

**CRIMINALIZATION IN WORLD POLITICS:
UNCOVERING THE HISTORICAL CONSTRUCTION OF
INTERNATIONAL CRIMES**

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ABSTRACT

This thesis examines the phenomenon of international criminalization. Specifically, it explores the process by which particular acts came to be established as international crimes in international society. Drawing upon constructivist International Relations scholarship on international norms and the socially constructed nature of international relations, it argues the process of international criminalization does not simply amount to a legal process, as existing accounts from the discipline of International Law suggest. Rather, it also embraces a social process that centres on international diplomatic negotiations amongst international diplomats and legal experts within multilateral organizations.

The thesis also argues the process of international criminalization consists of two stages: firstly, the emergence of an international criminal norm; and secondly, the translation of that international criminal norm into an international legal proscription. In the first stage, an international criminal norm develops once an international social consensus is obtained amongst diplomats and legal experts on the following: firstly, that an act deserves to be recognized as having the status of an international crime; and secondly, that an act ought to assume a specific form as an international crime. In the second stage, the international criminal norm is given legal expression by being made into a formal legal proscription under international law.

This two-stage process of international criminalization is then employed to analyze the historical emergence of two international crimes, namely, genocide and aggression. Through a historically-informed constructivist approach centring on archival research and a close reading of historical documents, the thesis demonstrates the establishment of these international crimes were preceded by the development of an international criminal norm. This, in turn, offers an alternative account of the criminalization of genocide and aggression, which emphasizes what existing accounts currently neglect, namely, the social dimensions of the process of international criminalization. The thesis also examines a negative instance of international criminalization. Through a focus on piracy, it shows how piracy, contrary to some views, cannot be regarded as an international crime because it did not undergo the process of international criminalization throughout its historical development.

For Papa, in loving memory

“Edelweiss, Edelweiss,

Every morning you greet me...”

Hammerstein II, O. and Rodgers, R. 1965. *Edelweiss*. New York: RCA Records.

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INTRODUCTION

The International Criminal Court (ICC)¹, a permanent international court based in The Hague (the Netherlands), is principally tasked with prosecuting individuals for having committed genocide, crimes against humanity, war crimes and aggression². The Rome Statute, the international treaty that established the ICC, characterizes these four acts as “unimaginable atrocities that shock the conscience of humanity”³. In addition, these four acts are also considered to be fundamentally criminal in their nature. As the Rome Statute states further, these four acts are “grave *crimes* that threaten the peace, security and well-being of the world”⁴ and they constitute “the most serious *crimes* of concern to the international community as a whole”⁵.

That these four acts attract special opprobrium for their criminality is also evident in international legal scholarship, where they are specifically referred to as ‘international crimes’, ‘crimes under international law’ or ‘core crimes’. According to international legal scholars, international crimes violate, attack and offend supranational values that the international community as a whole considers important to protect (Cassese 2008; Gaeta 2009; Werle 2009). Apart from violating “fundamental concepts of morality and fairness” (Yarnold 1994: 85), international crimes constitute “threat[s] to the international legal and political order” (Simpson 2007: 45). According to one commentator, international crimes occupy a distinct realm of “extraordinary international criminality” (Drumbl 2007: 4). As “acts of extreme evil” that

¹ The ICC was established on 17 July 1998 following the adoption of an international treaty (Rome Statute of the International Criminal Court) by states; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute)

² Article 5 of Rome Statute

³ Preamble of Rome Statute

⁴ *Ibid.*; emphasis added

⁵ *Ibid.*; emphasis added

victimize all members of the international community, international crimes are so much more egregious than other types of crimes and, hence, they are condemned internationally (Drumbl 2007: 3; 6).

These characterizations suggest international crimes represent a *sui generis* category that embraces particularly grave forms of criminality. Indeed, international crimes are distinguishable from ordinary crimes that exist within national legal systems, namely, ‘domestic crimes’. In this regard, domestic and international crimes violate different bodies of laws and legal principles. When an international crime has been committed, it is not domestic criminal laws that are violated, as is the case with domestic crimes such as murder, rape or robbery. Rather, international crimes violate the legal rules and principles that collectively constitute *international* criminal law.

Furthermore, in the case of domestic crimes, the domestic courts of individual states are responsible for prosecuting its perpetrators in terms of domestic criminal laws. In contrast, the perpetrators of international crimes are prosecuted by *international* courts and tribunals that apply *international* criminal law. At present, the international court with the special authority to prosecute individuals for the commission of international crimes is the ICC. As its founding treaty makes clear, the ICC was established to ensure the commission of international crimes “do not go unpunished”⁶ and to this end, the ICC was set up as a “permanent institution”⁷ with the “power to exercise jurisdiction over persons for the most serious crimes of international concern”⁸. Prior to the ICC coming into operation in 2002, *ad hoc* international criminal tribunals were established to prosecute individuals for international crimes committed in, most

⁶ Preamble of Rome Statute

⁷ Article 1 of Rome Statute

⁸ *Ibid.*

notably, Germany and Japan during the Second World War (1945), the former Yugoslavia (1993), Rwanda (1994), East Timor (2000), Cambodia (2001) and Sierra Leone (2002).

Finally, unlike domestic crimes, international crimes have international elements. They involve, in particular, the systematic or large-scale use of force, typically employed by a state against civilian populations (Boister 2003; Schabas 2009b; Werle 2009; Werle and Jessberger 2014). In this respect, international crimes can be regarded as ‘state crimes’, namely, acts perpetrated by state officials in their official capacity or backed by the apparatus of a state (Gaeta 2009: 63). Moreover, because international crimes are usually perpetrated to gain or maintain political power during periods of war and armed conflict, they represent particular “manifestations of political violence” (Smeulers and *Grünfeld* 2011: 20). In addition, international crimes often generate transborder political consequences: they trigger international security concerns, threaten regional stability and induce cross-border refugee movements (Drumbl 2009: 6; Simpson 2007: 45). Essentially, then, international crimes involve methods and effects that transcend national boundaries (Yarnold 1994: 90).

International crimes, therefore, are a unique category of wrongful conduct in world politics: they constitute universal criminal wrongs. At present, there are only *four* international crimes, namely, genocide, crimes against humanity, war crimes and aggression. That only a small number of acts have been brought under the special category of international crimes raises several questions, which forms the starting point of this thesis. Firstly, why are genocide, crimes against humanity, war crimes and aggression the only four international crimes that currently exist in contemporary international society? Given that a vast array of conduct exists as domestic crimes within the domestic political sphere, it is especially interesting that the converse is the case within the international political sphere. Moreover, many domestic crimes,

as O’Keefe notes, are just as grave as international crimes (2015: 57). What, then, what makes these four particular acts so reprehensible that they cannot simply be conceived as ordinary, domestic crimes but rather, must constitute international criminal wrongs?

Secondly, why have other types of conduct that also attract international condemnation not been included within the category of international crimes? Many acts in international society – for instance, slavery, international terrorism, or human and drug trafficking – represent conduct which the international community deems as objectionable. Unlike international crimes, however, they do not possess an additional element of criminal reprehensibility. Rather, they are simply regarded as unacceptable conduct and are simply the subjects of international prohibitions. What explains, therefore, why some acts have not been internationally prohibited but instead, have been elevated to the special category of international crimes?

Answering these questions, this thesis suggests, requires an understanding of the process by which certain acts came to be specifically established as international crimes. Put differently, it demands a focus on the process by which such acts were criminalized in international society, a process that can be termed *international criminalization*. Given that only a small number of acts currently constitute international crimes, this suggests the process of international criminalization is a distinctive international process that has unfolded only in particular instances. Moreover, given that international crimes have not always existed, this further indicates that the process of international criminalization is a unique phenomenon that arose at a particular point in international society.

However, the concept of international criminalization, as this introduction will demonstrate, is currently under-explored in existing International Law (IL) and International Relations (IR)

scholarship. More specifically, an account of what the process of international criminalization specifically entails, how it unfolds in international society and for what reasons has not been advanced by either IL or IR scholars. Yet, an understanding of international criminalization is important for several reasons: firstly, it can explain the reasons for the historical emergence of international crimes; secondly, it can illustrate how international crimes are distinct from other types of crimes; and finally, it can also clarify how international crimes are distinct from other types of wrongful conduct in world politics.

In order to address this existing lacuna, this thesis elaborates on and analyses the concept of international criminalization. In doing so, it is guided by the following research question: ***How and why have certain acts been criminalized in international society?*** The introduction of this thesis begins by suggesting why a study of international criminalization matters. Thereafter, it reviews existing accounts of international criminalization within IL and IR scholarship, demonstrating how these accounts are either underdeveloped or limited. The final section of this introduction addresses questions of research design and here, the theoretical approach, methodology, cases and sources of this study will be outlined.

WHY STUDY INTERNATIONAL CRIMINALIZATION?

Firstly, the concept of international criminalization can explain why international crimes exist in international society. Here, it is important to stress that international crimes have not always existed in world politics. As one commentator explains, international crimes, and the establishment of international courts or tribunals to exercise jurisdiction directly over individuals for the commission of these crimes, are a distinctly “modern phenomenon” (Shaw 2017: 289). In this regard, the emergence of war crimes is usually dated to the late nineteenth century, while aggression, crimes against humanity and genocide were established as

international crimes in the aftermath of the Second World War (Cassese and Gaeta 2013: 4; Cryer 2008: 115). Moreover, the emergence of international crimes was not an inevitable outcome. Rather, the establishment of particular international crimes, as this thesis will show, is the consequence of historically-contingent factors and processes. What the concept of international criminalization can illuminate, therefore, is why specific international crimes were established at a particular point in international society, as well as what historical factors enabled this to occur.

Secondly, the concept of international criminalization can help explain the distinction between international crimes and other types of crimes. As already highlighted, international crimes are distinct from domestic crimes. However, international crimes are also distinct from ‘transnational crimes’. As this concept will be addressed more extensively in the first chapter of this thesis, a brief definition would suffice at this point: transnational crimes refer to conduct or activities that states have sought to suppress and regulate through international treaties (Boister 2003: 955; Gaeta 2009: 63). Like domestic crimes, transnational crimes do not amount to violations of international criminal law and as such, they can only be prosecuted by domestic courts in terms of domestic criminal law. These different criminal categories raises the following question: why have only some acts been brought under the special category of an international crime, while others have been deemed as transnational or domestic crimes? As this thesis will demonstrate, answering this question requires an appreciation of the unique process that international crimes undergo prior to their establishment, namely, that of international criminalization.

Thirdly, an account of international criminalization can explain how and why international crimes are distinct from other types of internationally prohibited conduct. As IR scholars have

demonstrated, certain acts are prohibited in world politics due to the emergence of global taboos, prohibitory norms and global prohibition regimes (Price 1997; Tannenwald 2007; Nadelmann 1990; Inal 2013). Although conduct falling under these categories are considered reprehensible, they are not additionally regarded as being criminal, as international crimes are. What requires explanation, then, is why only certain acts have been criminalized and established as international crimes, while others come to be subjected to either taboos or prohibitions. Arguably, there is something distinctive about the processes that culminate in these different outcomes. What an account of international criminalization can valuably demonstrate, therefore, is how and why the process of international criminalization differs from that which results in the emergence of taboos or prohibitions in world politics.

Fourthly, an account of international criminalization can help identify the markers for the emergence of new international crimes. Although there are only four international crimes at present, it is not inconceivable that new international crimes might come to be established in the future. In fact, this possibility has already generated debate in contemporary IL scholarship. For instance, some have argued international terrorism and torture deserve to be recognized as international crimes (Cassese 2005: 436; Cassese and Gaeta 2013: 4), while others have suggested that nuclear terrorism and the financing of terrorism may constitute international crimes in the future (Bassiouni 2008: 138-139). If new international crimes are indeed in the making, it is important these developments be analytically identified and examined. This is only possible, however, if we have first engaged in conceptual analysis of what international criminalization entails, as well as an analysis of what factors drive or influence this process.

Finally, the concept of international criminalization, as already mentioned, is under-examined in contemporary scholarship. Within the discipline of IR, there is a burgeoning literature on

international criminal law and IR scholars have examined important questions surrounding international criminal justice, such as the politics behind the establishment and operation of the ICC and international criminal tribunals (for example, Ainley 2008, 2011; Bass 2000; Fisher 2012; Gow 2013; Kerr 2004; Leonard 2005; Ratner, Abrams and Bischoff 2009; Roach 2009; Rudolph 2017; Sikkink 2011; Teitel 2011). However, an account of the process of international criminalization does not currently feature in IR scholarship. This neglect has meant the discipline of IR presently has very little to say about how and why the special category of international crimes emerged in international society. Yet, as this thesis will show, IR does in fact possess some key intellectual resources to understand this concept. In particular, constructivist IR approaches, which focus on the role of norms and the social aspects of world politics, offer an important resource for understanding what the process of international criminalization entails, as well as how it unfolds. As this introduction and the first chapter of this thesis will elaborate, a valuable contribution that the discipline of IR can make is illuminating the social dimensions of this unique international process.

While the concept of international criminalization features within IL scholarship, this body of scholarship is still, at present, relatively small (Yarnold 1994; Bassiouni 2008a; Cryer 2008; Gaeta 2009; Ocheje 2002; Ambos 2011). More crucially, existing IL accounts only capture some aspects of the process of international criminalization. As the next section demonstrates more fully, international legal scholars primarily understand the concept of international criminalization as an international legal process. While this valuably highlights what the legal dimensions of international criminalization are, it reveals very little about its social dimensions.

EXISTING ACCOUNTS OF INTERNATIONAL CRIMINALIZATION

As will be discussed below, existing IL accounts provide two principal insights about the legal dimension of the process of international criminalization. After introducing these two aspects, the principal limitations of these accounts will be highlighted. Thereafter, discussion turns to IR scholarship and demonstrates why more traditional explanatory approaches cannot account for the empirical realities of international criminalization. It will also demonstrate how a broadly constructivist perspective, which focuses on the social dimensions of international criminalization, is most useful for understanding how the process unfolds in international society and relatedly, why international crimes were established.

International criminalization in international legal scholarship

In IL scholarship, international criminalization is generally conceived as an international legal process that involves the following: firstly, the legal establishment of an international crime and secondly, its legal prosecution. This suggests that IL scholars see the process of international criminalization as being marked by two critical moments. While the first centres on the moment when an international crime comes into legal existence, the second centres on the moment when an international crime is prosecuted before a court of law.

Turning to the first of these moments, how, then, does an international crime come into existence? According to IL scholars, an international crime is established when international law formally recognizes an act as an international crime. As Gaeta explains, an act is criminalized in international law “by virtue of general [international] rules” that prohibit such an act as an international crime (2009: 65). Unlike domestic crimes, whose criminal prohibitions originate from the domestic legal order, international criminal prohibitions

emanate from the international legal order – in other words, from international rules that specify the existence of an international criminal prohibition (Cryer 2008: 108).

An act can be recognized as an international crime if it has been declared as such by an international treaty (Schabas 2009b: 268; Cryer 2008: 108; O’Keefe 2015: 56). If states come together and agree upon an international treaty that explicitly provides an act amounts to an international crime, the conclusion of this international treaty therefore marks the moment when this act is criminalized under international law. This, in turn, implies that international criminalization centres on the creation of international laws stipulating that an act amounts to an international crime. This explains why IL scholars primarily conceive of international criminalization as an “international legislative process” (Bassiouni 2008a: 132) or an international “process of law-creation” (Cryer 2008:119).

An instructive example in this regard is the international crime of genocide. In December 1948, states concluded the Convention on the Prevention and Punishment of the Crime of Genocide⁹, in terms of which genocide was declared to be a “crime under international law”¹⁰. Genocide’s establishment as an international crime, therefore, centres on, and is synonymous with, the moment when the Genocide Convention was concluded (Cassese 2005: 443; Gaeta 2009: 67). A further example is crimes against humanity. This international crime was established when it was included the international treaty¹¹ that established the International Military Tribunal (IMT) in Nuremberg, Germany (Bassiouni 2008a, 2008b, 2008c; Cassese and Gaeta 2013;

⁹ Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

¹⁰ Article 1 of Genocide Convention

¹¹ Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945) 82 UNTC 280

Cryer 2008; Gaeta 2009). In this treaty, crimes against humanity was included as one of the crimes the former Nazi political leaders were to be prosecuted for by the IMT.

IL scholars also emphasize the importance of an international treaty when examining the possible emergence of new international crimes. For instance, in arguing that the domestic crime of political corruption ought to be elevated to an international crime, Ocheje (2002) states this would require embodying corruption as an international crime in an international treaty. An international treaty, as he argues, would “put [corruption] squarely amongst the family of international crimes” and it would represent the “logical culmination of [the] widespread reprobation of corruption in the international community” (Ocheje 2002: 774; 776). Turning to terrorism, Ambos suggests it may be considered as being “on the brink of becoming a true international crime” (2011: 675). However, before this can happen, a “clear declaration as to the international criminalization of the offence is required [and] [t]he international criminalization must be clearly stated by the law” (Ambos 2011: 670). This has not yet occurred in terrorism’s case, Ambos argues, particularly because states have not yet adopted a comprehensive international treaty on terrorism (2011: 670).

Aside from an international treaty, an international crime may also come into existence through the development of international customary law (Cryer 2008: 108; O’Keefe 2015: 56). In contrast with international treaties, where states consciously come together to agree upon legal principles and standards to govern behaviour, customary international law is not a “deliberate law-making process” (Cassese 2005: 156). Rather, customary international rules develop as a consequence of repeated practices on the part of states, which come to be accepted by them as binding law. Two requirements need to be fulfilled before a particular practice can develop into an international customary rule: firstly, there needs to be widespread and consistent practice on

the part of states (*usus*); and secondly, there needs to be conviction on the part of states that such practice reflects, or amounts to, law (*opinio juris*) (Cassese 2005: 156; Thirlway 2010: 104).

An international crime could also be established, therefore, as a consequence of repeated state practice and states' acceptance of this practice as amounting to a legal rule. An example in this regard are war crimes, namely, violations of the laws governing the conduct of war and armed conflicts. Since at least the eighteenth century, states have, through their national military manuals and regulations, punished their soldiers for violating commonly-accepted rules on the conduct of wars (Gaeta 2009: 66; Cassese and Gaeta 2013: 63). Over time, these practices evolved into customary rules, which were eventually codified in the Hague Conventions (1899 and 1907)¹² and the Geneva Conventions (1949)¹³ (Gaeta 2009: 66; Cassese and Gaeta 2013: 63).

Once an act has been formally established as an international crime under international law, special legal consequences follow. Firstly, an international crime invokes individual criminal responsibility under international law. Although states are usually the subjects of international law and would ordinarily be held responsible for breaches of international legal obligations, international criminal law deviates from this traditional model, as it imposes obligations directly upon individuals (Cassese and Gaeta 2013: 3; Werle and Jessberger 2014: 1). The subject or addressee of international criminal law, therefore, is not the state but rather, the

¹² Convention With Respect to the Laws and Customs of War on Land (29 July 1899) TS No. 403; Convention Respecting the Laws and Custom of War on Land (18 October 1907) TS No. 539

¹³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

individual (Werle 2005: 35; Werle and Jessberger 2014: 1). As such, when an international crime is committed, the individual perpetrator will be held responsible under international law for its commission. Indeed, as Bassiouni notes, all internationally criminalized conduct implies a legal duty to prosecute those individuals responsible for committing international crimes (2008a: 133).

Prosecution, then, is a further consequence that ensues from the establishment of an international crime. This prosecution can be undertaken by an international tribunal, as was the case with the *ad hoc* international tribunals that were established in Germany, Tokyo, Rwanda and the former Yugoslavia. Since the establishment of a permanent international criminal court, the ICC is responsible for prosecuting individuals for international crimes. However, the ICC was envisaged as a court of last resort and under the principle of complementarity, the ICC will only prosecute perpetrators of international crimes if national courts are either unwilling or unable to do so¹⁴. National courts, therefore, also have the authority to prosecute individual perpetrators, particularly in the following instances: when the international crime is committed on such a state's territory (principle of territoriality); when the individual perpetrator is a national of that state (principle of active nationality); or when the victim of the international crime is a national of that state (principle of passive nationality) (Gaeta and Cassese 2013: 274-277; Shaw 2017: 488-499). Under certain circumstances, national courts may also have the authority to prosecute individual perpetrators under the principle of universal jurisdiction, even if no link exists between that state and either the perpetrator or the victim of an international crime (Schabas 2009b: 275; Gaeta 2009: 72; Gaeta and Cassese 2013: 278-281; Shaw 2017: 500-503).

¹⁴ Article 1 of Rome Statute

Without actual prosecution, an existing international crime would simply remain ‘a crime on the law books’ – in other words, an unprosecutable crime. From a legal perspective, therefore, what transforms an international crime from a ‘crime on the books’ to a legally ‘enforceable crime’ is its prosecution before a court of law. The first time an international crime is successfully prosecuted following its initial creation – its initial ‘prosecutorial moment’ – can therefore be regarded as another critical moment within the process of international criminalization. In this regard, although aggression and crimes against humanity were both established when the Charter of the IMT was concluded in August 1945, their prosecutorial moment came when the IMT issued its legal judgment¹⁵ in October 1946 (Werle and Jessberger 2014: 329; 535; O’Keefe 2015: 138; 154). Turning to genocide, which was established in 1948 when the Genocide Convention was concluded, it was first prosecuted by an Israeli court¹⁶ in 1961 (Cassese and Gaeta 2013: 114)

An international crime’s ‘prosecutorial moment’ is not exclusively confined to its very first prosecution. Rather, it may also include ongoing judicial interpretation across different cases of prosecution that takes place over time. In this regard, various aspects concerning an international crime – such as its definition and its legal elements – requires legal interpretation during its prosecution. The judicial interpretation of these issues are undertaken by courts, who elucidate the applicable customary international rules and establish the most appropriate interpretation to be placed on relevant principles contained within an international treaty (Cassese and Gaeta 2013: 18; Armstrong, Farrell and Lambert 2012: 226). Indeed, as legal scholars have noted, the decisions of international courts and tribunals have clarified how the relevant principles that underpin international crimes ought to be interpreted, as well as

¹⁵ International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, reproduced in *American Journal of International Law*, Vol. 41 (1947), pg. 172-332

¹⁶ *Attorney-General for Israel v Eichmann*, 36 ILR 5 (District Court, 1961)

established new precedents in international criminal law more generally (Werle 2005: 51; Werle and Jessberger 2014: 63; Armstrong, Farrell and Lambert 2012: 227). The ensuing case law and jurisprudence that develops from different cases of prosecution can also be seen, therefore, as part of an international crime's wider process of international criminalization. Importantly, this additional dimension of judicial interpretation may not be attributable to a single moment. Rather, it may centre on multiple moments, as more and more cases of prosecution are progressively undertaken across time.

Having outlined these two legal dimensions, it is important to stress that when examining the process of international criminalization, IL scholars tend to focus more on the legal establishment of an international crime, as opposed to its legal prosecution (Ambos 2011; Yarnold 1994; Bassiouni 2008a; Cryer 2008; Gaeta 2009; Ocheje 2002). From the perspective of these scholars, the notion of international criminalization pivots quite centrally on the moment when an international crime legally exists under international law. Moreover, although IL scholars do recognize that international crimes may be established through the development of international customary law, many regard international treaties as having a fundamental role within the criminalization process. This centralizes how IL scholars primarily equate international criminalization with the international codification of prohibited conduct in an international treaty. This, in turn, provides a positivist view of international criminalization, as primary emphasis is placed upon the role of positive international law within the process of international criminalization.

A positivist view valuably highlights the role of international law – and international treaties, in particular – within the process of international criminalization. In this regard, codifying an international crime into positive international law publicizes its formal existence, thereby

making it difficult to deny or dispute its existence. Moreover, as international treaties are binding legal agreements between states, they allow for the establishment of international legal obligations in relation to criminalized conduct. For instance, in stating that genocide is a “crime under international law”, the Genocide Convention makes it unequivocally clear that genocide is an international crime¹⁷. In addition, the treaty requires states to enact domestic legislation in order to give effect to the provisions of the Genocide Convention¹⁸. By laying down such legal obligations, the international treaty therefore assists with the concrete implementation of preventing and punishing genocide.

However, equating international criminalization exclusively with international legal codification is limited for two principal reasons. Firstly, it dismisses the significance that developments taking place *prior* to international codification may have upon the criminalization process. While codification may be an important element of international criminalization, it may not constitute the *only* dimension of the process. As the next chapter demonstrates, the legal act of international codification is preceded by non-legal developments, which I argue should also be understood as a key part of process of international criminalization. Secondly, the positivist view treats international criminalization exclusively as a legal phenomenon. Relatedly, international crimes themselves are viewed primarily as legal constructs. However, as I will set out further below, international criminalization should also be understood as a social process. As a corollary, I also suggest that international crimes should also be viewed as social constructs that embody and express shared understandings concerning the nature of criminality in international society at particular points in time.

¹⁷ Article 1 of the Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

¹⁸ Article 5 of Genocide Convention

International criminalization in International Relations scholarship

To date, IR scholarship has offered little by way of an account of the process of international criminalization and in fact, the concept of international criminalization is glaringly absent in IR scholarship. Before suggesting how the discipline of IR can nevertheless provide an account of international criminalization, it would be valuable to begin by asking how more traditional approaches in IR, particularly realism and neo-liberal institutionalism, might explain the phenomena of both international criminalization and international crimes.

From the realist perspective, state behaviour is a function of power politics. Realists therefore look for where power is located, what interests are at stake and what role power relationships have in furthering those interests or reconciling clashing interests (Wohlforth 2008: 134). Relatedly, realists maintain a sceptical view about the role of international law in international politics. International law is seen as being epiphenomenal, rather than having an independent effect on state behaviour (Byers 2008: 613; Reus-Smith 2004: 16). Moreover, international law is regarded as being a reflection of the interests of powerful states (Byers 2008: 613; Reus-Smith 2004: 16; Steinberg 2013: 150).

From a realist view, therefore, explanations of international criminalization would focus on the distribution of power and the influence of dominant states in the international system. Instances of criminalization would not only be led by powerful states but crucially, would only occur if such states deem it to be in their interests. Ultimately, then, the process of international criminalization would be driven by power politics. From this perspective, the role and interests of powerful states explains the emergence of international crimes: they exist simply because such states have regarded the criminalization of certain acts to be in their interests. The specific form that a criminalized act assumes as an international crime would also be strongly

influenced by dominant states, who are likely to ensure the definition of an international crime serves their interests.

While a realist perspective usefully draws attention to the role of power and dominant states within the criminalization process, it too readily assumes powerful states have a pre-existing interest in criminalization. In treating this interest as a given, realism is unable to explain why powerful states found it in their interest to criminalize certain types of conduct at a particular point in international society. Moreover, as the case studies in subsequent chapters reveal, criminalization may nevertheless occur despite opposition from powerful states. Relatedly, the particular form that an international crime eventually assumes may not necessarily embody the version pushed for by powerful states. Exclusive focus on the role of powerful states therefore overlooks the role or influence of weaker states, as well as non-state actors, upon the criminalization process.

An alternative account of international criminalization might emanate from a neoliberal institutionalist perspective (Keohane and Nye 1977; Keohane 1984; Koremenos, Lipson and Snidal 2003; Krasner 1983; Martin and Simmons 2001). From this perspective, the creation of international crimes would be understood as a functional solution to cooperation problems and as being driven by the mutual interests of states. Relatedly, international criminalization would be viewed as another instance of “legalization” in world politics (Goldstein *et al* 2000; Abbott *et al* 2000; Goldstein *et al* 2001). International law, this perspective would argue, has been utilized to construct international rules, obligations and procedures to address specific problems posed by international criminality. This kind of explanation would focus, therefore, on the legal aspects and consequences of international criminalization, such as the nature of international obligations and specificity of legal rules that are established. In contrast with

realism, then, a neoliberal explanation would highlight the cooperative impetus behind international criminalization, as well as the formal, institutional or legal form that international crimes assume.

What this perspective cannot account for, however, is why international criminalization represents a relatively recent development in international society – or to put it another way, why states turned to criminalization at a particular point in time. Moreover, in treating international criminalization as an instance of legalization, neoliberal approaches say very little about what sets international criminalization apart from other international legal processes that similarly entail the creation of international rules and obligations. As this thesis will suggest, international crimes constitute very particular creations of international law that do not necessarily result from efforts to coordinate state behaviour. Instead, international crimes express and embody a collective view on what constitutes morally abhorrent behaviour in international society.

Constructivist approaches in IR emphasize the role of shared ideas, beliefs and values in world politics, as well as their influence on political action and behaviour (Finnemore 1996; Finnemore and Sikkink 1998; Keck and Sikkink 1998; Klotz 1995; Price 2007; Reus-Smit 1999; Tannenwald 2007). Constructivism offers two central insights about international criminalization, which improves upon realist and neoliberal institutionalist understandings of the concept. Firstly, rather than viewing international criminalization as an international legal process, a constructivist perspective would view international criminalization as a social process. In particular, it would see international criminalization as a process that is informed by, and which brings into play, existing norms and beliefs in international society on what constitutes a crime at the international level and why. Relatedly, a constructivist perspective

would challenge the apparent inevitability that realist and neoliberal perspectives attribute to international criminalization. Instead, the process of international criminalization would be appreciated as a historically-contingent phenomenon. Consequently, a constructivist perspective would be especially interested in the reasons why international criminalization rose to prominence at a particular point in international society, as well as what historically-specific factors enabled it to occur.

Secondly, instead of seeing international crimes exclusively as legal constructs, a constructivist perspective would view them as social constructs. More specifically, international crimes would be regarded as reflections of shared understandings in international society about the nature of criminality in world politics. In other words, they represent acts which international society have agreed, at a particular point in time, as not only being unlawful but in addition, criminal. Moreover, a constructivist perspective would also emphasize the role of non-material factors in the emergence of international crimes. Rather than stressing the role of power or mutual interests, constructivism would be interested in tracing the development of ideas and beliefs that culminate in an act being seen as worthy of being included within the special category of an international crime. From a constructivist perspective, therefore, international crimes represent sites to uncover the development of collective understandings in international society about international criminality.

INTERNATIONAL CRIMINALIZATION IN INTERNATIONAL SOCIETY

In the following section, the theoretical approach, methodology, case selection and the sources that guides this thesis' study of international criminalization will be outlined.

Theoretical approach and methodology

This study takes existing legal understandings of international criminalization as its point of departure. As outlined earlier, existing IL scholarship suggests two distinct moments mark the process of international criminalization: firstly, the moment when an international crime is legally established under international law, either through the conclusion of an international treaty or the crystallization of customary international law; and secondly, the moment when an international crime is legally prosecuted before a court of law, which includes the first time an international crime is prosecuted, as well as the evolving body of jurisprudence that develops from different cases of prosecution across time. What IL scholars have valuably demonstrated, then, is that the process of international criminalization centres on an initial *act of criminalization* and thereafter, ongoing *practices of criminalization*. While the initial act of international criminalization sees an international crime being legally established, the cases of legal prosecution that follow, which involve judicial interpretation on the part of judges, prosecutors and lawyers, refers to the unfolding of criminalization within the judicial spaces of courtrooms.

Although both dimensions collectively represent fruitful areas of research on the process of international criminalization, this thesis focuses exclusively on the initial act of criminalization. Given its primary concern with how and why some acts were established as international crimes in international society, concentrating on the initial act of criminalization allows for an in-depth examination into the timing and nature of particular instances of international criminalization. This is not to suggest questions surrounding the prosecution of international crimes do not open up interesting areas of investigation into the broader phenomenon of international criminalization. To be sure, exploring how the definitional elements of an international crime are judicially interpreted across different cases of prosecution is particularly

important for understanding how an international crime evolves within the international legal sphere after its initial establishment. However, these aspects of international criminalization are excluded from this study in order to devote more attention to questions pertaining to how, when and why an international crime is initially established in international society.

A focus on the initial act of criminalization also provides this thesis with the opportunity to refine existing IL understandings of this aspect of the process of international criminalization. As highlighted earlier, IL scholars generally equate the initial act of criminalization with international codification and in doing so, they primarily conceive of this phase of international criminalization in exclusively legal terms. While this thesis agrees that the establishment of an international crime entails international codification, it seeks to demonstrate how there is more to the initial act of criminalization than simply international codification. More specifically, this thesis aims to show how international codification is preceded by a social process and that this extra-legal development constitutes an additional dimension of the initial act of criminalization.

To refine existing IL understandings of the initial act of international criminalization, this thesis adopts a broadly constructivist IR approach. This perspective enables me to elucidate exactly what the social process that precedes international legal codification specifically entails. In this regard, this thesis suggests this social process centres on diplomatic negotiation between state diplomats and legal experts within a multilateral setting. Before an international crime is codified in an international treaty, decisions about international criminalization are negotiated by, and agreed between, diplomats and legal experts. These decisions, in turn, require these social actors to reach international agreement on questions such as, which act deserves to be criminalized and why, as well as what the defining elements of an international crime should

be. Once agreement between these social actors is obtained, an international social consensus on what constitutes criminal, as opposed to merely unlawful, behaviour in international society can be said to have developed.

In order to negotiate and reach consensus on decisions surrounding international criminalization, state diplomats and legal experts convene within international diplomatic spaces. As the case studies of this thesis reveals, these diplomatic negotiations have largely taken place within, or under the auspices of, multilateral international organizations such as the League of Nations, the United Nations (UN) and the ICC. In addition, major international conferences convened after the Second World War, such as the London Conference (1945) and San Francisco Conference (1945), were also significant diplomatic sites where the process of international criminalization has unfolded. Of these different international diplomatic spaces, the UN has been an especially significant site. As subsequent chapters will show, the members of the UN's General Assembly (GA), as well as the GA's dedicated legal committee, the Sixth Committee, have been instrumental in making decisions about new international crimes. These decisions, represent, therefore, pivotal steps within the historical development of an international crime that need to be appreciated as part of its process of international criminalization.

The diplomatic process within the UN, which culminates in an international social consensus on international criminality, needs to be understood, furthermore, as a historically-contingent development. On the one hand, the international social consensus that obtains amongst diplomats and legal experts does not arise instantaneously but rather, develops over time. It evolves, in other words, historically. As the case studies of this thesis will show, the international social consensus behind particular instances of international criminalization arose

from decisions that were made across time: in some cases, across several years and in others, across decades. Importantly, this centralizes how the initial act of criminalization does not constitute, as IL scholars tend to assume, a single step. Rather, it is a process that comprises of multiple stages that unfolds across time.

In addition, this social consensus takes root within a particular historical context and it depends, moreover, on historical factors present at a particular point in time. As subsequent chapters will demonstrate, particular international crimes emerged within a specific historical setting, which provided the broader normative context that provoked the process of international criminalization to occur. This has included, for instance, major historical events such as Nazi atrocities committed during the Second World War and international prosecutions conducted by *ad hoc* international tribunals in the aftermath of the Second World War. In addition, the active involvement of particular individual figures, who pushed for particular courses of action during the diplomatic process within the UN, were also instrumental in seizing the opportunity provided by the broader normative context to enable certain outcomes to materialize.

To operationalize its historically-informed social approach to international criminalization, this thesis develops in the following chapter an analytical framework for both understanding the concept of international criminalization and analysing the process that gives rise to international crimes. In this framework, international criminalization is defined as: *the historical process by which particular acts are recognized as international crimes in international society and are thereby accorded a legal existence in international law.* Furthermore, international criminalization is conceived as a two-stage process: the first stage centres on the emergence of an international criminal norm, while the second entails the translation of that international criminal norm into an international legal proscription.

The first stage introduces an aspect that has thus far been overlooked in existing IL accounts of international criminalization, namely, its social dimension. Drawing upon constructivist research on international norms, I argue that the initial act of international criminalization involves the development of a distinct type of international norm, an *international criminal norm*. Defined here as a shared expectation that an act is so reprehensible that it not only needs to be proscribed but additionally, be denounced as an international criminal act, an international criminal norm differs from ordinary international norms that proscribe or stigmatize international behaviour in two principal ways. Firstly, the stigmatization that accompanies an international criminal norm it is not simply that of wrongfulness, as is the case with international norms that specifically proscribe or prohibit certain behaviour. Rather, it entails wrongfulness of a criminal nature. Secondly, before an international criminal norm can emerge, international agreement on two particular issues is required. There needs to be international consensus, firstly, on the *status* of an act, namely, that it deserves to be specifically recognized an international crime, as opposed to merely an international wrong. In addition, international consensus is also required on the *form* that the act will assume as an international crime, namely, its defining features or elements. Once agreement on both status and form have been obtained, an international criminal norm comes into existence.

