[2] See Keegan (2004, p. 3).

[3] Pictet (2001, p. 91).

[4] Teichman (2006, p. 6).

[5] Such cultures include, for example, the Zulus in southern Africa, the Mamelukes (slave warriors) in the medieval Muslim Caliphates, or the Samurais in Japan. See Keegan (2004, pp. 24–46).

[6] According to some Authors, international humanitarian law has even become too detailed, "unreal" and "*too* humane"—and hence too complex to apply in practice. See Robertson (2002, p. 197) (emphasis in original).

[7] See, generally, Henckaerts, and Doswald-Beck (2005).

These juridical formalities do not, however, always succeed in making modern wars more just or less cruel.

Few issues of international law are as sensitive and problematic as that of aggression.[8] As Benjamin Ferencz put it, "[i]t is seemingly easier to evoke aggression than to dispel it, and easier to commit aggression than to define it".[9] The notion is highly sensitive in that it directly concerns State sovereignty,[10] and it is problematic, because no legally binding definition of potentially universal application could be produced, until just recently, either for the purpose of State responsibility or with a view to establishing individual criminal responsibility for directing acts of aggression committed by States. Despite some isolated attempts in the past,[11] the launching or waging of aggressive wars was not criminally punishable until after the Second World War. True, there were ideas and policies aimed at the prevention of wars throughout history. Already in the later part of the first millennium BC, some initial signs of perception of war as a pathological, unnatural state of affairs were recorded in civilisations as distant from each other, both geographically and culturally, as China and Rome.[12] In Ancient Rome, this tendency was subsequently reinforced by Christianity, which propounded a strong (although not complete)[13] rejection of war and quite quickly became a leading teaching throughout the Roman Empire.[14] During the Middle Ages, an important "peace programme" (Peace of God and Truce of God), which encouraged "kings and princes to take up the restoration of order in their own interests",[15] was implemented in Western Europe under the influence of the Catholic Church. Equally, Eastern European and non-European cultures continued offering philosophical and political initiatives to the same effect.[16]

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[8] See Borchard (1933, pp. 114–117); Borchard (1941, pp. 618–625); Borchard (1942, 628–631); Borchard (1943, 46–57); Carlston (1966, pp. 728–734); Cherkes (2009, pp. 103–119); Eagleton (1951, pp. 719–721); generally, Franck (2002); Gorohovskaya (2009, 45–52); Inogamova-Hegay (2009, 139–156); generally, Karoubi (2004); Keegan (2004); Kelsen (1944); Koh (2011, 57–60); Steinberg and Zasloff (2006, pp. 64–87); generally, Stone (1958); Teichman (2006); Verdirame (2007, pp. 83–162); Wright (1925, 76–103); Wright (1953, pp. 365–376); Wright (1956, 514–532); Yasuaki (2003, pp. 105–139); generally, Walzer (1977); Weisburd (1997).

[9] Ferencz (1972, pp. 491).

[10] See Baumgarten (1931, pp. 305–334); Baumgarten (1933, pp. 192–207); Koskenniemi (2011, pp. 61–70); Lansing (1907a, pp. 105–128); Lansing (1907b, pp. 297–320); Lansing (1921, pp. 13–27); Loewenstein (1954, 222–244); McCarthy (2010, pp. 43–74); Schrijver (2000, 65–98); Wang (2004, pp. 473–484); generally, Levin (2003).

[11] See, for example, Maridakis (2006, pp. 847–852).

[12] See Neff (2005, p. 14).

[13] Apparently, even Jesus himself did not resent the occurrence of "just" wars: "Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword" (Gospel of Matthew 10:34).

[14] See Teichman (2006, p. 164).

[15] Contamine (1984, pp. 270–274).

[16] See Teichman (2006, pp. 153–161). For details, see infra Chap. 1, especially 1.1.1.1, 1.1.1.2, 1.1.1.4.

