The Status of Aggression in International Law from Versailles to Kampala – and What the Future Might Hold

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I. JUS AD BELLUM AND JUS IN BELLO: THEIR ORIGINS AND THEIR DIFFERENCES

What we refer to today as international humanitarian law, regulating the use of force by one group against another, began its evolution in several civilizations some 5,000 years ago, thus evidencing the existence of evolving commonly shared human and social values. The principles that emerged from this evolution reveal a certain common humanitarian thread among diverse civilizations of the world, reflecting values such as the preservation of human life and the minimization of harm and hardship to noncombatants, particularly women, children, and the elderly. The observance of jus in bello has been marked by the protagonists’ shared interests.

The history of jus ad bellum, the legal or moral justification for going to war, is distinct from that of jus in bello. Warring groups rarely share interests or reasons for fighting: more often than not, the protagonists who resort to using force do so to achieve their own particular goals of power and wealth. Because compliance with jus ad bellum has lacked the motivating factor of common interests between protagonists in armed conflict, notwithstanding the apparent

connection between \textit{jus ad bellum} and \textit{jus in bello}, their legal norms have evolved differently.\textsuperscript{2}

The constraints that have emerged over time under \textit{jus ad bellum} also reveal the influence of shared value-oriented goals that include the preservation of world order, the maintenance of peace, and the minimization of human harm and material damage.\textsuperscript{3} While these constraints reflect some of the same human and social values contained in \textit{jus in bello}, they are based on different policy considerations and are conditioned by state interests, which in part explains why \textit{jus in bello} has been more consistent in its norms. Both, however, have had their enforcement challenges.

By the time the idea of the “just war” was reflected in St. Thomas Aquinas’s \textit{Summa Theologica}, published in 1485 CE,\textsuperscript{4} various norms and standards of \textit{jus in bello}, developed in different civilizations, were already some 4,000 years old.\textsuperscript{5} But in the end, both \textit{jus ad bellum} and \textit{jus in bello} became identified with Western civilization, even though they originated elsewhere and were transmitted to the West through ancient Greek, Persian, Indian, and Arabic writings translated by Arab Muslim scholars.\textsuperscript{6} That legacy shaped what


\textsuperscript{3} Political realists will challenge this premise expressed above, claiming instead that the outcome, mentioned above, is part of state interest and no commonality of shared moral or social values should be given more than marginal consideration. See Ian Ward, \textit{The End of Sovereignty and the New Humanism}, 55 Stan. L. Rev. 2091, 2106 (2003); Paul W. Kahn, \textit{Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order}, 1 Chi. J. Int’l L. 1, 9 (2000); Hans J. Morgenthau, \textit{The Machiavellian Utopia}, 55 Ethics 145, 146 (1945).

\textsuperscript{4} St. Thomas Aquinas, \textit{Summa Theologica} (1485) [hereinafter Aquinas]. See also discussion \textit{infra} note 6 on Aquinas and others.


\textsuperscript{6} These writings and principles went on to influence the writings of Western Christian scholars (transmitted mostly through Arab Muslim scholars) such as Vitoria (1486–1546), Ayala (1548–1584), Gentili (1552–1608), Suarez (1548–1617), and later to Hugo Grotius in his writings the \textit{De jure Belli ac Pacis} from 1625. These works were followed by Puffendorf, Burlemaqui, and de Vattel. Franciscus de Victoria, \textit{De Indis et de Ivre Belli Relectiones} (Classics...
became Western European Christian conceptions of, and limitations on, *jus ad bellum* and *jus in bello* that one can attribute to the migration of ideas or to the idea of human values and their role in times of conflict existing in many different societies throughout early recorded history, it was only in about the thirteenth century CE that the concept of *jus ad bellum* developed as a consequence of the writings of St. Thomas Aquinas on the “just war.” Aquinas was inspired by Augustine of Hippo, an Arab Tunisian Catholic bishop who lived from 354 to 430 CE and wrote about the war in North Africa between the invading barbarians of the European north, as they were referred to, and the Roman Byzantine troops that occupied parts of North Africa. At the time, the Roman governor was much less concerned with the conduct of war than he was with the pursuit of earthly pleasures, which led Bishop Augustine, who was later canonized, to argue for some theories, which we would in modern times call humane theories, in the use of war and limitations on the right to resort to war. Between 1265 and 1273, St. Thomas Aquinas, inspired by the writings of Augustine, drafted his *Summa Theologica* (though it was not published until 1485), which became the basis of the theory of the “just war” and the concept of *jus ad bellum*.

This is particularly evidenced in Islam’s early prohibition of aggression. As stated by Professor Mohammad Hashim Kamali:

> During the first 13 years of his campaign in Makka, the Prophet Muhammad was not permitted to use force even in self defence. Islam was propagated only through peaceful engagement with the people, inviting them to give up idolatry and embrace the monotheistic call of Islam. The idolaters of Makka persecuted and forced a number of the Prophet’s Companions to migrate, initially to Abyssinia, and later to Madina. Nevertheless, the Prophet kept reminding his Companions to be patient and to pursue their campaign peacefully. Some of them urged the Prophet if he would allow reciprocal treatment, which he declined due to repeated Quranic instructions:

> So wait patiently (O Muhammad) for thy Lord’s decree, surely thou art in Our sight (52:48);
> Then bear with them and say: peace. They will (eventually) come to know (43:89);
> So forgive, with a gracious forgiveness (15:85);
> Repel (evil) with what is better. Then will he between whom and thee was hatred become as it were thy friend and intimate! (41:34).

As the persecution of Muslims reached its peak when the pagans of Makka conspired against the life of the Prophet, he migrated to Madina. Even then the Quranic permission to fight was not granted until a year later when the Makkans set out to attack the Muslim community some 270 kilometers away in Madina. The first Quranic verse that permits fighting was then revealed:

> Permission is granted to those who fight because they have been wronged, and God is indeed able to give them victory; those who were driven from their homes unjustly because they said: our Lord is God (7:59).
natural sharing of moral values or both, a convergence that contributed to the growth and development of human and social values that the world community has come to embrace.

It was not until 1648, when the Treaty of Westphalia recognized the putative sovereign equality of States, that the principle of States’ respect for each other’s existence and integrity formally emerged. But that treaty was between European States that were extricating themselves from the Thirty Years War, which was fought over the reformation of Christianity, and the same States later showed that when it came to invading non-European States and territories, they did not feel bound by this limitation. These States freely engaged in what we generically have come to call aggression, carried out in the most brutal ways, particularly against non-Western and non-Christian communities, whether or not those communities were regarded as States in the European understanding of that

Mohammad Hashim Kamali, *Jihad and the Interpretation of the Quran: Contextualising Islamic Tradition, in Jihad and its Challenges to International and Domestic Law* 39, 42–43 (M. Cherif Bassiouni & Anna Guellali eds., 2010). As stated by this writer in the same book:

When the Prophet and his followers were forced to leave Makka (622 CE), they were attacked by non-Muslims, and a verse of the Quran was revealed about the right to self-defense against aggression: “Sanction is given unto those who fight because they have been wronged.” Later, the Quran was more explicit: Surat al-Baqarah: Fight in the way of God against those who fight against you, but do not begin hostilities for God does not love aggression. And slay them wherever you find them [the aggressors], and drive them out of their places whence they drove you out, for persecution is worse than slaughter. And fight not with them in the Inviolable Place of Worship until they attack you, then slay them. Such is the reward of disbelievers.


9 Or various analogs to monarchies, since “States” (as the term is now understood) did not then exist.

This is evident in the colonization by European States of territories in Africa, Asia, and North and South America.11

So even if \textit{jus ad bellum} was a limitation on the power of States to resort to the use of force against other States, in practice it was limited to interactions between Christian Western European States and certainly not without exceptions. But except for moralists, it was not a universal principle of what was right or wrong or what was universally applicable to all cultures and peoples of the world. This meant that there were multiple standards and that some members of this amorphous international society benefited from exceptionalism, just as happens today when it suits the interests of major powers.12

With so many exceptions throughout history and so little enforcement over so long, sustaining the desideratum to refrain from the use of force except for a just reason (which was essentially self-defense but which, like many expandable legal concepts, was in practice frequently stretched to the limits of credibility) became increasingly difficult. Yet that concept survived in \textit{jus ad bellum} and managed, by the time of the new millennium, to evolve to the point that major confrontations between States capable of inflicting terrible harm on the world have not only been contained but significantly reduced.


But although the practice of States using force against other States and other peoples has decreased, the concepts and values reflected in the *jus ad bellum* – and its moral and legal validity – have been politically compromised. Despite the post-millennium decline in interstate armed conflicts, States have still found ways to carry out their power and interest objectives, which attests to the success of *realpolitik*, or political realism in international affairs, over commonly shared human and social values. With the advent of the new millennium, *jus ad bellum* was tested by new means and methods of warfare, including the use by States of automated weapon systems (AWS), and new categories of protagonists, including non-state actors, who often provide support and assistance to combatants. This

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14 See infra Section VI and accompanying notes (on the changing nature of aggression).
changing reality requires us to consider a new legal strategy to address aggression: one that helps deter States’ decision makers from resorting to aggression; reduces their resorting to other methods and means of warfare, including the use of AWS; and reaches the ever-expanding groups of non-state actors and organizations (many of whom meet the definition of legitimate businesses and, in the case of certain multinational corporations, are beyond the reach of the law) engaging in such conduct. This new approach requires several paradigm shifts about international law enforcement modalities, particularly as to individual international criminal responsibility and its expansion to non-state actors.17

Although the brand name “aggression” no longer means what it did throughout the five centuries of evolution of jus ad bellum, we must not jettison the historical legacy of jus ad bellum. It is still the international law foundation of the prohibition of the use of force by one State against another State and against other people and, ideally, the use of force by non-state actors as well.18 It must be noted, however, that the customary international law violation of jus ad bellum does not contain principles and norms for the criminalization of individuals’ conduct leading to aggression. This is provided in another legal regime of international law, namely international criminal
II. THE CONTROL AND PROHIBITION OF AGGRESSION IN CONTEMPORARY INTERNATIONAL LAW

In what would appear to be the pursuit of a shared goal, the prevention of aggression, States have taken three paths: defining “aggression,” placing it under the jurisdiction of the United Nations Security Council, and criminalizing it under international criminal law. At the United Nations, the definition of aggression has gone through various stages and committees established by the General Assembly to draft a definition, culminating in a United Nations General Assembly resolution in 1974 after twenty-two years of work. More telling is the fact that the Security Council has never relied on that definition in any of its resolutions pertaining to the use of force by one State against another.

The United Nations Charter includes the prohibition of aggression in Article 39 and confers exclusive jurisdiction in matters affecting peace and security to the Security Council pursuant to Chapter VII. But in all the conflicts it has considered pursuant to its exclusive jurisdiction on matters affecting peace and security under Chapter VII of the Charter, the Security Council has never made a finding of aggression against any State. Throughout its history, the Security Council has dealt with such issues as political rather than legal matters, thus not relying on the 1974 Definition of Aggression. And because of the legal implications that could arise from a Security Council finding that one State committed aggression against another, it never made such a finding. The two major implications would be state responsibility and


\[21\] Id. at 195.
the international criminal responsibility of individual decision makers and senior executors of aggression under international criminal law.\textsuperscript{22}

The criminalization of aggression under international criminal law also has gone through a variety of stages, from post–World War II up to the International Criminal Court (ICC) Kampala Amendments of 2010.\textsuperscript{23} Thus what should have been a coordinated, complementary approach between \textit{jus ad bellum} as it evolved in customary international law (the definition of aggression by the United Nations, the international criminal law definition of aggression by individual decision makers and senior executors) and the application of the principles of state responsibility from the harmful consequences caused by one State to another never materialized. The fragmented and unrelated series of developments ultimately weakened the \textit{jus ad bellum} and its enforcement under international law. But then the world did not witness a Third World War, and the United Nations engaged in a number of peacekeeping operations, all of which indicated a relatively positive outcome, even though outside the historical legal framework that was also apparently being championed.\textsuperscript{24} This may well illustrate the wide gap between the perception of academics, or their wishful thinking, and reality.

