VOLUME 58, ONLINE JOURNAL, SPRING 2017

Accountability for the Unlawful Use of Force: Putting Peacetime First

Leila Nadya Sadat*

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.

***

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

* James Carr Professor of International Criminal Law and Director, Whitney R. Harris World Law Institute, Washington University (in St. Louis) School of Law.

[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)).

[2] The United Nations defines the human right to peace as "life without war." Right of Peoples to Peace, G.A. Res. 39/11, U.N. Doc. A/RES/39/11 (Nov. 12, 1984). *See also* STEVEN R. RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS 98 (2015); Alfred de Zayas, Independent Expert on the Promotion of a Democratic and Equitable

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."[3] 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),[4] 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 . . . ."[5] Although there had initially been fierce internal debate in the United States as to whether the Nazis should be tried for aggressive war,[6] 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 . . . ."[7] 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."[8] 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.[9]

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,

---

International Order, United Nations Human Rights Council, Opinion on Occasion of the First Session of the Open-Ended Working Group on the Right to Peace (Feb. 14, 2013).

[3] *Peace*, BLACK'S LAW DICTIONARY 1244 (9th ed. 2009).

[4] Oppenheim's classic treatise on international law, divided into two volumes (the first dealing with peace and the second with war), reflects this distinction. *See* 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1996); 2 OPPENHEIM'S INTERNATIONAL LAW (H. Lauterpacht, ed., 7th ed. 1952).

[5] Charter of the International Military Tribunal art. 6, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

[6] William Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"*, *in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 17, 25–26 (Mauro Politi & Giuseppe Nesi, eds., 2004).

[7] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 54 (1992) (quoting Robert Jackson).

[8] *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 186 (1947).

[9] U.N. Charter art. 2, para. 4.

struggled for fifty years with the task, only to include the crime of aggression, without definition, in its 1996 Draft Code.[10] 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.[11] 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*.[12] 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.[13] Through the perseverance of many, including Ben, and in spite of the fierce opposition of the United States (as well as other nations),[14] 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.[15]

A second example has been the assault on the Nuremberg legacy by states responding to acts of international terrorism.[16] Prominent U.S. scholars writing about the so-called "war on terror" have recently suggested the need to eliminate

---

[10] Draft Code of Crimes Against the Peace and Security of Mankind art. 16, Int'l L. Comm'n, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.532 (1996).

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

[12] SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE (Leila Nadya Sadat, ed., forthcoming 2017).

[13] Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 437 (2000).

[14] *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective,* 109 AM. J. INT'L L. 257 (2015).

[15] *Id.*

[16] Sadat, *supra* note 1, at 587–90.

the peacetime paradigm in favor of a state of "perpetual war,"[17] on the grounds that this realist approach will lead to greater protections for human rights[18] or a more sensible balance between human rights and the demands of national security.[19] 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.[20] 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.[21] 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,[22] 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.[23]

---

[17] *See* Rosa Brooks, *There's No Such Thing as Peacetime*, FOREIGN POL'Y, Mar. 13, 2015, http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/. *See also* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING (2016); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008).

[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.

[20] Brian J. Egan, State Department Legal Advisor, Keynote Address at the 110th ASIL Annual Meeting: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), *transcribed at* https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil.

[21] *See, e.g.,* Leila Nadya Sadat, *America's Drone Wars*, 45 CASE W. RES. J. INT'L L. 215 (2012); Kevin Jon Heller, *'One Hell of a Killing Machine': Signature Strikes and International Law*, 11 J. INT'L CRIM. JUST. 89 (2013).

[22] *See* Jack Goldsmith, *Obama Has Officially Adopted Bush's Iraq Doctrine*, TIME (Apr. 6, 2016), http://time.com/4283865/obama-adopted-bushs-iraq-doctrine/. *See also* Exec. Order No. 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, 81 Fed. Reg. 44,483 (July 7, 2016), and corresponding Fact Sheet: https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address.

[23] *See* Charlie Savage & Eric Schmitt, *Trump Administration is Said to be Working to Loosen Counterterrorism Rules*, N.Y.TIMES, Mar. 13, 2017, at A15. *See also* Micah Zenko, *Trump Could Take Obama's Drone Policy Further into the Shadows*, FOREIGN POL'Y (Feb. 2, 2017), http://foreignpolicy.com/2017/02/02/the-buck-doesnt-stop-with-trump-on-counterterrorism/.

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,[24] making everyone, everywhere, liable to be killed as "collateral damage."[25] 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."[26] 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.[27] 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.[28]

***

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.[29]

---

[24] Naz Modirzadeh, *International Law and Armed Conflict in Dark Times: A Call for Engagement*, 96 INT'L REV. RED CROSS 737, 746 (2014).

[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.

[29] *"The Biggest Murder Trial in History"*, U.S. HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007155 (last visited Mar. 15, 2017).

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 â€œunderstandingsâ€ 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.[15].Â This requires states to â€œput peacetime first,â€ 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. The principle of the non-use of force or threat of force was first embodied in the UN Charter. Art 2 of the Charter says that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."2.Â This principle was called upon to put an end to colonial domination and could not serve as grounds for dividing up independent countries.Â The U.N. Charter envisages two cases of legal use of armed force: for the purpose of self-defense (Art 51) and in compliance with a resolution of the U.N. Security Council in the event of a threat to peace, breach of peace, or act of aggression (Arts 39 and 42). In order to constitute an unlawful use of force it is widely accepted that an intervention must produce physical damage. Of course, a cyber attack can cause physical damage and therefore violate Article 2(4). Upon the available evidence, I submit that the deployment of the Stuxnet virus against Iran in 2010 is such an example.Â This essay will discuss how intrusive (hacking) cyber espionage in peacetime is legally justified, in particular by some US defence sources.Â Relevant issues including state sovereignty and sovereign immunity, accountability for cyber operations, effects of armed conflicts on rules applicable in peacetime and criminal jurisdiction are of practical significance in the context of cyber operations and need to be further elaborated. Force was used against enemy combatants who could be clearly distinguished from the civilian population. The use of force in order to maintain or restore public security, law and order was seen as a domestic task fulfilled by the police. Today, in many contemporary armed conflict situations, armed forces are increasingly expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security, law and order. Different reasons can be cited to explain this situation.Â First, contemporary armed conflicts are predominantly non-international armed conflicts. In these situations, belligerent States are using force against fighters who are often at the same time criminals under domestic law. First, are foreign military activities permissible at all? Second, what degree of force may lawfully be exercised (1) by the coastal state to repel intrud-ers and (2) by the foreign navy to assert navigational rights against the coastal state's territorial claim?Â twelve-mile coastal belt.15 This prohibition does not apply to the coastal state, which retains the freedom of using or allowing its allies to use the seabed zone within the twelve-mile limit for the emplace-ment of such weapons.' 6. Finally, the Treaty of Tlatelolco, which follows the provisions of the 1963 Test Ban Treaty,' 7 prohibits the emplacement of nuclear weapons in Latin America, including the territorial waters of the con-tracting parties.1 8 The Treaty of Tlatelolco extends its prohibition to underwater tests, including the territorial sea.