However, none of these policies could amount, at the time, to a decisive prohibition of resorting to armed force in inter-State relations, and still less could they warrant the individual criminal responsibility of authors of even most perilous aggressive wars. For instance, on 13 March 1815, by a declaration issued in reaction to Napoleon's escape from Elba, he was excluded "from civil and social relations" for his previous actions "as an Enemy and Disturber of the tranquillity of the World".[17] However, the practical decision to imprison him without trial "not only until Peace, but after Peace" was regarded by some leading international lawyers as an "Exception to general rules of the Law of Nations".[18] Just over a century later, the arraigned German Kaiser Wilhelm II escaped punishment in that he had found refuge in The Netherlands after Germany's defeat in the First World War, and the Allies' request for his extradition was refused. Moreover, the Commission on the Responsibility of the Authors of the War concluded that the "supreme offence against international morality and the sanctity of treaties" the Kaiser had committed was rather a "moral" one, and not one under international law of the time.[19] During the 1920s, the Draft Treaty of Mutual Assistance (1923) and the League of Nations Protocol for the Settlement of International Disputes (1924) referred to aggressive war as an international crime but none of these treaties was ever ratified (see infra1.1.6.3). The idea was also incorporated in relevant resolutions adopted by the League of Nations (1927) and the Pan American Conference (1928)[20] but those resolutions did not possess a binding force.

Even after the Second World War, it was not established, until after the Judgment of the Nuremberg Tribunal had been pronounced (see infra3.1.1) and subsequently reaffirmed by a United Nations General Assembly Resolution,[21] that the launching of an aggressive war was a crime. There exists evidence that "only one year before the London Conference three of the big four had gone on record that aggressive war was not in itself a crime".[22] During the Conference itself, there was substantial doubt as to whether there had existed a customary basis for charges of aggressive war.[23] Whilst the impact of the Nuremberg and Tokyo trials on the subsequent development of international law is now undisputed, details of their material law and procedure were criticised extensively both by contemporary commentators and during the decades that followed.[24] Some of the essential critique focused on the *ex post facto* character of the charge of aggressive war. The Nuremberg International Military Tribunal had to interpret the London Charter at

[17] Stewart (1951), at 573, especially note 8.

[18] *Ibid*., p. 574.

[19] See Cryer (2005, pp. 33–34), especially note 196.

[20] International Military Tribunal (Nuremberg), Judgment of 1 October 1946, p. 446.

[21] See UN General Assembly Resolution 95(I), 11 December 1946.

[22] Minear (1971, p. 50).

[23] *Report of Robert H. Jackson 1949, pp. 65–67, 295, 327, 335.*

[24] For an overview of such critique, see Kelsen (1944, pp. 13–15); Kelsen (1947), 156 et seq.; Tomuschat (2006, 830–844). For details, see infra Chap. 1, especially 1.2.1 and 1.2.2.

length, in order to substantiate its compatibility with existing international law (see infra3.1.1). In turn, at the Tokyo trial (see infra3.1.2), where the majority of Judges concurred with their colleagues at Nuremberg in the interpretation of the rules on the crime of aggressive war, two dissenting (by Judges Pal and Röling) and one concurring (by Judge Bernard) opinion were nevertheless formulated, which cast doubt on the legal supportability of the charge of aggression.[25]

After 1948, the crime of aggression entered the national criminal laws of many States (see infra4.1) but it was not treated as a matter of binding *international* law for over half a century. The 1949 Geneva Conventions for the Protection of Victims of War set up an ambitious system for the penal repression of their grave breaches as war crimes[26] but, surprisingly enough, no similar mechanism was established to criminalise the "supreme international crime", as aggression was termed at the Nuremberg trial. The 1968 United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity left the crime of aggression beyond its scope.[27] The Statute of the International Criminal Tribunal for the Former Yugoslavia did not mention the crime of aggression among the crimes within the Tribunal's jurisdiction, although it might have theoretically done so.[28] As a result of a lasting international political unwillingness to move forward decisively, the authors of some alleged crimes of aggression managed to evade justice.[29] As M. Cherif Bassiouni so rightly noted, "[t]he history of ICL is one driven by facts, characterised by practical experiences, dominated by pragmatism, and constantly gripped by the conflicting demands of *realpolitik* on the one hand, and those of justice on the other".[30] It appears that with regard to the crime of aggression the demands of *realpolitik* were, time and again, more successful than those of justice.