If one sets the birth of \textit{jus ad bellum} at 1485 CE, the date of the publication of the \textit{Summa Theologica},\textsuperscript{25} the principle has survived more than 500 years, and one can argue that the reasons for \textit{jus ad bellum} in the time of St. Thomas Aquinas still exist today. But in the postmillennial era of globalization,\textsuperscript{26} a time in which the post–World War II push for collective peace and security, human rights, and international criminal accountability is facing new domestic sociopolitical challenges and greater nationalistic unilateralism under the questionable claims of national security and national interest, this five-century evolution may well have outlived its political usefulness.

The concept of \textit{jus ad bellum} establishes the justification for the prohibition of aggression on the basis of the unarticulated premise that the concept of the “just war” presupposes the existence of a contrasting principle of the “unjust
war.” But between what is deemed a just and unjust war lies a schism filled by contrasting philosophical, theological, political, and legal views – and more important, the absence of any system capable of applying a fair and impartial standard to all States and enforcing it. The struggle that centers on the specificity of a prescriptive norm occurs at the political level, while the criminalization of aggression follows another tortuous course that started only after the end of World War I, when the then-unspecified concept of aggression was retroactively and ambiguously included in Article 227 of the Treaty of Versailles, which identified Kaiser Wilhelm II of Germany as the perpetrator of what was then an unknown international crime.27 This initiative separated the previously prescriptive stage of aggression, which could be thought to have started with the publication of the Summa Theologica in 1485,28 and the first effort at proscribing aggression in 1919, more than 430 years later. The initiative was presumably a tangible expression of the values of humankind and an attempt to regulate the conduct of States by holding a given head of state individually criminally accountable for the international crime of aggression. But that initiative was one of the most successful legal deceptions ever undertaken in the history of international criminal law.29

It started in the aftermath of the defeat of Germany, Austria-Hungary, and the Ottoman Empire in 1918, when the victorious Allies, namely Great Britain, France, Italy, Japan, and the United States30 demanded a heavy toll of punitive reparations from Germany.31 These reparations were

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28 Aquinas, supra note 4 and accompanying text.
30 The following States were also described by the Treaty of Versailles as the Principal Allied and Associated Powers: Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, Czechoslovakia, and Uruguay. Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 235 (entered into force Jan. 10, 1920) [hereinafter Treaty of Versailles].
31 See Frederick Taylor, The Downfall of Money: Germany’s Hyperinflation and the Destruction of the Middle Class (2015). See also Margaret MacMillan, Paris 1919: Six Months That Changed the World (2003); Patrick J. Buchanan, Churchill, Hitler,
reminiscent of discredited practices mostly known in the Roman era, and continuing up to the end of the Middle Ages. Germany’s economy was devastated and its peoples severely penalized, making life so difficult in the ensuing two decades that they helped bring about national-socialism and World War II.\(^{32}\)

Europeans were not, however, satisfied with reparations. They wanted to humiliate the Germans by prosecuting their Emperor, which resulted in Article 227 in the Treaty of Versailles.\(^{33}\) But that was not the end of the story, as Kaiser Wilhelm II was artfully charged to be prosecuted for “a supreme offence against international morality and the sanctity of treaties.”\(^{34}\) No such crime existed at the time, and the artful crafting of Article 227 in 1919, when the Treaty of Versailles was signed,\(^{35}\) was intended to assuage those who had been aggrieved by the German aggression that began on July 28, 1914, with the onset of the First World War. At the same time, the ambiguity of the provision ensured that the German Emperor could never be prosecuted for something that, as defined, did not constitute a crime under international law – or for that matter, a crime under the laws of any State.\(^{36}\) But it did satisfy Western public opinion. The Kaiser sought refuge in The Netherlands, which found that no such crime existed under its laws or international law and said that even if the Allies requested, it would not extradite him to be submitted to an international tribunal that would prosecute him.\(^{37}\) The rest of the world blamed The Netherlands, but the grandchildren of Great Britain’s Queen Victoria,


\(^{33}\) This was true even though Kaiser Wilhelm II was Queen Victoria’s grandson. Catrine Clay, King, Kaiser, Tsar: Three Royal Cousins Who Led the World to War (2006); Correspondance entre Guillaume II et Nicolas II, 1894–1914 (Marc Semenoff trans., 1924).

\(^{34}\) Treaty of Versailles, supra note 30, art. 227.

\(^{35}\) The Article was crafted by someone representing Great Britain at Versailles, where the treaty was drafted. See Bassiouni, WWI, supra note 29, at 268–72; see also M. Cherif Bassiouni, Combating Impunity for International Crimes, 71 U. Colo. L. Rev. 409, 411 (2000).

\(^{36}\) See sources cited supra note 29 (on WWI prosecutions).

including the Kaiser, and the rest of the European monarchy could breathe a sigh of relief that no head of state was held internationally accountable.

Although Article 227 of the Treaty of Versailles did not establish a criminal offense for which the Kaiser could be prosecuted, its inclusion in the treaty was the first time in history that a head of state was targeted to be tried before an international judicial body for what became known as “crimes against peace” after World War II and “aggression” in the Kampala Amendments of 2010.

A few years later, a number of European States, spurred in part by the United States, entered into the Kellogg–Briand Peace Pact in 1924, which implicitly prohibited State Parties from using force against each other. Although the text contained no absolute prohibition against the use of armed

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38 See sources cited supra note 33 and accompanying text (on Queen Victoria’s heirs). See also Willis, supra note 29.


force by one State against another, the pact was another small step forward, another confirmation of the *jus ad bellum* prohibition of aggression.\(^{42}\)

The historical record shows that aggression was not prohibited outright and certainly was not criminalized, but it also shows the slow growth of customary international law between 1919 and 1924. After World War II it became the legal building block for the proscription of aggression as “crimes against peace” and for holding accountable those responsible for it, including heads of state.\(^{43}\)

What the Kellogg–Briand Pact did in 1924 was reinforce the customary international law prohibition of aggression, which was firmly in the historical track of *jus ad bellum*, even though it was not in the international criminal law track of individual criminalization of the violation of *jus ad bellum*. Yet by necessity after World War II, this became the makeshift bridge between the *jus ad bellum* and the individual criminalization of its violation in the post–World War II prosecutions, when the victorious Allies felt compelled to deal with Nazi Germany’s and Japan’s acts of aggression. At that time, they had little customary international law to rely on except the Kellogg–Briand Pact of 1924, which by necessity became the foundational basis for “crimes against peace,” as enunciated in 1945 in the International Military Tribunal (IMT) Charter’s Article 6(a), the International Military Tribunal for the Far East (IMTFE)

\(^{42}\) Article 1 provides that

ARTICLE I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.


\(^{43}\) See sources cited supra note 40 and accompanying text (on the Nuremberg and Tokyo Charters and Control Council Law No. 10). See also sources cited infra note 44 (on “crimes against peace”). Later in 1998, the Rome Statute provides the following:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Statute’s Article 5(a), and the four major Western Allies’ Control Council Law No. 10.\textsuperscript{44} Almost at the same time, the United Nations Charter was adopted, but it shied away from using the then-current term of “crimes against peace,” preferring the more flexible term “aggression.”\textsuperscript{45} The United Nations Charter’s prohibition of aggression did not, however, include individual criminal responsibility for those who decided and/or carried out such acts, even though the U.N. language was adopted about the same time as the IMT Charter and the IMTFE Statute and the prosecution of individuals before the two international tribunals for “crimes against peace.”\textsuperscript{46} This was a politically artful

\textsuperscript{44} For all practical purposes, between 1624 and the international community’s reaction to the atrocities of World War II in 1945, history reveals how hard it was to achieve any progress to advance international criminal justice against political obstacles. See M. Cherif Bassiouni, Challenges to International Criminal Justice and International Criminal Law, in CAMBRIDGE COMPANION, supra note 19, at 533 [hereinafter Bassiouni, Challenges to ICJ & ICL]. And it was not until post–World War II that the international community adopted the London Charter on August 8, 1945, for the European theater, the Tokyo Charter on January 19, 1946, and Control Council Law No. 10 on December 20, 1945, that international criminal justice caught up with the commonly shared values of most people of the world, and its promotion was supported by the political will of States. See London Charter, supra note 40; Tokyo Charter, supra note 40; Bassiouni, LEGISLATIVE HISTORY OF THE ICC, supra note 39, at 49–53; Bassiouni & Schabas, supra note 39, at 20–33. Yet even then, the London Charter, the Tokyo Charter, and Control Council Law No. 10 defined aggression respectively as follows:

- London Charter art. 6(a): Crimes Against Peace: namely, planning, preparation, initiation or waging of a [declared] war 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;
- Tokyo Charter art. 5(a): Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- Control Council Law No. 10 art. II(1)(a): Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

London Charter, supra note 40, art. 6(a); Tokyo Charter, supra note 40, art. 5(a); Control Council Law No. 10, supra note 40, art. II(1)(a).

\textsuperscript{45} As described supra in note 44. See also U.N. Charter arts. 1(1), 39, allowing the use of force only for self-defense under Articles 51 and 52 and whenever it is authorized by the Security Council under Charter VII of the Charter. In time, the attempt to expand it to humanitarian intervention and to the “obligation to protect” were brought to a standstill. See Helal, Justifying War, supra note 2, at 577–642.

\textsuperscript{46} To the best of this author’s knowledge, there was only one case in which “crimes against peace” was successfully prosecuted under Control Council Law No. 10. See “The Ministries Case,” in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, Judgment, 358 (1949), available at www.loc.gov/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf.
severance of the postulates of the new international legal order reflected in the U.N. Charter: The Charter not only failed to address the criminalization of “aggression”; it did not even define it. It left this task to the Security Council, subject to the veto power of its Permanent Members.47

The political work evidenced in the Charter amounted to a functional decoupling of “aggression” as a political concept from the prohibition of aggression under customary international law and the international crime of “crimes against peace” under international criminal law, for which individual criminal responsibility attaches,48 up to and including heads of state.49 And so it remains to date except for the forward progress of the Kampala Amendments, subject to all their limitations.50

III. THE SITUATION AFTER WORLD WAR II

The historic evolution described above occurred mostly after World War II and in particular during and after the Cold War. During the Cold War years, from 1948 to 1989, States used the same political games and maneuvers they had used in the past, namely the manipulation of international institutions and the exploitation of the gaps and contradictions that existed in international


49 See London Charter, supra note 40, art. 7 (“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”); Tokyo Charter, supra note 40, art. 6 (“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”); Control Council Law No.10, supra note 40, art. II(4)(a) (“The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.”).

50 See sources cited infra notes 114–134 and accompanying text (discussion of the Kampala Amendments).
law. The powerful States’ manipulation of the United Nations’ organs and its bureaucracy shows how different stages can be set for different political plays and players in order to convey something to the international community that may not necessarily be the actual outcome. This is what occurred with aggression as described in this Section during the post–World War II era. What follows briefly describes multiple processes in connection with defining and criminalizing aggression and establishing an international criminal jurisdiction and then the International Criminal Court, which has jurisdiction over the perpetrators of that international crime.51

The events of 1939 and 1940 outdistanced customary international law on the topics of aggression, war crimes, and what became known as “crimes against humanity.”52 Nazi Germany blatantly invaded Czechoslovakia and Poland and rolled across Belgium before it invaded France and prepared to invade the United Kingdom. By the time Germany invaded the Soviet Union in June 1941, World War II was well underway. About six months later, on December 7, 1941, Germany’s ally the Empire of Greater Japan, which had already invaded China’s Manchuria in 1937 and committed brutal, mass atrocities against the civilians of Nanking,53 surreptitiously attacked the United States at Pearl Harbor.54 The conduct of Germany and Japan met any conceivable definition of aggression and certainly fell within the original scope of the limitations on the

51 For crimes within the ICC’s jurisdiction see the Rome Statute, supra note 23, art. 5. For ICC jurisdiction over heads of state, see id. art. 27(1)-(2). For the definition and provisions relating to the crime of aggression in the Kampala Amendments see the Kampala Amendments, supra note 23.