However, it will only remain as such unless the second stage of international criminalization ensues. This second phase embraces what existing IL accounts of international criminalization already emphasize, namely, its legal dimension. In this stage, the international criminal norm is translated into an international legal proscription. This results in two principal consequences: firstly, it provides the norm with formal legal existence under international law as an international crime and secondly, it enables the norm to be legally enforced through criminal prosecution.

One way an international criminal norm can be translated into a legal proscription is through the conclusion of an international treaty on a specific international crime. In this case, the legal proscription comes into existence through international legal codification. However, it is not inconceivable for an international criminal norm to be legally proscribed without an international treaty. Alternatively, an international criminal norm can be legally proscribed through the development of customary international rules. If this is the case, then the legal proscription would exist as a principle of customary international law.

Although it is suggested here that the process of international criminalization consists of two stages, this thesis devotes more attention to the first phase, namely, the emergence of an international criminal norm. Given its central concern with the social dimension of international criminalization, concentrating exclusively on the first phase allows this thesis to undertake a detailed analysis of the social process behind international criminalization – and more specifically, how and why international consensus on the two issues of status and form developed amongst state diplomats and legal experts negotiating within the UN in particular instances of international criminalization.

This is not to discount the importance of international legal proscription. However, as this second stage largely involves giving an existing international criminal norm a formal, legal quality, it can be regarded as the more procedural step within the overall act of international criminalization. In contrast, discerning how, when and why an international criminal norm has developed represents the more onerous aspect of the process of international criminalization, as it hinges on uncovering the historical development of an international social consensus. And so while the second stage of international legal proscription nevertheless informs the overall conceptualization of the process of international criminalization in this thesis, the empirical

research of this study is primarily directed towards uncovering the historical emergence of an international criminal norm. Accordingly, the case studies of this thesis, which will be introduced below, are centrally concerned with the questions of how, when and why international agreement on the status and form of an international criminal norm develops.

In addition to setting out these conceptual building blocks, the analytical framework posits several factors as the drivers of the process of international criminalization, which are largely drawn from constructivist research on the development of international norms (Finnemore and Sikkink 1998; Florini 1996; Kowert and Legro 1996; Nadelmann 1990; Sikkink 2011; Inal 2013). International criminalization, it will be suggested, is driven, firstly, by the existence of a pivotal event and secondly, by the actions of agents of criminalization. These agents, which may include state and non-state actors, advance contending ideas on the status and form of acts that have emerged as candidates of international criminalization. Which ideas eventually prevail depend, in turn, on three key factors: the degree of compatibility with existing norms; the status of the agents of criminalization, namely, their power and influence; and finally, the interests that such agents have in establishing and maintaining a distinction between ‘criminals’ and ‘non-criminals’ in world politics.

In light of the theoretical approach and analytical framework, this thesis adopts a historically-informed narrative method (Percy 2007). By tracing the evolutionary path of an object of study before it assumed its present place within international society, the narrative method aims to explain the present in terms of the past (Percy 2007: 33). This method is useful for investigating this thesis’ research question, as it enables me to show how and why international crimes emerged in international society. Moreover, a narrative method requires an examination into the history of an international crime and in particular, a focus on critical historical moments

within that history (Percy 2007: 34). These defining moments will provide a window into the important stages an act underwent during its development as an international crime. It can highlight, for instance, what aspects during its development were found contentious or easily accepted, as well as which elements were rejected in favour of others.

An advantage of the narrative method is that it allows the concept of international criminalization to be placed within a historical context and relatedly, for it to be understood from a historical perspective (Percy 2007: 33-34). This can help reveal the connections between the advent of international criminalization and other contemporaneous events and ideas that prevailed at the same time. For instance, it can demonstrate the relationship between international crimes and ideas that formed part of the normative landscape when an international crime was in its making. Conversely, it may also show how international crimes diverged from these existing ideas. Moreover, the narrative method can also centralize the role of historical contingency during the process of international criminalization. In this respect, it can demonstrate the possible role of chance occurrences or fortuitous circumstances during the historical development of international crimes (Percy 2007: 34).

Cases

This historical work implies the selection of a small number of cases of international criminalization and a structured comparison between them (George and Bennett 2005: 67). As such, this thesis only focuses on two international crimes, namely, genocide and aggression. It is acknowledged that this thesis cannot achieve the comprehensive breadth or generalizability that might come from examining all four international crimes. However, it compensates for this with a detailed historical study of genocide and aggression, as well as an identification and comparative discussion of the factors that facilitated their international criminalization. This

historical method could then be applied to the remaining two international crimes in future research, with the same aim of understanding why these two acts were criminalized and whether similar factors facilitated their process of international criminalization.

Genocide has been selected as a case study because of its uniqueness in having a single international treaty especially devoted to it, namely, the Genocide Convention. It is worth noting that there is no international treaty exclusively dedicated to either aggression or crimes against humanity, while four separate treaties¹⁹ collectively govern war crimes. As this thesis will demonstrate, genocide's process of international criminalization was very closely intertwined with international negotiations aimed at the formulation and conclusion of this international treaty. As such, genocide presents the opportunity to explore the phase of international criminalization that precedes international legal codification, namely, the diplomatic process of international negotiation.

When the ICC came into operation in 2002, aggression was the only international crime that this international court could not exercise jurisdiction over. The reason for this was because aggression's international legal definition had not yet been agreed upon at the time of the ICC's establishment. The ICC's jurisdiction over aggression was therefore prospective: it was contingent upon a definition to be agreed upon in the future. At the first ICC Review Conference in Kampala, Uganda in June 2010, a definition of aggression was finally agreed upon. Aggression can thus be regarded as the newest of the four existing international crimes and including it within this study can help illuminate some of the more contemporary dimensions of the process of international criminalization in the 21st century.

¹⁹ *Supra* note 13

This thesis also includes a negative case study or put differently, an analysis of a stigmatized act that does not reach the threshold of an international crime: piracy. Piracy was not included within the Rome Statute, which suggests it does not amount to an international crime. However, piracy's characterization within international legal scholarship is not as clear-cut as this international treaty indicates. While some scholars regard piracy as an international crime (Bassiouni 1996, 2001, 2008a; Colangelo 2006; Dickinson 1925; Joyner 1996; Kritsiotis 2011; Oppenheim 1920; Simpson 2006, 2007; Yarnold 1994), others disagree and argue piracy amounts to a transnational crime (Boister 2012; Churchill 2015b; Klabbers 2015; Kraytman 2005; Guilfoyle 2014a; Taulbee 2009). Importantly, neither of these contending views are made with reference to the concept of international criminalization. Yet, as this thesis will demonstrate, it is precisely this concept that can help establish more conclusively whether or not piracy amounts to an international crime. Piracy is also included in this study, therefore, as it enables an analysis of whether the factors identified as facilitating international criminalization were absent or weaker in this particular case. As will be shown, the process of international criminalization was absent in piracy's case and unlike genocide and aggression, piracy ought to be conceived as a transnational crime.

Sources

In order to operationalize the narrative method, this thesis primarily draws upon historical and documentary sources. This includes official resolutions of organs and bodies of international organizations; official documents of committees and commissions of international organizations; the *travaux préparatoires* of international treaties; and other official documentary records, such as the diplomatic statements of states and their leaders and official records of international proceedings. These historical sources, it will be shown, represent important evidentiary markers of the development of social consensus amongst diplomats

involved in the process of international criminalization. More specifically, these historical sources are able to establish the development of international agreement on the two components necessary for the development of an international criminal norm, namely, status and form. To supplement these historical sources, some secondary sources – such as secondary historical works on aggression, genocide and piracy, as well as articles and commentaries by international legal scholars on international crimes – will also be relied upon.

Outline of chapters

This thesis consists of eight chapters. Chapter 1 presents analytical framework that guides this study, and is devoted to the concept of international criminalization and an identification of the factors that facilitate the process. The five subsequent chapters address the empirical cases of this study. The international criminalization genocide is examined in Chapters 2 and 3: while Chapter 2 examines the development of international agreement on genocide's status as an international crime, Chapter 3 examines the development of international agreement on genocide's form as an international crime. In Chapters 4 and 5, the thesis turns to the international criminalization of aggression. As with genocide, the chapters on aggression are respectively structured in terms of the development of international consensus on status and form. In Chapter 6, the thesis turns to its negative case, piracy. Chapter 7 provides a comparative discussion of this study's empirical findings, as well as some concluding reflections on the analytical framework. Finally, the thesis concludes with a discussion of the theoretical and empirical contribution of this study to both IR and IL scholarship, and outlines suggestions for future research.

1

INTERNATIONAL CRIMINALIZATION: AN ANALYTICAL FRAMEWORK

This chapter introduces the central concept that animates this thesis, international criminalization. Drawing upon constructivist literature on norms, as well as ideas on crimes from the discipline of criminology, it develops a framework for understanding the process of international criminalization. The chapter begins by defining international criminalization and distinguishing this concept from two other concepts which, at first glance, appear similar. It also demonstrates how the proposed definition of international criminalization centralizes two key features about the concept that existing accounts do not currently capture. Thereafter, three central issues concerning criminalization will be addressed: what constitutes evidence for international criminalization; what stages mark the process of international criminalization; and what factors drive the process of international criminalization.

INTERNATIONAL CRIMINALIZATION: DEFINITION AND FEATURES

International criminalization refers to *the historical process by which particular acts are recognized as international crimes in international society and are thereby accorded a legal existence in international law*. This definition suggests two important features about international criminalization and international crimes: firstly, international crimes represent social constructs that emerge at a particular point in international society; and secondly, the act of criminalization entails a social process, which unfolds across time and occurs within a particular historical context. Before elaborating upon each of these in greater detail, it is important to distinguish international criminalization from two concepts that currently feature in IR scholarship.

International criminalization can be distinguished, firstly, from what IR scholars have termed “global prohibition regimes” (Nadelmann 1990; Andreas and Nadelmann 2006; Inal 2013). Global prohibition regimes are international and institutionalized regimes that prohibit the involvement of state and non-state actors in particular activities (Nadelmann 1990: 479). Examples of activities that are subject to global prohibition regimes include slavery, the counterfeiting of national currencies, the hijacking of aircraft, and the trafficking of women and children for purposes of prostitution (1990: 479). All of these activities transcend national borders and for this reason, states have devoted efforts towards constructing a global prohibition regime (Nadelmann 1990: 524). Most global prohibition regimes develop in four, and sometimes five, stages¹ – and it is a process that is influenced by material factors, such as power and interests, as well as normative factors centring on the delegitimization of particular activities into objectionable conduct (Nadelmann 1990: 484-486; Andreas and Nadelmann 2006: 20-21).

International criminalization can be additionally distinguished from the concept of “taboos” or “prohibitory norms” (Price 1995; Price 1997; Tannenwald 2007). A taboo is a particular type of norm which operates as a *de facto* prohibition in world politics (Tannenwald 2007: 10). Taboos operates as ordinary norms do: they do not merely restrain behaviour but they also impose meanings on what counts as legitimate behaviour (Price 1995: 87). IR scholars have used the concept of a taboo to explain why certain weapons ceased to be used in world politics.

¹ In the first stage, an activity is considered legitimate but in the second stage, it is redefined as a problem, so that involvement in the activity is gradually delegitimized. During the third stage, regime proponents agitate for the suppression of the activity, often calling for an international convention to ban the targeted activity. If their efforts prove successful, a fourth stage ensues, which sees a global prohibition regime coming into existence. The activity then becomes the subject of criminal laws and police action throughout the world, and international conventions and institutions emerge to play a coordinating role. In some cases, a final and fifth stage emerges, whereby the incidence of the proscribed activity is either greatly reduced or altogether reduced (Nadelmann 1990: 484-486; Andreas and Nadelmann 2006: 20-21)

For instance, Price (1995, 1997) has shown that the development of a chemical weapon taboo explains the non-use of chemical weapons during World War II, while Tannenwald (2007) has shown nuclear weapons have not been used since 1945 due to the development of a taboo against nuclear weapons.

International criminalization, global prohibition regimes and taboos all result in the prohibition of particular activities or conduct in international society. However, conduct that becomes prohibited through the criminalization process is specifically transformed into an international crime. Consequently, violations of criminalized conduct amount to international criminal wrongs. This, in turn, brings distinct international legal consequences into play: under the principle of individual criminal responsibility, the perpetrators of international crimes can be prosecuted under international law before international courts. By contrast, violations of global prohibitions or taboos are non-criminal international wrongs and as such, they do not generate the unique legal consequences that flows from international crimes. International criminalization is distinct, therefore, because far from simply creating an international prohibition, it additionally raises a prohibited act to the special category of an international crime.

International crimes as social constructs

In the domestic legal context, crimes are generally understood in formal legal terms: “a crime is that which the law and the courts treat as a crime, in that its perpetrator is liable to be subjected to a criminal process and to criminal punishment” (Duff *et al* 2010: 4). Relatedly, crimes are often framed in legally procedural terms, in that they are understood as acts that are prosecutable in criminal courts and are backed up by penal sanction (Lacey and Zedner 2012: 164). Crimes, therefore, are generally taken to be “acts of law-creation” (Lacey 2007:188) and

a “legal phenomenon” (Dubber 2010: 191). However, alternative understandings emphasize that crimes are not simply what is legislatively defined as a crime and relatedly, that they are not simply prohibitory norms enforced by criminal laws (Zedner 2011: 272; Lacey 2007: 188). Rather, crimes are social constructions whose existence depends on a complex set of social processes and factors (Lacey 2007: 188). To avoid conceiving crimes narrowly as “legal constructions”, therefore, focus should also be given to the way crimes are constructed by, for instance, politics, public opinion, the media and the criminal justice process (Lacey and Zedner 2012: 159; Zedner 2011: 272). This requires, in particular, an appreciation of the political, social and historical forces that bring about the existence of crimes within the legal order and influence the construction of criminal legal categories (Lacey and Zedner 2012: 160; 177-178).

Like domestic crimes, international crimes are also legal constructs. In this regard, they constitute violations of international law, a fact that is often formalized through their international legal codification within an international treaty. This formalization, in turn, allows for distinct legal consequences to flow. Under the principle of individual criminal responsibility, an individual who commits an international crime can be held responsible in terms of international law. This means the perpetrator of an international crime can be prosecuted by either national or international courts. During these legal prosecutions, international crimes, and the principles that underpin them, are judicially interpreted by judges, lawyers and prosecutors. Consequently, a body of legal jurisprudence on an international crime eventually develops, particularly as more and more cases of prosecution takes place over time.

However, international crimes should, like domestic crimes, additionally be understood as social constructs. It is helpful to demonstrate this in relation to two particular aspects about international crimes, namely, their *status* and *form*. Firstly, international crimes exist because

conduct falling under their scope has been internationally recognized by social actors within international society, more of which will be said below, as amounting to wrongful acts of an international criminal nature. There is an international social consensus, in other words, that such conduct deserves the special status of an international crime. This can partly be attributed to material factors, such as power and interests. For instance, the interests of powerful actors may have a bearing on why some acts, as opposed to others, come to be regarded as deserving of the status of an international crime. However, non-material factors also play a role, namely, the development of collective understandings on what constitutes a crime within international society, as well as why some acts are worthy of this special status.

Secondly, international crimes also possess a distinct and specific form. This is usually evident from their international legal definitions, which specifies their essential features and demarcates their exact scope. These definitions have an important legal purpose: they set out the formal legal requirements that must be fulfilled before an act can qualify as a particular international crime under international law. Importantly, these legal definitions are neither automatic nor natural. Rather, they reflect an international social consensus on the particular form an act ought to assume as an international crime. In this regard, an international crime assumes the specific form that their legal definitions provide because the social actors involved in their criminalization actively shape, craft and determine these definitions. As with their status, an international crime's form is not devoid of non-material factors. Influenced as they may be by material factors such as power or interests, which elements are included or excluded from its definition are partly influenced by normative understandings and choices on the following: who, amongst a range of possible actors, should be the perpetrators and victims of a particular international crime; what acts, amongst a range of possible ones, should fall under

the scope of a particular international crime; and what objects, values, and interests, to the exclusions of others, should be protected through the establishment of an international crime.

International criminalization amounts to a social process

In the domestic legal sphere, the act of criminalization is taken to mean “to pass a statute defining something as a crime” (Duff *et al* 2010: 2) or “to bring [something] within the scope of criminal law” (Dubber 2010: 191). From this, two core aspects about criminalization emerge: it refers, firstly, to the “legally binding decision to put a certain form of conduct under the threat of punishment” and secondly, to the “resulting individual norms of criminal law [that define] specific forms of conduct as criminal offences” (Nuotio 2010: 239). Criminalization occurs, in other words, when the law posits something to be a crime. However, if crimes are understood as legal and social constructs, then criminalization does not exclusively centre on the formal legal outcome produced. Rather, criminalization also refers to a “social institution” that it is made up of a “constellation of social processes and practices” (Lacey 2007: 197; Lacey 2009: 959-960; Lacey and Zedner 2012: 161). Two significant insights flow from this alternative conceptualization.

Firstly, it draws attention to the non-legal dimensions of criminalization. In particular, it centralizes how as a social process, criminalization is nested within particular institutions and norms that coalesce over time to produce formal legal outcomes, namely, criminal laws (Lacey and Zedner 2012: 161). Relatedly, the process of criminalization occurs within a social context and is related to other political, moral and normative processes (Lacey and Zedner 2012: 161). This centralizes how the rendering of an act as criminal is influenced by non-legal factors, such as cultural assumptions and prejudices or moral and political imperatives (Zedner 2011: 278; 283). It also highlights how criminalization amounts to an “interpretive human practice”: far

from simply involving the categorizing of behaviour into criminal legal categories, criminalization centres on human conduct being interpreted as amounting to criminal behaviour (Lacey 1995: 8). Secondly, it challenges the state-centric assumption that treats criminalization as the privilege of the state. When viewed as a social phenomenon, actors apart from the state – such as pressure groups, the mass media, lawyers, and private agencies involved in criminal justice – emerge as participants in the criminalization process that have an influence on decisions to criminalize (Lacey 1995: 5).

Drawing upon these ideas, as well as constructivist insights on international norms and the socially constructed nature of international relations, international criminalization can similarly be understood as a social process, as opposed to an exclusively legal one. In this regard, international criminalization needs to be additionally conceived as a social process for three central reasons. Firstly, the process of international criminalization involves the development of shared understandings within international society on status and form. As will be explained below in greater detail, once international agreement on status and form are obtained, an international criminal norm comes into existence. This special and unique type of international norm expresses and embodies an international social consensus on why a particular act deserves the status of an international crime, as well as what form it ought to assume as an international crime. Importantly, how and why this international social consensus takes hold within international society needs to be appreciated as part of the overall process of international criminalization. Downplaying this aspect, as the existing scholarship on international criminalization does, results in an account of international criminalization that only captures the legal dimensions of the overall process.

Secondly, the development of an international social consensus on status and form implies the presence and participation of social actors within international society. As with criminalization in the domestic realm, states will assume an important role and can therefore be regarded as the principal social actors participating within the process of international criminalization. However, if international criminalization is conceived as a social process, then this provides the opportunity to specify more clearly which specific social actors affiliated to a state are involved within the overall process. In this regard, it is not the state as an abstract entity but rather, the diplomats and legal experts who represent states during the process of international criminalization. In addition, conceiving the process of international criminalization as a social process also opens up space to consider the role that other social actors within international society – namely, non-state actors – have within the overall process. This will include, for instance, private individuals such as international legal jurists and experts or international non-governmental organizations.

Thirdly, the international social consensus on status and form that develops amongst social actors within international society arises through a process of international diplomatic negotiation. As will be elaborated upon below, this diplomatic process takes place principally within international social spaces that are affiliated to the United Nations (UN). This includes the General Assembly (GA) of the UN, the Sixth Committee of the GA, the International Law Commission and special *ad hoc* international committees established under the auspices of the UN. During these international diplomatic negotiations, different – and often contending – ideas are proposed, debated and discussed until international agreement on status and form are reached amongst the social actors involved. In this additional sense therefore, international criminalization can be understood as a social process.

EVIDENCE OF INTERNATIONAL CRIMINALIZATION

The definition offered here suggests international criminalization denotes a process that culminates in the establishment of international crimes. International criminalization has occurred, therefore, if the existence of an international crime can be confirmed. Put differently, an international crime constitutes evidence of international criminalization. This may seem like an obvious point but it is one worth emphasizing because it demarcates the conceptual boundaries of international criminalization – and by extension, the scope of this study – in two central ways. Firstly, international wrongdoings of a non-criminal nature fall outside the scope of the concept of international criminalization. Although internationally prohibited, conduct falling under this category – such as prohibitory norms and taboos – do not constitute international criminal acts. Non-criminal wrongs are therefore excluded from the scope of international criminalization. Other types of crimes other than international crimes also falls outside the scope of international criminalization. This includes domestic crimes (acts that constitute criminal offences within domestic legal orders such as murder, rape or robbery) and transnational crimes. This is not to suggest the emergence of domestic or transnational crimes cannot be attributed to a criminalization process but rather, to emphasize that the process of international criminalization is one which attaches uniquely to international crimes.

At this juncture, the concept of transnational crimes can be introduced. Traditionally, transnational crimes were termed “offences of international concern” (Clark 1988: 49); “common crimes against internationally protected interests” (Boister 2003: 955); or “treaty crimes” (Boister 2014: 11). More recently, the term ‘transnational crime’ has been used to refer to offensive “conduct that has actual or potential trans-boundary effects of national and international concern” (Boister 2003: 954). According to Boister, an offence is ‘transnational’ if it satisfies one of the following conditions: firstly, it is committed in more than one state;

secondly, it is committed in one state but a substantial part of its preparation or planning, takes place in another state; thirdly, it is committed in one state but involves an organized criminal group that operates in more than one state; and finally, it is committed in one state but has substantial effects in another (2012: 4). Key examples of transnational crimes include piracy and maritime safety offences; slave trading; human trafficking; migrant smuggling; child sex tourism; drug trafficking; weapons smuggling; terrorism; corruption; money laundering; and cybercrime (Boister 2012; Boister and Currie 2014).

Collectively, these transnational crimes share a common feature: they are harmful acts that states have sought to suppress internationally through the conclusion of “suppression conventions” (Boister 2003: 955). These suppression conventions, which can also be termed “crime control treaties”, have two main purposes. Firstly, they establish arrangements and mechanisms to facilitate state cooperation aimed at the suppression of these offences (Boister 2014: 17). Secondly, they provide for the substantive criminalization of these offences (Boister 2014: 16). This is achieved by obligating states to enact and enforce the punishment of activities specified in those conventions as offences within their domestic laws (Boister 2003: 955, 962; Boister 2014: 11, 15). Importantly, then, transnational crimes are domestic crimes that are established through obligations in multilateral conventions (Boister 2014: 11).

This has the effect of distinguishing transnational crimes from international crimes in one fundamental way. While international crimes generate individual criminal responsibility and can be prosecuted before an international court, transnational crimes do not (Boister 2014: 15). In contrast, the prosecution and punishment of transnational crimes are dealt by national courts and in terms of national laws (Boister 2003: 955). In other words, the authority to penalize, and the criminal liability for, transnational crimes are based upon national laws (Boister 2003: 962).

Transnational crimes do not, therefore, fall under the jurisdiction of the ICC (Boister 2003: 962).

How, then, do we know if an international crime exists? Simply put, the law – international law – tells us so and as such, we would need to turn to the sources of international law. In terms of Article 38(1) of the Statute of the International Court of Justice², the accepted sources of international law are international conventions, international custom, general principles of law recognized by civilized nations and judicial decisions and the teachings of highly qualified publicists. Of these four sources, international conventions and international custom are especially relevant when seeking to establish the existence of an international crime. Some international crimes are enshrined in positive international law, making their existence identifiable by reference to specific international treaties. We know that genocide exists in international law as this is provided by the Genocide Convention³, while the Hague Conventions (1899 and 1907)⁴, as well as the four Geneva Conventions (1949) and their Additional Protocols (1977)⁵, affirms the existence of war crimes.

With other international crimes, customary international law may be of greater significance – as is the case with crimes against humanity, which has yet to be enshrined in an international convention that is specifically devoted to it (deGuzman 2011: 121). It is generally understood,

² Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993

³ Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

⁴ Convention With Respect to the Laws and Customs of War on Land (29 July 1899) TS No. 403; Convention Respecting the Laws and Custom of War on Land (18 October 1907) TS No. 539

⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sock, and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

however, to have been first codified in the Charter of the International Military Tribunal⁶, which provided the rules and procedures of the Nuremberg Trials (Cassese 2008: 108; Werle 2005: 216). It is worth noting that the four international crimes that currently exist are all considered to be a part of customary international law. In this regard, genocide, war crimes, crimes against humanity and aggression are peremptory norms or *jus cogens* (Bassiouni 1996: 68). *Jus cogens* ('the compelling law') are norms that hold the highest hierarchical position amongst all other norms and principles in international law and as such, they are deemed to be peremptory and non-derogable (Bassiouni 2008: 174). The existence of all four international crimes are also affirmed by the Rome Statute of the International Criminal Court⁷, making it possible to say all four are part of customary and positive international law.

International law, in the form of treaties or custom, confirms whether an international crime exists and this, in turn, makes it possible to identify whether international criminalization has occurred. This is not to say, however, that international law, in itself, is responsible for creating an international crime. In the conceptualization of international criminalization offered here, international law plays the specific role of according an act that has been recognized as an international crime with a formal legal existence within the international legal system. The law therefore finds its way into the criminalization process not so much as the source of criminalization, as legal scholars suggest, but rather, to legally express the fact that a particular act has been recognized by social actors within international society as an international crime.

⁶ Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945) 82 UNTC 280

⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute)

THE PROCESS OF INTERNATIONAL CRIMINALIZATION

How does international criminalization occur? The process of international criminalization, this thesis suggests, consists of two-stages: firstly, the emergence of an international criminal norm and secondly, the translation of this international criminal norm into an international legal proscription. Upon completion of these two stages, which will be elaborated upon below, an international crime comes into existence.

The emergence of an international criminal norm

In the first stage of international criminalization, an international criminal norm comes into existence. In IR scholarship, a norm is viewed as “a standard of appropriate behaviour for actors with a given identity” (Finnemore and Sikkink 1998: 891). A norm, moreover, is not simply a rule about what to do; rather, it is a special type of rule that has a quality of ‘oughtness’ (Sikkink 2011: 11). Norms are, in essence, “social prescriptions” and in world politics, they regulate the behaviour of international actors (Kowert and Legro 1996: 452). The norm that comes into existence during the criminalization process is not simply an ordinary norm, however. Rather, the criminalization process generates an altogether unique norm, an international criminal norm. Drawing upon the IR norms literature, an international criminal norm can be defined as follows: *a shared expectation that an act is so reprehensible that it not only needs to be proscribed but additionally, be denounced as an international criminal act.*

Aside from being delegitimized as inappropriate or undesirable conduct, an international criminal norm, therefore, is additionally stigmatized as a criminal wrong. This element of criminality generates two unique legal consequences that are absent in the case of ordinary international norms. Firstly, an international criminal norm is a special type of international legal infringement. While some ordinary international norms may constitute violations of

international law and therefore amount to an international legal infringement, an international criminal norm specifically violates the legal rules and principles of international criminal law. Secondly, and relatedly, violations of international criminal law are enforced through prosecution and punishment by courts. In other words, those who violate international criminal norms will face prosecution and punishment by courts for such violations. By contrast, violations of ordinary international norms do not generate individual criminal responsibility under international law and as such, do not attract legal sanctions in the form of prosecution and punishment.

International criminal norms also differ from ordinary norms in the way they are established. Before an international criminal norm emerges, international agreement on two issues is required: firstly, on the *status* of an act that is a candidate of international criminalization and secondly, on the *form* the act should assume as an international crime. Status and form were introduced earlier to illuminate how aside from legal constructs, international crimes also need to be understood as social constructs. As suggested earlier, this social dimension centres on the development of shared understandings on status (an act is recognized as deserving the status of an international crime) and form (an act is given a specific form as an international crime). Status and form are re-introduced here to highlight their additional significance, this time as the two components an international criminal norm requires for its establishment.

The first component – international agreement on status – centres on the development of shared understandings that an act deserves to be recognized as a crime under international law. An element of social stigmatization is at play here: an act, once regarded as unobjectionable, is denounced as being unacceptable. This denouncement, however, does not simply concern an act's mere unacceptability but rather, it being *criminally* objectionable. Evidence of agreement

over status rests in an international declaration to this effect. This can be discerned from, as subsequent chapters will show, political declarations issued by a grouping of states or formal declarations or resolutions issued by organs of international institution, such as the GA of the UN. Other supporting or secondary evidence can also be found in the following: the official records of international proceedings or forums in which particular international crimes were the focus of international debate and discussion; the *travaux préparatoires* of international treaty negotiations; the diplomatic statements of states and their leaders; and the concerns of private individuals or non-state organizations formally issued at the international level.

Agreement over status alone cannot bring an international criminal norm into existence, however, and further agreement on a second component – form – is also required. Form concerns shared understandings about the particular shape or configuration an act ought to assume as an international crime. More specifically, it refers to collective understandings on an act's defining elements as a distinctive international crime, which are then formalized as its international legal definition. This definition, in turn, operates to demarcate an international crime's precise contours. Evidence of agreement on form rests, therefore, with an international crime's international legal definition – which is usually contained in an international legal instrument, such as an international treaty. Here, the historical record leading up this legal definition – such as the records of formal debates and proceedings devoted to an international crime's definition or the drafting records of the relevant international treaty in question – are particularly important when seeking to establish when international agreement on form was precisely obtained.

Three further issues about status and form deserve brief mentioning. As already mentioned, as status and form are underpinned by shared understandings that coalesce into an international

social consensus, they usefully highlight one of the social aspects of the process of international criminalization. When obtained, agreement on status and form represent normative choices that express collective views as to why a particular object, value or interest ought to be protected at the international level through the establishment of an international crime.

Secondly, the obtaining of agreement on status is likely to precede that of form: the reason why agreement on the latter is needed is because of prior agreement that an act deserves to be recognized as an international crime. This goes some way towards demonstrating how criminalization amounts to a process, as opposed to a singular act. In this regard, two distinct moments can be identified during the first stage of international criminalization, namely, the moments when international social consensus on status and form are respectively obtained.

Finally, because agreement amongst social actors is required, this centralizes the presence of agency within the criminalization process. Given that states occupy a central place within the international system, it is reasonable to expect states to play a primary role within the process of international criminalization. As already mentioned, it is not states in the abstract who are involved in the process of international criminalization. Rather, it is the diplomats and legal experts representing states within the different organs of multilateral organizations, such as the UN, including: the GA, the Sixth Committee of the GA, the International Law Commission and special *ad hoc* international committees established under the auspices of the UN. Apart from state diplomats and legal experts, the social actors within the process of international criminalization may also involve private individuals, such as international legal jurists, or international non-governmental organizations.

Translation into an international legal proscription

Once there is international agreement on status and form, an international criminal norm has developed. However, unless and until the second stage of international criminalization is completed, the international criminal norm will not transform into a fully-fledged international crime. What is additionally required, therefore, is for the international criminal norm to be made into a formal provision of international law. In this second stage, an international criminal norm is translated into an international legal proscription and this results in the following effects. Firstly, it provides the international criminal norm with formal legal existence under international law as an international crime, thereby allowing it to be identified as a provision of international law. Secondly, it also gives the international criminal norm legal enforceability, thereby allowing the international legal consequences of punishment and prosecution to ensue when the norm is violated.

This second stage embraces aspects of the criminalization process that existing accounts of criminalization already account for, namely, its legal dimensions. It is marked, therefore, by the conclusion of an international treaty on a specific international crime, making it synonymous with international legal codification. In these instances, international treaties like the Genocide and Geneva Conventions represent evidence that the second stage of criminalization has respectively occurred in the cases of genocide and war crimes. What is much rarer, though not inconceivable, is for an international criminal norm to be legally proscribed without an international treaty. In such a case, the legal proscription would instead lie in customary international law.

Defined in the Statute of the International Court of Justice⁸ as “evidence of a general practice accepted as law”, international customary rules develop when two requirements are fulfilled: firstly, there is widespread and consistent practice on the part of states (state practice) and secondly, states display a sense of legal obligation that the practice in question needs to be adhered to (*opinio juris*) (Thirlway 2010: 104). Following from this, the two elements of state practice and *opinio juris* would constitute evidence that an international criminal norm has been proscribed by customary international law. In the sphere of international criminal law, evidence of custom can be discerned from, for instance, the official behaviour of states, official acts and declarations by state representatives, decisions of international courts, and the practices of international organizations (Werle 2005: 46). An examination of these would therefore be required in order to determine if agreement over status and form has been translated into customary international rules.

To summarize, international crimes are established once an international criminal norm has developed and has been translated into an international legal proscription. Conceiving international criminalization as this two-stage process offers two main advantages. Firstly, it can help identify early signs that new international crimes are developing within international society. Although there are presently only four international crimes, it is not inconceivable that new international crimes may be established in the future. Relatedly, these new international crimes are unlikely to arise suddenly; rather, their emergence should be traceable to a discernible process. The two-stage process of criminalization advanced here provides the analytical tools, therefore, to empirically analyse whether new international crimes are in the making. It can help establish, for instance, whether a new international criminal norm is in the early stages of formation or whether, if one has already emerged, it has advanced into an

⁸ *Supra* note 2

international legal proscription. In doing so, the analytical framework proposed here provides a way to assess future developments in the sphere of international criminal law, potentially alerting us to early indications that new acts are in the process of being transformed into new international crimes.

Secondly, the conceptualization of international criminalization offered here can help us better understand how existing international crimes differ from one another. While international legal scholars tend to distinguish international crimes according to their legal requirements, by emphasizing how the material elements (*actus reus*) and the mental elements (*mens rea*) of one international crime differs from others, they do not single out international criminalization as a differentiating factor between international crimes. The analytical framework proposed here suggests international crimes can be additionally distinguished on the basis of their paths towards international criminalization. In this regard, what sets one international crime apart from another is the factor of timing, namely, how long its process of international criminalization took to complete. On the basis of timing, therefore, we can distinguish between international crimes that underwent a relatively quicker process of international criminalization and those that experienced much slower process of international criminalization.

An international crime whose process of international criminalization was completed relatively quickly is one where international agreement on the two components of status and form was obtained in relatively quick succession. In this case, the moments when international consensus on status and form crystallize are not separated by considerable period of time. In addition, the final stage of international legal proscription also follows relatively soon after an international criminal norm has developed. In the case of international crimes that experience a much slower process of international criminalization, two indicators can be identified. Firstly, a considerable

period of time may lapse between the moments when international agreement on status and form were obtained. In other words, the development of an international criminal norm may itself be protracted. Secondly, there may be delays with the second stage of international legal proscription, whereby considerable time elapses between the first and second stages of international criminalization.

Where the process of international criminalization has been completed relatively quickly – say, for instance, over the course of a few years – then this would indicate a more robust international desire for that act to be established as an international crime. However, where the process of international criminalization is only completed after several decades, this points towards a weaker desire for criminalization. Here, pinpointing where the specific delays during the process of international criminalization lie – for instance, with reaching international agreement on status or form or with the final stage of legal proscription – can reveal what particular obstacles prevented the process of international criminalization from being completed sooner. Differentiating international crimes on the basis of their respective paths towards international criminalization, therefore, can therefore highlight what aspects were particularly contentious or controversial during its process of international criminalization.

DRIVERS OF INTERNATIONAL CRIMINALIZATION

What factors drive international criminalization? It must be stressed, again, that an analytical framework for the process of international criminalization does not currently exist in either IR or IL scholarship. In developing its own analytical framework, this thesis puts forward a set of factors as the drivers of international criminalization, which are loosely drawn from the literature on norms, taboos and prohibition regimes in IR scholarship (Florini 1996; Finnemore and Sikkink 1998; Kowert and Legro 1996; Nadelmann 1990; Price 1998; Sikkink 2011; Inal

2013). These factors have been deductively derived from a reading of this literature and the thesis returns to them in Chapter 7, in order to reflect on how and to what degree they facilitated the establishment of the international crimes examined in this study.