There existed hope that this political unwillingness would come to an end in 1998, with the adoption of the Rome Statute of the International Criminal Court.[31] However, due to pressure from some delegations at the Rome Conference and the absence of a general consensus on the applicable international law,[32] it was impossible to define the crime before the adoption of the Statute. The Court was given jurisdiction over the crime of aggression on the futuristic condition that it

[25] Cryer (2005, p. 243). See also Röling and Cassese (1992, p. 67).

[26] See Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention.

[27] See UN General Assembly resolution 2391 (XXIII), annex, 23 UN GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), Article I.

[28] See Cryer (2005, 244); Zolo (2007, p. 804).

[29] As Cassese notes, "since 1946 there have been no national or international trials for alleged crimes of aggression, although undisputedly in many instances States have engaged in acts of aggression, and in few cases the Security Council has determined that such acts were committed by States". See Cassese (2003, p. 112).

[30] Bassiouni (2003, p. 18).

[31] See Akhavan (2001, pp. 7–31).

[32] Leanza (2004, pp. 12–15).

would be exercised "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".[33] The subsequent drafting process stretched itself over 12 years after the adoption of the Rome Statute and finally resulted in the adoption of relevant substantive and procedural provisions in 2010.[34]

Now as the 2010 Kampala amendments pertaining to the crime of aggression for the purpose of the International Criminal Court are accumulating ratifications required for their entry into force—and once they reach the requisite threshold of 30 ratifications and the ICC Assembly of States Parties activates the Court's jurisdiction with respect to the crime (see infra5.1.2 and 5.3.2.2), the prosecution of individuals for its planning, preparation, initiation or execution may take a qualitatively new turn—it is important to take stock of relevant developments in customary and conventional international law, to identify current challenges to the international legal regulation of the use of force in inter-State relations, and to suggest measures for enforcing—as efficiently as possible—individual criminal liability for the crime of aggression at the international and national levels. More particularly, I intended:

- to comprehensively consider the evolution of various cultures' attitudes towards war, and to single out key factors, which had contributed to the restraint of States' recourse to war as an instrument of national or international policy;
- to re-examine the current regulation of the inter-State use of force under conventional and customary international law, as well as under applicable *jus cogens*, and to offer a classification of uses of force by States in the light of applicable international law;
- with due regard to relevant twentieth century international jurisprudence, to demonstrate the functional relationship between aggressive State conduct and individual acts prompting such conduct, and accordingly to substantiate the criminality of individual acts leading to States' acts of aggression and other crimes against peace;
- to study, in a comparative fashion, the predominant legislative approaches towards the criminalisation of individual acts leading to States' acts of aggression and other crimes against peace;
- to critically reflect upon the substance of the 2010 Kampala amendments pertaining to the crime of aggression and their implications for the ensuing development of relevant international and national criminal law.

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[33] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, adopted on 17 July 1998 (hereinafter referred to as the Rome Statute, the ICC Statute, or the Statute), Article 5(2).

[34] For an overview of the drafting process, see infra1.2.6. For a detailed analysis of the relevant provisions adopted at the First Review Conference of the States Parties to the Rome Statute (Kampala, 31 May–11 June 2010), see infra Chap. 5.

Accordingly, this book is organised into six chapters. Chapter 1 considers the historical origins of the legal restraints on the use of force in international relations and of the criminalisation of aggression. In providing a chronological overview of relevant international instruments and examples of State practice, the chapter follows, as much as possible, a multi-civilisation approach, in order to display the international dimensions of the issue and the awareness thereof that had existed in different cultures throughout history. The overall purpose of Chap. 1 is to provide a *historical* introduction into the subject matter of the volume, whereas *substantive* details are given more attention in subsequent chapters.