53 In December 1937, more than 300,000 Chinese civilians and soldiers were raped, tortured, and murdered by Japanese forces. But that was of no interest or concern of the victorious Western Allies. See Iris Chang, The Rape of Nanking: The Forgotten Holocaust of World War II (2012). The Japanese military, with the assistance of the Japanese government, also sexually and physically exploited more than 100,000 women throughout Asia by forcing them into enforced prostitution. These women, referred to as “comfort women” were forced into “comfort stations” established throughout Asia by Japan to be repeatedly raped and assaulted by Japanese soldiers. Shellie K. Park, Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum, 3 ASIAN-PAC. L. & POL’Y J. 25 (2003). See also George Hicks, The Comfort Women: Japan’s Brutal Regime of Enforced Prostitution in the Second World War (1997); Yoshimi Yoshiaki, Comfort Women: Sexual Slavery in the Japanese Military During World War II (Suzanne O’Brien trans., 2000).

jus ad bellum that St. Thomas Aquinas first formulated and that became part of what is now known as natural law.\textsuperscript{55} But beyond the anemic language of the Kellogg–Briand Peace Pact,\textsuperscript{56} no positive international law norm was applicable at the time to the blatant acts of aggression carried out in World War I and in World War II, however defined.\textsuperscript{57} In fact, one could even say that the international community’s inability to agree beyond such an anemic definition in 1919 emboldened Germany and Japan, only twenty years after the

\textsuperscript{55} See generally The Natural Law Reader (Brendan F. Brown ed., 1960); see also Llyod L. Weinreb, Natural Law and Justice 56–65 (1987); Carl J. Friedrich, Philosophical Reflections of Leibniz on Law, Politics, and the State, 11 Nat. L.F. 89 (1966); Luis Legaz y Lacambra, Political Obligation and Natural Law, 2 Nat. L.F. 119 (1937). For a naturalist perspective, see Jacques Maritain, Les Droits de l’Homme et la Loi Naturelle (1942). But see H.L.A. Hart, The Concept of Law (1961); H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958), but cf. Patrick Devlin, The Enforcement of Morals (1965). Compare with Morris Cohen, Moral Aspects of the Criminal Law, 49 Yale L.J. 987 (1940); Jeremy Bentham, A Fragment on Government and an Introduction to the Principles of Morals and Legislation (Wilfrid Harrison ed., 1948). Llyod L. Weinreb, Natural Law and Justice 280 n.7, 47 (1987) (Cicero referred to the jus gentium as law derived from nature or reason. “For Cicero, ‘the universality of a principle is a proof of its naturalness and hence of its validity, for the law of Nature is no mere idea, it is a binding law and no enactment of the people or senatus-consult can prevail against it. The argument, though not put in these words, is obvious: if all races of mankind acknowledge a practice it must be because it has been taught them by their universal mother, Nature. Cicero thus identifies the law of Nature with the jus gentium in the sense of law common to all peoples.’”) (citations omitted) (“The incorporation of natural law into Christian thought is often traced to St. Paul’s statement in the Epistle to the Romans: ‘[W]hen the Gentiles, who have not the law, do by nature those things that are of the law, these having not the law, are a law to themselves; who shew the work of the law written in their hearts, their conscience bearing witness to them.’ Paul is responding to the argument that pagans, not having the benefit of Revelation in the Old Testament, should not be blamed for failing to follow the law. Although his words are at least suggestive of a moral law accessible to reason, biblical scholars do not all agree that in fact he had a conception of natural law in mind. Whether he did or not, his words were so construed by early Christian writers, who referred to them as a textual basis for the doctrine of natural law. There is nothing philosophically new in the use of the doctrine. But it is now identified with the law of God, taught to men by Christ; it is a specifically theological concept and much more concrete than the natural law of the Stoics.”).

\textsuperscript{56} See Kellogg–Briand Pact, supra note 42.

devastations of the First World War, to engage in acts of aggression against other States and usher in World War II.

After the surrender of Germany and Japan in May and August of 1945, the international community struggled with how to respond. By then, efforts had already been undertaken to take a big step forward in history, namely to hold accountable those who had committed acts that were considered crimes against international law in keeping with the early historic concept of *hostes humani generis*, which was first developed in Roman law for those who committed crimes against the Empire and were thus deemed the enemies of humankind.

The historical concept of *hostes humani generis*, as it evolved from Roman law into the post-1300s writings of publicists, culminating with the writings of the Dutch jurist Hugo Grotius in 1624 and many others after him, became the foundational concept of international criminal law and certainly in connection with the drafting of the Charter of the International Military Tribunal, the International Military Tribunal for the Far East Statute, and Law No. 10 of the Allied Control Council (the governing body of the Allied occupation zones in Germany after the end of World War II in Europe). These were the first three international normative instruments that posited “crimes against peace” and “crimes against humanity” as international crimes subject to prosecution; “war crimes” had already been established under international

58 Germany formally announced its surrender on May 7, 1945, and Japan followed in suit on August 14, 1945. See Keegan, Second World War, supra note 54.

59 See Bassiouni, Intro to ICL, supra note 17, at 137–38; see also Cicero, De Officiis (L.H.G. Greenwood trans., 1953). Except that in the Roman conception it was limited to the Roman Empire and did not extend beyond it. Nevertheless, in subsequent times it was found to be a valid legal concept that became internationalized, in part through the writings of Hugo Grotius in 1624, who embodied the notion of aut dedere aut punire in his work *De Jure Belli ac Pacis Libri Tres*, later reflected in Cesare Beccaria’s *Dei Delitti e Delle Pene*. See Grotius, supra note 6; M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995). See also M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 420–25 (6th ed. 2014); Bassiouni, ICL Vol. 1, supra note 41, at 129–31; Cesare Beccaria, *Dei Delitti e Delle Pene* (1764).

60 See Bassiouni, Intro to ICL, supra note 17, at 137–38. See also Cicero, supra note 59; sources cited supra note 6 (on early writers on international criminal law).


At the IMT, these two crimes were charged for the first time in Counts One and Two, specifically:
humanitarian law but had never been prosecuted by an internationally established tribunal.\(^62\)

The primary challenge in prosecuting “crimes against peace” was that until then, it did not exist as an international crime under normative international law.\(^63\) The criminalization of “crimes against peace” and the prosecution of its perpetrators under the Nuremberg and Tokyo Charters was founded on the existing prohibition in the Kellogg–Briand Pact, even though the language of that treaty offers little support for the recognition that aggression or “crimes against peace” as defined in the Nuremberg and Tokyo Charters constituted a crime under international law.\(^64\) This and other shortcomings led some to

When finally completed by the several staffs, the indictments contained four counts. Count One charged the defendants, during a period of years preceding May 8, 1945, with participating in a common plan or conspiracy to commit crimes against peace, war crimes, and crimes against humanity, as defined in the Charter. Particulars of the nature and development of the alleged common plan were specified and the Nazi Party was described as the central core of the plan.

Count Two charged the defendants, during a period of years preceding May 8, 1945, with participating in the planning, preparation, initiating, and waging wars of aggression. The actions against Austria and Czechoslovakia were not specified as aggressive wars; but it was charged that wars of aggression were waged against Poland, the United Kingdom and France, Denmark and Norway, Belgium, the Netherlands and Luxembourg, Yugoslavia and Greece, the U.S.S.R., and the United States of America.

**Whitney R. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946, at 30 (rev. ed. 1999) [hereinafter Harris, Tyranny on Trial].** The above-cited author, Mr. Whitney R. Harris, worked under Justice Robert Jackson as a prosecutor at the IMT trials at Nuremberg and was a Lieutenant Commander in the United States Navy.

\(^62\) The exception is the 1474 trial of Peter von Hagenbach, who was hired by the French Duke of Burgundy to occupy the city of Breisach and compel taxes from its residents. The townspeople rebelled and von Hagenbach followed the Duke’s orders to sack, pillage, and burn the city. Von Hagenbach was subsequently prosecuted by leaders from member States of the Holy Roman Empire, which for all practical purposes established the first international criminal tribunal. At trial, von Hagenbach attempted to exhibit the written orders of the Duke, but the judges refused his request and by refusing to accept von Hagenbach’s defense, they shielded the Duke from responsibility. Bassiouni, Intro to ICL, supra note 17, at 149–50. The post–World War I Leipzig trials prosecuted by the German Reichsgericht (Supreme Court) are detailed in Bassiouni, Intro to ICL, supra note 17, at 419–21. See also Willis, supra note 29, at 118.

\(^63\) See Ferencz, supra note 41, at 205–25, 415–91; Bassiouni & Ferencz, supra note 41, at 210–14; Bassiouni & Schabas, supra note 39, at 27–33. See generally Bassiouni, CAH, supra note 41, at 111–66; Scharf, supra note 41, at 369–74.

\(^64\) And that the tenuous language of the Kellogg–Briand Pact did not violate the “general principles of international law,” which include the “principles of legality” recognized in almost every national criminal justice system in the world. See Bassiouni, General Principles, supra note 57. See also the definitions of “crimes against the peace,” applied through the London Charter, Tokyo Charter, and Control Council Law No. 10, supra note 40.
refer to these two sets of proceedings as “victors’ justice,” even though those who were prosecuted had committed acts that by any stretch of the imagination would still be within the meaning of “crimes against peace” in existing customary international law.

In addition to the prosecutions under the Nuremberg Charter, the Tokyo Charter, and Control Council Law No. 10 (which was applicable only to the European theater), other prosecutions were undertaken by States within their domestic legal systems and by nationally established military commissions and other ad hoc courts. Such bodies were established by Australia and China, and in the Far East by France, The Netherlands, the United

\[65\] August von Knieriem, The Nuremberg Trials 101–05 (1959). See also Otto Pannenbecker, The Nuremberg War-Crimes Trial, 14 DePaul L. Rev. 348 (1965); Otto Kranzbuhler, Nuremberg Eighteen Years Afterwards, 14 DePaul L. Rev. 335 (1965); Herbert Kraus, The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years, 13 DePaul L. Rev. 233 (1964); Carl Haensel, The Nuremberg Trial Revisited, 13 DePaul L. Rev. 248 (1964); Harris, Tyranny on Trial, supra note 61, at 567–70. See generally Whitney R. Harris, The Tragedy of War (2004). The prosecutions under the IMTFE in Tokyo were far less rigorous than those under the IMT at Nuremburg, and such legal niceties as whether “crimes against peace” existed in international law were given short shrift in Tokyo.


\[66\] In addition to the prosecutions by the IMT and the IMTFE, the four major Allies also prosecuted the same crimes in Germany pursuant to Allied Control Council Law No. 10. See Telford Taylor, Final Report to the Secretary of the Army on the Nurnberg War Crimes Trials Under Control Council Law No. 10 (1949); Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992). To this writer’s best knowledge, only in “The Ministries Case” was “crimes against peace” successfully prosecuted. See The Ministries Case, supra note 46. Since then, to this writer’s knowledge, there have been no national prosecutions for “crimes against peace” or “aggression.”

\[67\] From 1942 onward, the Australian government undertook numerous war crime investigations that resulted in 300 trials involving 812 mostly Japanese alleged war criminals. Narrelle Morris, Obscuring the Historical Origins of International Criminal Law in Australia: The Australian
Kingdom, and the United States. The United States also established military commissions in Europe to prosecute war crimes committed throughout the

The British conducted war crimes trials of Japanese in Singapore for crimes committed on the


Even while World War II was ongoing, as early as 1942 the Republic of China had indicated that Japan would be held responsible for the crimes committed in China. Zhang Tianshu, The Forgotten Legacy: China’s Post-Second World War Trials of Japanese War Criminals, 1946–1956, in 2 HISTORICAL ORIGINS OF ICL, supra note 19, at 267, 272. Potential war crimes were investigated by the Investigation Commission on Crimes of the Enemy and the Investigation Commission on Damage and Loss of War. Id. After the war ended, an additional commission was established regarding the crimes committed in Nanjing (Nanking). Id. The Republic of China acted on its intent to prosecute, and Chinese military courts were established at ten different locations by the end of April 1949. These courts were located in Nanjing, Shanghai, Peking, Hankou, Guangzhou, Shenyang, Xuzhou, Jining, Taiyuan, and Taipei and sentenced 145 people to death and more than 300 people to prison. Ling Yan, The 1956 Japanese War Crimes Trials in China, in 2 HISTORICAL ORIGINS OF ICL, supra note 19, at 215, 215.