Before an act is subjected to the criminalization process, an external condition will provide the underlying historical context within which criminalization occurs. This external condition refers to a *pivotal event* or a critical juncture within international society, such as the development of new technologies, a global disaster or catastrophe, or the existence of a political shock. While the first two examples are self-explanatory, the notion of a political shock deserves some elaboration. The idea of a political shock is similar to that of “normative shocks”, which has been defined as “tragic situations or events that shock the public conscience into focusing on particular activities or institutions and changing core norms” (Inal 2013: 9). They are, furthermore, shocking events or crises that change the way actors see the world, their identities and the norms about appropriate behaviour (Inal 2013: 9). Drawing upon this, a political shock refers, in this study, to a world historical event that spurs actors into wanting certain conduct be criminalized, in order to address some of the perceived normative concerns arising from the historical event. It represents, therefore, the catalytic event that sets particular instances of international criminalization into motion.

Other constructivist scholars have also pointed out the role of shocks in the evolution of international norms. For instance, Florini (1996: 384) argues political shocks provide a “hospitable environment” for the spread of international norms, while Sikkink (2011: 245) suggests shocks often break the grip a reigning orthodoxy has and provoke international actors to seek political alternatives that were otherwise not contemplated. In similar veins, Kowert and Legro (1996: 472) suggest dramatic shocks to the international system contribute to new

understandings about how politics must be conducted, while Finnemore and Sikkink (1998: 909) highlight world historical events, such as wars or major depressions in the international system, can prompt a search for new ideas and norms. The idea of a political shock is advanced here, therefore, in order to demonstrate the wider historical context that provokes particular instances of international criminalization. This is not to suggest, however, that a political shock is a sufficient condition for international criminalization and indeed, as Florini points out, background conditions are necessary, though not sufficient, for the emergence of international norms (1996: 377).

A further driver of the criminalization process are norm entrepreneurs. Motivated by empathy, altruism or ideational commitment, norm entrepreneurs hold strong ideas about appropriate or desirable conduct and they try to turn their favoured ideas into accepted norms within their social milieu (Finnemore and Sikkink 1998: 896; Sikkink 2011: 11). By mobilizing popular opinion and political support within a particular issue-area, they function as “transnational moral entrepreneurs” (Nadelmann 1990: 482). Turning to international criminalization, norm entrepreneurs, who in this thesis are termed *agents of criminalization*, have a similar role. International crimes do not suddenly appear but rather, are actively constructed through the actions of agents of criminalization, who, as mentioned earlier, can be both state and non-state actors. During the criminalization process, the agents of criminalization attempt to influence the status and form of act that are to be criminalized. They not only try persuade other agents, as well as a wider audience, that a particular act deserves to be recognized as an international crime but in addition, they try to shape an international crime’s form, by influencing the content of its international legal definition.

As some agents of criminalization put forward their ideas on status and form, others respond with rival, alternative ideas. What ensues, consequently, is *political contestation* over the legitimacy and validity of these different ideas. The notion of political contestation is advanced here, therefore, to capture the competition of ideas between agents of criminalization. It is helpful to see this as a contest because ultimately, not all ideas will prevail: some are welcomed and will therefore triumph, while others will be rejected and eventually dismissed. This, moreover, is contest of a political kind because what underpins these different ideas are views on what particular political objects, goals or entities are worthy of being protected through international criminalization. Which ideas, to the exclusion of others, end up prevailing centralizes, therefore, which objects, goals and entities have succeeded in being safeguarded within international society through the criminalization process. Ultimately, then, this political contestation concerns an ideational struggle over what acts, and which actors, should be deemed as criminal in international society. What, then, determines which ideas succeed in prevailing?

What matters, firstly, is the *degree of compatibility with existing norms*. I suggest here that a proposed idea about status or form may find acceptability if the idea is perceived to be compatible with existing norms and practices. In this regard, IR scholars have analysed the element of compatibility in relation to the notion of coherence. No norm exists in a vacuum, Florini explains, and any new norm must fit coherently with other existing norms: a new norm acquires legitimacy when it fits coherently with other prevailing norms accepted members of the international community (1996: 376). Similarly, Price describes the process by which a new norm resonates with existing norms as “grafting” and argues that “the combination of active, manipulative persuasion and the contingency of genealogical heritage” enables a new norm to fit within established normative terrains (1998: 617). In the case of criminalization, we

can expect proposals to recognize an act as an international crime to draw upon other existing international norms and practices. This may include, for instance, the principles of state sovereignty and non-interference; the fact that similar acts have already been subjected to international outrage; or the fact that other international crimes are already in existence.

However, there may be instances where an idea that is incompatible with existing norms gains traction. Rather than being in conformity with existing norms, therefore, the proposed idea that gains acceptability represents a departure from existing norms. In such a case, the novelty or uniqueness of the new idea is emphasized: it is juxtaposed against existing norms, which are viewed as being defective or flawed in some way, and presented as being superior. Often, this is achieved when norm entrepreneurs emphasize the inherent limitations of existing norms and argue that different ones are required in its stead. For IR scholars, this refers to the perceived failure of existing norms and they have pointed out how dissatisfaction with past approaches or efforts contribute to the unacceptability of existing norms (Florini 1996: 378; Price 1998: 631; Björkdahl 2002: 18). I additionally suggest, therefore, that a proposed idea, which fundamentally departs from existing norms, may gain acceptability if it is seen as remedying the perceived deficiencies of existing norms. In the context of criminalization, this may involve emphasizing how a new international crime is able to remedy the deficiencies of existing legal categories or existing policies directed at the subject-matter of the international crime.

While the degree of compatibility with existing norms pertains to the quality of ideas themselves, a further factor that is likely to influence whether a proposed idea is able to gain traction is the *status* of the agents of criminalization. This brings a material factor – namely, the power and influence of criminalization agents – into the criminalization process. Sometimes, an idea takes hold because its proponent occupies a powerful position – for

instance, as a great power or as one of the superpowers in the international system. Power, as Florini explains, may be a significant part of the norm story, in that norms advocated by powerful states have greater opportunities to gain purchase (1996: 375). Goertz and Diehl have also explained, in this regard, that when powerful actors lie at the origins of norms, such norms amount to “hegemonic norms” (1992: 639). In the context of international criminalization, we may expect power to be an important part of the process: some ideas will gain acceptability because they have been proposed and advocated by agents who occupy a prominent position within international society. These might include, for instance, the two superpowers during the Cold War or long-standing great powers such as France and Britain.

Not all ideas emanating from the powerful automatically prevail, however. As some scholars have pointed out, some ideas have taken hold even when powerful states have actively opposed them. Sikkink, for instance, argues the norm of individual criminal accountability – which she terms the “justice cascade” – developed even though powerful states did not lead and in some cases, opposed its emergence and development (2011: 232). Similarly, Inal has demonstrated how despite Britain’s opposition, a prohibitory norm against pillage developed and was codified into the Hague Convention of 1907 (2013: 18). In these instances, therefore, power alone cannot explain why some ideas put forward by powerful actors may nevertheless be rejected. We can expect to find similar dynamics in the case of international criminalization, which means a non-power based explanation is required to account for instances when the ideas of the powerful are rejected.

A final factor, therefore, concerns the *interests* of the agents of criminalization. Interests, here, do not refer to the self-interested, strategic calculations of actors, as per neoliberal institutionalist thought. Rather, it concerns the interests agents of criminalization have in

establishing and maintaining a distinction between the categories of ‘criminals’ and ‘non-criminals’. The creation of these categories are inherent within the international criminalization process: the international crimes that ensues establishes who can and cannot be an ‘international criminal’ in world politics. Criminalization, put differently, is never neutral: it rests upon the conscious drawing of social categories that, in turn, serve to differentiate the legitimate members of international society from the illegitimate one, namely, the international criminals, villains and outlaws of world politics. We can expect, therefore, that ideas which do not immediately implicate the agents themselves into the category of an international criminal will be more readily accepted. Conversely, ideas which are perceived as having the possibility of transforming the agents of criminalization themselves as potential international criminals are likely to be rejected.

To summarize, then, following a pivotal event within international society, the process of international criminalization is likely to be set into motion when agents of criminalization engage in political contestation over the status and form of acts that have emerged as candidates for international criminalization. Which views eventually prevail is likely to depend, in turn, on three key factors: the degree of compatibility with existing norms; the status of the agents of criminalization; and finally, their interests. While I would expect all instances of criminalization to be marked by a combination of these factors, the relative importance of these is likely to vary in different instances of international criminalization. Furthermore, the empirical analysis of specific cases of international criminalization may reveal the significance of additional factors upon the process of criminalization. This makes it important to examine particular instances of international criminalization individually and it is to this task, beginning with genocide, which we can now turn to.

2

THE CRIMINALIZATION OF GENOCIDE: GENOCIDE'S STATUS AS AN INTERNATIONAL CRIME

This chapter, as well as the next, explores the criminalization of genocide. Genocide is a concept whose author and inception can be precisely dated and specified (Curthoys and Dockers 2010: 9). It is attributed to the Polish jurist Raphael Lemkin, who introduced the term in his book about German occupation policy in Europe, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress* (Axis Rule) (1944). “New conceptions require new terms”, Lemkin wrote, and he coined the term ‘genocide’ by combining the ancient Greek word *genos* (meaning race or tribe) and the Latin suffix *cide* (meaning killing) (1944: 79). Lemkin defined genocide as “a coordinated plan of different actions aim[ed] at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves” (1944: 79). Essentially, what lies at the heart of genocide is the “destruction of human groups” (Lemkin 1947: 147).

From its origins as an academic concept, genocide transformed into a fully-fledged international crime under international law within a short period of time. Following a mere four years after the publication of Lemkin’s book, the United Nations (UN) General Assembly (GA) adopted an international treaty¹ on genocide on 9 December 1948. In this treaty, genocide, was designated as a “crime under international law”². The treaty also provided genocide’s international legal definition:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;

¹ Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

² Article 1 of the Genocide Convention

- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) forcibly transferring children of the group to another group³

While Lemkin's core idea centring on the destruction of human groups is retained in this definition, a number of additional requirements is also specified. Firstly, genocide can only be committed against one of the four enumerated human groups, namely, national, ethnical, racial and religious groups. In contrast, Lemkin only included national groups in his definition of genocide (1944: 79). Nevertheless, the inclusion of these four particular groups gives genocide a circumscribed application. Genocide cannot be committed against other types of human groups, such as cultural, political, economic, or linguistic groups. Secondly, the destruction of the four specified groups need not be total; partial destruction would also qualify as genocide. However, this destruction must be deliberate and intentional. Put differently, genocide requires a specific intent, namely, the intent to destroy. Thirdly, although the destruction may embrace mental harm, it is largely confined to physical destruction. This departs from Lemkin's notion of destruction, which he understood as an assault on all aspects pertaining to a human group. In this regard, Lemkin identified the following spheres of human life as possible targets for genocidal destruction: political and social institutions, culture, economic existence, biological and physical security and finally, religion and morality (1944: 82-90).

Genocide was criminalized, it will be shown, after undergoing the two-stage process of international criminalization: firstly, an international criminal norm against genocide developed and thereafter, this norm was translated into an international legal proscription, namely, the Genocide Convention. The account of genocide's criminalization offered here departs from existing accounts in two central ways. Firstly, while existing accounts equate

³ Article 2 of the Genocide Convention

genocide's criminalization with the adoption of the Genocide Convention, the conclusion of this international treaty is seen here as the second phase of genocide's criminalization. Furthermore, whereas existing accounts do not treat developments prior to the adoption of the Genocide Convention as being analytically significant to the process by which genocide was criminalized, the account presented here suggests the development of an international criminal norm on genocide preceded the conclusion of this international treaty.

This chapter, and the next, examines the first stage of genocide's criminalization, namely, the emergence of an international criminal norm against genocide. An international criminal norm, it will be recalled, requires international agreement on *status* and *form*. This chapter focuses on 'status', while the following chapter turns to 'form'. Drawing upon the *travaux préparatoires*⁴ of the Genocide Convention, this chapter demonstrates genocide acquired the status of an international crime following international agreement on two issues: firstly, that genocide deserves to be recognized an international crime; and secondly, that genocide ought to be distinguished from an already-existing international crime. Agreement on these two issues was obtained at different points during genocide's historical development. While genocide was recognized as an international crime in 1946, it was only designated a distinct international crime towards the end of 1948.

The first part of this chapter traces the development of international agreement that genocide deserves to be recognized as an international crime. After showing how genocide emerged as an issue before the UN, the chapter surveys initial discussions on genocide within the GA.

⁴ The *travaux préparatoires* of the Genocide Convention has been compiled in its entirety in Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Leiden: Martinus Nijhoff Publishers (2008). This chapter, as well as the next, draws extensively on this compilation and while full reference details of specific historical documents appear in the footnotes, all page numbers indicated in parenthesis refer to the pages of this compilation.

Following these discussion, the GA issued a resolution on genocide in December 1946 and here, genocide was declared a crime under international law. This resolution represented the first international pronouncement on genocide's status by an international body and it signalled, it will be argued, the existence of international consensus on genocide's status as an international crime. However, consensus on this point was obtained amidst different ideas as to why genocide amounted to an international crime. Here, it will be shown four strands of thought were present: genocide represented a threat to international order; genocide needed to be punished and prevented in the future; genocide violated core notions of human dignity; and finally, genocide violated universal conceptions of morality.

Thereafter, the chapter examines genocide's establishment as a distinct international crime in its own right. This issue centred on a debate as to whether genocide ought to constitute a distinct international crime in its own right or whether it ought to be designated as a sub-type of an already existing international crime, namely, crimes against humanity. As will be demonstrated, it was mainly smaller states from Asia and Latin America who wanted genocide to exist as a separate and distinct international crime. In this regard, such states preferred a distinct international crime of genocide because, firstly, they were dissatisfied with the definition crimes against humanity acquired during the Nuremberg Trials and secondly, they had reservations about the legitimacy of the Nuremberg Trials themselves. Crucially, smaller states were able to push for their preferred outcome in the face of opposition from the Great Powers. Consensus on this aspect was eventually obtained in October 1948, during the final stages of the drafting of the Genocide Convention. Had this not occurred, genocide may have instead been designated as a sub-type of crimes against humanity.

GENOCIDE, AN *INTERNATIONAL CRIME*

As highlighted previously, genocide began as an academic concept in *Axis Rule*. Here, Lemkin argued genocide ought to be prohibited and punished by international law, and that it ought to be made into an international crime (1944: 92-94). In later writings, Lemkin went as far as arguing genocide already amounted to a “crime under international law” (1947: 146; 150). The influence of Lemkin’s ideas were swiftly reflected in international political discourse. Within a few years of *Axis Rule*’s publication, genocide made an appearance at international legal proceedings in Nuremberg, Germany and shortly thereafter, at the UN.

At the Nuremberg Trials, which were held to prosecute former Nazi leaders for atrocities committed during the war, ‘genocide’ appeared in the official indictment issued against the former Nazi leaders. In this regard, the Nazi defendants were charged with

“deliberate and systematic *genocide*, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies.” (International Military Tribunal 1947: 43-44; emphasis added).

According to legal scholars, the use of ‘genocide’ in this indictment represented the first formal legal reference to the concept of genocide (Lippman 1985: 4; Akhavan 2012: 96). In addition, ‘genocide’ was also used by British and French prosecutors in their closing arguments of the Nuremberg Trials (Lippman 1985: 4; Nersessian 2010: 102; Schabas 2009a: 43-44).

The first official mention of genocide within an international institutional setting occurred when three states – Cuba, India and Panama – initiated a draft GA resolution on 2 November 1946⁵. Directed at the UN Secretary-General, the resolution recommended:

“[T]he United Nations Assembly draw attention to the Social and Economic Council to the crime of genocide; and invite the Council to study this problem and to prepare a report on the possibilities of declaring genocide an international crime and assuring international cooperation for its prevention and punishment, and also, recommending, inter alia, that genocide and related

⁵ United Nations General Assembly (UNGA) ‘Draft resolution relating to the crime of genocide, proposed by the delegations of Cuba, India and Panama’ (2 November 1946) UN Doc A/BUR 50

offences should be dealt with by national legislations in the same way as other international crimes such as piracy, trade in women, children and slaves, and others.”⁶

It does not appear these three states had any particular motivation in advancing this resolution. And indeed, the historical record is surprisingly silent on this point (Robinson 1960; Lippman 1985; Schabas 2009a). Rather, what seems to be the case is that Lemkin successfully convinced these states of the need for international action on genocide. And indeed, Lemkin himself was responsible for drafting the resolution (Power 2002; Cooper 2008).

The resolution’s suggestion that declaring genocide an international crime be investigated demonstrates it was not yet recognized as an international crime at this stage. In making this suggestion, therefore, the resolution’s three initiators were attempting to provoke a change to genocide status. This desire is evident, moreover, from how all references to genocide throughout the resolution were accompanied by the term ‘crime’⁷. Interestingly, the resolution itself does not provide reasons for why genocide ought to be recognized as an international crime. As will be demonstrated, justifications for this only surfaced the debates that followed the issuing of the resolution.

The GA decided to include genocide on its agenda⁸ and subsequently, the draft resolution was referred to the GA’s Sixth (Legal) Committee⁹. It was then debated by the members of the Sixth Committee¹⁰ in three separate meetings on 22, 28 and 29 November 1946. These debates are

⁶ *Ibid.*

⁷ *Ibid.*; The opening paragraph of the resolution stated, for instance, that “*crimes* of genocide not only shook the conscience of mankind, but also resulted in great losses to humanity in the form of cultural and other contributions represented by these human groups. Meanwhile, another paragraph suggested that since piracy, the trade in women, children and drugs and obscene publications had been made matters of international concern, the punishment of “very serious *crime* of genocide” ought also be subjected to international action. (emphasis added)

⁸ UNGA ‘Request for the inclusion of additional items in the agenda, Report of the General Committee to the General Assembly’ (7 November 1946) UN Doc A/181

⁹ UNGA ‘Letter from the President of the General Assembly to the Chairman of the Sixth Committee’ (13 November 1946) UN Doc A/C.6/64

¹⁰ The members of the Sixth Committee included representatives of 48 countries: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa

significant for the present discussion for two central reasons: firstly, they demonstrate the development of an emerging consensus on genocide's status as an international crime and secondly; they reveal different justifications existed as to why genocide deserved this new status.

Conceptions of genocide as an international crime

During the Sixth Committee's debates, genocide was firmly characterized as an international crime. Crucially, no contention was made throughout these debates that genocide ought to be recognized as something other than an international crime. Here, it is worth mentioning several states – India, France, Saudi Arabia, the United Kingdom and the Soviet Union – proposed amendments¹¹ to the draft resolution. However, none of these amendments challenged the draft resolution's characterization of genocide as an international crime. Indeed, unanimity on this particular point was formally recorded in the Sixth Committee's report issued at the end of their debates:

“The amendments and the debate in the Sixth Committee indicated that there was unanimous agreement that the General Assembly should affirm that genocide is a crime under international law”¹².

However, differences of opinion emerged over the reasons why genocide amounted to an international crime. Explaining why the resolution had been proposed, the Cuban delegate stated genocide represented a “source of disturbance of international relations” and a “danger to peace”¹³. In order to make the punishment of genocide possible in the future, genocide, he

Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, the United States of America, Uruguay, Venezuela and Yugoslavia.

¹¹ UNGA Sixth Committee ‘Amendments to the draft resolution relating to the crime of genocide, proposed by the delegations of the United Kingdom, India, France and the Union of Soviet Socialist Republics (1946) UN Doc A/C.6/83; UNGA Sixth Committee ‘Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of Genocide’ (26 November 1946) UN Doc A/C.6/86

¹² UNGA Sixth Committee ‘Annex 63, The crime of genocide, Report of the Sixth Committee’ (1946) UN Doc A/231

¹³ UNGA Sixth Committee ‘Summary Record of Meetings, Twenty-second meeting, held at Lake Success, New York on Friday 22 November 1946 at 11.20 a.m.’ (25 November 1946) UN Doc A/C.6/84 (pg. 9)

argued further, needed to be declared as an international crime¹⁴. A similar view was made by the United Kingdom delegate, who stated situations where genocide was left unpunished ought to be prevented¹⁵.

Other delegates highlighted declaring genocide as an international crime would protect principles of human dignity at the international level. Here, the Indian delegate argued genocide “violat[ed] the dignity of human beings”¹⁶, while the Saudi Arabian delegate argued genocide should be condemned as an international crime because it amounted to an “offence against the principles of justice and respect for human dignity”¹⁷. Relatedly, the Uruguayan delegate stated if genocide were made into an international crime, this would contribute towards the protection of “fundamental human rights”¹⁸, while the Soviet delegate emphasized this would be a valuable contribution towards the “struggle against discrimination”¹⁹.

Finally, some delegates reached out to universal morality. In this regard, the French and Chinese delegates respectively argued genocide amounted to an “outrag[e] [of] the conscience of humanity”²⁰ and an “offense against the fundamental principles of morality”²¹. Consider, too, the view of the Saudi Arabian delegate, who described genocide as “one of the most obvious violations of the rules of international law and the laws of humanity”²².

¹⁴ *Ibid.* (pg. 8)

¹⁵ *Ibid.* (pg. 9)

¹⁶ *Ibid.* (pg.10)

¹⁷ UNGA Sixth Committee ‘Summary Record of Meetings, Twenty-third meeting, held at Lake Success, New York on Thursday 28 November 1946 at 11.15 a.m.’ (30 November 1946) UN Doc A/C.6/91 (pg. 14)

¹⁸ *Supra* note 13 (pg. 11)

¹⁹ *Ibid.*

²⁰ UNGA Sixth Committee ‘Summary Record of Meetings, Twenty-fourth meeting, held at Lake Success, New York on Monday 29 November 1946 at 11.20 a.m.’ (2 December 1946) UN Doc A/C.6/96 (pg.18)

²¹ *Ibid.* (pg. 22)

²² UNGA Sixth Committee ‘Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of Genocide’ (26 November 1946) UN Doc. A/C.6/86

Taken together, these views demonstrate genocide was regarded as deserving the status as an international crime for four central reasons: it posed a threat to the peace and stability of the international order; it should be both punished and prevented in the future; it violates core notions of human dignity; and finally, it also violates universal conceptions of morality and law. This, in turn, suggests two broad considerations were at play. Firstly, making genocide an international crime was informed by beliefs on what criminalization could achieve: criminalizing genocide would counter a potential threat to international stability and allow it to be punished. A second factor centred on the perceived intrinsic wrongfulness of genocide. For some, genocide represented a violation of core principles of human dignity while for others, it amounted to a violation of universal conceptions of morality.

The historical record indicates the Sixth Committee's delegates did not debate the merits or demerits of these different justifications. Rather, it appears general agreement on the need to declare genocide as an international crime was found sufficient cause to do so. While these different justifications can be viewed as complementary, they are important to single out because they centralize there was not a single, uniform view on why genocide ought to be recognized as an international crime. Nevertheless, the Sixth Committee was able to unanimously agree genocide deserved this status. In its report to the GA, the Sixth Committee recommended the GA should affirm genocide is an international crime²³. It also recommended the GA adopt a resolution on genocide, which was included in its report.

²³ *Supra* note 12

Resolution 96(1) of the General Assembly

The GA adopted the Sixth Committee's draft resolution on 11 December 1946. Issued as Resolution 96(I)²⁴, it made several pronouncements on genocide. Firstly, it stated genocide, defined as the "denial of the right of existence of entire human groups", "shocks the conscience of mankind" and is "contrary to moral law and to the spirit and aims of the United Nations"²⁵. Secondly, it provided the punishment of genocide is a "matter of international concern"²⁶. Finally, and most crucially, it stated the GA "affirms that genocide is a *crime under international law* which the civilized world condemns"²⁷.

It is important to highlight the GA has no direct power to create binding international law (Nersessian 2010: 99). Furthermore, GA resolutions are not legally binding as international law (Shaw 2008: 114). In terms of Article 38(1) of the Statute of the International Court of Justice²⁸, the only binding sources of international law are international conventions or treaties, international custom or customary international law, the general principles of law recognized by civilized nations, judicial decisions and judicial teachings of the most highly publicized jurists (Shaw 2008; Thirlway 2010). However, GA resolutions may nevertheless have recommendatory or persuasive value. In this respect, they can provide evidence of international custom and in some cases, they may be influential in bringing about the creation of new legally binding rules (Nersessian 2010: 100; Shaw 2008: 116; 118).

The status of GA resolutions has influenced the conventional view of genocide's criminalization. As GA resolutions do not create binding international law, Resolution 96(I) is

²⁴ UNGA 'Resolution 96(I) The Crime of Genocide' (11 December 1946) UN Doc A/RES/96(I)

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.* (emphasis added)

²⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevens 1179

not regarded as having legal significance within the process of genocide's criminalization. By contrast, as an international treaty, the Genocide Convention does create binding international law. It is commonly regarded, therefore, as having established the international crime of genocide. In this regard, genocide's path towards criminalization is generally understood as beginning with Lemkin's first coining of the term and culminating with the conclusion of the Genocide Convention (Salter and Eastwood 2013: 21). Although such accounts do mention Resolution 96(I), it is not portrayed as an important part of genocide's criminalization.

This thesis adopts a different view and it argues Resolution 96(1) was an important marker in the first stage of genocide's criminalization, namely, the emergence of an international criminal norm against genocide. In particular, Resolution 96(1) symbolized the existence of international agreement on genocide's status as an international crime. There are three central reasons why Resolution 96(I) can be taken as evidence of international consensus on genocide's status. Firstly, an international statement on genocide had not been issued prior to Resolution 96(I). In fact, the resolution was the UN's very first official pronouncement on genocide (Nersessian 2010: 98). In addition, it is the first international document that characterizes genocide as an international crime. Indeed, as Lippman argues, the resolution was an "unprecedented affirmation by an international body that genocide [...] was an international offense" (2002: 177). Furthermore, the resolution was adopted unanimously and without debate by all members of the GA. When the resolution was adopted in December 1946, 55 states from Africa, Asia, Europe and the Americas were members of the GA²⁹. This makes it

²⁹ At this stage, the members of the GA at this time included delegations from the following states: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, South Africa, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, and Yugoslavia.

possible to see the resolution as an expression of the collective will of the international community at the time.

Finally, the historical records demonstrate Resolution 96(1) and its contents were regarded by delegates involved in the drafting of the Genocide Convention as having special importance. This was particularly evident in the final stages of the drafting process, when states considered whether the Genocide Convention ought to characterize genocide in the same way that Resolution 96(I) did, namely, as a ‘crime under international law’. The majority of delegates voted in favour of this designation, as it was seen important to reaffirm the resolution’s characterization of genocide³⁰. In this regard, the Cuban delegate argued since “the idea of terming [genocide] a crime under international law was very recent”, it was crucial the final text of the Genocide Convention reaffirms Resolution 96(I)’s designation of genocide³¹. Similarly, the British delegate pointed out that if the wording of Resolution 96(I) were not retained, this would relegate genocide to the status of a national crime. As he argued further, the concept of ‘crime under international law’ was “quite new” and in order to make it clear that genocide is to be distinguished from ordinary, national crimes, the term used in Resolution 96(I) should be retained³².

The key idea advanced here, therefore, is that developments prior to the conclusion of the Genocide Convention are analytically relevant to genocide’s path towards international criminalization. Genocide’s criminalization did not simply centre upon, as is conventionally

³⁰ UNGA Sixth Committee ‘Sixty-eight meeting, Palais de Chaillot, Paris, Wednesday, 6 October 1948, at 3.30 p.m.’ (1948) UN Doc A/C.6/SR.68 (pg. 1342). The outcome of the vote was as follows: 36 delegates voted in favour of retaining the characterization of genocide as a ‘crime under international law’, 3 were opposed and 3 abstained.

³¹ UNGA Sixth Committee ‘Sixty-seventh meeting, Palais de Chaillot, Paris, Tuesday, 5 October 1948, at 10.50 p.m.’ (1948) UN Doc A/C.6/SR.67 (pg. 1338)

³² *Supra* note 30 (pg. 1346)

understood, the adoption of the Genocide Convention. Put differently, it embraced more than the legal step of drafting and concluding an international treaty on genocide. Rather, genocide's criminalization also involved the development of an international criminal norm against genocide. In this regard, one component necessary for this norm's emergence – international agreement on status – centred on Resolution 96(I). As the preceding discussion has shown, the debates leading up to this resolution, as well as its contents, indicates the formation of international consensus that genocide deserved the status as an international crime.

GENOCIDE, A DISTINCT INTERNATIONAL CRIME

A second matter that impinged upon genocide's status concerned its relationship with an already-existing international crime, namely, crimes against humanity. The key debate here centred on the question as to whether genocide should constitute a distinct international crime in its own right or, whether it should be designated as a sub-type of crimes against humanity. Reaching agreement on this question was not easily obtained; in fact, debate on this matter persisted right up until the completion of the final draft of the Genocide Convention in December 1948.

The debate progressed in three stages and in each of these, a different answer was proposed for the overarching question of genocide's relationship with crimes against humanity. In early 1947, genocide was characterized as a distinct international crime in the first draft of the Genocide Convention. However, in early 1948, genocide was given a closer association with crimes against humanity in the second draft of the Convention. Finally, at the end of 1948, when the final draft of the Genocide Convention was completed, all links between genocide and crimes against humanity were severed in the final draft of the Genocide Convention.

Before turning to these three phases, it is important to outline how crimes against humanity was understood as an international crime linked to war at this time. In this regard, the jurisdiction of the International Military Tribunal (IMT) in Nuremberg covered crimes against humanity, crimes against peace, and war crimes³³. Collectively, these three crimes formed the legal basis of the prosecution of Nazi officials. For the purposes of these trials, crimes against humanity was defined as follows:

“murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”³⁴

Importantly, the IMT’s jurisdiction over crimes against humanity was limited to atrocities committed after World War II began in September 1939 (Nersessian 2010: 142; Schabas 2008: 44). A nexus between crimes against humanity and an international armed conflict was, therefore, a necessary requirement. This gave crimes against humanity a particularly restrictive operation: as an international crime, it was inextricably tied to the presence of war. Furthermore, it meant atrocities committed in peacetime – that is, before the formal onset of the Second World War – were beyond the IMT’s jurisdiction. Put differently, the IMT could only prosecute cases of crimes against humanity that been committed during the course of the Second World War.

1947: Debating the autonomy of genocide

After Resolution 96(I) was issued, the UN Secretary-General was instructed to draw up a draft convention on genocide with the assistance of legal experts in the field of international and criminal law³⁵. With input from three appointed experts – Mr. Donnedieu de Vabres (Professor at the Paris Faculty of Law), Professor Vespasian Pella (President of the International

³³ Article 6 of the Charter of the International Military Tribunal (adopted and entered into force 8 August 1945) 82 UNTS 279 (Nuremberg Charter)

³⁴ Article 6(a) of the *Nuremberg Charter*

³⁵ ECOSOC ‘Resolution 47(IV) The Crime of Genocide’ (28 March 1947) UN Doc E/325

Association for Penal Law) and Professor Raphael Lemkin³⁶ – the Secretary-General prepared the very first draft of the Genocide Convention (the Secretariat Draft). Here, genocide was characterized as “the intentional destruction of a group of human beings” and specifically defined as:

“‘a criminal act’ directed against a racial, national, linguistic, religious or political group “with the purposes of destroying [the group] in whole or in part, or of preventing its preservation or development”³⁷.

Crucially, the Secretariat Draft depicted genocide as a distinct international crime. In the commentary accompanying the draft, the Secretary-General stated genocide ought to be understood restrictively as the “deliberate destruction of a human group”³⁸. Otherwise, there was the danger genocide would be “expanded indefinitely” to include, for example, “the law of war, the right of peoples to self-determination, the protection of minorities [and] the respect of human rights”³⁹. Arguing further that “each idea must be properly defined [so as to] not overlap [with] others”⁴⁰, the Secretary-General stated the various branches of international law “should not completely, or even partially, coincide with the question of genocide, even though genocide may have many points of contact with them”⁴¹. Other international crimes or abuses ought not, therefore, be regarded as constituting genocide⁴².

The Secretariat Draft was transmitted to the GA, who then referred it to the Sixth Committee⁴³.

Here, a preliminary question the Sixth Committee⁴⁴ addressed was which UN body should be

³⁶ ECOSOC ‘Draft Convention on the Crime of Genocide’ (26 June 1947) UN Doc E/447 (pg. 222)

³⁷ *Ibid.* (pg. 214)

³⁸ *Ibid.* (pg. 223)

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* (pg. 224)

⁴² *Ibid.* (pg. 223)

⁴³ UNGA ‘Draft Convention on the Crime of Genocide, Note by the Secretary-General’ (25 August 1947) UN Doc A/362

⁴⁴ The members of the Sixth Committee included representatives of 56 countries: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon,

entrusted with advancing work on genocide: the Sixth Committee itself, ECOSOC, or a body that was soon to be established, the International Law Commission (ILC). After deciding ECOSOC should be responsible, it requested ECOSOC to specifically consider whether genocide ought addressed as an autonomous issue or whether it should be dealt with in relation to a task the ILC was soon to be entrusted with, namely, to formulate the principles of international law recognized in the Nuremberg Charter and its judgment⁴⁵.

At this stage, the two opposing views on the relationship between genocide and crimes against humanity began to take root. For instance, the British delegate, who described genocide as “crime against humanity”, argued it “should be dealt with in conjunction with the codification of the principles of the Nürnberg Charter, since it was so closely analogous to other crimes which would thus be codified”⁴⁶. Others, however, disagreed with this view. As the Polish⁴⁷ and Philippines⁴⁸ delegates argued, genocide had not been covered by the Nuremberg Charter and as such, it should not fall within the scope of the ILC’s future task.

When the matter was brought back to the GA, these two contrasting positions persisted. Arguing in favour of conceiving genocide as an autonomous concept, the Norwegian delegate stated:

“Why should we halt the work [on the Genocide Convention] by connecting it with other subjects such as the question of the codification of the principles of the Nürnberg Charter and of the Nürnberg Tribunal? Why should we complicate genocide, on which there is such positive unanimity, by

Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, Yemen and Yugoslavia.

⁴⁵ UNGA Sixth Committee ‘Draft Convention on Genocide: Report of the Sixth Committee on the Report of the Economic and Social Council’ (20 November 1947) UN Doc A/510

⁴⁶ UNGA Sixth Committee ‘Fifty-Ninth meeting, Lake Success, New York, Thursday, 20 November 1947 at 3 p.m., Draft report and draft resolution prepared by Sub-committee 2 on the draft convention on genocide’ (20 November 1947) UN Doc A/C.6/SR.59

⁴⁷ UNGA Sixth Committee ‘Forty-First meeting, Lake Success, New York, Friday, 3 October 1947 at 11 a.m., continuation of the discussion on the draft convention on the crime of genocide’ (3 October 1947) UN Doc A/C.6/SR.41 (pg. 395)

⁴⁸ *Ibid.* (pg. 396).

linking it with other and more controversial subjects? The Nürnberg Charter deals only with questions of war, but genocide is a problem of peace as well as of war. Therefore, it will only confuse the issue if we link the two together.”⁴⁹

In viewing genocide as a problem in peace and war, the important point raised here was that in order to prevent genocide from being subjected to the same restriction as crimes against humanity, it should be recognized as a separate international crime.

