Accountability for the Unlawful Use of Force: Putting Peacetime First

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Writing on the unlawful use of force in a symposium honoring former Nuremberg Prosecutor Benjamin B. Ferencz is daunting. Ben has devoted a lifetime to the subject and has alternately inspired and harangued the international community on the question of war and its evils. His views have been expressed in a multitude of writings, from essays and articles to books, radio, and television interviews. His has been a voice of sanity, of moral clarity, in a world where being clever and powerful is often valued more highly than being wise. It has been my privilege to have known Ben for more than two decades, and to carry forward, in some small way, his vision of a world at peace under the rule of law.

In this brief essay, I would like to make a few points about the relationship between peace and war as a legal matter and challenge the notion that peace is no longer the natural state of human affairs, at least insofar as international law is concerned. I write from an admittedly U.S. perspective, which seems apt given that the Nuremberg trials were, to some extent, an American “show,” in terms of material support and participation.1 Additionally, a major challenge to the Nuremberg legacy emanates from the U.S. government as well as U.S. academics. This fight for the soul of the Nuremberg legacy—and perhaps the future of the world—is thus, in large part, an intra-country debate with a potentially profound global impact.

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Under international law, peace is defined in the negative—as the absence of war. So when international lawyers discuss a peacetime paradigm, they are not reflecting on an emotional or blissful state of inner well-being, or even on positive relations between neighbors, but on the legal paradigm governing national and international relations in the absence of armed conflict.2 The two concepts are

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1 Leila Nadya Sadat, The Nuremberg Trial, Seventy Years Later, 15 WASH. U. GLOBAL STUD. L. REV. 575, 579 n. 23 (2016) (citing ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS 233 (2005)).

related: peace (in the international law sense) leads to stability, which in turn may permit individuals to experience “life, liberty and the pursuit of happiness” or even “[a] state of public tranquility; freedom from civil disturbance or hostility.”

It is thus unsurprising that the traditional approach of public international law—even during an era in which war was considered lawful—has treated peace as the rule, with special legal regimes governing armed conflict as the exception. This is evidenced in treatises like Lassa Oppenheim’s, which divided the world of international law in two: Peace (volume I) and War and Neutrality (volume II), and in the requirement that there be an “armed conflict,” for international humanitarian law to apply.

Crimes against peace were one of the three charges leveled against the Nazis at Nuremberg. This charge was defined as the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances . . . .” Although there had initially been fierce internal debate in the United States as to whether the Nazis should be tried for aggressive war, ultimately the U.S. prosecutorial team, led by Supreme Court Justice Robert H. Jackson, vigorously pursued the Nazis for crimes against peace, arguing that the aggressive war itself was “the crime which comprehends all lesser crimes . . . .” The International Military Tribunal agreed, famously opining that aggression “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” That pronouncement was enshrined in article 2(4) of the U.N. Charter, not as a matter of criminal law, but as a fundamental—indeed, peremptory—norm of international law binding on all states.

Yet defining aggression either as a matter of state or individual responsibility—and ensuring its prohibition—has turned out to be difficult. The ambivalence that plagued the drafting of the Nuremberg Charter continued to bedevil international efforts to definitively prohibit the unlawful use of force. The International Law Commission, charged with developing a draft code of crimes,
struggled for fifty years with the task, only to include the crime of aggression, without definition, in its 1996 Draft Code. The General Assembly fared somewhat better; in 1974, it adopted Resolution 3314, which includes both a general definition of aggression and a list of prohibited acts. The International Court of Justice has occasionally been seized of disputes involving allegations of unlawful uses of force, and there have also been arbitral disputes, fact-finding commissions, human rights adjudications, and even some national legislation (and case law) defining and adjudicating situations involving the unlawful use of force. Many of these are the subject of chapters in the forthcoming volume, *Seeking Accountability for the Unlawful Use of Force*. In spite of the progress made to date, however, enforcing the notion that prohibitions on the unlawful use of force represent *binding legal norms* rather than *political objectives* or even *wishful thinking* has been a constant struggle of the modern era, the Nuremberg trial and judgment notwithstanding.

A case in point, as chronicled by others in this symposium, was the struggle to include the crime of aggression in the Statute of the International Criminal Court (ICC). Aggression was not included in the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, and the fight over its inclusion in the ICC Statute threatened to derail the Rome Conference. Through the perseverance of many, including Ben, and in spite of the fierce opposition of the United States (as well as other nations), the ICC Assembly of States Parties adopted amendments to the Rome Statute in Kampala on the crime of aggression that are likely to be “activated” later this year when the Assembly meets in December. These amendments represent an important step forward in achieving accountability for the unlawful use of force, as they define the crime of aggression and give the ICC jurisdiction over it in limited circumstances. Yet because states can opt out of them if they wish, and certain “understandings” were adopted in Kampala that constrain the applicability and enforcement of the aggression amendments, their inclusion in the ICC Statute came with costs as well as benefits.