An additional forty-five Japanese nationals were prosecuted for war crimes before a Special Military Tribunal (SMT) in Taiyuan and Shenyang in 1956. Id. at 216. At the time of the SMT trials, there was a new Chinese government that had abolished all laws enacted before 1949 by the former government. Therefore, a Decision on the Handling of Japanese War Criminals under Detention Who Committed Crimes during the Japanese Invasion War was adopted in April 1956 and provided for the prosecution of Japanese war criminals by the Special Military Tribunal as well as the court’s jurisdiction. Id. at 222–23. The SMT’s temporal jurisdiction ranged from September 1931 when the Imperial Japanese Army first invaded Manchuria until Japan’s World War II surrender in September 1945. The majority of crimes prosecuted by the SMT fell under the international crimes of war crimes and crimes against humanity, as well as the crime of aggression. Id. at 225. Further, only individuals were held accountable for crimes; none of the accused was part of the group that formulated a state policy of aggression or made the decision to wage war. Id. at 226.

The British conducted war crimes trials of Japanese in Singapore for crimes committed on the

Japanese-occupied islands of Andaman and Car Nicobar. Cheah Wui Ling, Post-Second World War British Trials in Singapore: Lost in Translation at the Car Nicobar Spy Case, in 2 HISTORICAL ORIGINS OF ICL, supra note 19, at 301. Japanese military personnel were alleged to have subjected residents of the two islands to torture, summary trials, executions, and mass killings during World War II, and survivors traveled to Singapore to give testimony at the trials. Id. at 302. Sixteen Japanese defendants were prosecuted for crimes committed against civilians. Id. at 305–06. See also David J. Cohen, The Singapore War Crimes Trials and Their Relevance Today, 31 SING. L. REV. 3 (2013). The British established the British War Crimes Courts in Hong Kong, which had jurisdiction over war crimes committed against any British or Commonwealth citizens or suspects captured within Hong Kong. See HONG KONG’S WAR CRIMES TRIALS (Suzannah Linton ed., 2013).

In 1945, the French Permanent Military Tribunal in Saigon (FPMTS, or Saigon trials) was established and tried 230 Japanese war criminals in Indochina. Ann-Sophie Schoepfel-Aboukrat, The War Court as a Form of State Building: The French Prosecution of Japanese War
continent that did not include “crimes against peace.”\textsuperscript{69} National prosecutions were also brought in the domestic legal systems of Czechoslovakia, France, Germany, Poland, the Soviet Union, and Yugoslavia,\textsuperscript{70} but they,

\textit{Trials were held in Czechoslovakia for crimes against the State, crimes against people, and...}
too, did not involve “crimes against peace” as defined in the Tribunal Charters and Control Council Law No. 10.71

The post-World War II international criminalization of aggression under the rubrique “crimes against peace” was short lived and ended with the IMT and IMTFE. Other than The Ministries Case, no convictions for that crime are known by this writer to have taken place under Control Council Law No. 10 in the European theater by any of the four major Allies.72

Separately and independently, two other political and legal tracks developed within the emerging United Nations system. But the criminalization of aggression remained a contested subject from 1947 until 1998, when that crime was included in the Statute of the International Criminal Court, though it remained undefined until the Kampala Amendments.73

IV. AGGRESSION IN THE UNITED NATIONS CHARTER

The prohibition of aggression first arose under the United Nations Charter, despite the Charter’s lack of a definition thereof and failure to provide for international criminal accountability for its transgression. The process of parceling aggression into different legal regimes continued, which did not strengthen the overall legal effect of the prohibition of aggression or the international criminal accountability of its perpetrators.

As stated in Article 1 of the Charter, the United Nations was established

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

Bassiouni, ICL ENFORCEMENT]. The Soviet Union prosecuted more than 80,000 individuals for crimes taking place during World War II under its 1943 Punishment Decree, which established military field courts. Bılıkova, supra, at 716–17. Between 1944 and 1946, Yugoslavia also prosecuted individuals for war crimes under a newly passed Act on Criminal Offences Against People and the State. Id. at 709.

71 See supra note 44 (on definitions of “crimes against peace”).
73 Kampala Amendments, supra note 23.
of international disputes or situations which might lead to a breach of
the peace.\textsuperscript{74}

Paragraph 4 of Article 2 requires that all Members “refrain in their inter-
national 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.”\textsuperscript{75} The Charter then charges the
Security Council, an organ of the United Nations, in Article 39 with responsi-
bility to “determine the existence of any threat to the peace, breach of the
peace, or act of aggression and . . . make recommendations, or decide what
measures shall be taken in accordance with Articles 41 and 42, to maintain or
restore international peace and security.”\textsuperscript{76}

The Charter mandated the Security Council to determine the existence of
acts of aggression even though the term remained undefined until 1974.\textsuperscript{77}
The tortuous path to the definition of aggression that followed evidenced
the political manipulations of States seeking to delay, if not undermine,
an enforceable definition of aggression as referred to in Article 39 of the
Charter.

While the Security Council was intended to determine the existence of acts
of aggression, it was not intended to be a collective security system. Instead, it
was a reflection of the experiences of World War II and the realization that
nuclear weapons existed and could be used by major powers and other States
to the world’s detriment. France, the Soviet Union, the United Kingdom, and
the United States saw themselves as the guardians of peace who by their
collective action could ensure such outcomes even if occasionally small

\textsuperscript{74} U.N. Charter art. 1(1) (emphasis added).
\textsuperscript{75} Id. art. 2(4).
\textsuperscript{76} Id. art. 39 (emphasis added). \textit{See also} Wolfgang Friedmann, \textit{The Changing Structure of
International Law} 60 (1964). Despite the mandate of the Security Council being limited to
maintaining international peace and security, a State-centric view of international law, in the
1990s increased focus on human rights gave rise to the idea that human beings, not States,
should be the primary beneficiaries of international legal protections. This was known as the
humanization of international law, and it impacted the perceived role of the Security Council
in regard to international security. \textit{See generally} Paul W. Kahn, \textit{Speaking Law to Power:
(2000); Theodore Meron, \textit{The Humanization of International Law} (2006); Menno T.
Kamminga, \textit{Humanisation of International Law, in Changing Perceptions of Sovereignty
and Human Rights: Essays in Honour of Cees Flinterman} 29 (Ineke Boerehiijn & Jenny
Goldschmidt eds., 2008).

\textsuperscript{77} Aggression was finally defined after a long journey that began in part in 1947 (but mostly in
conflicts erupted, as long as those conflicts did not threaten what the major powers saw as international peace and security.\footnote{This was described by one author as follows: First and foremost, however, the foundation of peace was believed to be the prevention of conflict between the great powers. With their superior militaries and political influence, it was assumed that only these states could seriously undermine international security. Therefore, the architects of the UN system established a great power concert, in the form of the Security Council, to oversee international security relations. The negotiations over the prerogatives of the Security Council and the powers of its permanent members demonstrated that the Council was indeed designed as a great power concert and not, as many assume, a collective security system. Under collective security, an attack against one is an attack against all. Nowhere in the Charter, however, does the UN make such a pledge to its members. Nowhere is the security, territorial integrity, and political independence of states guaranteed. Never was it promised that the Security Council would vigilantly subdue all aggressors and indiscriminately protect all victims. Once this reality of UN “collective security” is understood, it becomes apparent that the Security Council’s record of selectivity, politicization, and double standards are neither defects nor failures, but inherent features of the system.
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Mohamed S. Helal, Am I My Brother’s Keeper? The Reality, Tragedy, and Future of Collective Security, 6 Harv. Nat’l Sec. J. 583, 470 (2015) [hereinafter Helal, Am I My Brother’s Keeper?]. See also, id. at 470 n.589 (citing Peter Opitz, Collective Security, in A CONCISE ENCYCLOPEDIA OF THE UNITED NATIONS 38 [Helmut Volger ed., 2d ed. 2006] [the “tendency of the permanent members toward selective action” is a deficit of U.N. collective security]); id. at 398 (“A solution that is repeatedly proposed to overcome these challenges is to institute a system of collective security. To many scholars, the United Nations Charter represents the latest attempt to establish such a system. This, I contend, misunderstands the UN’s purposes and structure. The UN security regime, with the Security Council at its epicenter, is not a collective security organization. Rather, it resembles a great power concert designed to contribute to preventing conflict between the leading states in the international political system.”) (citations omitted); id. at 400–01 (“The second characteristic of collective security is that its members are granted legal assurances that the collectivity will unfailingly come to their aid in the event of aggression. This certainty of a collective response ‘permits no ifs or buts.’ In other words, collective security functions in a nondiscriminatory manner; all aggressors will be equally opposed and all victims will be equally defended. Therefore, participation in a collective effort to confront aggression must be forthcoming regardless of the identity of either the aggressor or the victim and independently of whether the threat or act of aggression jeopardizes vital interests of the participating state.”) (citations omitted). See also Gary Wilson, The United Nations and Collective Security 5 (2014); Oscar Schachter, Authorized Uses of Force by the United Nations and Regional Organizations, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65 (Lori Damrosch & David Scheffer eds., 1991); José E. Alvarez, Judging the Security Council, 90 Am. J. Int’l L. 1, 2 (1996); Ved P. Nanda, Preemptive and Preventive Use of Force, Collective Security, and Human Security, 33 Denv. J. Int’l L. & Pol’y 7 (2004) [hereinafter Nanda, Preemptive and Preventive Use of Force]; Thomas M. Franck, Collective Security and UN Reform: Between the Necessary and the Possible, 6 Chi. J. Int’l L. 597, 605 (2006); Christine Gray, The Charter Limitations on the Use of Force: Theory and Practice, in The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945, at 86, 86–87 (Vaughan Lowe et al. eds., 2008); Ruth B. Russell, A History of the United Nations Charter: The Role of the
While the Security Council was never intended to serve as a collective security body, the experiences of World War II and the existence of nuclear weapons led to the acceptance that the United Nations, at times, needed to serve as a peacekeeper among nations, both through bureaucratic and political processes as well as through peacekeeping operations. Only three years after the United Nations was established, the Security Council passed a resolution establishing the United Nations Truce Supervision Organization (UNTSO) to “assist the United Nations Mediator and the Truce Commission in supervising the observance of the truce in Palestine” in 1948. One year later, again by resolution, the Security Council assigned the UNTSO to monitor four armistice agreements between Israel and the neighboring countries of Egypt, Jordan, Lebanon, and the Syrian Arab Republic. These two resolutions sparked the lengthy history of United Nations peacekeeping operations, which includes seventy-one missions undertaken since 1948. Currently there are sixteen ongoing U.N. peacekeeping operations, across four continents. According to Article 17 of the U.N. Charter, every Member State is legally obligated to pay its respective share toward United Nations peacekeeping operations, and in addition to their financial contributions, 128 States have voluntarily contributed uniformed personnel to such operations. The budget for these peacekeeping operations has grown from about $4 million in 1948 to approximately $7.87 billion for 2016–2017. Some studies about the effectiveness of U.N. peacekeeping operations have been conducted, but none has been comprehensive enough to prove that these operations have contained or controlled aggression or the extent to which they have limited the human harm that conflicts have inflicted. One has to assume that they have had some positive effect, even though the cost–benefit analysis of these bureaucratically driven operations is generally negative. But if we add the positive outcomes of these operations to the Security Council’s involvement in situations affecting peace and security (even when referring to them as aggression), can we assume that these disparate efforts reduced occurrences of United Nations Peacekeeping Operations Fact Sheet: 31 May 2017, United Nations, www.un.org/en/peacekeeping/documents/bnotelatest.pdf.