As in the Sixth Committee, the United Kingdom continued to view genocide as a type of crimes against humanity. Here, its delegate argued genocide is “so closely analogous to the crimes against humanity covered by the Nürnberg principles” and as such, further action on genocide ought to occur in conjunction with the codification of the Nuremberg Principles⁵⁰. In a similar vein, France expressed disapproval at term ‘genocide’ and proposed the label ‘crime against humanity’ be used instead⁵¹. It also expressed regret that “the question of genocide was not considered in correlation with the principles affirmed in the statute and sentences of the Nürnberg Tribunal, and as a parallel to the conception of crime against humanity, of which genocide is merely one of the aspects”.⁵²

At the end of their discussions, the GA adopted Resolution 180(II)⁵³, which requested ECOSOC to continue its work on genocide. While the resolution re-affirmed genocide’s status as an international crime⁵⁴, no firm pronouncement was made on the relationship between genocide and crimes against humanity. Effectively, the GA avoided making a decision on this

⁴⁹ UNGA ‘Hundred and Twenty-Third Plenary Meeting, Genocide: Report of the Sixth Committee’ (21 November 1947) UN Doc A/PV.123 (pg. 451)

⁵⁰ *Ibid.* (pg. 456)

⁵¹ UNGA ‘Memorandum on the subject of genocide and crimes against humanity, submitted by the representative of France’ (19 May 1947) UN Doc A/AC.10/29 (pg. 141)

⁵² ‘Draft Convention on Genocide, communications received by the Secretary-General’ (27 September 1947) UN Doc A/401 (pg. 383)

⁵³ UNGA ‘Resolution 180(II): Draft Convention on Genocide’ (21 November 1947) UN Doc A/RES/180

⁵⁴ The resolution stated the General Assembly reaffirms its resolution 96(I) of 11 December 1946 on the crime of genocide and declares that genocide is an international crime entailing national and international responsibility on the part of individuals and states.

question. Roughly a year after genocide's status has been recognized as an international crime, therefore, there remained a real possibility that it might be designated as a type of crime against humanity.

1948: Linking genocide with crimes against humanity

In order to continue work on genocide, ECOSOC established an Ad Hoc Committee⁵⁵. A second draft of the Genocide Convention (the Ad Hoc Committee Draft), along with an accompanying report, was completed on 24 May 1948⁵⁶. Compared with the Secretariat Draft, a much stronger association between genocide and crimes against humanity was made in the Ad Hoc Committee Draft. This is evident from three central pronouncements in the Ad Hoc Committee draft. Firstly, genocide was characterized as a “crime against mankind”⁵⁷. Secondly, the draft made an explicit reference to the Nuremberg Trials. In this regard, it stated notice was being taken of the fact that the IMT had “punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing”⁵⁸. Finally, Article 1 of the draft provides the following: “Genocide is a crime under international law whether committed in time of peace or in time of war”⁵⁹. The report accompanying the Ad Hoc Committee Draft, as well as the records of the discussions that ensued within the Ad Hoc Committee, provides some insight as to how and why these changes to genocide's characterization came about.

⁵⁵ ECOSOC ‘Sixth Session, Social Committee, Summary Record of the Thirty-seventh meeting, Lake Success, New York Saturday, 21 February 1948, at 2.45 p.m.’ (26 February 1948) UN Doc E/A.C.7/SR.37 (pg. 615); The *ad hoc* Committee was composed of the following 7 members of ECOSOC: China, France, Lebanon, Poland, United States of America, Union of Soviet Socialist Republics and Venezuela. The Venezuelan delegate had proposed that the *ad hoc* Committee be composed of 9 members, to ensure representation of both legal systems and geographical distribution: Brazil, China, Denmark, France, Lebanon, New Zealand, Soviet Union, United Kingdom and United States. However, Brazil asked to be replaced by Venezuela, Denmark declined in favour of Poland, and both New Zealand and the United Kingdom declined to be members.

⁵⁶ ECOSOC ‘Ad Hoc Committee on Genocide (5 April – 10 May 1948), Report of the Committee and Draft Convention Drawn Up by the Committee’ (24 May 1948) UN Doc E/794

⁵⁷ *Ibid.* (pg. 1155); In the draft, genocide is described as “a grave crime against mankind which is contrary to the spirit and aims of the United Nations and which the civilized world condemns”.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

The term “crimes against mankind” was proposed by the Polish delegate, who stated it would help avoid confusion between genocide and crimes against humanity⁶⁰. The term was adopted, the accompanying report explained, to “express a popular idea on which everyone was in complete agreement” with⁶¹. In this regard, many felt a slightly different term would be useful because of how crime against humanity had “acquired a well-defined legal meaning” in the Nuremberg Charter⁶². However, some committee members were adamant genocide represented a crime against humanity. As the French delegate maintained, “The Ad Hoc Committee [...] should base its work on a broader idea, by placing [genocide] within the general framework of crimes against humanity”⁶³. Sharing this view, the Soviet delegate described genocide as “a most grievous crimes against humanity”⁶⁴.

Having settled on ‘crime against mankind’, those in favour of characterizing genocide as a crime against humanity also pushed for the inclusion of a reference to the Nuremberg Trials. This signalled a clear desire to create an association between genocide and crimes against humanity. In this regard, France, with the support of China and the United States, argued the Nuremberg Tribunal had in fact punished cases of genocide and this precedent should be reflected in the Genocide Convention⁶⁵. However, the Lebanese and Venezuelan delegates contended acts punished by the Nuremberg Tribunal had not been regarded as cases of genocide but rather, crimes against humanity⁶⁶. These contrasting positions centralize different

⁶⁰ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Twentieth Meeting, Lake Success, New York, Monday, 26 April 1948, at 2 p.m.’ (4 May 1948) UN Doc E/AC.25/SR.20 (pg. 949)

⁶¹ *Supra* note 57 (pg. 1116)

⁶² *Ibid.*

⁶³ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Seventh Meeting, Lake Success, New York, Monday, 12 April 1948, at 2.30 p.m.’ (20 April 1948) UN Doc E/AC.25/SR.7 (pg. 782)

⁶⁴ ECOSOC ‘Ad Hoc Committee on Genocide, Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948) (7 April 1948) UN Doc E/AC.25/7

⁶⁵ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Twenty-third Meeting, Lake Success, New York, Tuesday, 27 April 1948, at 4.25 p.m.’ (4 May 1948) UN Doc E/AC.25/SR.23 (pg. 972)

⁶⁶ *Ibid.*

interpretations about the Nuremberg Trials. For some, genocide had been addressed in these legal proceedings, albeit under a different label; for others, genocide did not feature in these trials.

Not all delegates were happy with the reference to the Nuremberg Trials, however. Indeed, some tried to downplay the link between the two crimes. In this regard, the Polish delegate proposed the phrase ‘whether committed in time of peace or in time of war’ be included, as it would “avoid the difficulty raised by the Nürnberg Charter”, namely, that a nexus with war was required⁶⁷. The Polish proposal was adopted by three votes to one, with three abstentions⁶⁸. The inclusion of this phrase helped to temper the association between the two crimes. Nonetheless, this wasn’t enough to completely isolate genocide as a distinct international crime. Ultimately, the explicit reference to Nuremberg in the Ad Hoc Committee Draft created a link between genocide and crimes against humanity.

1948: Cementing genocide’s status as a crime separate from crimes against humanity

The GA’s Sixth Committee debated the Ad Hoc Committee’s Draft from 5 October until 9 November 1948 and thereafter, the final draft of the Genocide Convention was completed on 3 December 1948⁶⁹. The Sixth Committee severed genocide’s link with crimes against humanity Draft: it deleted the Ad Hoc Committee’s term ‘crime against mankind’ and also removed the references to the Nuremberg Tribunal⁷⁰. Two aspects of the Ad Hoc Committee Draft were retained: firstly, the designation of genocide as a ‘crime under international law’ and secondly, the specification that the genocide could be committed in peace or in war.

⁶⁷ *Supra* note 61 (pg. 949)

⁶⁸ *Supra* note 57 (pg. 1121)

⁶⁹ UNGA Sixth Committee ‘Sixth Committee, Third Session, Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee’ (3 December 1948) UN Doc A/760

⁷⁰ *Ibid.* (pg. 2032)

These developments came about because the Venezuelan delegate tabled⁷¹ a proposal to delete the Nuremberg reference. As he argued:

“[T]he preamble to the convention should [not] include a reference to the Nürnberg Tribunal. The General Assembly, in its resolution 180(II), had decided that genocide would be the subject of a separate convention, while the International Law Commission would formulate the principles recognized in the Charter of the Nürnberg Tribunal. It had thus clearly indicated its intention to consider genocide as distinct from the crimes against humanity referred to in article 6 of the Charter of the Nürnberg Tribunal, which were prohibited in the latter not as genocide, but as crimes committed in connexion with war or with preparation for war. [...] The acts prohibited by the Charter of the Nürnberg Tribunal did not correspond exactly to those which the United Nations intended to prevent and to make punishable through the convention on genocide; consequently there was no reason to include in the convention on genocide a reference to the judgment of the Tribunal”⁷².

Support for the Nuremberg reference’s deletion was expressed by a range of countries, including America, Uruguay, Egypt, Cuba, China, Peru, United Kingdom, Belgium, Iran, Ecuador, Brazil, Haiti, Lebanon, Dominican Republic, and El Salvador.

For some of these delegates, removing the Nuremberg reference was necessary because of the restrictive meaning crimes against humanity had acquired at the Nuremberg Trials. A reference to Nuremberg would mistakenly imply, it was argued, genocide also required a link with war. As the American delegate explained, omitting the reference to the Nuremberg Tribunal prevented any confusion between genocide and the crimes mentioned in the Nuremberg Charter, which were connected with war⁷³. Similarly, the Pakistani delegate argued if genocide were described as a crime against humanity, this would contradict a principle the Ad Hoc Committee had agreed upon in its draft, namely, that genocide could be committed in times of peace or in time of war⁷⁴. Ultimately, if genocide were not separated from crimes against

⁷¹ UNGA Sixth Committee ‘Venezuela: proposed text for the preamble to the draft convention on genocide (E/794)’ (13 November 1948) UN Doc A/C.6/261

⁷² UNGA Sixth Committee ‘Hundred and ninth meeting, Palais de Chaillot, Paris, Wednesday, 17 November 1948, at 11.50 a.m.’ (17 November 1948) UN Doc A/C.6/SR.109 (pg. 1838)

⁷³ *Ibid.*

⁷⁴ UNGA Sixth Committee ‘Hundred and tenth meeting, Palais de Chaillot, Paris, Thursday, 18 November 1948, at 3 p.m.’ (18 November 1948) UN Doc A/C.6/SR.110 (pg. 1855)

humanity, the scope of the Genocide Convention would be incorrectly limited to genocide committed in times of war⁷⁵.

In addition, it was also emphasized that genocide represented an entirely new crime. Here, the American delegate argued genocide was a “completely new concept” and since it had not been defined by the Nuremberg Tribunal, the tribunal “could not be cited as a precedent in connexion with genocide”⁷⁶. What distinguished genocide from crimes against humanity, it was also pointed out, was the intentional destruction of a human group. In this regard, the Lebanese delegate stated: “[G]enocide differed, in law, from the other crimes with which it had so far been confused; for while genocide, like the other crimes, resulted in the physical destruction of one or several individuals, it involved a new factor, namely, the intention to destroy a group as such”⁷⁷. It was also stressed that genocide, unlike crimes against humanity, could be committed in times of peace and war. As the Brazilian delegate argued, genocide was “an international crime which could also be committed in time of peace” and as such, he felt it “would be well to define genocide as a separate crime”⁷⁸.

Finally, a reference to Nuremberg was also opposed because some delegates – particularly non-Western states – questioned the legitimacy of the Nuremberg Trials. For instance, the Peruvian delegate described the Nuremberg Tribunal as “an exceptional court”⁷⁹ and an “improvisation [which was] made necessary by exceptional circumstances resulting from the war”⁸⁰. In his

⁷⁵ *Supra* note 73 (pg. 1839-1840; 1843)

⁷⁶ *Ibid.* (pg. 1839)

⁷⁷ UNGA Sixth Committee ‘Sixty-sixth meeting, Palais de Chaillot, Paris, Monday, 4 October 1948, at 10.45 a.m.’ (4 October 1948) UN Doc A/C.6/SR.66 (pg. 1326)

⁷⁸ UNGA Sixth Committee ‘Sixty-third meeting, Palais de Chaillot, Paris, Thursday, 30 September 1948, at 10.30 a.m.’ (30 September 1948) UN Doc A/C.6/SR.63 (pg. 1292)

⁷⁹ *Supra* note 75 (pg. 1849)

⁸⁰ *Supra* note 73 (pg. 1841)

view, therefore, the trials could not serve as a precedent in a convention on genocide⁸¹.

Consider, too, the statement made by the delegate of El Salvador:

“From a legal point of view, the principles established by the Nürnberg Tribunal should not be regarded as tantamount to principles of international law, since that Charter was adopted solely to permit the trial, inter alia, of those guilty for acts for which previous legislation did not provide. [...] A further reason against reference to the Nürnberg Judgment was the fact that the Charter of the Nürnberg Tribunal was drawn up in special circumstances, which permitted the victorious Powers to impose certain standards on the European Axis countries. Such standards could not be applied ipso facto in other circumstances”⁸².

The delegates from Pakistan, Iran, Cuba, and Lebanon concurred with these views, and similarly emphasized the Nuremberg Tribunal’s controversial nature⁸³. Describing how the Nuremberg Trials represented “the subjection of the vanquished to the will of the victor”, the Pakistani delegate stated it was “doubtful whether the Judgment of the Tribunal could be considered as constituting a precedent” and as such, he preferred that no reference be made to the Nuremberg Tribunal⁸⁴.

Conversely, delegates who viewed the Nuremberg Trials in positive terms favoured the inclusion of a Nuremberg reference. Replying to the Peruvian delegate, the Syrian delegate stated that although the Nuremberg Trial contained “certain juridical faults”, its “moral implications were nevertheless very high”⁸⁵. Similarly, the Czechoslovakian delegate argued the establishment of the Nuremberg Tribunal “marked a most important stage in the development of international law”⁸⁶. Unsurprisingly, France, one of the countries involved in the establishment of the Nuremberg Tribunal, also regarded the Tribunal as valuable legal precedent: “International law could only advance by degrees, especially where such a complicated matter as criminal law was concerned. It was therefore extremely fortunate that

⁸¹ *Supra* note 80 (pg. 1849)

⁸² *Supra* note 73 (pg. 1846-7)

⁸³ *Supra* note 75 (pg. 1856; 1858-1860)

⁸⁴ *Ibid.* (pg. 1856)

⁸⁵ *Supra* note 73 (pg. 1841)

⁸⁶ *Ibid.* (pg. 1848)

alegal precedent did exist in the present case and reference should be made to that precedent in the [Genocide] [C]onvention”⁸⁷.

In addition, France also wanted the term ‘crime against humanity’ to be specifically mentioned in the Genocide Convention. As its delegate maintained, there was “no reason why th[e] distinct legal concept [of crimes against humanity] should not be used as a precedent” in the Genocide Convention and “the mere fact that the idea of crimes against humanity had first evolved at Nürnberg did not prevent that idea from having a general significance once it was introduced into international law”⁸⁸. Greece also felt genocide rightly “belonged to the category of crimes against humanity”⁸⁹, a view which the Czechoslovakian delegate echoed: “There was no doubt that the acts against which the convention on genocide was aimed, were identical with those which article 6(c) of the Charter of the Nürnberg Tribunal qualified as crimes against humanity”⁹⁰.

However, designating genocide as a type of crime against humanity and retaining a reference to the Nuremberg Tribunal proved to be minority views. When the Venezuelan amendment was put to the vote, it was adopted by an overwhelming majority: 38 votes to 9, with 5 abstentions⁹¹. Furthermore, the majority of delegates also voted to retain the Ad Hoc Committee’s characterization of genocide as a crime that could be committed in times of peace and war⁹². Consequently, the link previously been made between genocide and crimes against

⁸⁷ *Supra* note 75 (pg. 1854)

⁸⁸ *Ibid.*

⁸⁹ *Supra* note 73 (pg. 1844)

⁹⁰ *Ibid.* (pg. 1848)

⁹¹ *Supra* note 75 (pg. 1864)

⁹² UNGA Sixth Committee ‘Sixty-eighth meeting, Palais de Chaillot, Paris, Wednesday, 6 October 1948, at 3.30 p.m.’ (6 October 1948) UN Doc A/C.6/SR.68 (pg. 1352)

humanity was severed. From this point on, genocide acquired the status of independent international crime, one separate and distinct from crimes against humanity.

Genocide: a new and distinct international crime

Crimes against humanity's influence upon genocide's historical development has been appreciated in the existing literature. As Jessberger argues, genocide's emergence as an international crime is "the story of the emancipation of genocide from the notion of crimes against humanity" (2009: 20). In a similar vein, Akhavan maintains genocide emerged "in order to fill a perceived void both in the legal idiom and in historical understanding" (2012: 111). In fact, Schabas goes a step further and suggests genocide may not have existed at all were it not for the implications the Nuremberg Tribunal had upon crimes against humanity (2010: 125;128). As he writes,

"[T]he recognition of genocide as an international crime by the General Assembly of the United Nations in 1946, and its codification in the 1948 Convention, can be understood as a reaction to the narrow approach to crimes against humanity in the Nuremberg judgment of the International Military Tribunal. *It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at recognizing and defining the crime of genocide. Had Nuremberg affirmed the reach of international criminal law into peacetime atrocities, the Genocide Convention might never have been adopted.* The term 'genocide' might then have remained a popular or colloquial label used by journalists, historians, and social scientists but absent from legal discourse." (2010: 128; emphasis added)

However, the legal literature generally stops short of showing how the historical relationship between the two international crimes matters when seeking to understand the process by which genocide was criminalized. The eventual decision to distinguish genocide from crimes against humanity, it is suggested here, reveals two broad reasons influenced this aspect of genocide's first stage of international criminalization: firstly, dissatisfaction with crimes against humanity and secondly, reservations about the legitimacy of the Nuremberg Trials.

Turning firstly to crimes against humanity, a majority of states were dissatisfied with the nature of this international crime. In particular, its restrictive legal definition created a *lacuna* in

international law, whereby peacetime atrocities had been left unpunished. Genocide could fill this gap but crucially, only if it were established as an international crime distinct from crimes against humanity. This suggests genocide was thought of deserving an independent status because of the perceived limitations of crimes against humanity. In other words, genocide's status as a distinctive international crime was derivative of crimes against humanity's deficiencies.

In general, Asian and Latin America states saw genocide as an independent crime – and they were joined by a small grouping of Western states, namely, Norway, Poland and the United States. Meanwhile, three Great Powers – France, the Soviet Union and the United Kingdom – maintained genocide ought to be designated as a type of crimes against humanity. A close reading of the *travaux préparatoires* does not, in itself, reveal the reasons why these different states adopted these particular positions. Nevertheless, the broad division between the Great Powers and smaller, non-European states makes it possible to speculate what motivations were at work.

As the broader international context of this period saw the early onset of the Cold War, it is reasonable to expect France and the United Kingdom to have adopted a position in opposition to the Soviet Union. Indeed, the drafting of the Genocide Convention was broadly influenced by Cold War politics. As some have argued, the superpowers used the drafting process “to engage in ideological disquisitions”, and many of Genocide Convention's provisions were “heavily influenced by political and ideological considerations” (Lippman 2012: 19; LeBlanc 1991: 28). To some extent, this explains why the Soviet Union and the United States found themselves opposed to one another on the question of genocide's relationship with crimes against humanity. However, the ideological politics of the Cold War cannot entirely explain

why France, the Soviet Union and the United Kingdom shared a similar position on this question. At a time when the Cold War was intensifying, this made for a surprising and unexpected coalition. Unlike Asian and Latin American states, why were these three Great Powers satisfied with nature and status crimes against humanity had acquired after the Nuremberg Trials?

Here, it is important to appreciate why crimes against humanity was restricted to war-time atrocities for the purposes of the Nuremberg Trials in the first place. In this regard, the prevailing view amongst the Nuremberg Charter's drafters – France, the Soviet Union, the United Kingdom, and the United States – was that what occurred within a particular state remained the exclusive concern of that state (Casesse 2008: 104). Limiting crimes against humanity to acts committed in connection with an international war was thus a mechanism by which atrocities committed within Germany, such as those committed by the Nazis against their own Jewish populations, could be excluded from the Nuremberg Tribunal's jurisdiction. Importantly, this guaranteed the Great Powers could not be criticized for interfering with Germany's domestic affairs of Germany; more crucially, it also ensured the Great Powers themselves could not be held liable for atrocities committed against their own populations (Schabas 2009a: 40; Schabas 2010: 126; Schabas 2012b: 7). As Schabas argues, "The four powers were reasonably confident that by attaching such a condition to crimes against humanity, they could convict the Germans without exposing themselves to liability under international law" (2012a: 108). Given the Great Powers had a vested interest in a narrow definition of crimes of humanity, maintaining this restricted definition beyond the Nuremberg period appears a logical position for them to adopt. In this regard, subsuming genocide within the restrictive category of crimes of humanity would help prevent possible charges of genocide being brought against them in the future.

With this in mind, the position smaller states adopted appears increasingly calculated. Their dissatisfaction with crimes against humanity was shaped by concerns that its narrow definition conveniently excluded the actions of the Great Powers. To prevent this from occurring again, genocide needed to be designated as a separate international crime. This, along with an explicit provision providing genocide is an international crime whether committed in peace or in war, would effectively ensure no legal loopholes preventing genocide's applicability to all states existed. Arguably, the key motivation on the part of smaller states was the desire to ensure genocide would be applied equally to all states.

This point is reinforced when the second reason underpinning genocide's eventual designation as an independent international crime is considered, namely, reservations over the legitimacy of the Nuremberg Trials. Smaller states, it will be recalled, emphasized the special and exceptional nature of the Nuremberg Trials and in doing so, they questioned the validity and precedential value of these legal proceedings. Indeed, the overall criticism of "victors' justice" was evident in the way no prosecutions for Allied war crimes ever took place (Werle 2005: 9).

As Simpson explains,

"The phrase "victor's justice" as applied to [the Nuremberg Trials] is by now a truism. The victorious allied powers tried their German and Japanese adversaries without even considering the possibility of applying these same laws to their own war-time behaviour. There is little doubt that some allied actions would have proved amenable to the laws of Nuremberg even if the jurisdictional and political barriers were inevitably insurmountable." (1997: 5)

This, then, suggests an additional reason why smaller states wanted genocide to be recognized as a distinct international crime: to de-link genocide from the exceptional and controversial historical circumstances of the Nuremberg Trials themselves. From their perspective, genocide should not be tainted by the controversy surrounding the Nuremberg Trials. Rather, it should exist as an international crime that is not dependent upon the specific context of the Nuremberg Trials. As demonstrated, these states did not want a reference to the Nuremberg Trial included and furthermore, they pushed for an express provision stating genocide was a crime in both

peace and war to be included. Ultimately, such states were keen to ensure genocide's scope of application went beyond the context of war and more specifically, the Second World War itself.

Given their involvement in the Nuremberg Trials, it is understandable France, the United Kingdom and the Soviet Union did not share these reservations. Indeed, the Nuremberg Trials symbolized their status of the Great Powers as the victors of the Second World War. Maintaining an association between genocide and the Nuremberg Trials was a crucial way, therefore, to ensure Nuremberg's legacy remained influential in the post-war period. In this regard, Weiss-Wendt has argued the Soviet Union's insistence of a reference to Nuremberg was motivated by the desire to emphasize its role in defeating Nazi Germany. As he writes,

“The victory over Nazi Germany, which communist authorities attributed to the superior organization of the Soviet People, was attained in Berlin, signed into a treaty in Potsdam, but pronounced in Nuremberg. The International Criminal Tribunal at Nuremberg came to symbolize the ultimate victory of good over evil. But if genocide was the crime of all crimes, then it had to be directly linked to Nazism, and by extension to the Nuremberg proceedings. In short, Soviet attempts to incorporate the Nuremberg Charter into the wording of the Genocide Convention were not intended to affirm Soviet dominance, but rather to ascertain its status as a country that had played a major role in defeating Nazi Germany” (2012: 193).

All of this centralizes genocide acquired the status of a distinct international crime because smaller states' dissatisfaction with crimes against humanity and the legitimacy of the Nuremberg Trials. Keen to ensure genocide's universal application, they pushed for genocide to be distinguished from crimes against humanity in two main respects: firstly, genocide can be committed in both peace and in war and secondly, it was dependent on neither the Second World War nor the Nuremberg Trials. That the smaller states succeeded in achieving this was significant, particularly because it came at the expense of the wishes of the more powerful states who were present at the drafting table.

This chapter has examined the first stage of genocide's international criminalization, namely, the emergence of an international criminal norm against genocide. In doing so, it has

specifically focused on the issue of status and here, it has demonstrated the development of international agreement on genocide's status as an international crime centred on two particular issues: firstly, designating genocide as an international crime and secondly, distinguishing genocide from an already-existing international crime, crimes against humanity.

Genocide was recognized as an international crime on 11 December 1946, when the GA issued Resolution 96(I). This international declaration signalled the existence of international consensus that genocide deserves the special status of an international crime. The key insight the foregoing analysis revealed was that this agreement was obtained even though different views as to why genocide deserved this status existed. Four strands of thought emerged in this regard: genocide represents a threat to the stability of the international order; genocide needed to be punished; genocide violates core notions of human dignity; and finally, genocide violates universal conceptions of morality. Based on this, it was suggested international consensus on genocide's status as international crime was influenced by two overarching considerations. The first centred on beliefs about what the act of criminalization could accomplish: criminalizing genocide would counter a potential threat to international stability and it would also allow for genocide to be punished in the future. A second factor concerned the perceived inherent wrongness of genocide, namely, that it violated human dignity and universal morality.

Genocide was recognized as a distinct international crime in its own right on 6 October 1948. This was not an inevitable outcome; rather, genocide emerged as a distinct international crime after protracted debates about the proper relationship between genocide and crimes against humanity. Initially, genocide was given an independent status in the Secretariat Draft. However, this was reversed in the Ad Hoc Committee's Draft, which envisaged a much closer association between genocide and crimes against humanity. Ultimately, the Sixth Committee

cast the final decision: by virtue of a vote taken after its discussion, genocide was separated from crimes against humanity in the Genocide's Convention's final draft. Evidence for international consensus on genocide amounting to a separate and independent international crime can be attributed to this vote, therefore.

Genocide was distinguished from crimes against humanity for two inter-related reasons. Firstly, many states were dissatisfied with crimes against humanity's restrictive definition. As an international crime with a nexus to war, crimes against humanity did not extend to peacetime atrocities. Crucially, this gap in international law could be filled by establishing a new international crime of genocide that could be committed in peace and war. There was dissatisfaction, too, that crime against humanity's definition had been formulated in such a way that it excluded the actions of the Great Powers themselves. If genocide were established as a sub-type of crime against humanity, this would therefore restrict its scope and application. In order to ensure genocide would have universal application, it needed to be made into a separate international crime.

Secondly, many states had reservations about the legitimacy of the Nuremberg Trials. This contributed to the view genocide ought to be disassociated from the legacy of the Nuremberg Trials, as well as that of the Second World War. This could only be achieved by making genocide a distinct international crime. This would allow it to exist beyond the special and exceptional historical circumstances that resulted in the establishment of the Nuremberg Trials. Moreover, it would ensure genocide would not be a context-specific or context-dependent international crime.

3

THE CRIMINALIZATION OF GENOCIDE: GENOCIDE'S FORM AS AN INTERNATIONAL CRIME

Having examined how and why genocide acquired the status of an international crime, this chapter turns to the issue of form – the second component necessary for the emergence of an international criminal norm. In this regard, it seeks to explain why genocide acquired the specific form that is evident from its international legal definition. Genocide, it will be recalled, genocide refers to the intentional destruction, whether in whole or in part, of a national, ethnical, racial or religious group¹. Two specific types of human groups are excluded from this definition: *cultural groups* and *political groups*. This has meant the destruction of cultural and political groups are entirely excluded from genocide's scope. Put differently, genocide cannot be committed against cultural and political groups.

This chapter examines how and why these two groups were excluded from genocide's final form as an international crime. As will be shown, these two exclusions were not inevitable developments in genocide's criminalization. Rather, they were the result of conscious decisions that were made after protracted debates on whether the notions of 'cultural genocide' and 'political genocide' should feature within genocide's definition. To demonstrate this, the chapter draws upon debates and discussions on cultural and political genocide during the drafting process of the Genocide Convention at the United Nations (UN). Here, the three different drafts that preceded the final version of the Genocide Convention structures this chapter's analysis: the Secretariat Draft (completed by the UN Secretariat in 1947); the Ad Hoc Committee Draft (completed by the Ad Hoc Committee on Genocide in early 1948) and the

¹ Article 2 of the Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

Sixth Committee Draft (completed by the legal committee of the General Assembly (GA) in late 1948). As will be demonstrated, the question of genocide's form – whether it ought to embrace the notions of cultural and political genocide – was answered differently in each of these drafts.

The chapter begins by examining the notion of 'cultural genocide', the destruction of cultural groups. After demonstrating how debates on this issue unfolded throughout the three drafting stages, the chapter argues cultural genocide was excluded from genocide's form for the following reason: a majority of states saw cultural genocide as an idea that more compatible with an already-existing norm, namely, the international protection of minorities. In this regard, many states believed cultural genocide should be excluded from genocide's form because it was more suitably addressed in relation to the norm of minority protection. The exclusion of cultural genocide was also informed, it will be shown, by the desire to maintain a fundamental distinction between international crimes, on the one hand, and international human rights, on the other. In turn, this centralizes how genocide was deliberately crafted into an international crime – and not, as is commonly assumed in the literature, as a violation of international human rights.

Thereafter, the chapter turns to notion of 'political genocide', the destruction of political groups. After tracing debates on political genocide throughout the three drafting stages, the chapter argues adherence to the principle of state sovereignty best explains why political genocide was omitted from genocide's form. In this regard, states – the superpowers and smaller states – feared the notion of political genocide would, if included in genocide's definition, threaten internal and external dimensions of state sovereignty.

CULTURAL GENOCIDE

Cultural genocide was included within genocide's definition in the first draft of the Genocide Convention. It was also retained in the treaty's second draft but here, cultural genocide was given a more circumscribed meaning. In the final draft of the Genocide Convention, cultural genocide was altogether excluded from genocide's definition. After highlighting how debates on the cultural genocide unfolded throughout these three stages, the reasons why cultural genocide was excluded from genocide's form will be examined.

Secretariat Draft (1947)

The Secretariat Draft² distinguished between three forms of genocide: physical genocide³, biological genocide⁴, and cultural genocide. Under the latter, a wide range of cultural interests and objects were specified:

- “(a) forced transfer of children to another human group;
- (b) forced and systematic exile of individuals representing the culture of a group;
- (c) prohibition of the use of the national language even in private intercourse;
- (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications
- (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.”⁵

The notion of cultural genocide gave rise to divergent views amongst the legal experts involved in drafting of the Secretariat Draft. In this regard, Professors de Vabres and Pella both opposed

² ECOSOC 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447

³ *Ibid.*; Physical genocide was defined as the causing of the death of members of a group or the injuring of their health or physical integrity by:

- (a) group massacres or individual executions
- (b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
- (c) mutilations and biological experiments imposed for other than curative purposes; or
- (d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

⁴ *Supra* note 2; Biological genocide was defined as the restriction of births by (a) sterilization and/or compulsory abortion; (b) segregation of the sexes; or (c) obstacles to marriage

⁵ *Supra* note 2 (pg. 215)

including cultural genocide within genocide's definition. Cultural genocide, they argued, related more to the international protection of minority groups within states and its inclusion within genocide's definition represented an "undue extension" of the concept⁶. On the other hand, Lemkin maintained cultural genocide represented a fundamental element of genocide. The existence of a human group, Lemkin argued, can only be protected if that protection extends to physical, biological *and* cultural protection⁷. Moreover, because acts of cultural genocide aimed at the "rapid and complete disappearance of the cultural, moral and religious life" of human groups, he saw no reason why cultural genocide should be excluded from genocide's definition⁸.

Lemkin's views on cultural genocide matched those he expressed earlier in *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposal for Redress* (1944). Here, cultural genocide formed a part of his definition of genocide: genocide referred to the total destruction of human groups that is effected by "synchronized attack[s] on different aspects of [the] lives of [human groups]", including the cultural, political, social, economic, biological, religious and moral fields (Lemkin 1944: xi-xii). Lemkin also believed the destruction of human groups often began with acts of cultural destruction. As he wrote, "Physical and biological genocide are always preceded by cultural genocide or by an attack on the symbols of the group or by violent interference with religious or cultural activities" (Lemkin quoted in Moses 2010: 34). Lemkin's strong views on cultural genocide helps explain why it was included in the Secretariat Draft, despite opposition from the other legal experts (Moses 2010: 37; Schabas 2009a: 208).

⁶ *Ibid.* (pg. 234)

⁷ *Ibid.*

⁸ *Ibid.* (pg. 235)

When circulated to UN member states, the Secretariat Draft solicited comments from several states⁹. Here, three Western states – the United States (US), France, and the Netherlands – expressed opposition to cultural genocide on the grounds it represented a matter related to the protection of national minorities within states. In this regard, the American delegate stated genocide should be confined to “barbarous acts directed against individuals”¹⁰ and that cultural genocide was more suitably dealt with the protection of minorities¹¹. Similarly, France argued genocide should be “limited to physical and biological genocide”¹². As an issue related to the protection of minorities, cultural genocide concerned the domestic affairs of states; therefore, its inclusion in the Genocide Convention would risk “political interference in the domestic affairs of States”¹³.

The position of these governments reflected several developments concerning the international protection of national minorities. In the aftermath of the First World War, the international community constructed a system for the international protection of national minorities (Schabas 2009a: 27). Consisting of fourteen treaties designed to protect ethnic, religious, or linguistic minorities in Eastern Europe, the Baltic region, and parts of the Middle East, it accorded minority groups the right to non-discrimination on the grounds of ethnicity, religion or culture (Morsink 1999: 1011; Mazower 2009: 108). More specifically, the treaties ensured governments hosting minority groups in their states would not place restrictions on the use of minority languages or religious and cultural practices (Morsink 1999; Mazower 2009; Schabas 2009a). However, this system of minority protection broke down in the mid-1930s, mainly

⁹ UNGA ‘Draft Convention on the Crime of Genocide: communications received by the Secretary-General’ (27 September 1947) UN Doc A/401; This included comments from the governments of Denmark, France, Haiti, India, Netherlands, Norway, Philippines, Siam, the United Kingdom, United States of America, and Venezuela.

¹⁰ *Ibid.* (pg. 374)

¹¹ *Ibid.*

¹² UNGA ‘Draft Convention on the Crime of Genocide: communications received by the Secretary-General’ (31 October 1947) UN Doc A/401/Add.3 (pg. 383)

¹³ *Ibid.*

because the League of Nations was not empowered with mechanisms to enforce these treaties (Mazower 2009: 108).

After the Second World War, the question of minority protection resurfaced in connection with developments within the sphere of international human rights. In this regard, a provision on the protection of minority groups was slated for inclusion in initial drafts of the Universal Declaration of Human Rights (UDHR) (Morsink 1999). Thus, when the USA and France argued cultural genocide should be dealt with alongside the protection of minorities, they were also implicitly suggesting cultural genocide represented a violation of human rights. Indeed, as the Dutch delegate argued, cultural genocide was a matter that “touches upon the question of the rights of man”¹⁴. As a human rights violation, cultural genocide should not be addressed within an international treaty directed exclusively at an international crime. Rather, it ought to be dealt with instruments aimed at the international protection of human rights, such as the UDHR. As will be shown, Western states would consistently push for cultural genocide to be excluded from genocide’s definition on these grounds during subsequent drafting stages.

Ad Hoc Committee Draft (1948)

In the second draft¹⁵ of the Genocide Convention, the Ad Hoc Committee¹⁶ also drew a distinction between physical and biological genocide¹⁷ and cultural genocide. However,

¹⁴ ECOSOC ‘Prevention and Punishment of Genocide, Comments of Governments on the Draft Convention prepared by the Secretariat (Document E/447) UN Doc E/623/Add.3 (pg. 636)

¹⁵ ECOSOC ‘Ad Hoc Committee on Genocide (5 April – 10 May 1948), Report of the Committee and Draft Convention Drawn Up by the Committee’ (24 May 1948) UN Doc E/794

¹⁶ UNGA ‘Resolution 180(II): Draft Convention on Genocide’ (21 November 1947) UN Doc A/RES/180; The *ad hoc* committee was composed of representatives of the following states: China, France, Lebanon, Poland, Union of Soviet Socialist Republics, United States of America and Venezuela.