Chapter 2 dissects aggression as an internationally wrongful act of a State and characterises its definitional elements under applicable modern international law. It starts by analysing the nature of States' obligation under Article 2(4) of the UN Charter to refrain from the threat or use of force in their international relations, and subsequently examines the elements of the 1974 Definition of Aggression, which served as a basis for many—if not most—contemporary legal discussions on the matter. The chapter subsequently analyses the "Charter-based", "Charter-related" and "extra-Charter" exceptions—including, in particular, the protection of a State's own nationals abroad, and so-called "humanitarian" and "pro-democratic interventions"—to the prohibition of the use of force, in order to identify the limits of lawful (and, consequently, unlawful) uses of force by States under international law.

Chapter 3 explores the relationship between aggression as an internationally wrongful act of a State and the individual criminal responsibility of its authors. The foundations for the individual criminal responsibility for the crime of aggression under international law are examined in conjunction with the jurisprudence of the Nuremberg and Tokyo Tribunals and of relevant trials held under the Control Council Law № 10. Next, an overview of provisions on the crime of aggression and other crimes against peace contained in the International Law Commission's Draft Codes of Offences (1951) and of Crimes (1996) against the Peace and Security of Mankind—as vectors leading to the subsequent integration of such crimes in relevant sources of national and international criminal law—is offered.

Chapter 4 offers an overview of 42 national laws criminalising aggression and examines, in a comparative fashion, the *actus reus* and *mens rea* of the crime. With due regard to the applicable legislative models, the material, formal and truncated *corpus delicti* of the crime of aggression—a possible basis for the inference of customary international law on the matter—and the range of the crime's possible subjects are analysed. The chapter also reviews selected problematic issues related to the indirect enforcement of criminal responsibility for the crime of aggression. The propaganda for war is briefly examined as a separate crime.

Finally, Chap. 5 offers an in-depth analysis of the material and procedural provisions on the crime of aggression adopted for the purpose of the Rome Statute of the International Criminal Court. In particular, it analyses the definition of the crime of aggression for the purpose of the Statute, examines the applicability of general principles of criminal law to the crime, expounds the procedural aspects of the exercise of jurisdiction over the crime of aggression by the Court, and offers

brief remarks on the Elements of the crime of aggression. Overall conclusions and recommendations are summarised in Chap. 6.

With due regard to the universal nature of the issue under discussion, I have attempted to make the volume as "internationally researched" as possible.[35] The text has primarily been written on the basis of normative and doctrinal sources originally published in English, German, French, Russian and Spanish. Unless indicated otherwise, all translations from the latter four languages into English are mine. I have endeavoured to make the text accurate as of 18 November 2012. Later updates were introduced in the text where possible.

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[35] Cf. Petersen 2011, 149–163; Korotkyy 2010, 138–151.

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Part I
The Internationally Wrongful Act of State

Chapter 1
Historical Background of the Criminalization of Aggression

Abstract Aggression was not criminalized before 1945. Throughout centuries, and in all cultures, despite isolated efforts aimed at setting conditions for "lawful" uses of force, rulers and States felt at liberty to resort to force to enforce their political goals. It was only after the Second World War—more precisely, after the Nuremberg and Tokyo trials, followed by trials under the Control Council Law № 10—that aggression was recognized as a crime under international law. But even then, no more prosecutions for the crime occurred after 1949, for political reasons, despite numerous inter-State uses of force. A revival of the criminalization of aggression came with the adoption, on 17 July 1998, of the Rome Statute of the International Criminal Court where the crime of aggression was listed—along with genocide, crimes against humanity and war crimes—as one within the jurisdiction of the Court. Twelve more years had elapsed before the States Parties to the Statute agreed upon a definition of the crime of aggression for the purpose of the Statute, and upon the complex procedural conditions for the exercise of the Court's jurisdiction with respect to the crime. Generally, the chapter serves as a historical introduction to substantive matters dealt with in subsequent chapters of the book, and provides a background for almost any issue of relevant international law raised elsewhere in the volume.