82 Id.

83 Id.


85 United Nations Peacekeeping Operations Fact Sheet, supra note 81.
aggression? The answer, in light of the past millennium’s reduction of conflicts involving States (as described in Section VI) tends to be positive, though no scientific causal connection can be established between the decline in the number of aggressions by one State against another and the policies and practices of the United Nations. Nevertheless, inferences can be drawn with due consideration to other factors affecting such an outcome.

Despite the United Nations’ historical failure to prevent conflicts or to intervene in conflicts to minimize their harmful effects, the major powers have resisted the call for unilateral humanitarian intervention. The first of these occurred in 1971, just about twenty-five years after the establishment of the United Nations, when Indian forces entered what is now Bangladesh (then East Pakistan) in response to massive human rights abuses amounting to war crimes and crimes against humanity against the people of East Pakistan by the West Pakistani military. The situation forced an estimated eight million refugees to flood into India, and between 300,000 and three million Bangladeshis lost their lives. Following the invasion, India justified its use of force through unilateral intervention to the United Nations, stating that the duty to refrain from using military force did not apply because Bangladesh had become “a victim of colonial rule and was not a self-governing territory” and such force was necessary to prevent loss of life and promote self-determination.


87 A representative of the International Commission of Jurists described the conduct/treatment to the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities as “killing and torture; mistreatment of women and children; mistreatment of civilians in armed conflict; religious discrimination; arbitrary arrest and detention; arbitrary deprivation of property; suppression of the freedom of speech, the press and assembly; suppression of political rights; and suppression of the right of migration.” And “[o]ther reports have indicated that a ‘coldblooded, planned attempt at systematic and selective killing of the leaders of the Awami League, Bengali military and police officials, and intellectuals (especially university teachers, writers and students), was undertaken purportedly to deprive East Pakistan of any future leadership.” Ved P. Nanda, Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan), 66 Am. J. Int’l L. 321, 332 (1972) [hereinafter Nanda, Self-Determination in International Law].

88 See Nanda, Self-Determination in International Law, supra note 87, at 523 n.9.

89 Independent researchers put the number at 300,000 to 500,000 victims, while the Bangladesh government estimates as many as three million victims. Mark Dummett, Bangladesh War: The Article that Changed History, BBC News (Dec. 16, 2011), www.bbc.com/news/world-asia-16207201.

90 Franck & Rodley, supra note 86, at 276.
the United Nations, and more particularly the Security Council, with respect to the concept of collective force and with it the concept of humanitarian intervention as we understand it today.

The concept of unilateral humanitarian intervention has generally been rejected by the international community. But the rejection of unilateral humanitarian intervention did not stop the United States, acting through NATO from March until June, 1999, from using force against Serbia after events in Kosovo led to the expulsion of an estimated 800,000 ethnic Albanians living in Kosovo. Over eleven weeks, NATO bombarded Serbia in the largest allied military operation in Europe since World War II, causing significant civilian casualties and destroying Serbian weapons, helicopters, and infrastructure. For all intents and purposes, no further developments have been made with respect to the doctrine of humanitarian intervention. But the debate continues: despite U.N. Secretary-General Kofi Annan’s concern over NATO’s use of force in Serbia, one year later, in 2000, he posed the question to all Member States: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a

92 Ved P. Nanda, NATO’s Armed Intervention in Kosovo and International Law, 10 U.S. A.F. Acad. J. Legal Stud. 1 (1999–2000). The airstrikes raised concerns of the then–Secretary General of the United Nations Kofi Annan, as they were undertaken without Security Council authorization. Id. at 8.
Srebrenica— to gross and systematic violations of human rights that offend every precept of our common humanity?"

What these and other cases reveal is the existence of a political and legal gap between what international law posits and prohibits and what the United Nations is capable of doing to prevent aggression and its harmful consequences for civilian populations. The effort to fill this gap by the doctrine of humanitarian intervention had a short life span, no matter what the human consequences were. A few years later, a promising new international initiative was developed, but it was stillborn.

In 2000, the concept of the “Responsibility to Protect” was first actively developed by the International Commission on Intervention and State Sovereignty, and at the 2005 World Summit all United Nations Member States formally agreed to help protect the world from genocide, war crimes, and crimes against humanity. It was a grand declaration, subscribed by many heads of state in a formal ceremony, but again the world was duped. The declaration was never acted upon, and soon thereafter it became another of those historical legal appendages intended to make the peoples of the world feel better about a system that was not likely to become better.

Dividing aggression into a political concept, subject to the political considerations of the Security Council, including the veto power of its five Permanent Members; a legal definition; and the individual criminalization of those who engage in it (namely, its leaders and senior executors) has worked brilliantly to the benefit of States’ interests and to the detriment of the world’s peoples. This history – and what follows in Section V – are an extraordinary, perhaps unique, example of how States have played the games of realpolitik by using U.N. bodies and mechanisms to mandate different committees with different tasks to pursue different ends, creating the appearance of action while actually fostering the status quo.

95 The Commission described the concept as “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.” Int’l Comm’n on Intervention and State Sovereignty, The Responsibility to Protect VIII (2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf.
V. THE POST–WORLD WAR II EFFORTS TO DEFINE AGGRESSION AND THE ESTABLISHMENT OF INDIVIDUAL INTERNATIONAL CRIMINAL RESPONSIBILITY

A. Collective Responsibility

Historically, defeated tribes or nations have paid a heavy price to the victors, a collective responsibility that stopped only when the victors had exacted from the vanquished land material goods or other forms of payment. The victors usually argued that these payments were either a penalty for the defeated group’s decision to wage war or reparations for damages it had inflicted in fighting – two forms of collective punishment that reached their end with the Treaty of Versailles in 1919, when the victorious Allies exacted costly reparations from Germany.\(^97\) France obtained the territories of Alsace-Lorraine and, beginning in 1921, occupied the Ruhr industrial district of Germany, which produced eighty percent of the country’s coal,\(^98\) and all former German overseas colonies became League of Nations mandates.\(^99\) The result of this type of collective punishment, under the guise of reparations, was later identified as one of the causes for the rise of national-socialism in Germany and for World War II.\(^100\)

By the 1940s, however, many in the international community had decided that this kind of collective punishment was unfair because it violated the rights of those who opposed the war, those who did not engage in it, and future generations who should not be responsible for what their ancestors had done. But that shift still allowed for some new concepts of collective criminal responsibility to arise, though that took some time in the different legal systems throughout the world. In common-law countries, those who participated in a crime or aided and abetted its commission were held as criminally responsible as those who actually carried out the crime. In other legal systems, participation in organized criminal groups, such as the Mafia in Italy and other groups known in the French criminal code as “association de malfaiteurs,” became criminalized no matter how much the individual participated in or initiated

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98 Nicholas Roosevelt, The Ruhr Occupations, 4 Foreign Aff. 113 (1925).
100 As the German people struggled to survive under the enormous burden of the reparations, the loss of their major coal industry and an important economically productive territory had harsh consequences. See generally Roosevelt, supra note 98.
the goals of the criminal organization. The IMT also recognized this form of criminality in establishing the responsibility of the members of the SS (an abbreviation of Schutzstaffel, the black-uniformed elite corps and self-described “political soldiers” of the Nazi Party who had immense police and military powers), and the SA (the brown-shirted Storm Troopers, another paramilitary organization).\footnote{SS Police State, U.S. HOLOCAUST MEM’L MUSEUM, www.ushmm.org/outreach/en/article.php?ModuleId=10007675.} This meant that mere membership in an organization deemed criminal carried with it individual criminal responsibility, irrespective of what the individual did.\footnote{London Charter, supra note 40, art. 10 (“In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.”); see also BASSIOUNI, INTRO TO ICL, supra note 17, at 96–104.} The individuals’ actual conduct was left for the judge to consider when making decisions for purposes of punishment.

International criminal law (ICL), since its early beginnings with the prohibition of certain crimes under *jus in bello*, then piracy and the slave trade, remained focused on the individual actors involved in the actual commission of the crime or any of its elements. It did not bring organizations into its scope. It is only recently, in the millennial era, that ICL has defined certain international crimes such as terrorism as including elements of collective criminal responsibility. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) did establish the doctrine of “joint criminal enterprise” (JCE), which is a form of group criminality but not of collective criminal responsibility.\footnote{Joint criminal enterprise had its roots in Nuremberg conspiracy law but was largely created by the jurisprudence of the ICTY. Under the joint criminal enterprise theory, “an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design that involves the commission of a crime provided for in the Statute if the defendant participates with others in the common design.” BASSIOUNI, INTRO TO ICL, supra note 17, at 373–74. The ICTY and ICTR judges found joint criminal enterprise implicitly, though not explicitly, included in Article 7(1) and Article 6(1) of the respective Statutes on the issue of commission. See S.C. Res. 827, supra note 47, art. 7(1) (“1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”); S.C. Res. 955, supra note 47, art. 6(1) (“1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”). See also Prosecutor v. Krajišnik, Case No. IT-00–39, Judgment, ¶¶ 871–93 (Sept. 27, 2006); Prosecutor v. Plašiće, Case No. IT-00–39 & 40/A, Judgment Summary, § 2.} This is an important distinction to keep in mind.
when considering who should be included in the international criminalization of aggression.  

Aggression is more complex and more complicated, as are different types of massive criminality evident in the crimes committed during the Nazi regime and in the communist regime that started in Russia in 1917 and for all practical purposes lasted until 1989. While the number of victims in Nazi Germany – including Jews, Slavs, Gypsies, the mentally ill, and others – is estimated at twenty million people, the number of victims in the Soviet Union is also estimated at twenty million, though no one can verify either of those figures. But surely the scope of the victimization is so broad that it does not really matter how precise the numbers are. Germany paid reparations to Israel and to individual victims pursuant to the Luxembourg Agreements, but

While it may be easy to identify a dictatorial head of state for ordering planes, missiles, ships, and/or troops to cross a national border and attack another State, it may be more difficult to identify those in a cabinet or national security council or armed forces council who shared in the collective decision-making process. The common law–based legal systems have no such problems because their systems include the crime of conspiracy. But that crime exists in some fifty States of the world out of 198. Nevertheless, other States have developed similar concepts or enhanced their traditional concepts of group criminality.


Russia never did. As history shows, rarely has any Western European country ever been made to pay reparations to the indigenous population it has colonized, including those they exterminated.

While all these considerations are valid, we should remember that international endeavors to define aggression or criminalize the responsibility of those who engage in it have carefully avoided the issue of whom to include in what is necessarily a larger circle than in other forms of criminality. This necessarily has to include group criminal responsibility for the principal decision makers and principal executors of the aggression plan. More importantly, the consequences that flow from aggression – such as genocide, war crimes, and crimes against humanity – should also include individual and group criminality.

The exclusion of collective criminal responsibility for aggression is a valid consideration under international human rights law, and this impacts how to deal with victim compensation for those who have suffered the consequences of aggression as provided for in the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But this does not eliminate the responsibility of States for wrongful conduct.