¹⁷ *Supra* note 15; Article II of the Ad Hoc Committee’s Draft defined physical and biological genocide as follows:

In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members:

(1) killing members of the group;

cultural genocide was limited to acts of destruction aimed at the language, religion or culture of a group:

“In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

- (1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
- (2) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.”¹⁸

Again, opposition to cultural genocide came from the USA and France, which indicated an emerging coalition between the two powers. At this stage, the American representative provided two broad reasons for its opposition. Firstly, it viewed the physical destruction of human groups as genocide’s defining feature: “The act of creating the new international crime of genocide is one of extreme gravity and the United States feels that it should be confined to those barbarous acts directed against individuals [forming a group]”¹⁹. As he argued further, barbarous acts against individuals shocked the conscience of mankind and as such, the Genocide Convention should only deal with the condemnation of physical genocide²⁰. The second reason emphasized policy and pragmatic consideration. The condemnation of physical genocide was a matter all member states could easily reach agreement on; by contrast, defining cultural genocide, was difficult to agree upon²¹. There was a risk, therefore, that some states might refuse to ratify the Genocide Convention due to disagreements over a proposed definition of cultural genocide:

“Were the [ad hoc] Committee to attempt to cover too wide a field in the preparation of a draft convention, for example, in attempting to define cultural genocide – however reprehensible that crime might be – it might well run the risk of finding that some States would refuse to ratify the convention or would give their signature only after a long period devoted to the study of the question.”²²

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- (2) impairing the physical integrity of members of the group;
 - (3) inflicting on members of the group measures or conditions of life aimed at causing their deaths;
 - (4) imposing measures intended to prevent births within the group.

¹⁸ *Supra* note 15 (pg. 1156)

¹⁹ *Supra* note 15 (pg. 1127)

²⁰ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Fifth Meeting, Lake Success, New York, Tuesday, 8 April 1948, at 2 p.m.’ (16 April 1948) UN Doc E/A.C.25/SR.5 (pg. 727)

²¹ *Ibid.*

²² *Ibid.*

Similarly, France regarded the physical destruction of groups as genocide's most important element²³. It also argued cultural genocide, which it regarded as a violation of human rights, should be addressed in a covenant on human rights²⁴, as including cultural genocide within genocide's scope would interfere with states' rights over minority groups:

“[S]ome of the acts which [had been] proposed [under] the concept of cultural genocide might have a lawful basis; for example, current [domestic] legislation acknowledged the right of States to impose certain restrictions on the use of the national language of minority groups living in their territory. The [ad hoc] Committee should avoid stating the problem of genocide in such a way as to incriminate States exercising their powers in a normal way. Provisions of the nature of those that had been proposed, far from ensuring the protection of national groups, would run the risk of aggravating the conflict between those groups and the State”²⁵.

Supporters of cultural genocide included the USSR and Poland, as well as non-European states such as Venezuela, Lebanon and China. These states argued, firstly, genocide did not only concern the physical destruction of human groups²⁶. As the Venezuelan delegate put it, “The physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime”²⁷. Likewise, the Polish delegate stated the following: “It was important to recognize that genocide was a crime resulting from persecution directed against a group, and that it could assume a physical and a cultural character”²⁸. Secondly, it was argued the Ad Hoc Committee had a duty to include cultural genocide because in Resolution 96(I), the GA made it clear the cultural destruction of groups represented just as much of a loss to humanity as the physical destruction of human groups²⁹. Resolution 96(I)³⁰, it will be recalled, was the UN's first international pronouncement on genocide. Here, the GA argued genocide “not only shook the conscience of mankind, but [it] also resulted in great

²³ *Supra* note 20 (pg. 730)

²⁴ *Ibid.* (pg. 728)

²⁵ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Fourteenth Meeting, Lake Success, New York, Wednesday, 21 April 1948, at 2.15 p.m.’ (27 April 1948) UN Doc E/A.C.25/SR.14 (pg. 889)

²⁶ *Supra* note 20 (pg. 727; 729)

²⁷ *Ibid.* (pg. 727)

²⁸ *Supra* note 25 (pg. 886)

²⁹ *Supra* note 20 (pg. 726; 730)

³⁰ UNGA ‘Resolution 96(I) The Crime of Genocide’ (11 December 1946) UN Doc A/RES/96(I); It should be noted Resolution 96(I) did not explicitly employ the term ‘cultural genocide’.

losses to humanity in the form of *cultural* and other contributions represented by these human groups”³¹.

Ultimately, France and the USA were outnumbered and a sub-committee consisting of the Soviet Union, China, Venezuela and Lebanon and Poland proceeded to draft an article on cultural genocide³². Here, it was agreed cultural genocide should be confined to the deliberate destruction of the language or culture of a group³³. Both France and the USA voted against this article and emphasized, yet again, cultural genocide was a human rights issue that specifically concerned the protection of minority groups³⁴.

Sixth Committee Draft (1948)

When the Sixth Committee debated the Ad Hoc Committee Draft, state representatives were again divided over the question of cultural genocide. At this stage, supporters of cultural genocide developed into a broader coalition of non-Western states³⁵. In the view of these states, genocide should not be limited to physical destruction. Cultural and physical genocide, the Pakistani delegate argued, are “indivisible” and “complementary”; both are motivated by the aim of destroying a human group³⁶. It was also pointed out that although acts of cultural genocide may appear less atrocious than the physical destruction of a group, it nevertheless resulted in the destruction of a group. Here, the Egyptian delegate stated, “Cultural genocide was certainly not such a heinous crime as the physical destruction of a group, but it did nevertheless constitute a real danger for human groups. It was therefore essential that it should

³¹ *Ibid.* (emphasis added)

³² *Supra* note 25 (pg. 892)

³³ *Ibid.*

³⁴ *Ibid.* (pg. 889-890)

³⁵ UNGA ‘Eighty-third meeting, Palais des Chaillot, Paris, Monday, 25 October 1948, at 3 p.m.’ UN Doc A/C.6/SR.83; This included the Soviet Union, Yugoslavia, the Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, the Philippines, Poland, Saudi Arabia, Syria and the Ukrainian Soviet Socialist Republic.

³⁶ *Ibid.* (pg. 1502)

be designated a crime in international law [...]”³⁷. Ultimately, as the Czechoslovakian delegate put it, if the purpose of the Genocide Convention was to prevent the destruction of human groups, then it would be both proper and correct to treat cultural genocide in the same way as physical genocide³⁸.

It was also argued cultural genocide could not be adequately protected through an international human rights instrument. Here, the Chinese delegate argued including cultural genocide within genocide’s definition would allow binding international obligations to be established with respect to cultural genocide; in contrast, its inclusion within a declaration of human rights would only have moral force³⁹. Indeed, as the Pakistani delegate argued, the effects of an international treaty on an international crime were fundamentally different to an international declaration establishing the rights and duties of man and the citizen⁴⁰.

Opposition to cultural genocide came mainly from Western and Latin American states⁴¹. Apart from arguing cultural genocide represented a human rights issue⁴², three further reasons for excluding cultural genocide were advanced. Firstly, these states expressed concerns over the political implications of including cultural genocide. For the Brazilian delegate, a provision on cultural genocide could hamper assimilation policies within states. In particular, it would enable minority movements opposing a state’s assimilation policy to accuse such a state of

³⁷ *Ibid.* (pg. 1509)

³⁸ *Ibid.* (pg. 1517)

³⁹ *Ibid.* (pg. 1507)

⁴⁰ *Ibid.* (pg. 1502)

⁴¹ *Ibid.* (pg. 1518); This included Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Liberia, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Peru, Siam, South Africa, Sweden, Turkey, the UK and the USA.

⁴² *Ibid.* (pg. 1514); UNGA ‘Sixty-third meeting, Palais des Chaillot, Paris, Thursday, 30 September 1948, at 10.30 a.m.’ UN Doc A/C.6/SR.63 (pg. 1295); UNGA ‘Sixty-fifth meeting, Palais des Chaillot, Paris, Saturday, 2 October 1948, at 10.40 a.m.’ UN Doc A/C.6/SR.65 (pg. 1321); As in the Ad Hoc Committee, this was a point France and the United States continued to emphasize.

committing cultural genocide⁴³. Relatedly, the Danish delegate argued cultural genocide might result in the Genocide Convention being used as a “tool for political propaganda instead of an international legal instrument”⁴⁴. Ultimately, then, extending genocide to include cultural genocide would lead to, as France argued, “intervention in the domestic affairs of states”⁴⁵.

Secondly, it was argued the notion of cultural genocide was neither clearly nor sufficiently defined. Here, the Dutch delegate stated “[C]ultural genocide was too vague a concept to admit of precise definition and delimitation for the purpose of inclusion in the convention on genocide”⁴⁶. Characterizing the notion of cultural genocide as an “undefined field”⁴⁷, the Danish delegate emphasized the Sixth Committee was required to “draw up universal juridical rules” that was clear and capable of practical application⁴⁸. A similar point was made by the Iranian delegate, who drew attention to the practical difficulties of interpretation and application that would ensue if an article on cultural genocide were adopted⁴⁹.

Finally, it was suggested cultural genocide unduly extended the concept of genocide⁵⁰. A “great inherent difference” existed, the Iranian delegate argued, between physical genocide and cultural genocide and it would be better if the physical extermination of human groups were not artificially placed on the same level as its cultural destruction⁵¹. Similarly, the American representative argued the cultural destruction of a group had “no connexion with the better known conception of genocide as the physical destruction of members of a human group”⁵².

⁴³ UNGA ‘Sixty-third meeting, Palais des Chaillot, Paris, Thursday, 30 September 1948, at 10.30 a.m.’ UN Doc A/C.6/SR.63 (pg. 1291)

⁴⁴ *Supra* note 35 (pg. 1508)

⁴⁵ *Supra* note 45 (pg. 1295)

⁴⁶ *Supra* note 35 (pg. 1514)

⁴⁷ *Ibid.* (pg. 1508)

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* (pg. 1511)

⁵⁰ *Ibid.* (pg. 1507 and 1510)

⁵¹ *Ibid.* (pg. 1510-1511)

⁵² *Ibid.* (pg. 1514)

After their discussions, the Sixth Committee put the question of cultural genocide to a vote: twenty-five states voted for its exclusion, while sixteen states voted for its inclusion and 5 states abstained⁵³. Dissatisfied with this outcome, Venezuela and the USSR tabled amendments on cultural genocide before the GA as a whole, when it met to debate the final draft the Sixth Committee had completed⁵⁴. However, this attempt to reintroduce cultural genocide into the Genocide Convention were unsuccessful: when put to the vote, 31 states voted against the new clause on cultural genocide, while 14 states voted for and 10 abstained⁵⁵. This vote constituted the final decision on the question of cultural genocide. It would be excluded from genocide's form and genocide would be confined to the physical destruction of groups.

The exclusion of cultural genocide from genocide's form

The existing literature suggests cultural genocide was excluded from genocide's form primarily because of states' domestic political interests (Kuper 1981; Mako 2012; Mazower 2009; Moses 2013; Stiller 2012). As Stiller explains, a range of countries and regimes had vested interests in obstructing a broader concept of genocide: "colonial powers, apartheid states, democratic states with an indigenous minority "problem", and newly decolonized states with the objective of building a homogenous nation all had obvious motives to discourage any move that would have made cultural, political and socioeconomic discrimination or the destruction of minorities [...] an internationally criminal and punishable act" (2012: 123). This has been affirmed in a number of studies.

⁵³ Ibid. (pg. 1518)

⁵⁴ UNGA 'Union of Soviet Socialist Republics: amendment to the draft convention on the prevention and punishment of genocide proposed by the Sixth Committee' (5 December 1948) UN Doc A/766; UNGA 'Venezuela amendment to the draft convention on the prevention and punishment of genocide proposed by the Sixth Committee' (6 December 1948) UN Doc A/770

⁵⁵ UNGA 'General Assembly, Hundred and seventy-ninth plenary meeting, Palais de Chaillot, Paris, Thursday, 9 December 1948, at 3.30 p.m., Continuation of the discussion on the draft convention on genocide: reports of ECOSOC and of the Sixth Committee, A/760 and A/760/Corr.2' (9 December 1948) UN Doc A/PV.179 (pg. 2080)

For instance, LeBlanc (1991, 2012) and Lippman (2012) have shown the US opposed cultural genocide as it feared its internal race relations, as well as the treatment of Native Americans, would be subject to international criticism. In the case of France, Lewis argues it opposed cultural genocide because it conflicted with its colonial policies (2014: 185). Meanwhile, other writers have shown cultural genocide was opposed by settler colonial states such as Canada, Australia, New Zealand and South Africa because of fears their assimilationist policies towards their indigenous populations could be regarded as cultural genocide (Kuper 1981: 30; Moses 2013: 39; van Krieken 2010: 140). Finally, it has been suggested Latin American states opposed cultural genocide because they feared their *indigenismo* policies towards their indigenous communities could fall under the scope of cultural genocide (Mako 2012: 179).

Scholars have also drawn attention to the Cold War as a factor explaining why particular states adopted their specific positions on cultural genocide. For instance, Lippman argues the two superpowers used the Genocide Convention's drafting process to engage in broader ideological battles: while the Soviet Union endorsed cultural genocide in order to solidify its support in the Third World, the US aligned itself with Western and Northern European democracies" (2012: 19). Similarly, LeBlanc (1991: 28) points out "political and ideological considerations" heavily influenced many provisions of Genocide Convention, while Mako (2012: 182) argues "geopolitical and national interests" played a central role in determining the inclusion or exclusion of a clause on cultural genocide.

However, these explanations say little about the normative commitments that drove these interests. The deeper ideational motivations behind cultural genocide's exclusion from genocide's form can only be appreciated if more attention is focused on explaining why states who opposed cultural genocide pushed for it to be associated with an already-existing norm, as

opposed to the international criminal norm against genocide that was in the process of developing. As already demonstrated, opponents of cultural genocide believed it could be adequately accommodated under the ambit of the existing norm of minority protection. Here, it is important to highlight that when the issue of minority protection emerged before the UN after the Second World War, it had been redefined as an international human rights issue. According to Mazower (2004), this new approach to minority protection took hold for two key reasons.

Firstly, the League of Nation's failure to enforce provisions on minority protection in peace treaties concluded the end of the First World War, as well as Nazi Germany's abuse of the minority protection system through its expansionist policies in the 1930s, had largely discredited the earlier approach to minority rights (Mazower 2004: 383-385). This growing dissatisfaction facilitated greater support for the notion of human rights amidst intellectual and political circles across Europe (Mazower 2004: 387-388). Secondly, a move towards individual human rights was appealing to powerful states such as Britain and America. Apart from providing them with an important way to reaffirm the principles of liberal democracy vis-à-vis fascist autocracy, it was also useful for steering away criticisms that their policies – British colonial policies and domestic policies of racial segregation, in the case of America – violated the principle of minority protection (Mazower 2004: 386; 389). The re-framing of minority protection as a human rights issue was particularly evident during the drafting of the UDHR. Here, one of the drafters of the UDHR debated was whether the protection of national minorities ought to be included as a human right that was to be protected internationally (Mazower 2004; Morsink 1999).

Crucially, then, human rights emerged as the connecting link between the protection of national minorities and cultural genocide. Put differently, the notion of human rights allowed an association to be drawn between minority protection and cultural genocide. As already highlighted, states who opposed cultural genocide advanced two principal arguments: cultural genocide was more appropriately dealt with in connection with the protection of minorities and furthermore, it represented a human rights issue. While the existing literature attributes this to political interests, an alternative explanation is offered here. The view that cultural genocide represented an issue falling under the existing norm of minority protection and by extension, a human rights issue, was underpinned by the desire to maintain a fundamental distinction between the notion of an international crime and that of international human rights.

Without this distinction, the defining quality of an international crime would have otherwise been diluted. More specifically, it would not be limited to extremely heinous acts that are considered criminal in world politics; rather, it would also embrace prohibited acts in world politics of a non-criminal nature. Consequently, international crimes would appear no different to violations of human rights. In order to cement and preserve the distinctiveness of the category of international crimes, it needed to be firmly delineated from the violation of international human rights. Ultimately, this could only be achieved if cultural genocide were excluded from genocide's form and relatedly, if genocide were confined to the physical destruction of human groups.

The existing literature on genocide seldom emphasizes that genocide's criminalization was underpinned by the desire to maintain a distinction between international crimes and international human rights exists. Rather, the dominant view is that a close relationship exists between genocide and international human rights. In this regard, genocide's emergence in

world politics is often depicted as an important development in the history of international human rights. Relatedly, the Genocide Convention is frequently applauded as the first international human rights treaties to have been concluded by the UN (Lippman 1985; Lippman 2002; Schabas 2009a; Smith 2010). These views, it is argued here, incorrectly conflate genocide with human rights. What is the case, rather, is that international crimes and human rights violations constitute fundamentally different and distinct categories.

In suggesting this, this thesis finds agreement with the view Mazower (2009) has expressed. As he argues, the portrayal of the Genocide Convention as part of the UN's broader inaugural commitment to human rights in much of the literature loses sight of what is distinctive about genocide's story (2009: 129). Far from representing part of a single scheme, the Genocide Convention and the UDHR represented two different approaches to the role of law in international politics: the Genocide Convention combined international law with criminal sanction in order to protect the rights of human groups, while the UDHR turned to international law in order to express the post-war moral aspiration that individuals rights ought to be preserved (2009: 130). It is important to note Mazower's argument rests upon the drawing of a distinction between group rights and individual rights. According to his perspective, therefore, genocide's establishment was aimed at protecting group rights, while the development of international human rights was directed towards preserving individual rights. Building upon this view, this thesis suggests genocide's criminalization was additionally aimed at separating the notion of international crimes from that of international human rights. This is evident in the way cultural genocide was excluded from genocide's form on the basis that it represented a human rights issue. Indeed, had cultural genocide been included within genocide's form, this would have established a much closer connection between genocide and human rights.

To conclude, two central points can be summarized. Firstly, cultural genocide was excluded from genocide's form not so much because of political interests but rather, because of its perceived compatibility with the existing norm of minority protection. Secondly, the exclusion of cultural genocide centralizes an important but often neglected feature about genocide. Genocide is, first and foremost, an international crime; it does not amount to, though often portrayed as, a violation of international human rights. The category of an international crime, moreover, is one which is both separate and distinct from that of international human rights.

POLITICAL GENOCIDE

The destruction of political groups – political genocide – featured in two initial drafts of the Genocide Convention, namely, the Secretariat Draft and the Ad Hoc Committee Draft. However, political groups were excluded from the final version of the Genocide Convention. After surveying the debates on political genocide during these drafting stages, the reasons for the exclusion of political genocide will be analysed.

Secretariat Draft (1947)

Political groups were included as a protected group in the Secretariat Draft, which provided that the Genocide Convention was aimed at preventing the destruction of racial, national, linguistic, religious and political groups⁵⁶. This was justified on the basis that political groups had featured in Resolution 96(I) of the GA⁵⁷. However, the three legal experts involved in the drafting of the Secretariat Draft did not share a common view on political genocide. On the one hand, Lemkin opposed the inclusion of political groups on the grounds that this category lacked the permanency other groups possessed⁵⁸. In Lemkin's view, the membership of a political group

⁵⁶ *Supra* note 2 (pg. 214)

⁵⁷ *Ibid.* (pg. 224); The resolution stated the destruction of racial, religious, political and other groups amounted to instances of genocide.

⁵⁸ *Ibid.* (pg. 230)

was neither inevitable nor unchangeable: a person could choose to leave a political group after having made an initial decision to join one. However, de Vabres argued genocide represented an odious crime regardless of which group fell victim to it⁵⁹. In his view, excluding political genocide was tantamount to tolerating genocide in the case of political groups⁶⁰. Meanwhile, de Pella highlighted the complexities behind what, in his view, amounted to a political question⁶¹. If governments agreed to include political groups, they would also have to agree on the circumstances that might justify political genocide in some cases⁶².

At this early stage, the question of political genocide was not a contentious issue amongst states. Indeed, only the United States (US) submitted an official comment on the matter: it favoured the inclusion of political groups within genocide's definition but only on the basis that political genocide strictly denoted the physical destruction of political groups⁶³. The lack of debate on this issue amongst states indicates political genocide was not a particularly controversial at this point. However, as will be demonstrated, this significantly changed during subsequent stages of the drafting process.

Ad Hoc Committee Draft (1948)

Political groups also featured in the Ad Hoc Committee Draft⁶⁴. As Article II⁶⁵ of the draft specified, genocide included the physical or biological destruction of a political group on the

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Supra* note 9 (pg. 373)

⁶⁴ *Supra* note 15

⁶⁵ *Ibid.*; In its entirety, Article II reads as follows: In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members: (1) killing members of the group; (2) impairing the physical integrity of members of the group; (3) inflicting on members of the group measures or conditions of life aimed at causing their deaths; (4) imposing measures intended to prevent births within the group.

grounds of the political opinion of its members. The decision to include political groups was the result of a close vote on the matter: four members (China, France, Lebanon and the USA) favoured its inclusion, while three (Poland, the USSR and Venezuela) opposed their inclusion⁶⁶. China's position was particularly critical: having initially expressed doubts⁶⁷ over the inclusion of political groups, China subsequently altered its view on the matter. It even offered a proposed definition of genocide that specifically included political groups⁶⁸.

The drafting records do not indicate why China reversed its position and indeed, as Nersessian points out, the actual reasons for this shift remains unclear (2010: 107). However, China initially opposed including political groups for the same reasons Lemkin expressed: political groups did not have the stability nor homogeneity that other groups, which were slated for inclusion in the Genocide Convention, possessed⁶⁹. Poland expressed a similar sentiment: political groups were more mutable than national, religious or racial groups and they lacked distinguishing characteristics that could be clearly defined in the Genocide Convention⁷⁰.

Opponents of political genocide also emphasized the advantages of confining genocide to a narrow definition. Here, the Soviet representative pointed out genocide was derived from the Latin word for 'tribe'; etymologically, genocide strictly referred to the destruction of nations

⁶⁶ ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Thirteenth Meeting, Lake Success, New York, Tuesday, 20 April 1948, at 2 p.m.' (29 April 1948) UN Doc E/AC.25/SR.13 (pg. 873)

⁶⁷ ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Third Meeting, Lake Success, New York, Tuesday, 5 April 1948, at 2 p.m.' (13 April 1948) UN Doc E/AC.25/SR.3 (pg. 702-3)

⁶⁸ ECOSOC 'Ad Hoc Committee on Genocide, Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948' (16 April 1948) UN Doc E/AC.25/9

⁶⁹ *Supra* note 69 (pg. 702)

⁷⁰ ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Fourth Meeting, Lake Success, New York, 7 April 1948, at 2 p.m.' (15 April 1948) UN Doc E/AC.25/SR.4 (pg. 717); ECOSOC 'Two hundred and eighteenth meeting, held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 3 p.m.' UN Doc E/SR.218 (pg. 1230)

or races⁷¹. Adding political groups would therefore unduly broaden the concept of genocide: it would contradict the “basic, scientifically recognized meaning” of the word genocide and it would detract from the Genocide Convention’s primary aim to prevent the destruction of human groups on the grounds of their race, nationality or religion⁷². A similar sentiment was expressed by Poland, whose representative argued there would be no valid reason exclude other kinds of groups, if political groups were included⁷³. Restricting genocide to national, racial and religious groups was necessary, therefore, in order to avoid the Genocide Convention’s objective from being weakened, blurred or distorted⁷⁴.

More explicit political considerations were furnished by Venezuela, who argued political groups would pose difficulties for governments facing domestic threats from subversive movements⁷⁵. It would allow those political groups revolting against the internal authority of a government to unjustifiably accuse a government of committing genocide, when such a government could have legitimate reasons to suppress such groups. In other words, the Genocide Convention could be used by domestic political groups to seek protection for subversive actions⁷⁶. As a result, governments facing domestic threats to their authority might hesitate to ratify the Genocide Convention⁷⁷.

⁷¹ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Twenty-Fourth Meeting, Lake Success, New York, Wednesday, 28 April 1948, at 2:00 p.m.’ (12 May 1948) UN Doc E/AC.25/SR.24 (pg. 1016)

⁷² *Ibid.*

⁷³ ECOSOC ‘Ad Hoc Committee on Genocide, Summary Record of the Fourth Meeting, Lake Success, New York, 7 April 1948, at 2 p.m.’ (15 April 1948) UN Doc E/AC.25/SR.4 (pgs. 717-718)

⁷⁴ ECOSOC ‘Two hundred and eighteenth meeting, held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 3 p.m.’ UN Doc E/SR.218 (pg. 1230)

⁷⁵ *Supra* note 67 (pg. 708)

⁷⁶ *Supra* note 73 (pg. 719)

⁷⁷ *Supra* note 66 (pg. 872)

France forcefully argued in favour of political genocide and its support was based on the principle of freedom of opinion⁷⁸. Here, the French delegate argued the notion of political genocide transposed the idea of individual freedom of opinion to a collective plane⁷⁹. Relatedly, it maintained the persecution of members of political groups due to their political opinion was as reprehensible as the persecution of national, racial or religious groups⁸⁰. Clearly, France's justifications for political genocide were based on human rights principles. However, as will be shown below, other liberal states who favoured political genocide – such as the US – did not resort to human rights during further debates in the Sixth Committee.

Sixth Committee Draft (1948)

The Sixth Committee excluded political genocide from the final draft of the Genocide Convention, which provided genocide could only be committed against national, ethnical, religious or racial groups⁸¹. This was not a straight-forward decision but rather, the consequence of intense debate and two separate rounds of voting. Importantly, a second vote reversed an earlier decision to retain political groups in the Genocide Convention; if this second vote had not been taken, political genocide would have featured within genocide's form.

At the first vote, a majority (twenty-nine members) of the Sixth Committee⁸² voted in favour of including political groups in genocide's definition, while thirteen members voted against

⁷⁸ *Supra* note 67 (pg. 708)

⁷⁹ *Supra* note 73 (pg. 717)

⁸⁰ *Ibid.* (718)

⁸¹ UNGA Sixth Committee 'Sixth Committee, Third Session, Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee' (3 December 1948) UN Doc A/760 (pg. 2032)

⁸² The members of the Sixth Committee included representatives of 58 countries: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet

and nine abstained⁸³. A diverse range of governments favoured the inclusion of political groups: Asian states (Philippines, Siam, Turkey, Burma, China, and India), Arab states (Saudi Arabia, Syria, Yemen), Latin American states (Panama, Paraguay, Bolivia, Chile, Cuba, Ecuador, Salvador, and Haiti), as well as Western states (Netherlands, New Zealand, Norway, Sweden, United Kingdom, United States of America, Australia, Canada, Denmark, France, Iceland, and Luxembourg)⁸⁴. Interestingly, the main argument presented in favour of political groups before the Ad Hoc Committee – namely, including political groups in genocide’s definition was necessary for the protection of freedom of opinion – did not feature at all at this stage. In fact, the Bolivian delegate went as far as arguing the matter did not concern the protection of freedom of opinion; rather, it was a more basic point that political groups deserved protection from violent destruction⁸⁵.

Instead, the main arguments that prevailed centred mainly on two points: firstly, the alleged flexibility of the concept of genocide; and secondly, the consequences of excluding political groups. Concerning the concept of genocide, some delegates argued it did not possess a fixed meaning. There was no theoretical or practical reason, the Greek delegate therefore argued, for excluding political genocide from genocide’s meaning⁸⁶. Similarly, the Salvadorian representative insisted genocide’s etymology of genocide did not definitively determine its meaning, particularly because the meaning of words evolve and change⁸⁷. Consider, too, the statements made by the delegate of Bolivia: “There was no valid reason for restricting the concept of genocide by excluding political groups. [...] There was nothing to prevent [the

Socialist Republic, Union of South Africa, Union of Soviet Socialist Republic, United Kingdom, United States, Uruguay, Venezuela, Yemen and Yugoslavia.

⁸³ UNGA Sixth Committee ‘Seventy-fifth meeting, Palais de Chaillot, Paris, Friday, 15 October 1948, at 3.20 p.m.’ UN Doc A/C.6/SR.75 (pg. 1411-2)

⁸⁴ *Ibid.*

⁸⁵ UNGA Sixth Committee ‘Seventy-fourth meeting, Palais de Chaillot, Paris, Thursday, 14 October 1948, at 3.25 p.m.’ UN Doc A/C.6/SR.74 (pg. 1391)

⁸⁶ *Ibid.* (pg. 1402)

⁸⁷ *Supra* note 83 (pg. 1411)

broadening of the concept of genocide]; the word “genocide” meant the destruction of a group without implying distinction between the various groups.”⁸⁸

Those who emphasized the political consequences of excluding political genocide argued the destruction of political groups would go unpunished. As the Ecuadorian delegate stated, if the Genocide Convention did not extend protection to political groups, those committing the crime of genocide might use political groups as a pretext to escape international sanctions⁸⁹. Excluding political groups might create a loophole to avoid charges of genocide because, as the Haitian delegate explained, it would make it possible to allege the extermination of a political group had been dictated by legitimate political considerations⁹⁰. Relatedly, the UK delegate pointed out it would be wholly illusory to expect political groups to receive protection under domestic laws, especially in cases where they were being persecuted by the state⁹¹. Here, the Cuban delegate added that as political groups were increasingly facing danger, excluding them from the Genocide Convention would leave them even more vulnerable and defenceless to threats to their existence⁹².

In addition, the exclusion of political groups would undermine the spirit and significance of Resolution 96(I) of the GA. Here, the Ecuadorian delegate argued public opinion would not understand why the UN no longer condemned in 1948 what it had condemned in 1946 in Resolution 96(I)⁹³. Agreeing with this, the American representative stated Resolution 96(I) was an important factor in the history of the Genocide Convention and deviations from it

⁸⁸ *Supra* note 85 (pg. 1391)

⁸⁹ *Ibid.* (pg. 1393)

⁹⁰ *Supra* note 83 (pg. 1409)

⁹¹ UNGA Sixth Committee ‘Sixty-ninth meeting, Palais de Chaillot, Paris, Thursday, 7 October 1948, at 3.30p.m.’ UN Doc A/C.6/SR.69 (pg. 1360)

⁹² *Supra* note 85 (pg. 1403)

⁹³ *Ibid.* (pg.1394)

required extremely strong justifications⁹⁴. Poland presented the counter-argument, by suggesting Resolution 96(I) only gave a “general indication of the General Assembly’s attitude towards genocide”⁹⁵. Similarly, Venezuela contended Resolution 96(I) only mentioned political groups as an example of what the Genocide Convention might protect but not as a definitive statement that political groups were to be included in the Convention⁹⁶.

Opponents of political genocide included Poland, the Ukrainian Soviet Socialist Republic, the Union of South Africa, the Union of Soviet Socialist Republics, Uruguay, Venezuela, Argentina, Belgium, Brazil, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Dominican Republic and Iran⁹⁷. Their principal argument had been echoed in earlier drafting stages, namely, political groups lacked the stability and homogeneity of other groups. Relatedly, acquiring membership into a political group was neither inevitable nor automatic; rather, it involved a choice that could be renounced at any time. As the Polish delegate put it,

“The object of the convention was to outlaw genocide. That was the crime consisting in the destruction of those groups of human beings which were the product of circumstances beyond the control of their members.[...] Those who needed protection most were those who could not alter their status. [...] It was quite another thing where political groups were concerned. [...] [I]n view of their flexibility and their lack of homogeneity, they should not be treated in the same way as national, racial or religious groups. Only the latter should be protected by the convention because its members were defenceless.”⁹⁸

Reiterating the argument it made before the Ad Hoc Committee, the Soviet Union also warned against extending the concept of genocide. It urged the Sixth Committee to adhere to the “scientific definition of the concept of genocide”, which on the basis of its etymology, was confined exclusively to national, racial and religious groups⁹⁹. In its view, political groups fell beyond the scope of genocide’s definition and its inclusion would weaken the Genocide

⁹⁴ *Supra* note 85 (pg. 1407)

⁹⁵ *Ibid.* (pg. 1406)

⁹⁶ *Ibid.* (pg. 1408)

⁹⁷ *Ibid.* (pg. 1412)

⁹⁸ *Ibid.* (pg. 1406-7); Other delegates who made explicit mention of this argument during the debates included Brazil, Egypt, Venezuela and Norway.

⁹⁹ *Ibid.* (pg. 1398-9)

Convention¹⁰⁰. In support, the Brazilian delegate argued crimes must be given strict definitions, and that if genocide's definition were extended beyond the destruction of racial, national or religious groups, the concept of genocide would be weakened¹⁰¹.

Egypt and Venezuela provided more specific reasons against a broader definition of genocide. Egypt suggested their inclusion would result in the "domestic political struggles of every country" being brought into the United Nations¹⁰². Meanwhile, Venezuela repeatedly voiced its concern that political genocide would conceivably limit the right of states to suppress internal disturbances¹⁰³. As its delegate explained, in countries where domestic political struggles were present and ongoing, subversive political groups might make use of the notion of political genocide – by specifically accusing their governments of having committed political genocide against them – to counter government attempts to suppress them¹⁰⁴.

A new argument that surfaced at this stage centred on identifying alternative ways to protect political groups. In this regard, many state representatives that opposed the inclusion of political genocide emphasized their opposition did not imply a desire to leave political groups without any protection at all. Rather, they simply did not think the Genocide Convention was the appropriate place for their protection. For many delegates, including those representing Egypt¹⁰⁵, Yugoslavia¹⁰⁶, Uruguay¹⁰⁷, Poland¹⁰⁸, Sweden¹⁰⁹ and Norway¹¹⁰, political genocide

¹⁰⁰ UNGA 'Sixty-fourth meeting, Palais des Chaillot, Paris, Friday, 1 October 1948, at 10.30 a.m.' UN Doc A/C.6/SR.64 (pg. 1302)

¹⁰¹ *Supra* note 91 (pg. 1355)

¹⁰² *Ibid.* (pg. 1358)

¹⁰³ UNGA 'Sixty-fifth meeting, Palais des Chaillot, Paris, Saturday, 2 October 1948, at 10.40 a.m.' UN Doc A/C.6/SR.65 ((pg. 1312)

¹⁰⁴ *Supra* note 91 (pg. 1356-7)

¹⁰⁵ *Supra* note 43 (pg. 1294)

¹⁰⁶ *Ibid.* (pg. 1296)

¹⁰⁷ *Supra* note 100 (pg. 1305)

¹⁰⁸ *Ibid.* (pg. 1309)

¹⁰⁹ *Supra* note 91 (pg. 1357)

¹¹⁰ *Ibid.* (pg. 1360)

represented a violation of human rights. They therefore suggested the protection of political groups be addressed through efforts aimed at the protection of international human rights, such as those being pursued by the UN Commission on Human Rights. Not all opponents of political genocide shared this view, however. For instance, Brazil¹¹¹ and Venezuela¹¹² suggested political groups could be adequately protected by national legislation. In the words of the Venezuelan delegate, “That political groups had to be protected was not questioned in any way. [...] The [Venezuelan] delegation felt that political groups should be protected not by the convention on genocide but by respect for individual liberties under constitutions, national legislation and the declaration on human rights.”¹¹³

When the first vote was taken, opponents of the inclusion of political groups were in the minority and consequently, political genocide was included within genocide’s definition. However, opponents of political genocide re-opened the question at the final stage of the drafting process, thereby forcing another vote on the matter. In supporting a last-minute proposal¹¹⁴ by Egypt, Iran and Uruguay, the Egyptian delegate stated since the final draft of the Genocide Convention was close to being finalized, the question of political groups should be revisited with a more complete view of the Genocide Convention in mind¹¹⁵. In addition, he argued when political groups were included, it was unclear whether the inclusion of political groups might jeopardize the number of final ratifications the Convention might receive¹¹⁶. The issue of ratifications was also raised by the Iranian delegate, who argued:

“[A]n amendment to exclude political groups from the protection provided in the convention [had been submitted] in order to facilitate ratification of that convention by the various

¹¹¹ *Ibid.* (pg. 1355)

¹¹² UNGA Sixth Committee ‘Seventy-fifth meeting, Palais de Chaillot, Paris, Friday, 15 October 1948, at 3.20 p.m.’ UN Doc A/C.6/SR.75 (pg. 1408-9)

¹¹³ *Ibid.*

¹¹⁴ UNGA Sixth Committee ‘Hundred and twenty-eighth meeting, Palais de Chaillot, Paris, Monday, 29 November 1948, at 8.50 p.m.’ UN Doc A/C.6/SR.128 (pg. 1865)

¹¹⁵ *Ibid.* (pg. 1867)

¹¹⁶ *Ibid.*

parliaments. [...] [I]f it were desired that a large number of States should ratify the convention on genocide, it was desirable not to refer to political groups.”¹¹⁷

In the second vote, twenty-two states voted to exclude political groups, while six states voted for their inclusion and twelve states abstained¹¹⁸. The results of this vote reveal a number of interesting points. Whereas in the first vote twenty-nine states supported the idea of political genocide, this drastically dropped to a mere six in the second vote¹¹⁹. Only Burma, Chile, China, Ecuador, the Netherlands and the Philippines continued to support the inclusion of political groups at the second vote¹²⁰. The increase in the number of opponents of political genocide was the consequence of several developments. Firstly, several states that had previously abstained in the first round now voted against the protection of political groups; this included Afghanistan, Egypt, Greece, Pakistan and Peru¹²¹. More crucially, several states that previously supported political genocide subsequently voted against the inclusion of political groups. This included the United Kingdom, the United States, Australia, Canada, India, and Syria¹²². In this regard, the American delegate is recorded in the drafting records as having the stated the following:

“[T]he United States delegation had since decided that it was necessary to reconcile two factors: on the one hand, the Committee must prepare a complete draft convention founded on just principles; on the other hand, the convention must be ratified by the greatest possible number of Governments. The United States delegation continued to think that its point of view was correct, but in a conciliatory spirit and in order to avoid the possibility that the application of the convention to political groups might prevent certain countries from acceding to it, he would support the proposal to delete from article II the provisions relating to political groups”¹²³.

