

## The Human Right to Peace

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The idea of an international criminal court was probably contemplated by dreamers in the eighteenth and nineteenth century, but it did not grow legs until the weeks following the armistice that ended the First World War. The forum for much of the debate was the Commission on Responsibilities, a body set up by the Preliminary Peace Conference in January 1919.<sup>1</sup> At its second meeting, the Commission decided to establish three sub-commissions, each charged with developing recommendations on a piece of the problem. The first of them focused on fact-finding, while the other two addressed the legal issues.<sup>2</sup> One sub-commission considered the responsibility for planning and launching the war, and the other examined violations of the laws and customs of war committed during the conflict.<sup>3</sup>

Thus, from the earliest days of international criminal justice, a distinction was made between the *jus ad bellum* and the *jus in bello*. Ultimately, the Commission on Responsibilities decided to focus criminal justice on the violations committed during the war rather than the responsibility for starting it.<sup>4</sup> But the important decisions on the content of the peace treaty were taken not by the Commission but by the Council of Four, which convened in April 1919. The Council set aside much of the Commission report. It agreed to create an international tribunal to try the German Emperor for “a supreme offence against international morality and the sanctity of treaties.”<sup>5</sup> The trial never took place, of course, because the Netherlands refused to surrender the Kaiser.

When international justice revived during the Second World War in forums like the London International Assembly, the United Nations War Crimes Commission, and the London Conference, the debates about the relationship between responsibility for starting a war of aggression and crimes committed within the conflict resumed. The judges of the International Military Tribunal

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<sup>1</sup> See DIV. OF INT’L L., CARNEGIE ENDOWMENT FOR INT’L PEACE, PAMPHLET NO. 32, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 1919 (1919).

<sup>2</sup> *Id.* at 2–3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 22–23, 25–26.

<sup>5</sup> Treaty of Peace between the Allied and Associate Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188.

addressed the issue by describing the category of crimes against peace as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>6</sup> They presented a holistic view of international criminality for atrocities by which crimes against peace, war crimes, and crimes against humanity were joined in what amounted to a symbiosis.

That relationship was challenged, although only indirectly, during the 1990s, when the Security Council established *ad hoc* tribunals to respond to the conflicts in the former Yugoslavia and Rwanda. The statutes of those institutions were confined to the *jus in bello*.<sup>7</sup> What the International Military Tribunal had called the “supreme international crime” was absent. This is partly explained by the understanding that the conflicts in both Yugoslavia and Rwanda were essentially non-international in nature. But the uncertainty about the status of the “supreme international crime” persisted during the drafting of the Rome Statute of the International Criminal Court (ICC).<sup>8</sup> Eventually, the vision of the International Military Tribunal began to be restored with the adoption, at Kampala, of amendments to the Rome Statute on the crime of aggression.<sup>9</sup> These entered into force in 2013 and are expected to become fully operational at the end of 2017.<sup>10</sup>

Yet a tendency to marginalize the crime of aggression persists. For example, a press release issued by the ICC in February 2017 described the Court as “the first permanent international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community, namely: genocide, war crimes and crimes against humanity.”<sup>11</sup> Of course, not only does article 5 of the Rome Statute include the crime of aggression as one of the *four* core crimes, but the amendments adopted at Kampala entered into force nearly four years ago. The oversight is a bit symptomatic.

Benjamin Ferencz, who has probably thought about these issues longer than anyone else on the planet, manifests in his writings and lectures an understanding of the bonds that join the crimes of the *jus ad bellum* to those of the *jus in bello*. He has developed a very creative approach by which aggressive war is positioned under the umbrella of crimes against humanity.<sup>12</sup> It makes a neat and persuasive complement to the vision at Nuremberg, whereby crimes against humanity were hitched, as it were, to war crimes and crimes against peace. In that

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<sup>6</sup> 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 427 (1948).

<sup>7</sup> See, e.g., S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing an international tribunal to prosecute violations of international humanitarian law in the former Yugoslavia).

<sup>8</sup> See Rome Statute of the International Criminal Court art. 5(2), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

<sup>9</sup> International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

<sup>10</sup> Rome Statute, *supra* note 8, arts. 15 *bis*, 15 *ter*.

<sup>11</sup> Press Release, International Criminal Court, ICC President Highlights Role of Legal Profession at Events in Barcelona (Feb. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1276>.

<sup>12</sup> See Benjamin B. Ferencz, *The Illegal Use of Armed Force as a Crime Against Humanity*, 2 J. ON THE USE OF FORCE & INT’L L. 187 (2015).

sense, it might be said that crimes against humanity have become the “supreme international crime.”