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107 Even further, Russian lawmakers are in talks over the possibility of Russia requesting reparations from Germany for Russians killed during WWII. P. Spinella, Russian Lawmakers Want Germany to Pay Reparations for World War II, MOSCOW TIMES (Feb. 3, 2015), https://themoscowtimes.com/news/russian-lawmakers-want-germany-to-pay-reparations-for-world-war-ii-43525.

108 An exception to this was the payment of reparations by Austria to Austrian victims of the Holocaust and their heirs. Agreement Between the United States of America and Austria, U.S.-Austria, Jan. 23, 2001, T.I.A.S. No. 13,143, www.state.gov/documents/organization/129563.pdf.

109 This includes the United States in connection with the extermination of the Native Americans as well as major colonial powers such as the United Kingdom, France, Portugal, Belgium, and The Netherlands.


After all is said and done, the option of collective responsibility has been abandoned and rejected, and the responsibility of States for wrongful conduct is far from effective.\textsuperscript{112} Victim compensation has worked for Holocaust victims because of political pressure, but not for others. And the major powers’ opposition to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power continues unabated, making sure United Nations resolutions do not even refer to it.\textsuperscript{113} What is left are the Kampala Amendments.

B. Defining Aggression and Establishing Individual Criminal Responsibility

After the extraordinary developments in international criminal justice after World War II, notwithstanding their weaknesses and faults, the international community was buoyed by the hope that it could establish a permanent international criminal court. That meant developing a codification of international crimes and a statute for an international court that would directly enforce the proscription of criminal conduct in what later became the Draft Code of Offences Against the Peace and Security of Mankind, in addition to the existing indirect or state enforcement regime.\textsuperscript{114} In 1946, the U.N. General Assembly adopted a resolution embodying what were then called the

\textsuperscript{112} This may be a reason why for so long many States opposed the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which includes reparations. See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, supra note 110. See also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 I.C.J. Rep. 14 (June 27).


\textsuperscript{114} See Bassiouni, \textit{ICL Enforcement}, supra note 70. At the time, this was the code that was being developed for the codification of international crimes, but ultimately it was not used in the establishment of the International Criminal Court.
Nuremberg Principles, and in 1947 the General Assembly mandated a committee to prepare the draft code of offences, which began its work two years later. In 1950, the General Assembly established a separate committee to draft a statute for a permanent international criminal court. By that time, however, the Cold War was underway and enthusiasm for the codification of international crimes and enforcement through a permanent international court had waned. Aggression, one of the crimes that was to be included in the draft code of offenses, was the most contentious, especially for the United States and the Western Alliance, along with the Soviet Union, and the Eastern Bloc, as the prospects of war or lesser military engagements were very real.

Although the idea of having a definition of aggression that proscribed certain conduct and established individual criminal responsibility was not met with much enthusiasm from the two opposing blocs, the process was already in motion. A committee had been established to prepare a draft code, including aggression, and a separate committee was working on a statute for a permanent international criminal court. Stopping the process tout court would have been very difficult – and probably would have encountered considerable opposition, particularly in the West, so another approach was needed. In an artful bureaucratic manner, one that suited both the Soviet Union and the Eastern Bloc, the preparatory “dirty work” was left to the States of the West, which controlled the U.N. bureaucratic and institutional mechanisms, and that launched a splintered process that lasted for several decades. (This long and twisted process has been described in detail in several works.)

In brief, this was the splintering process: first, the concept of aggression was removed from the mandate of the committee working on the draft code, and a special committee was established in 1952 to define the crime. What once had been a coherent, cohesive process was fragmented: three different committees worked in three different locations at three different times – each with

118 See generally Bassiouni, Legislative History of the ICC, supra note 39, at 54–90; 1–2 Bassiouni & Schabas, supra note 39. See also Bassiouni, CAH, supra, note 41, at 176–83; Bassiouni, Challenges to ICJ and ICL, supra note 44, at 385–87.
its own members, resources, and staff support. Lack of coordination basically ensured that the committees would create distinct products, released at different times, that would not necessarily be compatible. And so it went: in 1953, the committee working on the draft statute for the court produced its final report, which was tabled by the U.N. General Assembly because the committee on the code of offenses had not completed its work.120 That committee did so in 1954, but the General Assembly promptly tabled that draft code because the committee on aggression had not completed its work.121 The Special Committee on Aggression, which consisted of government representatives (not experts, like the other two committees) took its time and produced its report in 1974, a full twenty-two years after it had been established.122

By then the draft code had been tabled for twenty years and was in need of significant updates, if not completely obsolete. The draft statute on an international criminal court, tabled for twenty-one years, also required updating. But to do this, the General Assembly had to provide a new mandate for a new committee to look into the three drafts. That alone took four more years, and by 1978 the General Assembly re-mandated the draft code to the International Law Commission (ILC), but without reference to the draft statute for the court, which remained in limbo.123

It was not clear whether the new mandate to the ILC included the definition of aggression that the General Assembly had adopted in 1974.124 The ILC appointed a new rapporteur125 who had difficulties finding his way through the maze and produced a report in 1991,126 and the process went straight downhill from then on. The final report, which boiled down the elaborate draft code of twelve crimes to only five, was submitted to the General Assembly in 1996 but

was never voted on.\textsuperscript{127} On the topic of aggression, there was no progress. The establishment of an international criminal court moved forward some time later, in part, as a result of the Security Council’s establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)\textsuperscript{128} and the International Criminal Tribunal for Rwanda (ICTR).\textsuperscript{129}

Finally, in 1998, a statute for an international criminal court was adopted in Rome. Article 5 included “aggression” as one of the crimes within the court’s jurisdiction, but at the time the statute was adopted it did not contain a definition for the crime.\textsuperscript{130} It was not until twelve years later that the Kampala Amendments were adopted at the Review Conference, defining aggression in Article 8bis and amending the International Criminal Court’s jurisdiction over the crime of aggression in Article 15bis. The full articles include many details, but the Kampala Amendments generally define “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.”\textsuperscript{131} Article 8bis(1) defines a “crime of aggression” as the

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.\textsuperscript{132}

\begin{footnotesize}
\begin{enumerate}
\item S.C. Res. 827, supra note 47.
\item S.C. Res. 955, supra note 47.
\item Rome Statute, supra note 23, art. 5(2).\textsuperscript{130}
\item Kampala Amendments, supra note 23, art. 8bis(2). As of June 2017, thirty-four States have ratified the Kampala Amendments, subject to any legal issues pertaining to Palestine being considered a State for the purposes of the International Criminal Court. Those thirty-four States are Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, The Netherlands, Norway, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, Macedonia, Trinidad and Tobago, and Uruguay. Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, Update No. 27, CRIME OF AGGRESSION (May 1, 2017), http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/.
\item Id. art. 8bis(1). As evidenced by the text of the Kampala Amendments, the definition adopted in 2010 refers to the 1974 General Assembly Resolution adopting the Definition of Aggression, and the enumerated acts constituting aggression follow the 1974 definition verbatim.
\item Compare G.A. 1974 Res. Defining Aggression, supra note 41, art. 3(a)-(g) with Kampala Amendments, supra note 23, art. 8bis(2)(a)-(g). Both definitions also explicitly refer to acts of aggression as violations of the United Nations Charter, and both definitions apply regardless of
\end{enumerate}
\end{footnotesize}
Those opposed to defining “aggression” had hoped that such a day would never come, but a few committed States and nongovernmental organizations were not about to give up.\textsuperscript{133}

Even with a definition, however, the ICC does not have jurisdiction over the “crime of aggression” with regard to other States that have not specifically opted into the Kampala Amendments, even if those Amendments are ratified by the requisite thirty States Parties.\textsuperscript{134} The Kampala Amendments are, however, what I consider the life-support system for the individual criminalization of the crime of aggression.

VI. THE CHANGING NATURE OF AGGRESSION IN THE NEW MILLENNIUM

Two basic considerations or assumptions should be assessed here. The first: have human and social values been able to limit States’ pursuit of power and wealth through acts that violate those values and the international law that embodies them? The second: was an international legal system ever meant to protect the collective security of all States and all peoples?

\textsuperscript{133} It must be said that Kampala would not have taken place had it not been for the concerted efforts of a number of persons, chief among them Ambassador Zeid Ra’ad Al Hussein of Jordan, who served as President of the Assembly of States Parties (ASP), and Ambassador Christian Wenaweser of Liechtenstein, who was also a former President of the ASP. A number of NGOS and other individuals representing civil society organizations and academia were also very active and effective, including Benjamin B. Ferencz. The Coalition for the International Criminal Court also deserves recognition.

\textsuperscript{134} The Amendments will not enter into force, giving the Court jurisdiction over the crime of aggression, until sometime after January 1, 2017, when a decision is made by States Parties to activate jurisdiction, and they will apply only to the States Parties that have opted in.
These questions include a number of related questions, such as whether the United Nations system was ever intended to be a collective security system or whether it was meant to be a much more modest and basic process reflecting past experiences and seeking to avoid repeating them. If the latter is true, then the United Nations’ system, and particularly its veto mechanism in the Security Council for five Permanent Members, is nothing more than a reflection of the reality of political power. If so, no further discussion is needed. This answer, that the United Nations was established to help avoid the repetition of past, harmful experiences, explains the Security Council’s failure to act as a collective security mechanism in so many world conflicts, and the failure of the practice of humanitarian intervention, and the failure of the Responsibility to Protect.

All the changes witnessed in the practices of various U.N. organs are essentially variations on this theme, reminiscent of what Giuseppe di Lampedusa stated in his novel The Leopard: “[i]f we want things to stay as they are, things will have to change.” This explains States’ tergiversations, and not only within the United Nations, but since the early days of the evolution of jus ad bellum. It also reveals how States have used various legal, political, and bureaucratic techniques to create the impression – over long periods of time – that humanitarian values were embodied in international legal norms and standards concerning the prescription and proscription of aggression. What is more telling than the practice and pronouncements of the Security Council in light of its mandate and Articles 1, 39, and 53 on “aggression,” is that not once since 1945 has the Security Council deemed any conflict anywhere in the world to constitute “aggression.” And not once has the Security Council referred to the 1974 General Assembly Resolution defining “aggression.”

This is relevant to the future insofar as the political interests of the major powers remain somehow balanced. In the end, for the world’s major powers and for most developed States, the major concerns are the prevention of wars,

136 See sources cited supra notes 86–94 and accompanying text; see also sources cited infra note 164 and accompanying text (on humanitarian intervention).
137 For the definition of the Responsibility to Protect see supra notes 94–96. See also sources cited infra note 165 and accompanying text (on the Responsibility to Protect).
139 See Aquinas, supra note 4.
140 U.N. Charter arts. 1, 39, 53.
the protection of their security and economic interests, and when conflict occurs, minimizing it.\textsuperscript{142} The techniques employed to achieve these outcomes have varied as required by the changing means, methods, and weapons of war.\textsuperscript{143}

Since the United Nations was established in 1945, the world has witnessed more than 300 conflicts,\textsuperscript{144} some of which were defined under international humanitarian law (IHL) as “conflicts of an international character,” others as “conflicts of a non-international character” and “purely internal conflicts” (to which IHL does not apply). These classifications, which were adopted by the States that formulated the four Geneva Conventions of August 12, 1949,\textsuperscript{145} reflected the interests of States in a narrow way that limited the applicability of international humanitarian law to only the first two categories, even though the same protected human values were at stake in “purely internal conflicts.”\textsuperscript{146} This was done to give States greater leeway with what could otherwise be deemed violations of international humanitarian law when these acts were committed against their own populations.\textsuperscript{147} Even so, under “conflicts of

\textsuperscript{142} This is evident in the present conflict in Syria. See discussion and sources cited infra note 150.