Consistent opponents of political genocide during both rounds of voting were South Africa, Belgium, Iran, Uruguay, Venezuela, Argentina, Brazil, and the Dominican Republic¹²⁴.

¹¹⁷ *Ibid.* (pg. 1868)

¹¹⁸ *Ibid.* (pg. 1870)

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.* (pg. 1867)

¹²⁴ *Ibid.* (pg. 1870)

Interestingly, the Eastern bloc (consisting of the Soviet Union, Poland, Yugoslavia, Czechoslovakia, the Byelorussian Socialist Republic and the Ukrainian Socialist Republic), all of whom had initially voted against political genocide, abstained in the second vote¹²⁵. Other abstaining states were Cuba, France, Luxembourg, New Zealand, Norway and Sweden, all of whom had previously voted in favour of including political genocide¹²⁶.

Why was political genocide excluded from genocide's form?

In the literature, three broad explanations have been advanced: firstly, the Soviet Union and the Eastern bloc led a deliberate campaign against political genocide; secondly a pragmatic compromise was reached amongst states on this question; and finally, most states shared an interest in upholding the principle of state sovereignty.

The most common explanation claims political groups were excluded from genocide's definition at the protest and insistence of the Soviet Union and its Eastern bloc (Bruun 1993; Chalk & Jonassohn 1990; Curthoys and Docker 2010; Harff 2003; Kelly 2007; Kuper 1981; Luban 2006; Ratner & Abrams 2001; van Schaak 1997). As one scholar explains, the Soviet Union opposed political groups because Stalin was keen on shielding the purges of the kulaks during the forced collectivization of agriculture in the late 1920s and early 1930s from the charge of genocide (van Schaak 1997: 2268). Similarly, others have maintained the Soviet Union feared its use of mass terror against its political opponents in the 1930s and 1940s would be seen as constituting genocide (Weiss-Wendt 2012: 189; Schabas 2012a: 111).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

The attractiveness of this explanation is that it reinforces broader arguments that have been made about the drafting of the Genocide Convention. As many have suggested, the onset of the Cold War provided the USA and the Soviet Union with the opportunity to use the drafting process for broader ideological battles (LeBlanc 1991; Lippman 2012; Mako 2012). From this perspective, the question of political genocide was simply another issue that pit the Western bloc against the Eastern bloc. In this regard, the USA's support for the inclusion of political groups can be interpreted as an expression of its ideological support for liberal freedoms, such as the freedom of expression and association. Meanwhile, Soviet opposition to political groups can be read as being rooted within its authoritarian and illiberal tendencies: a communist state, it is alleged, cannot accommodate the unfettered existence of political groups.

However, laying the blame at the doorstep of the Soviet Union and relatedly, explaining the exclusion of political groups exclusively in terms of a Cold War ideological battle, is misleading. In particular, it is based upon a fundamental misreading of the *travaux préparatoires* of the Genocide Convention. If an ideological battle between the key promoters of communism and liberalism really did influence the debate and eventual outcome on political genocide, we would expect to have seen the USA and the Soviet Union advancing ideological arguments in support of their positions. This was simply not the case, however.

Instead, the US representative emphasized the exclusion of political groups would deviate from Resolution 96(I), and that this was undesirable. Moreover, the one argument that can be seen as being ideologically influenced – namely, the protection of political groups is justified on the basis of the principle of freedom of opinion – was not advanced by the USA but rather, by France. Although France presented this argument before the Ad Hoc Committee, it did not, it is seldom noted, raise this argument at all throughout the Sixth Committee's lengthy

discussions. An absence of an ideologically-driven justifications is also evident from the arguments the Soviet Union presented. In both the Ad Hoc Committee and the Sixth Committee, its main argument centred on the concept of genocide: genocide's etymology confined it to the destruction of national, ethnic and religious groups and as such, including political groups would unduly broaden the concept of genocide.

It may be suggested that ideological arguments may not have been overtly made but rather, that ideology operated more subtly in the background. However, this, too, ignores clear evidence to the contrary. As Schabas argues, rigorous examination of the *travaux* fails to confirm the “popular impression” and the “urban legend” in the literature that political groups were excluded at the behest of and due to Soviet machinations (2009a: 160; 2012a: 111). There are two key considerations here. Firstly, while it is true the Soviet Union voted against political genocide in the Ad Hoc Committee and in the Sixth Committee's first vote, it abstained in the final vote. The entire Eastern bloc – consisting of Poland, Yugoslavia, Czechoslovakia, the Byelorussian Socialist Republic and the Ukrainian Socialist Republic – also abstained in the final vote. Secondly, the Soviet bloc consisted of only six of a total of fifty-nine states in the UN in 1948 (LeBlanc 1988: 284; 1991: 75). On its own, therefore, the Soviet bloc lacked the power to control and influence the pace and direction of negotiations on political genocide (Benavides-Vargas 2003: 587).

Secondly, a Soviet-led plot against political genocide becomes less plausible when it is remembered that a diverse grouping of states opposed the inclusion of political groups. At the Sixth Committee's first vote, opponents of political genocide were mostly states from the Eastern bloc and Latin American states. However, in the second vote, opponents of political genocide included Western states (United Kingdom, United States, Australia, Belgium,

Canada, Denmark and Greece), Latin American states (Uruguay, Venezuela, Argentina, Brazil, Colombia, Dominican Republic, Mexico and Peru), Asian states (Afghanistan, Pakistan and India), Arab states (Iran and Syria) and African states (Union of South Africa and Egypt).

Drawing upon this, Benavides-Vargas has argued:

“The fact that many different states, with completely different ideologies, agreed in the exclusion of political groups has to be taken into account, because it challenges the idea of some invisible hand determining the outcome of the discussions. [...] Moreover, the idea that the exclusion was the result of a totalitarian conspiracy loses its basis when we realize that amongst the countries that supported the deletion of political groups were Sweden and Uruguay, two strong democracies at the time” (2003: 587-88).

An alternative explanation in the literature that goes some way towards accounting for these anomalies focuses on the idea of political compromise. As LeBlanc argues,

“[I]t is important to bear in mind that the drafters were diplomats who represented states, and these states had different interests so far as specific provisions of the convention were concerned. At the same time, as diplomats, the drafters had to find ways to produce an instrument that would be acceptable to a large number of states. In fact, the question of what would be acceptable to states was at all times a matter of great concern to the drafters. *Achieving that goal meant that compromises of various sorts had to be reached, and these compromises did not always reflect the best possible choice among competing principles and ideas, but rather the most acceptable choice*” (1991: 28; emphasis added)

It has been suggested, therefore, that political groups were excluded because states found it necessary to reach a pragmatic compromise on the question of political genocide (Chalk 1994; Kuper 1981; LeBlanc 1988; Nersessian 2010; Sainaiti 2012; Schabas 2002; Shneider 2010).

In this regard, some have argued states feared inclusion the inclusion of political groups would jeopardize the number of ratifications the Genocide Convention would receive (Chalk 1994; Chalk and Jonassohn 1990; Kuper 1981; Le Blanc 1988; Sainaiti 2012; Schabas 2002). In the interest of ensuring the Genocide Convention secured as many ratifications as possible, states backed down from their initial positions on political groups and ultimately voted against the protection of political groups. Importantly, this is supported by the drafting records. For instance, Sweden and Iran used the issue of ratification to argue against the inclusion of political groups. In addition, Egypt, Iran and Uruguay argued the question of ratification

justified another vote on political groups. Finally, the US, who was a keen supporter of political genocide, altered its stance in the final vote to ensure the Genocide Convention received as many ratifications as possible.

Meanwhile, others have suggested states' position on the question of political groups were partly influenced by broader political bargains that needed to be struck. For instance, Kuper argues the US altered its stance on the inclusion of political groups because it feared its proposal on the establishment of an international tribunal to prosecute genocide would not find support (1981: 29). Similarly, LeBlanc states the US eventually accepted the deletion of political groups in the hope that its proposal on an international criminal court, which had been rejected, might be reconsidered (1988: 277-78; 1991: 66; 2012: 177).

These explanations suggest the eventual exclusion of political groups had very little to do with principled considerations pertaining to the nature or essence of political groups themselves. Rather, this outcome came down to political negotiation and the reaching of political compromises. In this regard, Nersessian has argued the exclusion of political groups can be characterized as a “negotiated political compromise” rather than a “theoretical determination that [political groups] were unsuitable [for inclusion within the Genocide Convention]” (2010: 111). Likewise, Schabas suggests the decision to exclude political groups was “not a principled decision based on some philosophical distinction between stable and more ephemeral groups” (2002: 382). This is not particularly unusual and indeed, it is hard to imagine any piece of legislation, be it domestic or international, not being influenced by political compromises or negotiations (LeBlanc 1991: 28; Weiss-Wendt 2010: 181). However, explaining the exclusion of political groups entirely on political compromises overlooks the fact that the debate on political groups was particularly protracted. As LeBlanc points out, the question as to whether

political groups should be protected under the Genocide Convention was lively and prolonged and in fact, was the most time-consuming issue the drafters faced (1991: 64). It seems inconceivable, therefore, that such a drawn-out debate marked by serious disagreement was completely void of more principled considerations.

Rather than emphasizing Soviet political interests or the idea of political compromises, a third explanation suggests states had principled reasons for excluding political groups, namely preserving state sovereignty. For instance, van Schaak argues the decision to exclude political groups was informed by two key objectives: firstly, states sought to limit their obligations under international law; and secondly, they were keen to insulate their political leaders from international scrutiny and liability (1997: 2261; 2268). As she argues further, the exclusion of political groups consciously resulted in “a legal regime that insulated political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups” (1997: 2268). In a similar vein, Fournet argues political groups were excluded from genocide’s definition because political leaders were keen to avoid international liability (2007: 53). As she explains, states sought to preserve their right to exert effective control from internal disturbances and crucially, the only way they could take action against subversive elements without triggering potential charges of political genocide was to exclude political groups altogether from the Genocide Convention (2007: 52-3).

It is argued here that perspectives emphasizing the role of state sovereignty offer the most satisfactory explanation for why political genocide was excluded from genocide’s form. In this regard, it convincingly explains why smaller and superpower states mutually opposed the notion of political genocide. As the drafting records demonstrate, smaller states argued political genocide would lead to undesirable political consequences: it would allow subversive political

groups to accuse their governments of political genocide in cases where such governments have taken political action against them; it would limit the right of states to suppress internal disturbances; and it would unnecessarily bring domestic political struggles under international limelight. These apprehensions centralize how internal threats to states' authority were a central concern in debates over political genocide. In this regard, political genocide specifically threatened internal aspects of state sovereignty: it restricted the ability of government to take legitimate action against internal subversive groups and it also unjustifiably afforded such groups with international protection for revolting against the internal authority of the state. Additionally, political genocide threatened the external dimensions of state sovereignty. If domestic political groups are able to charge their governments with political genocide, this unnecessarily exposes national governments to international liability.

A focus on the role of sovereignty considerations also places the Cold War context into clearer perspective. In the climate of Cold War rivalry, excluding political groups from the Genocide Convention brought clear political advantages to both superpowers. As Weiss-Wendt writes, "Not having political groups listed alongside with racial, national, religious and ethnic groups – protected under the letter of the Genocide Convention – preserved the option of interfering in each other's affairs by means of armed groups styled as legitimate opposition" (2012: 190). Both the US and the Soviet Union, he argues further, were keen to preserve a free hand at sponsoring insurgent groups in each other's spheres of influence without fear of international sanction in terms of the Genocide Convention (2012: 197). Ultimately, excluding political groups ensured the superpowers' ability to engage in proxy wars – by supporting opposition or liberation movements in each other's spheres of influence – would be unconstrained. It would also ensure neither superpower could accuse the other of committing political genocide in such

cases of superpower intervention. This provides an answer to why both superpowers did not, in the final instance, vote in favour of political genocide.

This chapter has examined a second component of genocide's first stage of international criminalization, namely, the issue of genocide's form as an international criminal norm. In doing so, it has explored how and why genocide acquired the particular form that is evident from its international legal definition. In this regard, genocide's definition excludes two particular notions from its form: firstly, cultural genocide or, the cultural destruction of human groups; and secondly, political genocide or, the destruction of political groups. Accordingly, this chapter has sought to examine how and why the notions of cultural genocide and political genocide were excluded from genocide's final form.

Cultural groups were included in initial definitions of genocide, despite opposition from two key Western states, namely, the USA and France. At the early stages of the drafting process, therefore, there was a reasonable possibility genocide would embrace the notion of cultural genocide. However, at the final stages of the drafting process, a firm majority of states within the Sixth Committee – a coalition consisting mainly of Western and Latin American states – voted decisively against the notion of cultural genocide. Consequently, the cultural destruction of human groups was excluded from genocide's form. Even a last-minute attempt on the part of the Soviet Union and Venezuela to reintroduce cultural genocide into genocide's definition proved unsuccessful in reversing what represented a strong tide against cultural genocide.

In explaining why cultural groups were excluded from genocide's definition, existing accounts have focused on two factors: firstly, state interests and secondly, the broader Cold War context.

While interest-based explanations suggest states had domestic political reasons for opposing cultural genocide, other explanations emphasize the broader Cold War confrontation between the two superpowers. Although insightful, both explanations were found unsatisfactory, particularly because they reveal very little about the deeper normative commitments that drove these interests.

It was argued, therefore, that cultural genocide was excluded from genocide's form because the majority of states viewed cultural genocide as an issue falling under the existing norm of minority protection. In the view of many states, cultural genocide could be adequately accommodated and addressed under this existing norm; therefore, it did not need to feature within genocide's definition. Importantly, what enabled an association between cultural genocide and minority protection to be drawn was the emerging notion of international human rights. In this regard, the protection of national minorities had been redefined as an international human rights issue in the aftermath of the Second World War. This, in turn, made it possible for states to argue cultural genocide amounted to human rights issue and as such, that it should be addressed in relation to the protection of international human rights.

The exclusion of cultural genocide, it was also argued, was underpinned by the desire to maintain a clear separation between the concept of an international crime and that of international human rights. As cultural genocide was regarded by many as a human rights issue, its inclusion in the Convention would have resulted in international crimes being conflated with international human rights. This, in turn, would detract from the distinctiveness of the category of an international crime, namely, a label reserved exclusively for conduct that has been prohibited in world politics for its inherent criminality. In order to ensure a distinction would

exist between international crimes and violations of international human rights, therefore, cultural genocide was excluded from genocide's form.

Political groups featured in all three drafts of the Genocide Convention. However, a last-minute attempt to exclude political groups from genocide's definition, as well as a sudden change of heart on the part of the majority of states, resulted in political genocide being excluded from genocide's form. If this has not occurred, the question of political genocide would have pitted the Soviet Union, its allies of the Eastern bloc and a scattering of Latin American states against a broad coalition of Asian, Arab, and Western European states, all of whom were in favour of protecting political groups. Importantly, these dynamics altered at a second vote on political genocide that was introduced at the eleventh hour, whereby states who were previously in favour of protecting political groups – including Western states like the USA – eventually voted against including political groups within genocide's definition.

Three main explanations exist in the literature for why political genocide was excluded from genocide's form: firstly, the Soviet Union led a campaign against political genocide; secondly, a pragmatic political compromise between states; and finally, considerations relating to state sovereignty. After reviewing these three explanations, the chapter argued that concerns about internal and external sovereignty provides the most compelling explanation for why states collectively agreed to exclude political genocide from genocide's form.

4

THE CRIMINALIZATION OF AGGRESSION: AGGRESSION'S STATUS AS AN INTERNATIONAL CRIME

This chapter, along with the next, turns to the international crime of aggression. In the Rome Statute of the International Criminal Court (ICC)¹, aggression is defined by two clauses. Article 8bis(1) provides the “crime of aggression” means

“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”

while Article 8bis(2) specifies that for the purpose of Article 8bis(1), term ‘act of aggression’ refers to

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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute)

An initial glance at aggression's definition highlights that genocide², by contrast, possesses a shorter and more immediately-accessible meaning. On simply definitional terms, therefore, aggression represents an interesting contrast to genocide: why has the international crime of aggression assumed a particularly complex form? However, aggression also presents an intriguing case for this study of international criminalization for a number of additional reasons.

Firstly, the history of aggression's historical development is particularly lengthy. Unlike genocide, whose historical development can be neatly traced to the four years between 1944 and 1948 (that is, from when Raphael Lemkin introduced the concept of genocide in his book *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress* to the conclusion of the Genocide Convention), aggression's history spans close to a century. Moreover, this history has included very recent developments within in the sphere of contemporary international criminal law. There are two inter-related reasons for this long and continuing history.

The first is that the notion of aggression is simultaneously a political and legal concept. While aggression constitutes an international crime under international criminal law, its political significance has come from its historical connection with a fundamental issue that has persistently preoccupied the practice and study of international relations, namely, the use of

² "Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

See Article II of the Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) and Article 6 of Rome Statute

force between states. It may be useful, therefore, to think of aggression's history as having taken place in two different realms – international law and international relations – whilst at the same time, bearing in mind that these two spheres are also intricately intertwined. Inevitably, then, aggression's history is far from straight-forward, with some of this complexity having come down to the fact that the legal and political developments surrounding aggression's long history have sometimes coincided or occurred in tandem whilst in other moments, they have proceeded independently in separate spheres.

Aggression's protracted history is also attributable to the fact that for ensuing decades, there was no international agreement over its international legal definition. The definition introduced above, it is important to note, is of very recent origin. Aggression only acquired this international legal definition in June 2010, following a Review Conference on the Rome Statute³ held in Kampala, Uganda to consider amendments to the Rome Statute. Any attempt to analyze the process of aggression's international criminalization must therefore contend with a legal and political history that extends as far back, according to most writers, to the period following end of the First World War, and which stretches to very recent developments in contemporary times.

A second reason why aggression makes for an interesting case for a study of international criminalization centres upon the distinctive position it was accorded under the contemporary regime of international criminal law that the Rome Statute inaugurated. Aggression was included in the Rome Statute *even though* at the time of the treaty's adoption, there was no international agreement on its definition. When the Rome Statute was adopted, aggression was

³ The first-ever Review Conference on the Rome Statute was held from 31 May to 11 June 2010, with participants that included ICC states parties, observer states, international organizations, and non-governmental organizations. See: <http://www.iccnw.org/?mod=review> (last accessed: October 2017)

deemed one of the “most serious crimes of concern to the international community as a whole”⁴, along with genocide, war crimes and crimes against humanity. However, the ICC would not have jurisdiction over aggression – meaning, the crime would remain unprosecutable by the Court – until international agreement over its definition, as well as the conditions providing for the Court’s exercise of jurisdiction, were reached⁵. By contrast, the inclusion of the other three international crimes within the Rome Statute were all accompanied by their respective international legal definitions⁶ and the Court had immediate jurisdiction over them⁷. As a new chapter in the history of international criminal justice unfolded with the establishment of the ICC, therefore, aggression’s position within this new schema was markedly different to the other three international crimes, causing some contemporary writers to describe aggression as, for instance, “a dead letter” (Murphy 1990: 153), an “enigmatic crime” (Schabas 2004: 18), a “crime to come” (Simpson 2007: 158), a “latent crime” (Weisbord 2008: 161), a “sleeping beauty” (Sayapin 2014: 321) and a “work-in progress” (Clark 2009: 722).

Aggression’s unusual position within contemporary international criminal law persists because the legal provisions⁸ on its definition⁹ and jurisdictional conditions¹⁰ have not yet come into effect. At present, aggression remains an unprosecutable crime and this will only change after the following further conditions are met. Firstly, the ICC may only exercise jurisdiction over aggression after *thirty* State Parties to the Rome Statute have ratified the Kampala Amendments¹¹. At the time of writing, thirty-four state ratifications have been registered with

⁴ Article 5(1) of Rome Statute

⁵ Article 5(2) of Rome Statute

⁶ Articles 6, 7 and 8 of the Rome Statute

⁷ *Supra* note 4

⁸ These legal provisions are often referred to as the ‘Kampala Amendments on the Crime of Aggression’ (Kampala Amendments)

⁹ Article 8*bis* of the Rome Statute

¹⁰ Articles 15*bis* and 15*ter* of the Rome Statute

¹¹ Article 15*bis* para 2

the Depositary of the Rome Statute¹². However, a second condition stipulates the ICC shall exercise jurisdiction over aggression subject to a final decision to be taken *after 1 January 2017* by a *majority* of State Parties to the Rome Statute¹³. This means the ICC's jurisdiction over aggression will only become operative when this is approved by at least two-thirds of the Assembly of State Parties (ASP)¹⁴ at their next meeting, which has been scheduled for December 2017¹⁵.

As this brief overview suggests, aggression's path towards international criminalization has been unique, and the task of this chapter, and the next, is directed at exploring this. International criminalization, it will be remembered, constitutes a two-stage process: firstly, the development of an *international criminal norm*, which requires international agreement on the 'status' and 'form' of an act; and secondly, the translation of that international criminal norm into an *international legal prohibition*. The analysis of aggression's international criminalization begins, therefore, with an examination of the development of an international criminal norm against aggression. In doing so, this chapter focuses on the issue of 'status' and more specifically, the question of how and why aggression was recognized as an international crime. The issue of 'form' – how and why aggression assumed the particular form that is evident in its international legal definition – is the focus of the next chapter.

¹² Following the most recent status update (1 May 2017), thirty-four states have ratified the Kampala Amendments: Liechtenstein, Samoa, Trinidad and Tobago, Luxembourg, Estonia, Germany, Botswana, Cyprus, Slovenia, Andorra, Uruguay, Belgium, Croatia, Slovakia, Austria, Latvia, Spain, Poland, San Marino, Georgia, Malta, Costa Rica, Czech Republic, Switzerland, Lithuania, Finland, the former Yugoslav Republic of Macedonia, El Salvador, Iceland, Palestine, the Netherlands, Chile, Portugal and Argentina. See: <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (last accessed: 1 October 2017)

¹³ Article 15*bis* para 3

¹⁴ Composed of state representatives who have ratified the Rome Statute, the 'Assembly of State Parties' is the ICC's management, oversight and legislative body. See: <https://www.icc-cpi.int/asp> and https://asp.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx (last accessed: 1 October 2017)

¹⁵ The activation of the ICC's jurisdiction over the crime of aggression has been included on the provisional agenda of the ASP's upcoming Sixteenth Session, to be held from 4 to 14 December 2017 in New York. See: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-1-ENG.pdf (last accessed: 2 October 2017)

As highlighted, aggression's international legal definition is particularly complex. It is useful, therefore, to provide a simplified meaning of the term 'aggression', on the basis of which the discussion of this present chapter can then proceed. In general terms, aggression refers to the "unlawful use of force by states" (Antonopoulous 2001: 37; Dinstein 2011: 124) or the "illegal use of force by one state against another" (Reddi 2008: 658). The concept of aggression thus takes us into the sphere of interstate armed conflict, where it specifically denotes the "illegal interstate use of armed force" (Drumbl 2009: 304-305). Evidently, the notion of aggression possesses a negative connotation and it assumes a distinction can be made between 'good' and 'bad' conduct on the part of states (Wilson 2009: 4). As Michael Walzer puts it, aggression is the word used to "condemn armed attack" committed by states (2007: 637). Why, then, has the unlawful use of force by states come to be seen as an international crime – and not simply, for instance, a mere violation of an international prohibition?

The existing literature provides two contrasting answers. The first view posits aggression was established as an international crime sometime during the period between the end of the First World War and the outbreak of the Second World War. According to this perspective, the origins of aggression's criminality lie during the interwar period, namely, between the years 1918 and 1939. In support of this view, a series of international protocols and resolutions concluded under the auspices of the League of Nations, as well as the Kellogg-Briand Pact (1928), are relied upon as evidence that a clear disposition developed during this time on aggression's inherent criminality.

The second view dates aggression's criminalization to 8 August 1945, when the Allied Powers concluded an international treaty – Agreement for the Prosecution and Punishment of the Major

War Criminals of the European Axis¹⁶ (commonly known as the ‘London Agreement’) – to deal with the members of the Nazi Party in the aftermath of the Second World War. Annexed to this international treaty was the Charter of the International Military Tribunal¹⁷, the legal document that established an international tribunal¹⁸ to prosecute the major war criminals of the European Axis. As the IMT Charter stipulated aggression was one of the crimes within the jurisdiction of the Nuremberg Tribunal, it has considerable significance to proponents of this second view. Accordingly, its advocates rely upon the IMT Charter, as well as the judgment of the Nuremberg Tribunal, to support their argument that aggression was criminalized in the period immediately following the Second World War.

Although they reach different conclusions as to the moment when aggression emerged as an international crime, existing accounts rely on international treaties as evidence for aggression’s criminalization. In other words, the process of international criminalization is equated with the adoption of particular international treaties. In contrast, this chapter suggests aggression’s criminalization began with the emergence of an international criminal norm against aggression. Importantly, this development did not centre on the conclusion of an international treaty. Rather, as will be shown, it is attributable to the adoption of resolution by the General Assembly (GA) of the United Nations (UN). An international criminal norm against aggression emerged when the GA adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal in December 1946¹⁹. This international resolution, it will be argued, represented the first expression of international agreement on

¹⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945) 82 UNTC 280

¹⁷ Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (IMT Charter)

¹⁸ The international tribunal has come to be known as the ‘Nuremberg Tribunal’, as it was held in the German town of Nuremberg.

¹⁹ UNGA ‘Resolution 95(I) Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal’ (11 December 1946) UN Doc A/RES/95

aggression's status as an international crime. Prior to this resolution, views on aggression's criminality only found limited, as opposed to universal, recognition. Accordingly, aggression's process of international criminalization began, it will be suggested here, with the issuing of this international resolution in December 1946, that is, *after* the conclusion of the Nuremberg Tribunal.

The chapter is structured in three parts, which corresponds to the three possibilities outlined above concerning when aggression was criminalized: the period after the First World War until the outbreak of the Second World War (1918 to 1939); the period after the end of the Second World War until the conclusion of the Nuremberg Tribunal (1944 to 1946); and finally, the period after the Nuremberg Tribunal's conclusion (1946). After reviewing key international legal and political developments within these three periods, the chapter highlights two central features about aggression's path towards international criminalization. Firstly, after initially possessing an exclusively political character in international relations, aggression gets progressively pulled into the international legal sphere, a presence which it has maintained until today. Secondly, the development of an international criminal norm against aggression is only evident after the Nuremberg Tribunal had concluded. Contrary to conventional views, therefore, aggression only acquired the status of an international crime in December 1946 – a status that remains undisputed until today, despite the protracted disagreement that then ensued over its form as an international crime.

THE OUTLAWING OF AGGRESSION (1918-1939)

Following the end of the First World War, a series of international efforts were undertaken to limit and prevent the further occurrence of war. Most notable amongst these, to be examined below, included the Treaty of Versailles; the Covenant of the League of Nations; a series of

draft international treaties and resolutions concluded under the auspices of the League of Nations; and the Kellogg-Briand Pact.

Treaty of Versailles

At the end of the First World War, the Allies set up the ‘Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties’²⁰ (‘the Commission’) in January 1919. The Commission was charged with inquiring into who ought to be attributed with the responsibility for starting the First World War; whether the laws and customs of war had been violated; and how a tribunal dealing with the prosecution of these offences ought to be constituted²¹. In its report, which was presented to the Paris Peace Conference, the Commission made the following findings: the responsibility for the outbreak of war rests with the Central Powers (Germany and Austria) and their allies (Turkey and Bulgaria)²²; the Central Powers and their allies had violated the laws and customs of war, as well as elementary laws of humanity, during the war²³; and those responsible for these violations were liable to criminal prosecution²⁴.

The Commission’s findings on aggression are significant for the present discussion. Here, it is important to note, the Commission employed the term ‘aggression’ to denote the war conducted by the Central Powers, which it described as a “war of *aggression*”²⁵ and a war waged “in pursuance of a policy of *aggression*”²⁶. Although a war of aggression represents “conduct

²⁰ The Commission comprised of fifteen members made up of representatives of the United Kingdom, the United States, France, Italy, Belgium, Greece, Poland, Romania, Serbia and Japan.

²¹ ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919’, reproduced in the American Journal of International Law (1920), Vol. 14(1/2): 95-154 (pg. 95)

²² *Ibid.* (pg. 98)

²³ *Ibid.* (pg. 112-115)

²⁴ *Ibid.* (pg. 116-117)

²⁵ *Ibid.* (pg. 118) (emphasis added)

²⁶ *Ibid.* (pg. 98) (emphasis added)

which the public conscience reproveth and which history will condemn”, it cannot, the Commission stated, “be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal”²⁷. While aggression was seen as condemnable, it was not yet deemed to amount to a violation of law, and thus could not form the basis of legal prosecution. Accordingly, the Commission advised against charging the authors of the war before a tribunal for waging the war of aggression²⁸. However, it did recommend such acts be the subject of formal condemnation by the Peace Conference and that in the future, penal sanctions should be provided for such “gross outrages upon the law of nations and international good faith”²⁹.

It is in light of the Commission’s conclusions that the well-known provisions of the Treaty of Versailles³⁰, the peace treaty concluded between Germany and the victorious Allied Powers, ought to be read. Two specific provisions of the Treaty of Versailles deserve particular mention. Firstly, Article 227 of the Treaty provided the following:

“The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.”

²⁷ *Ibid.* (pg. 118)

²⁸ *Ibid.* (pg. 119)

²⁹ *Ibid.* (pg. 120)

³⁰ Treaty of Peace with Germany (Treaty of Versailles) (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 188

As this provision makes clear, the Commission's recommendations were not heeded: the former German Emperor was in fact charged for the outbreak of war (Schabas 2004: 21). Indeed, Britain and France favoured delivering the ex-Kaiser before some kind of international tribunal, a position which the USA opposed (Sellers 2013: 3; Wilson 2009: 29-30). However, the exact wording of the provision does reflect the Commission's view that aggression was not contrary to international law. In this regard, the former German Emperor was to be arraigned for a 'supreme offence against international morality and the sanctity of treaties', as opposed to the crime of aggression or indeed, any violation of international law *per se*. As Finch explains, the ex-Kaiser was not charged with "a crime defined or punishable by any existing international or penal law" (1943: 82). In other words, the former German Emperor's responsibility was couched in political and moral terms – as opposed to legal, criminal or penal terms – which meant the charge levelled against him was primarily a political and moral one (Finch 1943: 82; Levy 1943: 1062; United Nations War Crimes Commission 1948: 240; Pompe 1953: 167; Boeving 2005: 561; Cryer 2005: 34; Schmitt 2011: 137; Grzebyk 2013: 81)³¹.

That this intended tribunal was to be guided by "international policy" and "international morality" – as opposed to international law – makes it additionally clear that Article 227 was not intended to initiate formal legal proceedings against the former German Emperor for a legal offence. The precise wording of Article 227 was intentional, as it gave expression to different Allied Powers' interests over the fate of the ex-Kaiser: Britain's and France's desire for an international tribunal were met, while the reservations America and Italy maintained about pursuing a legal response involving prosecution and punishment were simultaneously preserved (Sellers 2013: 7). In effect, Article 227 amounted to a "halfway house between law

³¹ For a contrary view, see Kelsen (1943: 545), who argues Article 227's arraignment of the ex-Kaiser was criminal: "The true reasons for the ex-Kaiser's demanded submission to a *criminal* court was that he was considered the main author of the war, and resorting to this war was considered a *crime*". (emphasis added)

and morality [and] between judicial procedure and political action” (Pompe 1953: 170). It was therefore not by chance or omission that Article 227 did not refer to aggression; international law at that time knew no such notion (Schmitt 2011: 137; Sayapin 2014: 30). Even the Allied Powers themselves conceded, in response to Germany’s protests against Article 227, that the indictment “has not a juridical character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice”³². As it turned out, the ‘special tribunal’ to try the ex-Kaiser never materialized. The Netherlands, a neutral state who was not a signatory to the Treaty of Versailles, refused to surrender the ex-Kaiser over to the Allies.

While the term ‘aggression’ did not feature in Article 227, it did appear in another provision of the Treaty of Versailles. Article 231, famously known as the ‘War Guilt Clause’, provided that

“The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the *aggression* of Germany and her allies.” (emphasis added)

According to Sellers, Article 231 introduced a new perspective on the conduct of warfare:

“It signalled that a nation was not being punished for *losing* a war, as had traditionally been the case, but for *starting* one. While there had previously been no legal stigma attached to the initiation of conflict, this article suggested that the war that Germany had ‘imposed’ on the entente powers was not just morally reprehensible, but also unlawful.” (original emphasis)

Meanwhile, Simpson argues the Versailles settlement represented the “first such *de facto* criminalization of pariah states in international legal history” (2007: 59; original italics). In this regard, Simpson suggests Germany was punished by the Great Powers for violating a serious norm of the international legal order – though he concedes it was never made absolutely clear

³² Reply of the Allied and Associated Powers to the Observations of the German Delegation and the Conditions of Peace, Paris, 16 June 1919, HMSO, Misc. No. 4 (1919)

which norm had actually been breached – and the extent and intensity of its punishment was akin to that of criminal sanctions found in domestic legal orders: Germany was identified as the “outlaw state” and deprived of some of its basic sovereign prerogatives, particularly as it was forced to pay punitive damages, obliged to undergo a process of demilitarization and it lost some of its territory (2007: 60). For Simpson, therefore, Versailles revolutionized the notion of aggression; it transformed aggression into a marker of international criminality, whereupon an entire sovereign state could then be delineated as a “criminal state” within international society (2007: 60).

While the direct reference to aggression in Article 231 – along with the associated idea that it was reprehensible and as such, demanded answerability – was unprecedented, it fell short of construing aggression as an international crime. Germany was indeed held responsible for its act of aggression and subjected to punitive treatment for such an act. However, this responsibility and punishment was neither criminal nor penal in nature. Here, it bears mentioning that Article 231 was the opening clause to a section in the Treaty of Versailles dealing with the financial reparations Germany would make to the Allied Powers as compensation for the damage done to the civilian populations and property of the Allied Powers³³. As Schmitt explains, Article 231 embodied the “financial and economic demands of the [war’s] victor[s]” and more specifically, their “claims for damages”; an intention of punishment, in the full criminal-legal sense, was neither contemplated nor intended by the Article (Schmitt 2011: 141-143). Similarly, Eagleton argues Article 231 did not “go so far as to outlaw war, in the sense of making it an international crime, but it effectively penalize[d] aggressive war by holding the aggressor responsible for losses resulting from the war” (1930: 587). Germany’s responsibility for aggression was, therefore, exclusively pecuniary; it came

³³ Articles 232 to 263 of the Treaty of Versailles

down entirely to economic and financial payments. It seems better to conclude that the concept of aggression was employed to justify the “wholesale assignment of moral responsibility” for World War I to Germany and relatedly, to indicate an “accompanying degree of economic responsibility” on the part of Germany (Wilson 2009: 26-27).