Contents

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Human societies knew wars from prehistoric times.[1] Beyond all doubt, warfare had become a usual feature of human living much earlier than did law, State, and other sophisticated social institutions. It arguably is approximately as ancient as religion—another prominent factor in virtually all civilizations.[2] In fact, in the course of millennia, war became a legal and social institution of such a standing that its legitimacy was never disputed seriously until the first half of the past century[3]—a markedly immature age for as important a reform. With all the pain and destruction wars brought about, they were commonly seen as acceptable political practices, and sometimes even as noble endeavors uniting peoples in their human destiny and exclusively capable of displaying all human virtues and vices.[4] In a world where, throughout centuries, "there [was] no greater good than for a warrior to fight in a righteous war,"[5] there could obviously not be any place for declaring the phenomenon of war as "criminal." One's own war is always righteous—all the criminals were always on the other side.

This chapter examines, chronologically and cross-culturally, the evolution of attitudes toward war(fare), from antiquity to our days. The chapter's purpose is to show how the waging of war was transformed from a largely glorified and sometimes mystical concept to a legally restrained and, in appropriate circumstances, even a criminal enterprise. The primary focus of the chapter will be on the *jus ad bellum*, i.e., the "right" to wage war, as opposed to the *jus in bello*—the conventional or customary

[1] On primeval warfare, see, generally, Davie 1929; Turney-High 1971.

[2] See generally Hinnells 2007; Iles Johnston 2007; Scaglia 2011.

[3] It is submitted that all major "just war" doctrines were essentially different from the landmark twentieth- and twenty-first-century developments in international law in that they actually sought to define "fair" conditions for the occurrence of wars (positive restriction), instead of banning the phenomenon of war as such, with a few strictly defined exceptions (negative restriction). See Neff 2005, pp. 54–68; Werle 2009b, p. 405. Also, see infra 1.1.2.3.

[4] Coppieters et al. 2002, p. 25.

[5] *The Bhavagad Gita* 1962, p. 51.

rules relative to the conduct of hostilities.[6] Yet, before turning to the particulars, it appears useful to recall some definitional features of war, so well summarized by Stephen Neff,[7] as each of them could be applicable to the contemporary understanding of aggression as an internationally wrongful act of State and an individual crime.

Firstly, war is a collective undertaking.[8] It is carried out by organized collectivities under the command of public authorities and is supposed to be aimed at the furtherance of shared interests of the community. The collective nature of war—as regards the conduct of hostilities—has been reflected in applicable regulations, policies, and even terminologies.[9] However, the decision to start a war, the direction of the war effort throughout its entire duration as well as the subsequent termination of hostilities and the making of peace arrangements is up to fairly limited circles of political, military, and some other superior decision-makers (see infra 3.2), subject to their States' relevant constitutional provisions. Since no one can exercise more rights than he or she actually has—i.e., no one can arrange the commission of an act of aggression but only those supreme officials who are capable of supervising and managing the war effort of a State—the range of possible subjects of a crime of aggression is automatically reduced to those narrow circles. While anyone in a State's military or political hierarchy may, in appropriate circumstances, be held accountable either for the direct commission of war crimes or crimes against humanity in the course of an armed conflict, or for tolerating such crimes and refraining from taking preventive, disciplinary or penal measures against their perpetrators in accordance with international legal rules on the responsibility of superiors, this would not apply to the crime of aggression. An order to start an international armed conflict is, *de lege lata*, not manifestly unlawful (see infra 5.2.12). It therefore makes sense that aggression has been conceived of as a "leadership crime" and excludes officials below the supreme decision-making level (see infra 4.2).

Secondly, until the twentieth century, most wars were fought against foreign enemies rather than against domestic adversaries.[10] The distinction between the two types of armed violence was so sharp that internal hostilities were almost never referred to as "wars" but rather as "revolts," "riots," "revolutions," or "policing." While the modern

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[6] The scholarly literature on the *jus in bello* is abundant. See highlights on the subject in: Artsibasov and Yegorov 1989; Batyr 2006; Best 1994; David 2011; Deyra 2002; Dinstein 2004; Green 1993; Heintschel von Heinegg and Epping 2007; *International Dimensions of Humanitarian Law* 1988; Kalugin 2006; Kalugin and Akulov 2004; Kalugin et al. 1999; Khakimov 2007; Kotlyarov 2003; McCoubrey and White 1992; Rajabov 2006; Rusinova 2006; Sassóli and Bouvier 2006; Zemmali 1997.

