The Crime of Aggression in International Criminal Law

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Historical Development, Comparative Analysis and Present State

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Foreword

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

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

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

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

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

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

The Hague, Summer 2013

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

Preface

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

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

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

Tashkent, December 2013 Sergey Sayapin

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

Contents

Abbreviations

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] Contamine (1984, pp. 270–274).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] See Akhavan (2001, pp. 7–31).

[32] Leanza (2004, pp. 12–15).

would be exercised "once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".[33] The subsequent drafting process stretched itself over 12 years after the adoption of the Rome Statute and finally resulted in the adoption of relevant substantive and procedural provisions in 2010.[34]

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

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

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

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

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

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

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

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

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

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

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

References

Akhavan P (2001) Beyond impunity: can international criminal justice prevent future atrocities? AJIL 95:7–31

Bassiouni MC (2003) Introduction to international crime law. Transnational Publishers, Inc., New York,

Baumgarten A (1931) Souverenität und völkerrecht. ZaöRV 2:305–334

Baumgarten A (1933) Souverenität und völkerrecht. ZaöRV 3:192–207

Borchard E (1933) War and peace. AJIL 27:114–117

Borchard E (1941) War, neutrality and non-belligerency. AJIL 35:618–625

Borchard E (1942) The place of force in international law. AJIL 36:628–631

Borchard E (1943) The place of law and courts in international relations. AJIL 37:46–57

Carlston KS (1966) A framework for the legal analysis of war-peace issues. AJIL 60:728–734

Cassese A (2003) International crime law, Oxford University Press, New York

Cherkes ME (2009) Ispolzovanie sily v mejdunarodnyh otnosheniyah (The use of force in international Relations). Almanach of International Law 1:103–119

Contamine P (1984) War in the middle ages, translated by M. Jones. Basil Blackwell Publisher, Oxford

Cryer R (2005) Prosecuting international crimes: selectivity and the international criminal law regime. Cambridge University Press, Cambridge

Eagleton C (1951) International law or national interest. AJIL 45:719–721

Ferencz BB (1972) Defining aggression: where it stands and where it's going. AJIL 66:491–508

Franck TM (2002) Recourse to force: state action against threats and armed attacks. Cambridge University Press, Oxford

Gorohovskaya EV (2009) Agressiya kak mejdunarodnoe prestuplenie: genezis razvitiya ponyatiya (Aggression as an international crime: the genesis of the notion's development). Almanach of International Law 1:45–52

Henckaerts JM, Doswald-Beck L (eds) (2005) Customary international humanitarian law. Volume I: Rules. Cambridge University Press, Oxford

Inogamova-Hegay LV (2009) Voprosy prestupleniya agressii v mejdunarodnom ugolovnom prave [Issues of the crime of aggression in international criminal law]. In: Bogush GI and Trikoz EN (eds.), Международное уголовное правосудие: современные проблемы [International criminal justice: Contemporary issues], Moscow, p. 139–156

International Military Tribunal (1946). The trial of German major war criminals. In: Proceedings of the international military tribunal sitting at Nuremberg, Germany, Part 22, 22nd August 1946–1st October, 1946

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

Jackson RH (1949) United States representative to the international conference on military trials. U.S. Government Printing Office, Washington, DC (Report)
Karoubi MT (2004) Just or unjust wars: international law and unilateral use of armed force by states at the turn of the twentieth century. Ashgate, Burlington
Keegan J (2004) A history of warfare, 2nd edn. Norton, Pimlico
Kelsen H (1944) Peace through law. The University of North Carolina Press, Chapel Hill
Kelsen H (1947) Will the judgment in the nuremberg trial constitute a precedent in international law?. ILQ 1:153–171
Koh T (2011) International law and the peaceful resolution of disputes: Asian perspectives, contributions, and challenges. Asian JIL 1:57–60
Korotkyy TR (2010) Ot *jus inter gentes* k *jus inter civilisatione* (From *jus inter gentes* to *jus inter civilisatione*). Almanach of International Law 2:138–151
Koskenniemi M (2011) What use for sovereignty today? Asian JIL 1:61–70
Neff SC (2005) War and the law of nations: a general history. Cambridge University Press, Cambridge
Lansing R (1907a) Notes on sovereignty in a state. AJIL 1:105–128
Lansing R (1907b) Notes on sovereignty in a state. AJIL 1:297–320
Lansing R (1921) Notes on world sovereignty. AJIL 15:13–27
Leanza U (2004) The historical background. In: Politi M, Nesi G (eds) The international criminal court and the crime of aggression. Ashgate Publishing Limited, Aldershot, pp. 3–15
Levin ID (2003) Suverenitet (Sovereignty). Yuridicheskiy Centre Press, Moscow
Loewenstein K (1954) Sovereignty and international co-operation. AJIL 48:222–244
Maridakis GS (2006) An ancient precedent to Nuremberg. JICJ 4:847–852
McCarthy C (2010) The paradox of international law of military occupation: sovereignty and the reformation of Iraq. JCSL 10:43–74
Minear R (1971) Victor's justice: the Tokyo War Crimes Trial. Princeton University Press, Princeton
Petersen N (2011) International law, cultural diversity, and democratic rule: beyond the divide between universalism and relativism. Asian JIL 1:149–163
Pictet J (2001) Razvitie i printsipy mejdunarodnogo gumanitarnogo prava (Development and principles of international humanitarian law). ICRC, Moscow
Robertson G (2002) Crimes against humanity: struggle for global justice, 2nd edn. Penguin Books, Westminster
Röling BVA and Cassese A (1992) The Tokyo trial and beyond. Polity Press, oxford
Schrijver N (2000) The changing nature of state sovereignty. BYIL 71:65–98
Steinberg RH and Zasloff JM (2006) Power and international law. AJIL 100:64–87
Stewart JH (1951) The imprisonment of Napoleon: a legal opinion by Lord Eldon. AJIL 45:571–577
Stone J (1958) Aggression and World Order. University of California Press, Berkeley
Teichman J (2006) The philosophy of war and peace. Imprint Academic, Exeter
Tomuschat C (2006) The legacy of Nuremberg. JICJ 4:830–844
Verdirame G (2007) The 'sinews of peace': international law, strategy, and the prevention of war. BYIL 78:83–162
Walzer M (1977) Just and unjust wars: a moral argument with historical illustrations. Basic Books, New York
Wang G (2004) The impact of globalization on state sovereignty. Chinese JIL 3:473–484
Weisburd AM (1997) Use of force: the practice of states since world war II. The Pennsylvania State University Press, Philadelphia
Wright Q (1925) The outlawry of war. AJIL 19:76–103
Wright Q (1953) The outlawry of war and the law of war. AJIL 47:365–376
Wright Q (1956) The prevention of aggression. AJIL 50:514–532
Yasuaki O (2003) International law in and with international politics: the functions of international law in international society. EJIL 14:105–139
Zolo D (2007) Who is afraid of punishing aggressors? On the double-track approach to international criminal justice. JICJ 5:799–807