\textsuperscript{143} See sources cited supra note 16 (on new wars).


\textsuperscript{146} It is worth mentioning that the State Parties in 1949 purposely wanted to distinguish between the two types of conflicts, irrespective of the identity of the human and social interests protected in these instruments. Thus violations of the four Conventions in the context of “conflicts of an international character” were deemed “grave breaches,” requiring prosecution and eventually punishment, while with respect to “conflicts of a non-international character,” violations of the same practices were contained in a single article, namely Common Article 3, which were not called “grave breaches” but “violations.” See Theodor Meron, The Humanization of Humanitarian Law, 94 Am. J. Int’l L. 239 (2000); Theodor Meron, Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout, 92 Am. J. Int’l L. 236 (1998); Theodor Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int’l L. 348 (1987).

a non-international character,” the main compliance incentive of granting insurgents “prisoner of war” (POW) status has been renounced, and only under “belligerency” can similar rights and obligations in “conflicts of an international character” be applied. That this discrepancy in the two legal regimes still exists, even though the same humanitarian values are at stake, is a contradiction in the application of these values and a disincentive to comply with the laws of armed conflicts. As to “purely internal conflicts,” none of these humanitarian norms applies, even though the same human and social interests are involved. As always, state interests prevail.

The number of conflicts of an “international character” as well as those of a “non-international character” began to decline around the end of the first decade of the new millennium, and by 2016 only eight conflicts involving opposing forces from different States continued to exist. They were the following: Iraq (with United States and Iranian forces acting in support of the government); Syria (with Russian and Iranian forces acting in support of the Assad regime in power, and with the United States and others engaging in limited military activities against the group known as the Islamic State of Iraq


In the first category, the conflict has to be between two States and in the second, the conflict, which exists in one State, has to involve an internal insurgent group and a foreign State. As defined, and more so as interpreted, States have much leeway to interpret the terminology and standards of international humanitarian law as a way of avoiding the characterization of the conflict, and thus avoiding responsibility under international humanitarian law – as is evident in the current conflict in Syria, in which Russia and Iran, as well as the United States and Turkey, are militarily involved, but so far the conflict has not been legally characterized. This allows Russia and Iran, as well as the Syrian regime, to claim that it is a purely internal conflict and that international humanitarian law – let alone “aggression” – does not apply. Russia Launches Third Day of Syria Strikes from Iran, REUTERS (Aug. 18, 2016), www.reuters.com/article/us-mideast-crisis-russia-iran-idUSKCNieTi5I; Anne Barnard & Somini Sengupta, Syria and Russia Prepare Ready to Search Aleppo, N.Y. TIMES (Sept. 25, 2016), www.nytimes.com/2016/09/26/world/middleeast/syria-un-security-council.html; Rick Gladstone & Somini Sengupta, Unrelenting Assault on Aleppo Is Called Worst Yet in Syria’s Civil War, N.Y. TIMES (Sept. 26, 2016), www.nytimes.com/2016/09/27/world/middleeast/aleppo-syria.html; Ben Hubbard, “Doomsday Today in Aleppo”: Assad and Russian Forces Bombard City, N.Y. TIMES (Sept. 23, 2016), www.nytimes.com/2016/09/24/world/middleeast/aleppo-syria-airstrikes.html.
and Syria [ISIS] but not operations connected with the civil war between opposition forces and the Assad regime; Afghanistan (with U.S., U.K., and some NATO forces\(^{151}\) in support of the Afghan government against Taliban nationalist fighters from within Afghanistan and across its borders with Pakistan); Pakistan (with U.S. drones engaging in bombings against selected individuals believed to be involved in Taliban operations in Afghanistan); Yemen (with Saudi Arabia and Egypt engaging in aerial bombings against Yemenis who have seized power in an internal conflict in the country with the support of the United States); Libya (where troops from the United States, the United Kingdom, France, and Italy are on the ground in Benghazi to support the U.N.-sponsored government [which has yet to be recognized by the separate parliament in Tripoli] engaging in military operations against Libyan militias in the Misrata area presumed to be affiliated with ISIS);\(^ {152}\) Somalia (with the United States engaging in special operations on the ground and air support against al-Shabaab, a dominant dissident Islamist group opposing the makeshift government); and Ukraine (with Russian forces supporting rebel Ukrainian forces in Eastern Ukraine and the occupation by Russian forces of Crimea). The United States, France, the United Kingdom, and maybe other States also engage in covert military “special operations” in certain States, with French forces being reported present in Mali, Niger, and Chad.\(^ {153}\)

Compared to the number of conflicts in the last decades of the previous millennium, the number of involvements by governments using their military forces in the territories of other States and the amount of resulting human harm as reported by various United Nations, intergovernmental organizations (IGO), and NGO sources is significantly lower.\(^ {154}\) Thus, in a technical legal sense, today we have many fewer “conflicts of an international character” than a decade ago and even fewer when compared to the number over the last fifty years, though a number of “conflicts of a non-international character” and “purely internal conflicts” involving the interests of other States still exist.


\(^{154}\) Admittedly these sources are not necessarily reliable, and they are also selective insofar as they ignore conflict zones in Asia in particular, where they have little or no presence or access.
Those numbers, however, also have declined since 2008, as has the amount of human harm.\footnote{See Bassiouni, Study on Conflicts, supra note 135. “The decline in international or interstate war started in the 1970s, but at the same time civil wars surged, thus diverting attention from the decline in international war. With the end of the Cold War, however, international war declined further and civil wars began to decline as well. After 2001, there was another increase in civil wars, but it does not even begin to suggest a return to the high civil war levels of the pre-1900 period.” Kathryn Sikkink, Federica D’Alessandra & Aroop Mukharji, Memo: Has International Law Diminished the Illegal Use of Armed Force? 4 (Feb. 3, 2016) (Carr Center for Human Rights Policy White Paper, unpublished, on file with author).}

All this seems to have contributed to the decrease in interest in aggression by the international community. Facts have caught up with political reality: aggression, as it had been known since 1945 until recently, no longer constitutes the type of threat to world peace and security that existed during the Cold War, and it therefore no longer demands political and legal efforts to prohibit and criminalize it. The changing reality since 1989, the official end of the Cold War, has gradually marginalized the threat of aggression – and as a result, its legal consequences.

States still pursue power and wealth through various means, including coercive ones, but these no longer fall within the historic meaning of aggression. This raises the question of whether aggression, as conceived of in the post–World War II era, is the type of international activity that still needs to be criminalized \textit{per se}, as opposed to reinforcing the criminalization of its consequences.

The protagonists engaged in today’s armed conflicts are very different from those of previous decades, and the means and methods of warfare have also changed. New technology has added new challenges, namely automated weapons systems, which include drones and other tools with which attacks can be committed without the forces of one State actually entering the territory of another.\footnote{See sources cited supra note 16 (on AWS, drones, cyber warfare, and new wars).} These new tools – and the definition of those who use them – no longer fit into the traditional categories of aggression, and international humanitarian law will have to be altered to apply to such new methods and means, including the responsibility of its actors, however defined.\footnote{Will this be limited to the AWS operators or extend to their commanders? And how will that technological chain of command be established? Will it include the scientific and technological developers of such weapons systems? The next generation of AWS may also employ the use of artificial intelligence and robotics, pushing further out any traditional concepts and standards of responsibility.} That is also likely to mean that the painstaking progress made

\begin{itemize}
\item \footnote{See sources cited supra note 16 (on AWS, drones, cyber warfare, and new wars).}
\end{itemize}
against the prevalence of realpolitik over human and social values will have to start all over again – or certainly take many steps backward.

Academics, including this writer, who have relied on *jus cogens* for the non-derogable prohibition of certain international crimes such as aggression, genocide, crimes against humanity, war crimes, torture, and slavery, may well have to revisit the sustainability of that doctrinal source of law in light of new realities.\(^{158}\) Admittedly, it is hard to justify this source of higher law in light of the absence of state practice. The academic bestowment of the *jus cogens* label to a given type of activity is not in itself evidence of its existence, particularly in the absence of state practice to sustain it.\(^{159}\) Just as we need to

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\(^{159}\) D’Amato, *supra* note 158 (on *jus cogens*). Article 38(d) of the Statute of the International Court of Justice (ICJ) recognizes as one of the sources of international law, “the teachings of the most highly qualified publicists of the various nations,” but what may be sufficient as an eventual source of law for the ICJ in light of its narrow jurisdictional scope may not be so with respect to international criminal law insofar as there exists the “principles of legality” in any criminalization of individual conduct, whether it emanates from an international or national source. Statute of the International Court of Justice art. 38(d), June 26, 1945, 59 Stat. 1055, § 1779. While this problem has not arisen before the ICTY and ICTR in their respective articles on war crimes or the laws and customs of war, the legal issue nevertheless remains that international as well as national criminalization requires certainty in the definition of the crime as well as notice to its potential perpetrators. It is hard to think of how non-state actor combatants in various arenas in Africa and Asia, who may not even know how to read and write...
reassess the sustainability of *jus cogens* as a source of higher law, we should assess the past to better confront the issues of the future.

**VII. ASSESSING THE PAST TOWARD DEVELOPING A NEW STRATEGIC APPROACH FOR THE FUTURE**

The First World War witnessed a rise in popular demand by the aggressed peoples of the world for the accountability of those who committed aggression against them. The word “aggression” was used in popular literature in Europe and in the everyday discourse of the people of Belgium, France, and England. It was the first time in history that a popular movement of the sort succeeded in achieving a legal reality (in Article 227 of the Treaty of Versailles).

But political considerations prevailed, and no one, including the German Emperor, was ever prosecuted for aggression.

Those who were invaded and many others needed no legal expertise to recognize that Germany’s invasion of France and Belgium during World War I was an act of aggression, as was Japan’s World War II invasion of China and attack on Pearl Harbor, ordered and executed by the principal decision makers in these countries. The value-oriented limitations on the power of States in their use of force were popularly understood throughout the world, no matter how complex they were for theologians, philosophers, and jurists. For most of the world’s people, the prohibition of aggression, no matter how defined, was common sense.

But this was not so for those who practiced *realpolitik* (or whatever other term was advanced by politicians and academics who defended the pursuit of power and wealth objectives by state actors claiming justification for the self-identified interests of the State or States in question). This became evident in the 1970s with the emergence of the controversial doctrine of “humanitarian intervention,” and later in the early 2000s with the concept of the...
“Responsibility to Protect.”¹⁶⁵ None of these counterpart doctrines to realpolitik’s manipulations of justifications to engage in aggression succeeded.¹⁶⁶ And so it was for jus ad bellum, which has been around since the time of St. Thomas Aquinas in the 1200s CE.¹⁶⁷ in Western Christian Europe – nothing much has changed, notwithstanding the trials and tribulations of those who are dismissed by their opponents in the political realism field as unrealistic idealists. Yet ever since certain moral and social values emerged in different civilizations, sustaining the validity of jus ad bellum and jus in bello, including the implication that the conduct in question should be proscribed and its violators held accountable, the political defenders of the unbridled pursuit of power and wealth used their bag of tricks to arrest, deviate, or alter this value-oriented expectation. And this caused the political demise of aggression and its legal status.

There was a time when the realpoliticians opposed outright political and legal efforts to have aggression declared an international crime and to have that crime enforced. But then they found other covert ways to undermine it. After the First World War, it was the artful definition of Article 227 of the Treaty of Versailles on the responsibility of the Kaiser that prevented the prosecution of the Emperor (or anyone else) for aggression.¹⁶⁸ Then, in the brief period between 1919 and 1939 with Italy’s blatant aggression in Ethiopia (Abyssinia), world powers again saw the need to stymie any efforts to proscribe Rogers, supra note 93. See also Stahn, supra note 93; Bellamy, Whither the Responsibility to Protect?, supra note 93.