[7] For an excellent cross-cultural summary of the definitional features of war, see Neff 2005, pp. 14–29.

[8] Ibid., pp. 15–18.

[9] Notably, many key categories of international humanitarian law have been devised in plural or denote collectivities—e.g., "the civilian population," "civilians," "combatants," "protected persons," "prisoners-of-war," etc.

[10] See Neff 2005, pp. 18–20.

law of armed conflicts also increasingly applies to non-international armed conflicts—another legal novelty which is just over 60 years old (or "new"?)—the concept of aggression remained restricted to the inter-State uses of the armed force, and it is hardly correct to refer to armed conflicts between, for example, a State's central and local authorities, where a region *de jure* belongs to the State in question, as "aggression."[11] In line with this intermediate conclusion, this text will not deal with situations of intra-State armed violence, because these cannot qualify as aggression by definition.

Thirdly, for the most part, wars have been seen as activities subordinated to more or less clearly defined rules.[12] It must be admitted that the codification of the *jus in bello*, i.e., of rules applicable to the conduct of hostilities, has been more comprehensive than that of the *jus ad bellum* and, at a later stage, of the *jus contra bellum*.[13] However, as will be shown below, the twentieth century has also seen an unparalleled development of the *jus contra bellum*, and the normative outcomes resulting from these crucial developments must be considered as replacing, for the most part, previous ones, for such must have been the intention of their drafters. Since public international law constitutes the *ratione materiae* of international crimes,[14] essential developments within the former must of necessity be taken into account for the interpretation of the latter. More particularly, it will be argued below (see infra 1.2, especially 1.2.1) that the adoption of the Charter of the United Nations in 1945 has influenced the subsequent development of international criminal law beyond the limited and specific scope of the Nuremberg and Tokyo Judgments (see infra 3.1.1 and 3.1.2). The concept and elements of the individual crime of aggression have traditionally been based upon these Judgments, without due regard to the fact that they had been pronounced on the basis of international law which had *predated* the Second World War, and the lack of State practice with regard to the crime of aggression—i.e., the limited number of trials on the charges of the crime of aggression after that war (see infra 3.1.3)—should not be taken as a valid reason to conclude that binding international law—international criminal law's *ratione materiae* foundation—did not develop with regard to the crime of aggression ever since. True, there have been no criminal trials where the new, post-1945, international law could have been applied. But the lack of such case law should not bring one to the deceptive conclusion that international law underlying the criminalization of aggression is still the same as it stood in 1945–1949. The absence of trials on the matter only means that *there have been no opportunities to apply and interpret the new international law* after 1949.

[11] For example, the launching of the armed conflict in South Ossetia (8–12 August 2008) was sometimes referred to as Georgia's "aggression". However, it is submitted that this terminology was inaccurate in the circumstances, since, at the time of the attack, South Ossetia did not *de jure* constitute a recognized State. See generally International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I (September 2009).

[12] See Neff 2005, pp. 20–25.

[13] See Kemp 2010, pp. 47–48.

[14] Bassiouni 2003, p. 8.

After all, judicial decisions—even such authoritative ones as the Nuremberg and Tokyo Judgments—are not *sources* of international law. They are "subsidiary means for the determination of rules of law,"[15] which means that the respective Tribunals only *interpreted* international law, without actually *creating* any new law, and therefore, in the post 1945-world, relevant legally protected interests (international peace and security), the existence of acts of aggression, and the individual criminal responsibility for such acts must be inferred from the Charter of the United Nations and other pertinent sources of contemporary international law (for details, see infra Chap. 2).