A second example has been the assault on the Nuremberg legacy by states responding to acts of international terrorism. Prominent U.S. scholars writing about the so-called “war on terror” have recently suggested the need to eliminate

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15 Id.
16 Sadat, *supra* note 1, at 587–90.
the peacetime paradigm in favor of a state of “perpetual war,” on the grounds that this realist approach will lead to greater protections for human rights or a more sensible balance between human rights and the demands of national security. Under this view, the U.S. government can use military force, even in peacetime and outside a theater of war, if a state in which the United States suspects terror activity is deemed “unable or unwilling” to address the threat under a broad understanding of the right to self-defense under article 51 of the U.N. Charter. This has led to the use of drones and targeted killing in the fight against Al-Qaeda, ISIL and other groups, even in highly contested and controverted cases, which may violate jus ad bellum and jus in bello rules as well as international human rights law. Although the slide towards loose understandings of jus ad bellum (and jus in bello) constraints on American power began in earnest following the September 11 attacks, it continued during the Obama administration, albeit with more self-restraint, and it appears likely to worsen under the forty-fifth president, who is apparently seeking to reject Obama-era constraints and “open the throttle on using military force,” according to recent reports.

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18 Brooks, There’s No Such Thing as Peacetime, supra note 17.

19 Id. Brooks refers to the “war on terror” in her writings, a phrase that was coined by the Bush administration but subsequently abandoned by it, and that was also not favored by the Obama Administration, which preferred the moniker “countering violent extremism.” See, e.g., President Barack Obama, Remarks at the Leaders’ Summit on Countering ISIL and Violent Extremism at the United Nations Headquarters (Sept. 29, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/29/remarks-president-obama-leaders-summit-countering-isil-and-violent.


This notion of a “boundary-less battlefield” could push the laws of war and the prohibition on the use of force to the breaking point, making everyone, everywhere, liable to be killed as “collateral damage.” It works harm to the fundamental importance of peace as the presumptive framework for international relations and the existence of the emerging “human right to peace.” Echoing Ben’s experience of World War II and the judgment of the International Military Tribunal at Nuremberg, Steven Ratner recently argued that the first pillar of an ethical standard of global justice is whether a norm promotes the advancement of peace. He writes:

War has unparalleled catastrophic consequences for overall human welfare. More than any other activity over which humans have control, war undermines the possibility of people to live decent lives. As an initial matter, its death toll is staggering. . . .

War also creates an atmosphere of havoc, fear, irrationality, and aggressive human behavior that facilitates the commission of horrible acts against individuals . . . actions that many governments and their opponents would not commit in peacetime.

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In this short essay I have tried to make the case for reinforcing rather than abandoning the Nuremberg legacy and the U.N. Charter in which it is enshrined. This requires states to “put peacetime first,” rather than viewing the world through the lens of military force and its projection. The creators of the post-war world understood that to prevent the next war, the world needed rules, institutions, and enforcement. Let us hope that the seeds that were planted by Ben and his compatriots in the ashes of that war continue to bear fruit. As Ben himself has stated:

Nuremberg taught me that creating a world of tolerance and compassion would be a long and arduous task. And I also learned that if we did not devote ourselves to developing effective world law, the same cruel mentality that made the Holocaust possible might one day destroy the entire human race.

25 Id.
26 See, e.g., DOUGLAS ROCHE, THE HUMAN RIGHT TO PEACE (2003); Anwarul K. Chowdhury, Human Right to Peace: The Core of the Culture of Peace, in CONTRIBUCIONES REGIONALES PARA UNA DECLARACION UNIVERSAL DEL DERECHO HUMANO A LA PAZ 125 (Carlos Villán Duran & Carmelo Faleh Perez eds., 2010).
27 RATNER, supra note 2.
28 Id. at 67.
The calculus of reasonableness embodies an allowance for the fact that law enforcement officers/agents are often forced to make split-second decisions - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. A use of force is "necessary" when it is reasonably required to carry out the Authorized Officer's/Agent's law enforcement duties in a given situation, considering the totality of facts and circumstances of such particular situation. Unlawful use of force means force that violates the principle of legality, i.e. force that has an insufficient legal basis or that is used in pursuance of an objective that cannot be qualified as a legitimate law enforcement objective. Such legitimacy is determined by domestic law, which should be compliant with international human rights obligations. Excessive use of force applies to situations where the use of force was legal and legitimate, but the type and level of force was unnecessary and/or disproportionate. Use of force is arbitrary when resorting to force (or the specific type and level of force). Recruiting in the US Armed Forces in peacetime is based on voluntary enlistment, whereas in time of WWII recruiting was compulsory. The Selective Service Act of 1948 initiated a peacetime draft program which ended soon after the shameful war in Vietnam. Nowadays, to become a serviceman, an individual may enlist or reenlist in the branch selected by him. The preliminary training of officers is conducted at the United States Military Academy at West Point (USMA), the US Naval Academy (USNA), the US Air Force Academy (USAF) and at other educational institutions of the Armed Forces and at civilia...