¹⁶⁵ G.A. Res. 60/1, supra note 96, ¶¶ 138–39; David Scheffer, The Fate of R2P in the Age of Retrenchment, in BASSIOUNI, GLOBALIZATION, HRs and ICJ, supra note 26, at 617; Ved P. Nanda, The Future Under International Law of the Responsibility to Protect After Libya and Syria, 21 Mich. St. Int’l L. Rev. 1 (2013); David Scheffer, Atrocity Crimes, supra note 93; Saul, supra note 93. See also Burke-White, supra note 93, at 17, 18; Evans, supra note 93, at 38–50; Joyner, supra note 93, at 720; Bellamy, The Global Effort, supra note 93, at 84; Helal, Am I My Brother’s Keeper?, supra note 78, at 453–54 (“In 2005, the UN hosted the World Summit, which was celebrated as ‘the largest gathering of world leaders in history.’ At its conclusion, the World Summit Outcome Document (WSOD) was unanimously adopted by the General Assembly. Although the WSOD included matters spanning the entire breadth of the UN’s work, it was the adoption of RtoP that attracted the most attention, was hailed as a ‘millennial change’ in international relations, and celebrated by some scholars as marking a constitutional moment in which the principle of ‘civilian inviolability’ became a foundational norm in international law” [citations omitted]).

¹⁶⁶ So blatant is the resistance of realpolitik and other self-proclaimed political realists from Harvard and the University of Chicago law faculty that there is now a frontal attack on all human rights. See ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

¹⁶⁷ See supra note 4 and accompanying text (discussion of St. Thomas Aquinas).

¹⁶⁸ See Bassiouni, WWI, supra note 29, at 257–60.
acts of aggression. But by then the League of Nations had been formed, and its political processes were thwarted. Then the major Western European powers needed justifications to preserve and protect their colonial regimes, which were inflicted on other peoples by means of aggression. This, too, was not new.

Then came World War II, whose unprecedented, horrible consequences could not be ignored. Once again, people all over the world had no difficulty identifying Nazi-German aggression in Europe and imperial Japanese aggression in Asia and against the United States. This time, the crimes committed were too egregious to be overlooked and their consequences were so devastating that they could not be covered up politically. Thus the successful Allies pursued the criminalization of some of the major perpetrators before the IMT, the IMTFE, and under Control Council Law No. 10. Still, politics played a role, and the term “aggression” was carefully avoided, as was the prosecution of the Emperor of Japan.

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171 As of the twelfth century, jus ad bellum was transcended by the papal justifications for four Crusades and the established right for these Western Christian States to discover other people’s lands and occupy them by subjugating those non-Western Christians to slavery and colonial occupation and what we have to call “inhumane and degrading treatment and punishment.” See generally Riley-Smith, The Crusades: A History, supra note 12; Riley-Smith, The Oxford History of the Crusades, supra note 12; see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); J. Herman Burgers & Hans Danelius, United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1988); José Luis de la Cuesta Arzamendi, El Delito de Tortura (1990); Nigel Rodley & Matt Pollard, The Treatment of Prisoners Under International Law (3d ed. 2011); M. Cherif Bassiouni & Daniel Derby, An Appraisal of Torture in International Law and Practice, 48 Rev. Int’l’le De Droit Pénal 23 (1977); M. Cherif Bassiouni, An Appraisal of the Growth and Developing Trends of International Criminal Law, 45 Rev. Int’l’le De Droit Pénal 405 (1974), translated and reprinted as Il Diritto Penale Internazionale: Contenuto e Scopo Nel Suo Sviluppo Storico, La Giustizia Penale, Feb. 1979, at 55. Exceptionalism was born then and continues to live on. See sources cited supra note 13 (on exceptionalism).

172 See London Charter, supra note 40; Tokyo Charter, supra note 40; Control Council Law No. 10, supra note 40.

173 The Emperor of Japan, by decision of General Douglas MacArthur, was spared prosecution before the IMTFE or any other body because of the Japanese people’s reverence of his person. Douglas MacArthur, Reminiscences (1964).
After the post–World War II criminalization of “crimes against peace” came the attempt, starting in 1947, to codify and criminalize “offenses against the peace and security of mankind,” although that attempt still did not refer to aggression. One year later, in 1948, the Cold War menaced the world’s peace and security, but by then the two main protagonists had weapons of mass destruction, including nuclear, chemical, and biological weapons. With these weapons, particularly nuclear ones, the world’s very existence was at stake. The conduct of war changed, and surrogates were successfully used to avoid confrontation between the United States and the Soviet Union. This was not the time to talk about proscribing aggression.

As is evident in the practice of the United Nations Security Council, between 1945 and 2016 the term aggression was not used once and the Security Council did not find one case of aggression. The Security Council also never referred to the General Assembly 1974 Definition of Aggression, as mentioned before, even though articulating that definition took twenty-two years. The realpoliticians also buried the half-century effort to draft a code of international crimes, as the United Nations referred to it first as the Draft Code of Offenses Against the Peace and Security of Mankind from 1947 to 1988, and thereafter as the Draft Code of Crimes Against the Peace and Security of Mankind. Neither one was ever adopted by the United Nations. Both were politically and bureaucratically buried and with them aggression, notwithstanding the 1974 Definition of Aggression adopted by the General Assembly. Then in June 2010, when the International Criminal Court’s Kampala Amendments defined the crime of aggression, the moribund legal proscription of aggression as an international crime received some life support. Kampala saved it in extremis.

174 G.A. Res. 177 (II), supra note 116.
175 See sources cited supra note 16 (on new wars, drones and non-state actors).
177 See discussion supra Sections I and II (on defining “aggression”).
179 Id.
How long this life-support system will last — and how effective it will be — remains to be seen, but its moral legacy is not to be underestimated, for, if nothing else, the Kampala Amendments reinforced the human and social values that condemn aggression and exposed to the international community those States that failed to ratify or accede to the definition of aggression.\textsuperscript{181} I fear, however, that this will have insignificant impact on world political opinion.

As I have discussed, since World War II, the changed nature of armed conflict has resulted in fewer international conflicts between or involving States — but more conflicts involving non-state actors.\textsuperscript{182} This changing reality has added to the realpoliticians’ arguments that aggression is no longer a necessary legal concept requiring proscription and individual criminal accountability. The argument, deceiving as its purposes are, is nonetheless plausible. But it does not take into account the many other means by which aggression and its intended outcomes can be achieved in this era of globalization, particularly with the use of automated weapons systems. Political, economic, and financial means, as well as other subversive means, can be effectively used to achieve the same results that the post–World War I and post–World War II formulations of aggression could, with much lower costs and fewer harmful consequences.\textsuperscript{183} This means that international law and all its specialized disciplines such as international humanitarian, human rights, and criminal law must converge on this new reality and develop the necessary and appropriate legal means and methods likely to deter these new forms of aggression and to hold accountable those who will be less visible in the commission of human harm.

That will take forms other than the caduc concept (the French term best expresses the political status of aggression) that has legally fallen into désuetude with respect to its practice.\textsuperscript{184} The fact that aggression remains unacceptable conduct in the human and social values of most peoples of the world does not alter its record of nonenforcement.

Ideally, the next stage of enforcing aggression will be to secure a more genuinely universal acceptance of commonly shared values and goals of condemning and preventing aggression, including but not limited to, means

\textsuperscript{181} For a list of States Parties that have ratified the Kampala Amendments see supra note 131 and accompanying text.

\textsuperscript{182} See sources cited supra note 16 (on new wars, drones, and non-state actors).

\textsuperscript{183} Id.

\textsuperscript{184} A “consistent state practice” is an element of customary international law.
of collective security\textsuperscript{185} and the application of principles and methods of international and national criminal accountability for those at the highest levels of government and in the military and security apparatuses of States as well as those in the technological and scientific fields of developing automated weapons systems and robotics. But in light of history, that outcome is doubtful. Ideals may exist at the national and international levels, but their enforcement, let alone their effective and impartial enforcement, are not a certain consequence.

Aggression, as reflected in the hollow promises of the United Nations Charter, has fallen into désuétude, and its consequence among the peoples of the world has been to discredit international law as a tool of the powerful.\textsuperscript{186} Nevertheless, though it cannot be empirically demonstrated, the human and social values sustaining the prohibition of aggression and the goal of holding its perpetrators criminally accountable may have had the beneficial effect of limiting wars between major powers and the escalation of conflicts of an “international character.” In a pragmatic sense, this reality of States refraining from resorting to aggression in the traditional sense has some benefit. This should be the new point of departure for a new approach to the proscription of aggression – by holding its protagonists internationally criminally responsible for its consequences.

The response to this historical transformation requires an imaginative approach to international criminal responsibility to ensure accountability of heads of state, senior military commanders, senior decision makers in the intelligence communities, and others for using aggression through new means and methods of warfare and coercive techniques.

If the end goal is to deter people from engaging in aggression as a means of minimizing the resulting harm, the pursuit of alternative legal ways is the course of the future. The objective should not be the survival of the brand name “aggression” but of the transformation of the technique of prevention by enhancing the deterrent through international and national criminal accountability for the consequences of what would be implicitly recognized as aggression. How the realpoliticians will react will probably echo their historical reactions against any limitations on the powers of States to pursue, through non-state actors, power and wealth no matter what human and material harm is inflicted on others.

\textsuperscript{185} Wilson, supra note 78, at 5; Schachter, supra note 78, at 65; Alvarez, supra note 78, at 2; Nanda, Preemptive and Preventive Use of Force, supra note 78; Franck, supra note 78, at 605.

\textsuperscript{186} See sources cited supra note 13 (on exceptionalism).
How successful such a new strategy may be depends on the capability of some States and international civil society’s ability to join forces to resist the efforts of realpolitik now so well linked to intergovernmental organizations’ bureaucracies. And so the struggle goes on, passed as a baton in the relay of generations by those trying to make this world a better place for everyone.

Maybe the best policy solution is to leave aggression in the category of a legal concept in limbo, neither dead nor alive but somehow capable of being brought back to life if and when needed. Perhaps new efforts should be directed toward other international crimes, which are the outcome or consequence of aggression as it is customarily understood, to fill the gap of criminal accountability for the perpetrators. Thus, what may de facto, but not de jure, start as aggression may end up as crimes against humanity or war crimes.¹⁸⁷

Even though the jus ad bellum reveals that what is generically called aggression is politically dead, legally moribund, and on life support, it is stoically alive in the commonly shared values of most peoples of the world.

¹⁸⁷ International humanitarian law in this respect is not particularly useful. In fact, it is a hindrance to the achievement of international criminal accountability for the consequences of aggression because of the division of international humanitarian law into the three sublegal regimes. That division, as mentioned, was designed to shield States and state actors from international criminal accountability, other than in the situations of conflicts of an “international character” and the more narrowly circumscribed conflicts of a “non-international character” which are reflected in Common Article 3 of the Geneva Conventions and Protocol II. See Geneva Conventions, supra note 145. In large part due to the political influence of the United States, Protocol II, which now has 168 State Parties, has not been recognized as being part of the customary law of armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [Protocol II]. The same is true of Additional Protocol I of 1977, which applies to conflicts of an “international character” and which for the same reasons as in the case of Protocol II is still not recognized as being part of customary international law despite having 174 State Parties. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [Protocol I]. The solution mentioned above is at best a short-term palliative, though not one to be underestimated. The example of the Syria conflict is once again relevant, as it is politically impossible and legally difficult to charge, but surely “crimes against humanity” and “war crimes” can be charged against Syrian, Russian, and Iranian military operatives in the field, and more importantly, against their commanders under command responsibility. But that of course requires political will, which is presently lacking—though maybe not permanently. For sure, new norms are needed to address the new technologies of AWS, though that, too, requires political will. The use of drones is a reality, as are certain forms of cyberattacks that presage the potential expansion of this new form of aggression.