Challenges to the link between the crime of aggression and the other atrocity crimes are explained, at least in part, by an insistence upon the distinction between the *jus ad bellum* and the *jus in bello* that comes from international humanitarian law. Without necessarily proclaiming total indifference on the lawfulness of the use of force, there is nevertheless an emphasis on conduct within the conflict and an affirmation of the essential equality of the parties, a consequence of ignoring the responsibility for the war itself.

What is a useful distinction in international humanitarian law seems to have spilled over into the international law of human rights. For example, at the Kampala Review Conference a position paper published by Human Rights Watch explained that the organization did not have much interest in the amendments on the crime of aggression because its focus was on the *jus in bello* rather than the *jus ad bellum*.<sup>13</sup> Amnesty International did much the same, explaining that “peace” was not a part of its mandate, which was derived from the Universal Declaration of Human Rights, because that document does not deal with the lawfulness of the use of force.<sup>14</sup>

This is a very narrow interpretation of the scope of international human rights. The opening words of the Universal Declaration of Human Rights affirm that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>15</sup> The concluding phrase confirms the relationship of three fundamental objectives.<sup>16</sup> The sentence as a whole highlights the connection between freedom, justice, and peace and the protection of fundamental human rights.

After a period of some legal uncertainty as to whether or not human rights law applies during armed conflict, some having argued that it is displaced by the *lex specialis* of the law of armed conflict, it is now beyond serious dispute that human rights protections and obligations continue during wartime. According to the International Court of Justice, “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International

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<sup>13</sup> HUMAN RTS. WATCH, MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE (May 10, 2010), <https://www.hrw.org/report/2010/05/10/making-kampala-count/advancing-global-fight-against-impunity-icc-review-conference> (“We have not participated actively in negotiations on the crime of aggression. We believe that we are most effective as a human rights organization if we do not opine on issues of *jus ad bellum*, the lawfulness of waging war, and instead adopt . . . an approach of strict neutrality during armed conflicts.”).

<sup>14</sup> AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: CONCERNS AT THE SEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES 23 (Oct. 2008).

<sup>15</sup> Universal Declaration of Human Rights, Preamble, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

<sup>16</sup> *Id.*

Covenant on Civil and Political Rights.”<sup>17</sup> Article 4 permits no derogation to the right to life.<sup>18</sup> Moreover, the European Convention on Human Rights permits derogation from the right to life only for “lawful acts of war.”<sup>19</sup> The rather limited *travaux préparatoires* of the Convention suggest that this phrase may well apply to the *jus ad bellum* as well as to the *jus in bello*.

It can be no more accurate to claim that the Universal Declaration of Human Rights is inapplicable in wartime than to say that the Charter of the United Nations, from which the Declaration is derived, does not operate during armed conflict. The importance of the right to life, sometimes described as the “supreme right,” enshrined in article 3 of the Universal Declaration of Human Rights and in all of the major treaties of general application, is at its most acute during armed conflict.<sup>20</sup> The right to life manifests itself in specific norms of the law of armed conflict, such as the prohibition of attacks on non-combatants and on civilian objects.<sup>21</sup>

Article 29(2) of the Declaration recalls that “[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”<sup>22</sup> How can it be contended that the Universal Declaration is silent on the lawfulness of the use of force if the Declaration permits limitation of the right to life only when it is “determined by law”? Obviously, unlawful resort to force to settle an international dispute cannot be consistent with the requirement that it be “determined by law.”

The law of armed conflict takes its distance when the lawfulness of the use of force is concerned. It examines whether deprivation of life is arbitrary only from the perspective of the *jus in bello*. There is no reason for international human rights law to take the same path. Killing in an unlawful war is unlawful killing. It may escape the sanction of the law of armed conflict because of the internal logic of that system. But that rationale should not and cannot apply to international human rights law, where it is fitting to speak of a human right to peace.<sup>23</sup> The

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<sup>17</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).

<sup>18</sup> International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>19</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>20</sup> Universal Declaration of Human Rights, *supra* note 15, art. 3.

<sup>21</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 48–60, June 8, 1977, 1125 U.N.T.S. 609.

<sup>22</sup> Universal Declaration of Human Rights, *supra* note 15, art. 29, para. 2.

<sup>23</sup> William A. Schabas, *The Human Right To Peace*, in MAKING PEOPLES HEARD: ESSAYS ON HUMAN RIGHTS IN HONOUR OF GUDMUNDUR ALFREDSSON 43–57 (Asbjørn Eide, Jakob T. Möller & Inete Ziemele, eds., 2011); William A. Schabas, *Freedom from Fear and the Human Right to Peace*, in THE CHALLENGE OF HUMAN RIGHTS; PAST, PRESENT AND FUTURE 36–51 (David Keane & Yvonne McDermott, eds., 2012).

criminalization of the unlawful use of force—the crime of aggression—is the corollary of this human right to peace.