And last but not least, it is important—for the sake of applying law appropriately—that there be some sort of a temporal and circumstantial boundary between peace and war.[16] This feature has a crucial meaning for the purpose of determining the existence of a crime of aggression, especially if one interprets it in a more contemporary way than "planning, preparation, initiation or waging of a war of aggression" (the definition accepted by the Nuremberg Tribunal, see infra 3.1.1). The chief problems about "wars of aggression" are (1) the precise location of their beginning in time, (2) their magnitude, and (3) duration. In the past, when it was common to declare wars, it was fairly easy to determine from which date a state of war was effective. Now that wars are hardly declared at all, it is less clear whether an armed conflict begins from firing a first shot, killing or wounding a first person or destroying a first material object (see infra 4.3.1.3). Further, it is fairly easy to say that aggression is there when it is of a scale comparable to that of Germany or Japan in the Second World War. But what about lesser but nonetheless significant uses of inter-State military force (e.g., Iraq's use of force against Kuwait in 1991 or the US-led invasion of Iraq in 2003)? Might their authors' responsibility not be invoked as a matter of international criminal law just because these armed conflicts have resulted in less than 50 million deaths? And, finally, is a war lasting less than 6 years, by definition, not one of aggression? It will be suggested in this book that some further criteria than purely quantitative should be involved when "measuring" aggression as an internationally wrongful act of a State and as an individual crime. Continuing to maintain the exceptionally high definitional threshold of aggression set by the Nuremberg and Tokyo Tribunals—and it is worth recalling that that level of the armed conflict's magnitude was recognized by those Tribunals simply *as a matter of fact* in the Second World War, which should not mean that *all* unlawful uses of inter-State military force below that level must mechanically be discarded as not reaching the legally relevant "bottom line" of aggression—would be a misinterpretation of current public international and international criminal law.

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[15] Cf. Statute of the International Court of Justice, Article 38(1)(d).

[16] See Neff 2005, pp. 25–29.

1.1 An Overview of the *jus ad bellum* Before World War II

1.1.1 The Ancient World

In the ancient world, both international law (as we understand it now) and diplomacy as a tool for making international law stood, with rare exceptions, entirely at the service of war.[17] In most cultures where the waging of wars was common,[18] diplomatic means—in the form of treaties—were used either at the close of wars, in order for victors to impose their conditions of peace upon the vanquished (and in order for the latter to inescapably accept those conditions), or in anticipation of prospective conflicts, in order to secure alliances for the wartime future. The earliest recorded examples of treaties concluded between rulers of ancient States testify vividly to the prominence of war-making in the daily lives of their subjects and in their own external policies. The following sections will provide an overview of philosophical, political or legal—as far as they could have *then* been viewed as legal—attitudes toward war in the major ancient civilizations and cultures.[19] The following text cannot be regarded as a comprehensive historical account, for reasons of limited volume space, but rather aims at giving an idea of how the complex notions of war and peace were perceived, at the time, in the respective contexts.

1.1.1.1 Asian Civilizations

1.1.1.1.1 Egypt[20]

Probably due to its relative geographic isolation, Egypt was, at the dawn of its history, the most peaceful nation of the ancient world. It was only by the time of the New Kingdom (sixteenth–fourteenth centuries BC) that it had to learn defending itself against some of its powerful neighbors—such as Assyria, Babylon, the Hittite Kingdom, Nubia, and Syria—and established a professional army (which

[17] See Martens 2008, p. 27.

[18] See Neff 2005, pp. 25–29.

[19] According to F. F. Martens (1845–1909), "for theoretical, purely a priori reasons, one could not agree that barbarian and ancient peoples knew international law. It suffices to analyze concepts and feelings which prevailed among peoples who were just at the dawn of their histories, and about whom we have quite veritable information, to become convinced of an absolute impossibility to suppose [the existence of] any rational need for a law among these peoples, for a certain order in the sphere of [their] mutual relations." See Martens 2008, p. 31.

[20] Traditionally, Egypt was not regarded as an African civilization, despite its geographical location in Northern Africa, due to its culture's fundamentally distinctive features. See, for example, Vasilyev 2003, pp. 98–120.