In the immediate aftermath of the First World War, the notion of aggression decisively emerged within international relations, where it was catapulted into an international treaty that sought to govern international arrangements of the post-war international order. However, as Articles 227 and 231 of the Treaty of Versailles make clear, no association with criminality figured in this context, despite some views to the contrary. Instead, the former German Emperor was morally denounced and the German state bore exclusive moral responsibility for starting the war, for which it was forced to pay financial reparations. Simply put, the Treaty of Versailles made explicit mention of aggression but it stopped short of banning aggression and imposing penal sanctions for acts of aggression (Grzebyk 2013: 81). The most that can be said about aggression during this period, therefore, is that it acquired a negative connotation within international relations, specifically as a condemnable act. As we will see, this would intensify and be reinforced in subsequent developments.

Covenant of the League of Nations

Also contained within the Treaty of Versailles was the Covenant of the League of Nations³⁴, the legal document that established the League of Nations, the forerunner of the present day’s United Nations. The Covenant signalled a new approach to the regulation of force in international relations: it aimed to prevent wars in the future by subjecting the initiation of war

³⁴ Articles 1 to 26 of the Treaty of Versailles; Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 195 (the Covenant)

to the regulatory framework of international law (Stürchler 2007: 11; Sellers 2013: 12). It did so through a series of provisions, which collectively aimed at the “legislative elimination of war” (Pompe 1953: 153).

The concept of aggression featured in Article 10 of the Covenant:

“The Members of the League undertake to respect and preserve as against external *aggression* the territorial integrity and existing political independence of all Members of the League. In case of any such *aggression* or in case of any threat or danger of such *aggression* the Council³⁵ shall advise upon the means by which this obligation shall be fulfilled.” (emphasis added)

However, the Covenant did not define the term ‘aggression’ and interestingly, the only instance when the term was used was in Article 10. In other provisions, the Covenant consistently used the term ‘war’ instead. For instance, Article 11 declared “any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations”. Read together, Articles 10 and 11 provided war was no longer a private matter between parties to a conflict but rather, one of interest to the entire international community (Brownlie 1983: 57; Grzebyk 2013: 18). At first glance, Articles 10 and 11 appear to have laid down a general prohibition against war. However, as the next cluster of articles show, the Covenant did not completely outlaw war.

Articles 12 to 15 established the procedural mechanisms for the peaceful settlement of international disputes. Members agreed that any dispute “likely to lead to a rupture” be submitted to arbitration or inquiry by the Council; members could not, furthermore, resort to

³⁵ The League of Nation’s Council consisted of representatives of the Allied and Associated Powers, together with representatives of four other members of the League, who were to be selected from time to time by the League’s Assembly (which consisted of representatives of all members of the League); see Article 4 of the Covenant

war until three months after the award by arbitrators or the report by the Council³⁶. An arbitration award was to be made within a reasonable time, while the Council's report was to be made within six months after submission of the dispute³⁷. Matters which were to be submitted for arbitration were those that could not be "satisfactorily settled by diplomacy", such as the interpretation of a treaty, any question of international law, or reparations for breaches of international obligations³⁸. Concerning matters submitted for inquiry by the Council, the Council was empowered to effect a settlement of the dispute; in cases where a settlement was not possible, the Council, unanimously or by a majority vote, could publish a report with recommendations; and finally, if the Council fails to reach a report, the members to the dispute reserve the right to take action as they consider necessary for the maintenance of right and justice³⁹.

The effect of these procedural provisions was the following: war was not to be undertaken *until* certain methods of procedural settlement had been attempted (Eagleton 1933: 242). Consequently, the Covenant did not lay down a general prohibition against war; rather, it simply provided for "procedural restrictions" that limited the instances when war could be resorted to lawfully (Hula 1946b: 412). In doing so, the Covenant established a novel distinction between different types of wars, namely, lawful/legal and unlawful/illegal wars (Eagleton 1930: 589; Broms 1968: 11; Thomas and Thomas 1972: 17; Brownlie 1982: 57; Grzebyk 2013: 18; Sellers 2013: 15). Importantly, an illegal war was one waged without adherence to the procedural requirements laid down in the Covenant (Thomas and Thomas 1972: 17; Brownlie 1982: 66). Conversely, war remained legal if the procedural requirements had been duly followed. It is crucial to note that these procedural provisions were only binding

³⁶ Article 12 of the Covenant

³⁷ *Ibid.*

³⁸ Article 13 of the Covenant

³⁹ Article 15 of the Covenant

upon members of the League and as such, states were entirely free to engage in war with non-members (Grzebyk 2013: 15).

Where a state resorted to war in breach of Articles 12, 13 or 15, the members of the League undertook to employ the following “financial and economic measures” against such a state: the severance of all trade or financial relations; the prohibition of all intercourse between their nationals and those of the covenant-breaking State; and the prevention of all financial, commercial or personal intercourse between their nationals and those of the covenant-breaking State⁴⁰. While the option of military sanctions were not excluded, this would only be possible after the League’s Council has issued a recommendation to member governments as to what military, naval or air forces they would severally contribute to armed forces that would be used to uphold the Covenant⁴¹. Crucially, however, member governments would not be obliged to follow such recommendations; they were not binding and purely moral in nature (Sellers 2013: 14; Grzebyk 2013: 17). Ultimately, these sanctions amounted to “police sanctions” and it would be incorrect to regard them as being penal in nature or as indicating criminal responsibility (Brownlie 1983: 58).

Essentially, the League of Nations sought to regulate war, specifically by delegitimising wars that had been embarked upon without exhausting pacific remedies beforehand (Sellers 2013: 15). Within this new scheme, aggression featured in a slightly different manner to the way it did in the Treaty of Versailles. In the latter, aggression was employed as the *moral* basis upon which to exact war reparations from Germany. However, in the Covenant, aggression acquired *juridical* significance under the Covenant and in the view of some commentators, a novel legal

⁴⁰ Article 16 of the Covenant

⁴¹ *Ibid.*

character⁴². According to Thomas and Thomas, the Covenant gave aggression “real significance in international law”: it was introduced into positive international law for the first time and in addition, it was specifically tied with the new collective security system ushered in by the League (1972: 16). Similarly, Stone (1958) and Broms (1968) have highlighted the following: aggression mainly figured in bilateral treaties of alliance or neutrality as a political term but through the Covenant, it acquired general significance in international law (Stone 1958: 40; Broms 1968: 10). In particular, aggression no longer referred to “a mere expression of a moral principle” but rather, it was used to impose a clear legal obligation to respect and preserve the territorial integrity and political independence of the League’s members against external aggression (Brownlie 1983: 62).

It is important to stress, again, that under the Covenant, wars were illegal if they violated the prescribed procedural requirements. Crucially, the Covenant did not deem war to be criminal in and of itself. As Grzebyk states, “Just because certain actions are unlawful, they are not necessarily criminal: international law provides for a wide array of acts and omissions that are unlawful but for which no criminal sanctions are provided” (2013: 79). Crucially, then, although the Covenant explicitly provided for aggression’s legal character as an unlawful act, this unlawfulness did not amount to criminality.

Interwar efforts to outlaw war (1923 to 1928)

The Covenant was not the only attempt to restrict the use of force. Throughout the interwar period, other efforts – the adopting of international protocols, agreements and resolutions – were also undertaken. Four specific initiatives undertaken between 1923 and 1928 have

⁴² For a contrary view, see Wilson (2009: 34-35) and Grzebyk (2013:14), both of whom suggest Article 10 represented a purely moral obligation.

significance on aggression's historical development and they will be briefly discussed below: the draft Treaty of Mutual Assistance (1923); the draft Protocol for the Pacific Settlement of International Disputes (1924); and two resolutions adopted by the League's Assembly (1925 and 1927).

These efforts must be seen in conjunction with the Covenant, particularly because they were adopted under the League's auspices and to some extent, they represented initiatives aimed at rectifying the Covenant's main deficiencies. In this regard, the perceived limitations of the Covenant's system of collective security included the following: although it condemned aggression, the Covenant simply restricted war and did not lay down a general prohibition against the use of force; the notion of aggression itself was undefined in the Covenant; and the League's system of sanctions were optional and depended primarily on the willingness of its leading members – France and Britain – to assume the burdens and responsibilities of imposing sanctions (Broms 1968: 12; Thomas and Thomas 1972: 17; Brownlie 1983: 62; Wilson 2009: 34; Grzebyk 2013: 16-17; Sellers 2013: 14; Lesaffer 2015: 52). In addition, the League Nations also lacked universal membership. Most notably, the United States did not ratify the Covenant and communist Russia was not a member of the League.

In 1923, the League prepared the draft Treaty of Mutual Assistance and Article 1 of the draft treaty stipulated the following:

“The High Contracting Parties solemnly declare that aggressive war is an *international crime* and severally undertake that no one of them will be guilty of its commission”⁴³.
(emphasis added)

A similar characterization of aggression was made a year later in the draft Protocol for the Pacific Settlement of Disputes. Here, the draft protocol's preamble stated “a war of aggression

⁴³ Draft Treaty of Mutual Assistance, reproduced in League of Nations Official Supplement, No. 16 (1923), Annex 10 (Part 1), pg. 203-208

constitutes a violation of [the] solidarity [of the members of the international community] and an *international crime*”⁴⁴.

However, neither draft met with the approval of governments and as they failed to receive sufficient ratifications, they did not come into force. This makes it difficult to rely on these documents as firm evidence of any change in the way aggression was being perceived in international society. Moreover, these draft treaties were primarily aimed at addressing questions of international security. The use of the term ‘international crime’ in this context did not, therefore, mark a shift towards criminalizing aggressive war in itself (Sellers 2013: 17; 20). In this regard, many commentators have been reluctant to view the term ‘international crime’ in these documents as denoting what it later came to mean, namely, a criminal violation of international law (Radin 1946b; Gross 1947; Pompe 1953; Brownlie 1983; Boeving 2005; Schmitt 2011). For instance, Radin argues it was employed simply as a “rhetorical term” as opposed to “a term with definite legal content” (1946b: 381). Similarly, Brownlie argues the term ‘international crime’ could only refer to “delictual liability” at that time, as opposed to the “criminal liability of states” (1983: 69).

Nevertheless, the term ‘international crime’ continued to be associated with aggression in a number of the League’s other initiatives. At the Sixth Session of the League’s Assembly in 1925, an adopted resolution declared “a war of aggression should be regarded as an international crime”⁴⁵. And at the Eight Session of the League’s Assembly in 1927, a further resolution stated “a war of aggression can never serve as a means of settling international

⁴⁴ Protocol for the Pacific Settlement of International Disputes, reproduced in League of Nations Official Supplement, No. 24 (1924), Annex 18, pg. 136-140 (emphasis added)

⁴⁵ Resolution Adopted on the Reports of the First and Third Committees: Arbitration, Security and Reduction of Armaments (September 25, 1925), reproduced in League of Nations Official Supplement, No. 19 (1925), pg. 19

disputes and is, in consequence, an international crime” which “shall always be punished”⁴⁶. A similar resolution was also adopted outside the context of the League, at the Sixth International Conference of American States in Havana, 1928. This resolution stated a “war of aggression constitutes an international crime against the human species” and that “all aggression is considered illicit and as such is declared prohibited”⁴⁷.

However, none of these resolutions were legally binding (Sellers 2013: 23; Grzebyk 2013: 21)⁴⁸. Nevertheless, they reinforced the view enshrined in the Covenant as to aggression’s unlawful character. As Pompe has suggested, these clauses were “predominantly moral [in] character” and the term ‘international crime’ was employed to reflect and satisfy the “moral conviction” of international opinion at the time, namely, the unwillingness to accept war as a political means at the disposal of statesmen (1953: 156; 175). What is evident during the interwar period, therefore, was a “general move towards the delegitimisation of aggression” but crucially, this move had “not yet acquired [legal] traction within general international law” (Sellers 2013: 23).

⁴⁶ Resolutions and Recommendations Adopted on the Reports of the Third Committee: Declaration Concerning Wars of Aggression (September 24, 1927), reproduced in League of Nations Official Supplement, No. 22 (1927), pg. 22

⁴⁷ Resolution of the Sixth International Conference of American States (18 February 1928), reproduced in American Journal of International Law, Vol. 22 (1928), pg. 356-357

⁴⁸ However, see Brownlie (1982), who argues that these resolutions did create a legal obligation on members of the League of Nations. Writing with specific reference to the 1927 Resolution, Brownlie argues the following:

“The resolution does not recommend, it declares, and is a ‘solemn renunciation’. Members are declared to be ‘under an obligation to conform to these principles’. In spite of [...] the fact that it is not connected with sanctions or mutual assistance arrangements, the text appears to be a clear acceptance and recognition of an obligation with regard to subject-matter which was pre-eminently legal in character. It is no unknown for a resolution of an organ of the League to be regarded as binding upon states which assented to it. The fact that the principle is not enshrined in a mutual assistance pact might well be regarded as giving it generality and force as a declaration which is not restricted by a particular context or purpose.” (1983: 72)

Kellogg-Briand Pact

A final development of the interwar period that deserves attention took place outside the structure of the League of Nations. In 1928, the General Treaty for Renunciation of War as an Instrument of National Policy⁴⁹, also known as the ‘Kellogg-Briand Pact’, was concluded. In terms of this treaty, states agreed to “condemn [the] recourse to war for the solution of international controversies” and to renounce war as “an instrument of national policy” in their relations with one another⁵⁰. States also agreed that the “settlement or solution of all disputes or conflicts” would only be sought by “peaceful means”⁵¹.

This international treaty was a major development in international efforts to outlaw war. As we have seen, the Covenant delineated between lawful and unlawful wars and in doing so, permitted the recourse to war in certain circumstances. By contrast, the Kellogg-Briand Pact, sought to totally outlaw the resort to war. As Pompe has put it, it made every initiation of war “an illegal act in international law” (1953: 160; 162). The Kellogg-Briand Pact has therefore been described in particularly glowing terms. For instance, Sayapin (2014: 25) characterizes it as a “momentous step in the progressive development of international law”, while Dinstein (2011: 85) portrays the year the international treaty was concluded as “a watershed date in the history of the legal regulation of the use of inter-State force” (2011: 85). Finally, for Brownlie, the most striking aspect of the Pact was “the legal completeness with which war is renounced and outlawed” (1983: 91). He also argues the Kellogg-Briand Pact, which is technically still in force today, stands, along with the UN Charter, as one of the two major sources of the norm limiting resort to force by states (1982: 91).

⁴⁹ General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 24 July 1929) 94 LNTS 57 (Kellogg-Briand Pact)

⁵⁰ Article 1 of Kellogg-Briand Pact

⁵¹ Article 2 of Kellogg-Briand Pact

What enhances the Kellogg-Briand Pact's significance is the near universal support it received. It commanded the support of sixty-three states – including the United States, Britain, France, Germany, Italy and France – and only four states were not signatories⁵². Moreover, the Kellogg-Briand Pact had considerable effects on state practice at the time: it formed the basis of other bilateral and multilateral prohibitions of war, many of which reaffirmed the obligations of the Pact (Pompe 1953: 157; Brownlie 1983: 75; Fournet 2006: 151-152; Bassiouni and Ferencz 2008: 211; Werle and Jessberger 2014: 533). In addition, the Kellogg-Briand Pact was repeatedly referred to within private political deliberations, public pronouncements and diplomatic communications as a source of existing obligation: although its terms came to be disregarded by some states, no state explicitly repudiated the obligations that the Pact laid down (Brownlie 1983: 72; 80; Fournet 2006: 151).

The Pact was not without its shortcomings, however. Although war was condemned and renounced, it nevertheless appeared to allow war in certain circumstances. For instance, it did not explicitly condemn forceful measures that fell short of full-scale war; it did not subject internal strife and civil war to the general prohibition; it seemed to suggest wars used as an instrument of international policy remained lawful; and it also suggested wars with non-signatories did not fall under the scope of the prohibition (Eagleton 1933: 252; Fournet 2006: 150-151; Dinstein 2011: 86-87; Sellers 2013: 25). Aside from these ambiguities, the Kellogg-Briand Pact did not prohibit wars undertaken for the purposes of self-defence. And indeed, many of its signatories made their adoption of the Pact subject to the reservation that their right to self-defence remained unaffected by the provisions of the Pact (Hula 1946b: 415; Stone 1958: 32; Broms 1968: 17; Brownlie 1982: 81; Schmitt 2011: 160; Sellers 2013: 28). Finally,

⁵² The four non-signatories were all Latin American States, namely, Bolivia, El Salvador, Uruguay and Argentina

the Pact did not provide for any sanctions, be it economic or military. According to one commentator, the only consequence it contemplated was the sanction of “public opinion” (Radin 1946b: 380). Taken together, these shortcomings make it difficult to suggest the Kellogg-Briand Pact amounted to an absolute prohibition of war (Hula 1946b: 415).

It is important to stress that the term ‘aggression’ was not used in the treaty. Nevertheless, it is possible to argue the Pact’s outlawing of war embraced the notion of aggression (Stone 1958: 32). To a large extent, the terms ‘war’ and ‘aggression’ were viewed as interchangeable terms during the interwar period. As commentators have noted, politicians and diplomats of the interwar period understood ‘aggression’ as a “synonym for the illegal use of force” (Brownlie 1983: 356); “resort to war in breach of [a] treaty undertaking” (Stone 1958: 32); and “a corollary of the illegality of ‘resort to war’ (Pompe 1953: 60). On this basis, therefore, it is possible to conclude the Kellogg-Briand Pact outlawed aggression (Levy 1943: 1067; Wright 1946: 50; Pompe 1953: 162; Glennon 2010: 73; Grzebyk 2013: 23; Werle and Jessberger 2014: 533)⁵³.

It is equally important not to automatically equate aggression’s unlawfulness or illegality with *criminality*. As Schmitt argues, “A mere abdication is, of course, not a penalization of the circumstance of ‘war’” (2011: 157). As the Kellogg-Briand Pact did not declare war to be criminal, Schmitt finds it difficult to see the treaty as a “legal foundation for criminal punishment of a novel crime” (2011: 160; 164). Similarly, Glueck states as historic as the Kellogg-Briand Pact was, it “failed to make [the] violation of its terms an international crime punished by an international tribunals or by national courts” (1946: 403). As he argues further,

⁵³ For a contrary view, see Sellers (2013: 27), who argues that the Kellogg-Briand Pact did not outlaw aggression but narrowly renounced the recourse to war as an instrument of national policy.

“[T]he fact that the contracting Parties to a treaty have agreed to render aggressive war illegal does not necessarily mean that they have [also] decided to make its violation an international crime” (1946: 405). The view that the Kellogg-Briand Pact made aggression unlawful but not criminal is widely supported in the literature (Hula 1946a: 14; Finch 1947: 30; Gross 1947: 209; Schick 1947: 784; Schick 1948: 456; Jescheck 2004: 48; Cryer 2005: 242; Kelly and McCormack 2008: 105; May 2008: 146; Reddi 2008: 659; Glennon 2010: 74; Werle and Jessberger 2014: 535; Murphy 2015: 535; Kemp 2016: 79).

Concurring with these views, it is suggested here it would be incorrect to construe the Kellogg-Briand Pact as having simultaneously prohibited and criminalized aggression. Doing so would amount to reading a great deal more into the Pact than its text, as well as the history preceding it, suggests. Crucially, no provision of the Kellogg-Briand Pact equated or described war as an international criminal act. Moreover, when seen in conjunction with earlier legal and political developments outlined above, the Kellogg-Briand Pact’s spirit, aims and content were firmly rooted within the interwar period’s primary preoccupation, namely, the restriction and prevention of war. This, in turn, centred upon the twin issues of disarmament and security, (Schmitt 2011: 145). Criminalizing war simply did not feature, either as a concrete initiative or even a nascent idea, within these efforts. Yet, as the discussion below demonstrates, the Kellogg-Briand Pact, seen in conjunction with the inter-war developments reviewed above, is viewed as having criminalized aggression.

Was aggression criminalized in the inter-war period?

The view that aggression was criminalized during the inter-war period posits aggression transformed into an international crime before the outbreak of the Second World War in 1939. This view has been famously associated with the Judgment of the International Military

Tribunal⁵⁴ (the Judgment), which was delivered after the conclusion of the trials against the Nazi leaders in October 1946. Referring specifically to the Kellogg-Briand Pact, the Judgment declared that

“In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a *crime* in so doing”⁵⁵. (emphasis added)

It also declared that “[...] resort[ing] to a war of aggression is not merely illegal, but is *criminal*”⁵⁶. In reaching this conclusion, the IMT’s judges relied on the international history that preceded the conclusion of the Kellogg-Briand Pact. After reviewing relevant portions of the draft Treaty of Mutual Assistance (1923), the draft Protocol for the Pacific Settlement of Disputes (1924), the Resolution of the Assembly of the League of Nations (1927), and the resolution of the Sixth Pan-American Conference (1928), it stated:

“All these expression of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.”⁵⁷

The IMT’s view on aggression’s illegality *and* criminality was supported by numerous commentators at the time⁵⁸, as well as by contemporary scholars (Kelsen 1943; Levy 1943; Trainin 1945; Kelsen 1945; Wright 1945; Doman 1946; Wright 1946; Glueck 1946; Wright 1947; United Nations War Crimes Commission 1948; Wright 1948; Lukashuk 1990; Murphy 1990; Petty 2008; Poltorak 2008). In this regard, the conclusion reached by Glueck, after examining the same historical sources reviewed by the IMT, is illustrative of these concurring views:

⁵⁴ International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, reproduced in American Journal of International Law, Vol. 41 (1947), pg. 172-332 (Nuremberg Judgment)

⁵⁵ *Ibid.* pg. 218

⁵⁶ *Ibid.* pg. 220 (emphasis added)

⁵⁷ *Ibid.* pg. 219-220

⁵⁸ For an extensive listing of writers who supported the criminality of aggression during the 1940s, see the sources listed by Wright (1947) in footnote 14

“All these solemn expressions of the conviction of civilized States regarding the need for conciliation, for the settlement of international disputes by pacific means only, for the renunciation of war as an instrument of national policy, and, logically, for the recognition that aggressive war is an international crime, greatly re-enforce whatever inference to that effect is derivable from the Briand-Kellogg Pact itself. They may be regarded as powerful evidence of the existence of a widely prevalent juristic climate which has energized a spreading *custom* among civilized peoples to regard a war of aggression as not simply “unjust” or “illegal” but downright *criminal*”. (1946: 412; original emphasis)

In contrast with these views, this thesis argues aggression’s criminalization did not occur during the interwar years. More specifically, a review of developments in the interwar years the first stage of international criminalization – the development of an international criminal norm against aggression – did not emerge during this period. Although aggression acquired international significance in international treaties and resolutions, it was not regarded as having any quality of criminality in these initiatives. In addition, all the historical documents examined above demonstrates aggression was not perceived of as amounting to a criminal act. Moreover, what is notably absent are any initial debates over aggression’s potential criminality or even, at a more basic level, nascent views that aggression ought to be considered as an international crime. It remains difficult to discern, therefore, the beginnings of the process of international criminalization during this period, namely, the existence of international agreement on aggression’s status as international crime.

This is not to suggest aggression was insignificant during the interwar period. Indeed, aggression featured prominently throughout this period, where it was closely intertwined with interwar efforts aimed at the prevention and prohibition of war. As demonstrated, efforts to abolish war were directed at exacting reparations from Germany for having started the First World War (Treaty of Versailles); making certain wars unlawful and establishing an international system of dispute settlement (Covenant of the League of Nations); and finally, banning all wars except those waged for self-defence (Kellogg-Briand Pact). Initially, aggression featured in these stages as a condemnable act: in the Treaty of Versailles, aggression

was employed as a moral notion upon which to attribute moral responsibility for the outbreak of the First World War. Thereafter, aggression's inclusion within the Covenant of the League of Nations gave it a formal place within international law as a legal concept.

These developments marked aggression's development into an unlawful act in world politics. This would continue in subsequent international treaties and resolutions, which reinforced the ongoing de-legitimatization of aggression as an illegal act during the interwar period. This would reach its climax with the Kellogg-Briand Pact. By outlawing aggression, the Kellogg-Briand Pact made it clear aggression constituted an unlawful and illegal act. Yet, an international criminal norm against aggression did not develop during this period. In particular, the historical record demonstrates an absence of international consensus on aggression's status as an international crime during the interwar years. Put differently, aggression was not thought of as being criminal. Rather, aggression was simply viewed as being an unlawful and illegal act in world politics.

**‘CRIMES AGAINST PEACE’:
THE NUREMBERG CHARTER AND THE NUREMBERG JUDGMENT
(1944 – 1946)**

This section reviews the significance of the Nuremberg Tribunal upon aggression's historical development. In doing so, it focuses on the following: the United War Crimes Commission; the London Conference, where the IMT Charter was negotiated; and the final judgment of the IMT.

The United Nations War Crimes Commission

Following a proposal by the British government, the United Nations War Crimes Commission (UNWCC) was established at a diplomatic conference held on 20th October 1943 at Britain's

Foreign Office⁵⁹. Composed of representatives of fourteen states⁶⁰, the UNWCC was tasked with undertaking preparatory investigative work aimed at the future prosecution of atrocities committed by the Axis Powers⁶¹. During its work, the UNWCC found itself confronted with the question of aggression's status in international law or, as the UNWCC put it, "the question of whether aggressive war amounted to a criminal act"⁶². After an initial proposal to treat aggressive war as a crime within the scope of the commission's work was rejected, a sub-committee was formed to study the question in greater detail⁶³. The sub-committee, in turn, found itself divided on this matter and consequently, two separate reports were issued.

The majority report concluded aggressive war did not represent a crime in positive international law⁶⁴. It provided three main reasons for this view: firstly, states themselves could not be the subject of criminal liability and consequently, the launching of a war could not be considered a crime; secondly, breaches of international law do not result in crimes but only in delicts; and finally, although the Kellogg-Briand Pact made war illegal, it did not make it criminal⁶⁵. The report did seem to suggest, however, that aggression amounted to a condemnable act that *ought* to be criminalized. In words that were extremely similar to those made by the 1919 Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties (1919), it suggested aggression "should be made the subject of a formal condemnation in the peace treaties" and that it was desirable that "future penal sanction should

⁵⁹ History of the United Nations War Crimes Commission and the Development of the Laws of War (1948) (pgs. 110; 112)

⁶⁰ The members of the UNWCC included representatives from the following states: Australia; Belgium; China; Czechoslovakia; France; Greece, India; Luxembourg; Netherlands; Norway; Poland; Yugoslavia; United Kingdom and United States; *supra* note 59 (pg. 118)

⁶¹ The UNWCC was specifically charged with investigating and recording evidence of war crimes, identifying where possible the individuals responsible, as well as reporting to the Governments concerned cases in which adequate evidence might be forthcoming; *supra* note 57 (pg. 113)

⁶² *Supra* note 59 (pg. 180)

⁶³ *Ibid.* (pg. 180-181)

⁶⁴ *Ibid.* (pg. 181)

⁶⁵ *Ibid.* (pg. 181-182)

be provided for such grave outrages against the elementary principles of international law”⁶⁶. In contrast, the minority report stated that aggressive war was a criminal act, a conclusion it reached by relying on developments during the interwar period, including the Kellogg-Briand Pact⁶⁷.

The UNWCC considered both reports but due to divergent views, it concluded a final decision on the matter ought to be made by state representatives themselves⁶⁸. In this regard, Yugoslavia, New Zealand and Australia instructed their representatives to vote in favour of the minority report⁶⁹. Meanwhile, Britain, India and Greece instructed their representatives not to vote on the issue, while others simply did not receive instructions from their governments (Schabas 2004: 25-26; Grzebyk 2013: 88). Consequently, voting on the matter failed to take place and no further discussions on this question were held⁷⁰. All of this may seem like an unimportant development in aggression’s historical evolution. However, the fact that the UNWCC found itself divided on the matter pertinently demonstrates how aggression’s criminality was far from settled towards the end of the Second World War. The view that aggression amounted to an international crime was certainly present but this was also contested by others. As the next section demonstrates, the matter was settled during political negotiations between the four Allied Powers – United States, United Kingdom, France and the Soviet Union – aimed at the establishment of an international military tribunal to prosecute German political and military leaders.

⁶⁶ *Ibid.* (pg. 182)

⁶⁷ *Ibid.* (pg. 182)

⁶⁸ *Ibid.* (pg. 183)

⁶⁹ *Ibid.* (pg. 184-185)

⁷⁰ *Ibid.* (pg. 185)

London Conference

In May 1945, the Allied Powers agreed to establish an international military tribunal in order to try the Axis leaders and to determine their appropriate guilt and punishment⁷¹. A judicial course of action, as opposed to a political one involving the execution of captured German leaders, was deemed preferable for the following reasons: the major Axis leaders were deemed to have committed criminal violations of international law; only a judicial trial could provide for the punishment of crimes; the punishment of war criminals would have a deterrent effect in the future; and a judicial-based punishment would preserve the moral force of the Allied cause⁷². Between June and August 1945, therefore, representatives of the Allied Powers gathered in London to agree upon the provisions and procedures of the international tribunal that was to be established. Aggression occupied a central place within these negotiations (commonly referred to as the ‘London Conference’), with principal discussion centring on the following three key issues: aggression’s status as an international crime; the legal basis of aggression’s criminality; and finally, the character aggression ought to assume for the purposes of the upcoming trials against the Axis leaders.

1 AGGRESSION’S STATUS AS AN INTERNATIONAL CRIME

The records of the negotiations show that at the start of the proceedings, the idea that aggression amounted to an international crime was a novel idea. In a report to the President of the United States (US), Justice Robert Jackson, the American representative to the London Conference, indicated the legal position the US intended to put forward at the upcoming negotiations was

⁷¹ ‘American Memorandum Presented at San Francisco, April 30, 1945’, in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: A documentary record of negotiations of the Representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal (1949, Washington: US Government Printing Office) (Jackson Report) (pg. 29)

⁷² *Ibid.* (pg. 33-35)

that a war of aggression represented a crime⁷³. He also acknowledged that this departed from the prevailing legal position.

Nonetheless, he was “not disturbed by the lack of precedent” that characterized the legal stance of the US, for what was required to address the absence of precedent was, in his view, simple and straight-forward: international law’s non-recognition of aggression’s as an international crime could be rectified through government action⁷⁴. According to Jackson, although aggression was not a crime under international law, it could easily be *constructed* into one by governments:

“International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties of agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. [...] Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. [...] It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal”⁷⁵.

The ideas that aggression’s lack of criminal status under international law could be reversed at the London Conference was also evident from the British representative’s statement:

““[L]aunching a war of aggression” may involve discussion of different schools of thought as to whether that is an existing offence against international law, and there is the further question whether we are breaking new ground. That we [the British government] think ought to be discussed and is one of the matters which this Conference should consider”⁷⁶.

What is especially interesting – a point not often emphasized in the literature – is that once formal negotiations commenced, the initial American and British view that aggression still had to be deemed an international crime was quickly discarded in favour of one which maintained aggression was in fact *already* an international crime. For instance, the British representative stated, at a much further point into the negotiations, the following: “The question comes down

⁷³ ‘Report to the President by Mr. Justice Jackson, June 6, 1945’ in Jackson Report *supra* note 71 (pg. 53)

⁷⁴ *Ibid.* (pg. 52)

⁷⁵ *Ibid.*

⁷⁶ ‘Minutes of Conference Session of June 29, 1945’ in Jackson Report *supra* note 71 (pg. 98-99)

to this: whether it is right or desirable to accept the position that a war of aggression is a crime. *It seems to be agreed that it is.* [...] More strictly, it may be said that it is accepted as a crime without declared punishment or any declared sanction against it”⁷⁷. Throughout the negotiations, America consistently adopted the position that aggression already amounted to an international crime. The launching of a war of aggression, Robert Jackson argued, has come to be recognized by the “civilized world” as a “criminal violation of international law”⁷⁸.

However, no solid reasons were provided by either the US or Britain to justify why they altered their initial position and subsequently regarded aggression as already amounting to an international crime. Although Jackson indicated the American position was rooted in the view that the Kellogg-Briand Pact, along with other international instruments⁷⁹ concluded after the First World War, had outlawed aggression, he also suggested aggression had come to be seen as an international crime because of the “common sense of mankind”: “[The Kellogg-Briand] Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law in harmony with the *common sense of mankind*, that unjustifiable war is a crime”⁸⁰. However, precisely what, in the American view, pushed aggression from the category of mere unlawfulness to that of criminality was never clearly articulated.

⁷⁷ ‘Minutes of Conference Session of July 19, 1945’ in Jackson Report *supra* note 71 (pg. 297) (emphasis added); See also ‘Minutes of Conference Session of July 25, 1945’ in Jackson Report *supra* note 69, where the British delegate contended aggression’s criminality was beyond dispute (“I do not think anyone suggests that aggression does not make a crime.”) (pg. 385)

⁷⁸ ‘Minutes of Conference Session of July 23, 1945’ in Jackson Report *supra* note 71 (pg. 332)

⁷⁹ Robert Jackson specifically mentioned the draft Protocol for the Pacific Settlement of Disputes (1924), the Resolution of the Assembly of the League of Nations (1927), and the Resolution of the Sixth Pan-American Conference (1928); *supra* note 73 (pg. 52-53)

⁸⁰ *Supra* note 73 (pg. 52) (emphasis added); See also ‘Preface’ by Robert Jackson in Jackson Report *supra* note 71 (pg. ix)

It has been suggested that the official position the US adopted on aggression's criminality throughout the London Conference was due to Jackson's personal conviction (Wilson 2009: 49). As the records of the London Conference demonstrate, Jackson was deeply enthusiastic about this idea, and he consistently made it clear during the negotiations that this was a central element of the American trial plan for the Nazi leaders. Moreover, as Bush shows, hints of the idea that aggression constituted an international crime were discernible in speeches and addresses Jackson made to the American Society of International Law and the Inter-American Bar Association before the London Conference (2002: 2366). However, the origins of the idea, as well as its ascendancy within American policy circles, cannot be attributed to Jackson himself. Rather, the first author of the idea is William Chanler, a prominent New York lawyer who joined the US War Department in 1942.

According to Bush, it was Chanler who first proposed that aggression be framed as an international crime and that it be placed on the American agenda (2002: 2350). Perhaps more crucially, of all the individuals who figured in aggression's historical development – ranging from legal scholars, commentators and experts involved in special commissions that dealt with aggression – Chanler was the only one who was able to, firstly, articulate the idea that the Nazis had committed the international crime of aggression and secondly, successfully obtain political and institutional support for this idea (2002: 2349-2350). As Bush recounts in his revisionist study, the actual genesis of the idea that aggression represents an international crime lies in a memorandum that Chanler presented to Henry Stimson, the then Secretary of the War Department, in November 1944 (2002: 2354-2359).

In this memorandum, Chanler suggested the German leadership be punished for illegal acts of aggression, a legal question which he approached through the Kellogg-Briand Pact. As the

treaty declared the illegality of war, Germany's breach of the international treaty placed its leaders outside international law: they were men who used violence without legal justification and this, consequently, deprived them of the status of legitimate legal combatants of war and turned them into *criminals* (Bush 2002: 2355). Those who committed aggression in violation of the Kellogg-Briand Pact were, according to Chanler's reasoning, criminals guilty of an international crime. This was an extremely novel idea and as Bush argues,

“[Chanler] took [this] position before all but a few foreign academics accepted it, before mainstream international law professors were remotely willing to consider it, before other Washington planners dared go that far, and before any planners knew of the few other academics who had been writing of aggressive war as a crime” (2002: 2362).

This idea gained traction in American policy circles for several reasons. Firstly, it allowed the Second World War as a whole, as opposed to disparate war-time atrocities, to be seen as the central charge against the Nazis. Secondly, it allowed a whole host of individuals to be brought to trial, not only battlefield combatants but also top military and political commanders. Finally, it was anchored in a treaty that Stimson had personally championed during his former position as Secretary of State (Bush 2002: 2357-2358; Sellers 2013: 72). One further element – an important personal political connection – would allow Chanler's idea to gain solid foothold. A close friend of Chanler's, Colonel John Boettiger, was President Roosevelt's son-in-law and after Boettiger brought Chanler's idea to the President, it subsequently gained presidential approval. Henceforth, charging the Nazi leaders for the international crime of aggression became a cornerstone of official American policy. In Bush's view, therefore, the strong position Robert Jackson's adopted at the London Conference over aggression – and indeed, perhaps even the very fact that aggression featured prominently during these negotiations – stemmed from its “unexpected birth” in 1944 with Chanler's intervention (2002: 2327).

The Soviet Union also concurred with the American and British view. In all of its draft proposals, the Soviet Union included aggression as a crime for which the Axis leaders would be tried for⁸¹. Furthermore, one of the Soviet Union's delegates at the negotiations was Professor Aron Naumovich Trainin, a Soviet expert of international law. In 1944, Trainin published a book entitled '*Hitlerite Responsibility under Criminal Law*', in which he argued Hitler, along with other German leaders, were guilty of having committed "crimes against peace". This term was used by Trainin to denote aggression, which he regarded as "the most dangerous international crime" (1944: 37)⁸². Offences against peace, he wrote, can be expressed in many forms, the direct and most dangerous form being aggression, the attack of one state on another (1944: 37). Trainin's ideas received considerable official attention, both within and beyond the Soviet Union: in Soviet quarters, it was viewed as a *de facto* official statement, while outside of the Soviet Union, it was circulated among officials in major capitals (Sellers 2013: 57). Soviet enthusiasm for an international crime of aggression at the London Conference, it has therefore suggested, was largely developed by Trainin on the basis of his own ideas (2004: 28). Trainin's ideas did not only inform the Soviet Union's official stance during the negotiations, however. As the records of the negotiations show, his book had been read by all of the main delegates present and they often referred to its ideas during their discussions on aggression.

France stood out as the only Allied Power who did not regard aggression as an international crime. As its representative argued:

⁸¹ 'Draft Showing Soviet and American Proposals in Parallel Columns' in Jackson Report *supra* note 71 (pg. 169); 'Redraft of Definition of "Crimes"', submitted by Soviet Delegation, July 23, 1945' in Jackson Report *supra* note 71 (pg. 327); and 'Redraft of Definition of "Crimes"', submitted by Soviet Delegation, July 25, 1945' in Jackson Report *supra* note 71 (pg. 373);

⁸² According to Sellers, Trainin was one of the earliest jurists who articulated the view that aggression represented an international crime and she disputes, therefore, Bush's (2002) view that the idea originally emerged in the US Department of War in 1944 (2013: 50). For a contrary view, see Bush, who dismisses Trainin's work, arguing that it is "unlikely to be the source for any new crime of aggressive war" because it is "based on Soviet legal premises" and is "simply confusing" (2002: 2349).

“We do not consider as a criminal violation the launching of a war of aggression. We think that in the next years any state which will launch a war of aggression will bear criminal responsibility morally and politically; but on the basis of international law as it stands today, we do not believe these conclusions are right. [...] The subject was often up for discussion in the League of Nations. It is said very often that a war of aggression is an international crime, as a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage. We think it will turn out that nobody can say that launching a war of aggression is an international crime – you are actually inventing the sanction”⁸³.

The statement importantly demonstrates that while France thought aggression might come to be regarded an international crime in the future – a situation which it viewed as “morally and politically desirable”⁸⁴ – this had not yet happened. As its representative went on to state, “The effort to make [a] war of aggression an international crime is still *tentative*”⁸⁵.

In the face of the three Allied Powers firmly maintaining aggression amounted to an international crime – without, it should be stressed, providing substantive reasons why – France found itself marginalized. And as it was unable to convince the other representatives of its position, France found itself having to accept that the prosecution of the Axis leaders would be based upon the criminal charge of aggression. This acceptance may very well have been calculated. As Sellers explains, France, along with the other Allies, had an interest in ensuring the US remained fully engaged in the legal and political reconstruction of Europe: if the US were to withdraw again into isolation, as it had after the previous war, the European Allies stood to lose American financial support and military security (2013: 89). An interest in perpetuating American international engagement, therefore, might explain why France – and perhaps even Britain – acquiesced to Jackson’s view that aggression amounted to an international crime. Consequently, almost no further debate on whether aggression was or was not an international crime ensued. Thereafter, the negotiations shifted towards finding

⁸³ ‘Minutes of Conference Session of July 19, 1945’ in Jackson Report *supra* note 71 (pg. 295)

⁸⁴ *Ibid.* (pg. 297)

⁸⁵ *Ibid.* (pg. 296) (emphasis added)

agreement on the legal basis of aggression's criminality, as well as the way it would be characterized in the trials that would take place.

2 THE BASIS OF AGGRESSION'S CRIMINALITY

Having agreed aggression amounted to an international crime, the Allied Powers found themselves having to consider the proper legal basis of aggression's criminality. Here, the discussion centred on determining the acts which aggression contravened. In other words, what was aggression a violation of – what particular principle, specific rule, or underlying norm? The Allied Powers held different views about this question, and their contrasting positions reveals important insights as to why they believed aggression represented an international crime.

The Soviet Union did not find this legal question particularly complex. In its view, an earlier statement collectively issued by the Allied Powers – the Moscow Declaration – had established aggression's criminality. As such, there was no need to ground the crime of aggression, as well as the prosecution of the Nazi leaders, in anything further⁸⁶. As the Soviet representative argued: “We are dealing here with the chief war criminals who have already been convicted and who conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offences which have been committed”⁸⁷. This made it absolutely clear that for the Soviet Union, the Nazi leaders were, even before a formal trial, already guilty. What simply remained was to provide for their punishment: “The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the

⁸⁶ ‘Minutes of Conference Session of June 29, 1945’ in Jackson Report *supra* note 71 (pg. 105); ‘Minutes of Conference Session of July 19, 1945’ in Jackson Report *supra* note 71 (pg. 303); ‘Minutes of Conference Session of July 25, 1945’ in Jackson Report *supra* note 71 (pg. 377)

⁸⁷ ‘Minutes of Conference Session of June 29, 1945’ in Jackson Report *supra* note 71 (pg. 105)

measure of guilt of each particular person and mete out the necessary punishment – the sentences”⁸⁸.

The Soviet Union’s reliance on the Moscow Declaration for aggression’s criminal basis was, however, somewhat tenuous. Although it declared the Allied Powers’ intention to bring the Nazi leaders to trial for the commission of atrocities during the war, nowhere in the Moscow Declaration was aggression – or indeed, its purported nature as an international crime – mentioned. Moreover, the Moscow Declaration, as Pompe notes, only indicated a plan to punish atrocities amounting to war crimes, an altogether different category of international crimes (1953: 178). The more important point to stress, however, is that in relying on the Moscow Declaration, the Soviet Union revealed that it regarded the criminality of aggression as a matter that simply required a declaration. This position was further underlined by the Soviet Union’s views on the prerogatives of the Allied Powers in relation to the establishment of the international military tribunal. In this regard, the Soviet representative stated that for the purposes of the trial of the Nazi leaders, the four powers had the competence to “declare certain acts to be criminal”⁸⁹. From the Soviet perspective, therefore, if the Allied Powers declared aggression to be an international crime, then its criminality would stem from such a declaration.

The Soviet Union was not alone in holding an international crime could simply come into existence through declaration. Jackson, as demonstrated, was also of the view that aggression could simply be criminalized by decisions of the Allied Powers. And like the Soviet Union, Jackson also took this to be a task that fell upon the negotiators of the London Conference themselves. When confronted by the question of the negotiators’ role vis-à-vis aggression’s

⁸⁸ ‘Minutes of Conference Session of July 19, 1945’ in Jackson Report *supra* note 71 (pg. 303)

⁸⁹ *Supra* note 78 (pg. 335)

position under international law, Jackson argued that “[W]e are a codification commission for the purposes of this trial as I see it”⁹⁰. If government representatives declare an act to be an international crime, this was tantamount to establishing its legal existence under international law, Jackson seemed to have suggested. However, unlike the Soviet Union, the US attached more importance to assigning a clear legal basis to aggression’s criminality. In particular, it was keen on grounding aggression’s criminality in some existing aspect of international law.

A review of the various proposals the US put forward in this regard demonstrates that it sought to base aggression’s criminality on, initially, it amounting to a “violation of international law”⁹¹; then, it representing a “breach of treaties, agreements, or assurances between nations”⁹²; subsequently, it amounting to a “violation of the principles of International Law and in breach of treaties”⁹³; and finally, that aggression amounted to a “violation of any international treaty, agreement, or assurance, or in particular, of the General Treaty for the Renunciation of War”⁹⁴. These proposals centralize how the US was keen on grounding aggression’s criminality in some existing aspect of international law. While this suggests the US viewed aggression’s criminality as stemming from its inherent illegality under international law, Jackson failed to clarify how or why aggression’s illegality was *simultaneously* criminal. In this regard, the records of the negotiations show that the step from illegality to criminality was never specifically raised by Jackson.

⁹⁰ *Ibid.*

⁹¹ ‘Revision of American Draft of Proposed Agreement, June 14, 1945) in Jackson Report *supra* note 71 (pg. 58)

⁹² ‘Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945’ in Jackson Report *supra* note 71 (pg. 121)

⁹³ ‘Draft Showing Soviet and American Proposals in Parallel Columns’ in Jackson Report *supra* note 71 (pg. 169)

⁹⁴ ‘Revision of Definition of “Crimes”, Submitted by American Delegation, July 31, 1945’ in Jackson Report *supra* note 71 (pg. 395)

Nevertheless, the desire to ground aggression's criminality in international law was noteworthy because it revealed a greater concern to impart legal legitimacy to the actions of the Allied Powers, especially when compared with the Soviet delegation. However, more basic political interests were also at play, which Jackson frankly disclosed to his fellow negotiators. More specifically, the motives for including a reference to international treaties was closely connected to American foreign policy in relation to the Second World War (Pompe 1953: 198). The US, Jackson explained, had participated in the war on the basis that Germany's resort to war was, firstly, illegal and secondly, that its illegality stemmed from it violating the Kellogg-Briand Pact⁹⁵. And it was on these grounds that American participation in the war had been justified to the American public. However, the American public widely expected a return to isolationism after the war's conclusion and as such, American involvement with Germany after the war required further justification (Sellers 20123: 88). Conceiving the crime of aggression specifically as a violation of the Kellogg-Briand Pact provided precisely that, a continuous policy rooted in upholding the principles of an international treaty the US had played a major role in establishing.

Britain was not opposed to associating aggression with international treaties such as the Kellogg-Briand Pact. However, it disagreed with the suggestion that aggression be regarded as a violation of the principle of international law. The reasons for this were simple: it would open up room for disputes during the trial of the Nazi leaders about which particular principle of international law was in question. The British delegate argued the following, on two separate occasions: "I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. [...] It should not be left to the Tribunal to say what is or

⁹⁵ 'Minutes of Conference Session of July 19, 1945' in Jackson Report *supra* note 71 (pg. 299); 'Minutes of Conference Session of July 25, 1945' in Jackson Report *supra* note 71 (pg. 383-384)

is not a violation of international law”⁹⁶. Subsequently, he stated: “What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won’t be any discussion on whether it is international or not”⁹⁷. Clearly, then, basing aggression’s criminality on a concrete international treaty would present itself discernible advantages. Firstly, it would ground the crime in positive international law, thereby mitigating possible charges that the Allied Powers ‘created’ the crime. In addition, it would also ensure the prosecution of the Nazi leaders would not be obstructed by legal arguments as to whether or not any violations of the principles of international law had in fact occurred.

As France did not regard aggression as a crime under international law, it opposed basing aggression’s purported criminality on international law itself. In its view, international law, as it stood then simply did not provide that aggression amounted to an international crime.

The alternative basis it suggested was the “practical results” flowing from aggression:

“[I]f you define their crimes according to their practical results, if you show that the Germany has been breaking treaties and as a result of that have annexed populations, run concentration camps, and violated international law by criminal acts against people, what you will condemn are those acts which in fact are criminal in all legislation, and you will condemn them for having directed those acts”⁹⁸.

The suggestion, then, was to ground aggression’s alleged illegality on its actual consequences, particularly because some of these amounted to crimes existing under domestic law. And indeed, France held the view that the reason why the Nazi leaders were being punished were precisely because of these domestic crimes: “It is what is in the aggression, what comes after the aggression, that makes really the necessity and the right of judging those men”⁹⁹.

⁹⁶ ‘Minutes of Conference Session of July 23, 1945’ in Jackson Report *supra* note 71 (pg. 328)

⁹⁷ ‘Minutes of Conference Session of June 29, 1945’ in Jackson Report *supra* note 71 (pg. 99)

⁹⁸ ‘Minutes of Conference Session of June 19, 1945’ in Jackson Report *supra* note 71 (pg. 299)

⁹⁹ ‘Minutes of Conference Session of July 25, 1945’ in Jackson Report *supra* note 71 (pg. 378)

France was also particularly opposed to grounding aggression's illegality on a mere declaration by the Allied Powers. The negotiation records demonstrate that France had two principal concerns in this regard. Firstly, any declaration by the Allied Powers that effectively sought to 'create' the crime of aggression that the Nazi leaders would be charged with would represent *ex post facto* legislation. France was particularly keen to avoid the criticism of "punishing something that was not actually criminal"¹⁰⁰, as well as to ensure the basis of the prosecutions were rooted in "safe"¹⁰¹ legal grounds. Relatedly, France did not regard the Allied Powers as having either the power or prerogative to create new international law. The very idea that the four representatives at the London Conference could single-handedly designate an act to be a criminal violation of international law was, in France's view, "shocking", as it purported to settle a question that had been disputed for years on the misguided view that the negotiators themselves had the authority of a codification commission of international law¹⁰². Secondly, it would expose the upcoming trials to the criticism of selective justice. Anticipating a key criticism that would later be levelled against the Nuremberg Trials, the French delegate stated:

"I am afraid of the public opinion which will take the whole work of the Tribunal, and I would prefer to have this result: "Well, the victors have decided to judge the vanquished, and they put it to the court and that court has judged them for crimes committed by the people in the service of the leaders." That is sensible, and you will get no adverse comment from anyone for the years to come. On the contrary, if you put in a declaration deeming something to be international law, and saying that launching a war of aggression is a violation, you will be criticized, and not by lawyers but by people who will make accusations that the result of the trial was made beforehand"¹⁰³.

What was eventually agreed upon amounted to a compromise: Britain's preference against a general reference to principles of international law was accepted; the US partially succeeded in associating aggression's criminality with an existing aspect of international law; and the Soviet Union, although it did not think it was necessary in the first place, countenanced the general

¹⁰⁰ *Supra* note 97

¹⁰¹ *Supra* note 98 (pg. 297)

¹⁰² 'Minutes of Conference Session of July 23, 1945' in Jackson Report *supra* note 71 (pg. 334)

¹⁰³ 'Minutes of Conference Session of July 25, 1945' in Jackson Report *supra* note 71 (pg. 378-379)

mention of violations to which aggression was associated. However, it seemed that France, once again, was forced to give way to majority sentiments. What was agreed upon, then, was that the planning, preparation initiation or waging of a war of aggression was, in and of itself, an international crime – clearly, a position that the Soviet Union, the US and Britain maintained. In addition, aggression amounted to a violation of international treaties, agreements or assurances. Although this fell short of American preference for an explicit reference to the Kellogg-Briand Pact – which was opposed by the Soviet Union on the grounds that it had not been a party to the international treaty¹⁰⁴ – the general reference to international treaties allowed aggression’s criminality to be associated with an existing aspect of international law.

3 CHARACTERIZING AGGRESSION

A final area of disagreement between the Allied Powers concerned the characterization of the international crime of aggression. Here, key differences principally emerged between the US and the Soviet Union over aggression’s definition, as well as its scope of applicability. The US felt it necessary that aggression be clearly defined. It not only urged the negotiators to “find and adopt proper language which would define what [they] mean when [they] charge a war of aggression”¹⁰⁵ but also formally proposed a definition of aggression¹⁰⁶. The desire to define

¹⁰⁴ ‘Minutes of Conference Session of July 20, 1945’ in Jackson Report *supra* note 71 (pg. 316); ‘Minutes of Conference Session of August 2, 1945’ in Jackson Report *supra* note 71 (pg. 416)

¹⁰⁵ ‘Minutes of Conference Session of July 17, 1945’ in Jackson Report *supra* note 71 (pg. 273)

¹⁰⁶ ‘Definition of “Aggression”, Suggested by American Delegation as Basis of Discussion, July 19, 1945’ in Jackson Report *supra* note 71 (pg. 294); The proposed definition was as follows:

“An aggressor, for the purposes of this Article, is that state which is the first to commit any of the following action:

- (1) Declaration of war upon another state;
- (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another state;
- (3) Attack by its land, naval, or air forces, with or without a declaration of war, of the territory of another state;
- (4) Naval blockade of the coasts or ports of another state;
- (5) Provision of support to armed bands formed in its territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression.”

aggression reinforced the American view that the creation of a new international crime was a prerogative that fell exclusively upon the Allied Powers themselves.

However, the need to connect the definition of aggression to a broader legal and prosecutorial strategy was clear and unmistakable. Without a definition, Jackson argued, “[t]here is a very real danger of [the] trial being used, or of an attempt being made to use it, for propaganda”, as the Nazi leaders would potentially use the trial to show their alleged acts of aggression were undertaken in defence and therefore, were entirely legitimate¹⁰⁷. It is instructive to quote Jackson’s further statements in this regard in full:

“Now Germany will undoubtedly contend, if we don’t put [a definition] in, that this wasn’t a war of aggression although it looked like it. They will say that in reality they were defending against encirclement or other remote menaces. Then you are in the whole political argument of who was doing what to whom in Europe before 1939”¹⁰⁸.

This, in turn, would “take lots of time and cause lots of trouble”¹⁰⁹. A definition was thus absolutely crucial for the US: “We either have to define it now, in which case it will end argument at the trial, or define it at the trial, in which case it will be the subject of an argument in which the Germans will participate; and it seems to me that it is much better that we face it now and preclude all of that argument”¹¹⁰.

Evidently, then, aggression needed to be characterized in a particular way in order to prevent legal disputes, to prevent the trial being unnecessarily prolonged and finally, to deny the Nazi leaders of a possible ground of defence. Embedded within these motivations were additional political concerns: the prevention of counter-charges being levelled against the Allied Powers themselves and the avoidance of domestic criticism of American participation in the Second

¹⁰⁷ *Supra* note 103

¹⁰⁸ ‘Minutes of Conference Session of June 19, 1945’ in Jackson Report *supra* note 71 (pg. 302)

¹⁰⁹ *Supra* note 103

¹¹⁰ *Supra* note 106

World War. From the US perspective, both these aims could be achieved by providing a definition of aggression. If aggression was defined in a way that did not cast European foreign policies in an unfavourable light, this would prevent European appeasement or collaboration with the Nazi regime from being scrutinized at the upcoming trials (Sellers 2013: 94; 98). This, in turn, would deprive isolationists in American domestic politics from the opportunity to criticize American involvement in Europe, both during and after the war, as amounting to unnecessary “entanglement in discreditable Old World affairs” (Sellers 2013: 94).

The Soviet Union, by contrast, was opposed to defining aggression. Despite holding the view that the Allied Powers were able to create the crime of aggression, this prerogative did not include defining aggression. Rather, this task was better suited for the United Nations. The matter of defining aggression, the Soviet representative stated, “does not enter into the competence of this commission [...] It would really be up to the United Nations or the security organization which has already been established to go into questions of that sort”¹¹¹. The question of competence, although certainly legitimate, was not the Soviet Union’s core concern, however; it also stressed defining aggression would be extremely difficult.

Pointing out how the United Nations Charter, which had been recently concluded at the San Francisco Conference, had not defined aggression despite referring to it on several occasions, the Soviet delegate argued:

“We looked through the Charter of the United Nations once again and observed that, while aggression is mentioned several times, it is not defined anywhere. Apparently this is due to the fact that aggression has become sort of a formula in itself. Apparently, when people speak about “aggression”, they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time”¹¹².

¹¹¹ ‘Minutes of Conference Session of June 19, 1945’ in Jackson Report *supra* note 71 (pg. 303)

¹¹² ‘Minutes of Conference Session of June 23, 1945’ in Jackson Report *supra* note 71 (pg. 328)

The above statement proved to be prescient, as the quest for defining the international crime of aggression, the next chapter demonstrates, was a project that spanned close to an entire century. While it may have been true that reaching agreement on aggression's definition would have been difficult, the Soviet Union's opposition to defining aggression stemmed also from its view the punishment of the Nazi leaders was the more immediate, pressing concern. It was not particularly interested, therefore, in deciding on provisions on aggression for the future or, as its delegate put it, "draft[ing] a code which could be applied at all times and under all circumstances"¹¹³.

Britain and France were similarly opposed to according aggression with a definition. And here, an unstated goal of preserving their future status – one which the Soviet Union also shared – was at play. Within the new international order marked by the UN system, the Soviet Union, France and Britain all possessed a privileged role as permanent members of the new Security Council, which was assigned with the maintenance of international peace and security. In this regard, the Security Council was given the right to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and make "recommendations" or take "measures" in order "to maintain or restore international peace and security"¹¹⁴. As the next chapter will demonstrate more fully, the term 'aggression' was intentionally left undefined in the UN Charter, particularly because it was felt the Security Council members should have the freedom to determine the existence of aggression without being constrained by rigid or strict definitional criteria. Mindful of the privileged powers they had acquired through the UN Charter, the three powers did not wish to create a "competing source of authority" with regards to the notion of aggression (Sellers 2013: 99-100). A definition of aggression agreed upon at

¹¹³ 'Minutes of Conference Session of June 25, 1945' in Jackson Report *supra* note 71 (pg. 382)

¹¹⁴ Article 39 of Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

the London Conference would potentially constitute a rival conceptualization of aggression which, in turn, would undermine the three powers' freedom of action and dilute the privileges and prerogatives they had recently acquired (Sellers 2013: 100).

The Soviet Union's preoccupation with how aggression would immediately feature in the upcoming trials against the Nazi leaders, as opposed to how it might come to feature in international law in the future, was also evident from its insistence that the international crime be directly linked to the European Axis Powers – and importantly, to them only. Throughout the entire negotiations, the Soviet Union pushed for aggression to be conceived as a crime that was committed specifically and exclusively by the European Axis Powers¹¹⁵. For the Soviet Union, therefore, aggression should assume a restricted and circumscribed character; it should have an *ad hoc* character and be applicable *only* to the European Axis Powers (Pompe 1953: 197; Sellers 2013: 101).

Explicitly limiting the crime of aggression to the Axis Powers also served an important political interest, one which was collectively shared by the Soviet Union, Britain and France: the preservation of their status within the international order. Having emerged as the victors of the war, the Soviet Union, Britain and France were keen to preserve their moral high ground against the Axis Powers. Clearly, an *ad hoc* crime of aggression applicable only to the Axis Powers would facilitate this, as it would guarantee Allied actions and operations during the war would be immune from scrutiny (Brownlie 1983: 163; Grzebyk 2013: 91; Sellers 2013: 102). A crime of aggression, tailored specifically towards the Axis Powers and with a specific set of

¹¹⁵ 'Aide-Memoire from the Soviet Government June 14, 1945' in Jackson Report *supra* note 71 (pg. 61); 'Draft Showing Soviet and American Proposals in Parallel Columns' in Jackson Report *supra* note 71 (pg. 168); 'Redraft of Definition of "Crimes", Submitted by Soviet Delegation, July 23, 1945' in Jackson Report *supra* note 71 (pg. 327); 'Redraft of Definition of "Crimes", Submitted by Soviet Delegation, July 25, 1945' in Jackson Report *supra* note 71 (pg. 373)

defendants in mind, would therefore serve an important political function: “it “allow[ed] the Allies to distance themselves from their pre-war accommodation of the Nazi regime and thereby establish their legacy of an unblemished ‘good war’ against fascism” (Sellers 2013: 159).

The US found this position difficult to accept. As Robert Jackson argued, “If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us”¹¹⁶. The criticism of partiality and unfairness was also levelled against the Soviet proposal: “[O]ur definition would sound pretty partial if we are defining an act as a crime only when it is carried out by the Axis powers. That is what I have in mind: If it is a good rule of law, it should bind us all, and if not, we should not invoke it at this trial.”¹¹⁷. The key considerations arguably at play here concerned aggression deserving a *universal* character, as opposed to a narrowly circumscribed one. In other words, aggression ought to be an international crime that all states, be they victors or the vanquished, could be equally responsible for. It seems plausible to suggest, moreover, that in prescribing a universal crime, the US was attempting to secure aggression a place beyond the trials themselves. Put differently, it was keen on ensuring the crime of aggression would exist beyond the specific context of the upcoming trials and become a permanent feature of the post-war international order. Although Jackson did not explicitly articulate this, it is consistent with his previous statements about the role the Allied Powers had in developing new principles of international law through constructing the crime of aggression.

¹¹⁶ ‘Minutes of Conference Session of June 23, 1945’ in Jackson Report *supra* note 71 (pg. 330)

¹¹⁷ *Ibid.* (pg. 336)

Ultimately, the US was unable to garner support for its vision of aggression's character from Britain or France. And consequently, the Soviet Union's views as to how aggression ought to be characterized prevailed: aggression would not only have restricted application, but it would also remain undefined for the purposes of the upcoming trials. The Soviet Union was also able to convince the other negotiators to replace the term 'aggression' with that of "crimes against peace"¹¹⁸. This term originated from Professor Trainin's book, which he had employed to designate the crime of aggression, and the suggestion was not opposed by the other delegates.

In Article 6(a) of the Charter of the International Military Tribunal, aggression, now re-branded as 'crimes against peace', denoted the

"planning, preparation, initiation, or waging of a 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"¹¹⁹.

And as the opening clause of Article 6 provided, aggression was firmly designated as a crime that the major war criminals of the *European Axis countries* would be prosecuted and tried for¹²⁰. Aggression was not, in other words, a universal crime with general application; rather, it was deemed a crime for the specific purpose of prosecuting the Nazi leaders at the IMT, in the German town of Nuremberg.

International Military Tribunal

After the Charter of the IMT had been negotiated, the trials of the Nazi leaders took place between 20 November 1945 and 1 October 1946. In its judgment, the IMT made three central legal pronouncements about 'crimes against peace'. Firstly, it unequivocally stated aggression

¹¹⁸ 'Minutes of Conference Session of August 2, 1945' in Jackson Report *supra* note 71 (pg. 416)

¹¹⁹ *Supra* note 17

¹²⁰ *Ibid*; The other crimes falling under the jurisdiction of the International Military Tribunal were war crimes and crimes against humanity, see Articles 6(a) and 6(b) of the Charter of the International Military Tribunal, *supra* note 17

is an international crime. Apart from condemning aggressive wars as a grave act with adverse international consequences, it also characterized aggression as the worst possible international crime that could be committed or, as Schabas has put it, “the apex of the pyramid of wrongdoing” (2004: 18). In the words of the Tribunal:

“The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, 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”¹²¹.

The second pronouncement concerned the basis of aggression’s criminality. Aggression was criminal for two reasons, the IMT stated. Firstly, aggression represented a “violation of international treaties”¹²² – and here, it relied on the wording of Article 6(a) of the IMT Charter, which, as demonstrated, explicitly provided that aggression represented a “violation of international treaties, agreements, or assurances”¹²³. In addition, aggression amounted to an international crime by virtue of a series of pacts and treaties concluded during the interwar period¹²⁴. The IMT, as explained earlier, held the view that aggression had been criminalized before the outbreak of the Second World War and to support of this view, it relied upon various draft agreements and resolutions of the League of Nations.

Finally, the IMT held that aggression is an international crime for which individuals can be held personally responsible. In the oft-cited words of the Tribunal’s Judgment:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”¹²⁵

¹²¹ *Supra* note 54 (pg. 186) (emphasis added)

¹²² *Ibid.* (pg. 217)

¹²³ Article 6(a) of Charter of the International Military Tribunal, *supra* note 17

¹²⁴ *Supra* note 54 (pg. 220)

¹²⁵ *Supra* note 54 (pg. 221)

With this, the Tribunal introduced the central principle that the entire corpus of modern international criminal law now rests upon: *individual criminal responsibility*. In doing so, the Tribunal made it clear that only *individuals* – and not states – can be held liable for criminal violations of international law. This, in turn, signalled the end of the classic doctrine of international law, whereby only states possessed international legal personality in international law (Jescheck 2004: 43). The Tribunal’s introduction of individual criminal responsibility was an important and influential contribution to international law, for the principle has since become an “unassailable foundation” (Kelly and McCormack 2008: 103) and the “unchallenged cornerstone of the entire edifice” (Tomuschat 2006: 840) of international criminal law.

With these pronouncements, the doubts during the London Conference – and indeed, during the interwar period as a whole – as to, firstly, whether or not aggression amounted to an international crime and secondly, what represented the basis of aggression’s criminality, were put to rest. From this moment on, that aggression was both an illegal and criminal act under international law would come to be accepted as a mainstream view. More crucially, what emerged as a central aspect of this mainstream view was the belief that aggression’s criminalization stemmed from developments leading up to the Nuremberg Trials. For some, the Charter of the IMT represented the source of aggression’s criminalization, while for others, the Tribunal’s Judgment was instructive, particularly because it had the status of binding international law.

Was aggression criminalized in the years leading up the Nuremberg Trials?

To put it differently, did aggression acquire the status of an international crime because of developments leading up to the Nuremberg Trials? Yes, according to many commentators. For some, the Nuremberg Charter represents the source of aggression’s criminalization (Wright

1946; UNWCC 1948; Pompe 1953; Lukashuk 1990; Leanza 2004; Schabas 2004; Cryer 2005; Kelly and McCormack 2006; Cassese 2007; Zolo 2007; Drumbl 2009; Dinstein 2011; Grzebyk 2013; Sellers 2013; Werle and Jessberger 2014). In the view of these writers, aggression attained its status as an international crime when the Allied Powers concluded the London Agreement, wherein the Nuremberg Charter was annexed thereto.

In this regard, the views of the UNWCC – who, it will be recalled, had previously been unable to agree upon aggression’s status as an international crime – are worth highlighting. In its report published in 1948, the UNWCC eventually settled on the view that aggression was an international crime before the outbreak of the Second World War¹²⁶. More crucially, it also expressed the view that the Nuremberg Charter was an especially important landmark in the criminalization of aggression: “The Nuremberg Charter is an international act which definitely provided the last link in the [historical] development [of aggression], namely, it not only authoritatively rendered aggressive war an international crime, but made it in addition a crime *punishable* by an international tribunal”¹²⁷. Sellers, in fact, takes a slightly different position to the conventional view that the UNWCC, as well as other writers, commonly adopt – namely, that 8 August 1945, the date when the Nuremberg Charter was signed, represents the moment when aggression was criminalized. In contrast, she argues that aggression’s criminalization can be dated to six decisive days at the end of June 1945 because during this period, disagreements between the Allied Powers over the charge of aggression finally gave way to unanimity, thereby allowing for the successful conclusion of the London Conference (2013: 111).

¹²⁶ *Supra* note 59 (pg. 245; 253-254)

¹²⁷ *Ibid.* (pg. 246) (original emphasis)

Two factors strengthen the view that the Nuremberg Charter criminalized aggression. Firstly, despite having been drafted exclusively by the four Allied Powers, the London Agreement and the Nuremberg Charter annexed therein constituted a “multilateral international legislative document” (Pompe 1953: 240). In this regard, nineteen states¹²⁸ subsequently adhered to the London Agreement after its conclusion. This demonstrates how nineteen other governments, despite having no impact on the content of the agreement or on the legal proceedings at Nuremberg, consented to the ideas and principles expressed in the Nuremberg Charter (Pompe 1953: 240; Grzebyk 2013: 95). In particular, it represents strong evidence that these states accepted aggression’s status as an international crime. Important confirmation of this acceptance lies, according to Brownlie, in the fact that a number of these states went as far as incorporating Article 6(a) of the Nuremberg Charter into their national laws is (1983: 176).

A further factor that supports the view that aggression was criminalized by the Nuremberg Charter is the fact crimes against peace, as enunciated in the Charter, found immediate application beyond the Nuremberg Trials themselves. The International Military Tribunal of the Far East (Tokyo Tribunal)¹²⁹, which was established by the Allied Powers in January 1946 to prosecute former Japanese political and military leaders for aggression, war crimes and crimes against humanity, drew heavily on the Nuremberg Charter’s conception of aggression. In this regard, the Tokyo Charter’s description of crimes against peace was copied from the wording of Article 6(a) with minor modifications¹³⁰. The nucleus of Article 6(a) was also reiterated, with some variation, in Article II(1)(a) of Allied Control Council Law No. 10¹³¹,

¹²⁸ The nineteen states were Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

¹²⁹ ‘International Military Tribunal of the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946’ (Tokyo Charter), TIAS No 1589, 4 Bevans 20

¹³⁰ Article 5(a) of Tokyo Charter

¹³¹ ‘Allied Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, an Against Humanity, December 20 1945’, 3 Official Gazette of the Control Council for Germany 50-55 (1946)

which allowed for lower-level German war criminals to be prosecuted in the occupied zone of Germany.

While not understating the Nuremberg Charter's significance, some commentators point, rather, to the Nuremberg Judgment as the source of aggression's criminalization (Lukashuk 1990; Griffiths 2002; Boevig 2005; Gomaa 2004; Leanza 2004; Fournet 2006; Ferencz 2007; O'Donovan 2007; Simpson 2007; Wilson 2009; Sayapin 2014; Werle and Jessberger 2014; Kemp 2016). For some of these writers, the Nuremberg Judgment operationalized the principles contained within the Nuremberg Charter. As Pompe argues,

“Without the subsequent judgment of the Nuremberg Tribunal the rules formulated in the Charter would never have come within the domain of international law. The definition of the crimes finally reached may have had the form of general law, the Charter as such remained none the less an *ad hoc* legal instrument, and without acceptance and implementation by the Tribunal it would no doubt have been added to that pile of documents, draft conventions, proposals and resolutions on international criminal law and jurisdiction which before the war expressed and entertained the aspirations of many international lawyers and others, without having any direct legal significance” (1953: 203; original italics).

Meanwhile, others have emphasized how the Judgment contributed towards the development of new international law. In this regard, Sayapin (2014: 160) suggests the Tribunal's Judgment testifies to the formation of an “instant custom” on the criminality of aggression, while Werle and Jessberger argue the Nuremberg Judgment is “the starting point for the established *opinio juris* of the international community that waging aggressive war is criminal” and that it “contributed to the creation of customary international law criminalizing the preparation and waging of aggressive war” (2014: 535; original italics). Consider, too, the views of Tomuschat (2006: 839), who states the Judgment “translated the core values of the leading states [regarding aggression] into the provisions of a criminal code”. Such views are supported by the fact that the Judgment was endorsed and followed by subsequent tribunals, namely the Tokyo Tribunal and the tribunals that took place under Allied Control Council Law No. 10 (Pompe 1953: 203;

Dinstein 2011: 129). That these tribunals upheld the Nuremberg Judgment's pronouncements on aggression demonstrates that they were recognized as legally authoritative statements.

It is undeniable that the Allied Powers accorded aggression with legal import by inserting 'crimes against peace' within the Nuremberg Charter. Moreover, it is true that the Nuremberg Trials, and the judgment that followed, represented the first international judicial prosecution for 'crimes against peace'. But as important as these developments were, they did not, it is submitted here, amount to the criminalization of aggression. More specifically, the developments leading up to the Nuremberg Charter and the Nuremberg Judgment did not result in what this thesis suggests constitutes the first stage of international criminalization, namely, the development of an international criminal norm. For two main reasons, an international criminal norm against aggression cannot be said to have emerged during the years when the Nuremberg Charter was concluded and the Nuremberg Judgment was delivered.

First, aggression was not recognized by international society as an international crime before the outbreak of the Second World War in 1939. Importantly, this non-criminal status continued to persist in the years immediately following the end of the war, years that witnessed the conclusion of the Nuremberg Charter and the delivery of the Nuremberg Judgment. As already argued, the developments of the interwar period resulted only in the outlawing of aggression. While aggression was regarded as being illegal, it was not thought of as also being an international crime. Notwithstanding opposite claims, the fact remains that when the Nuremberg Charter was drawn up and after the Nuremberg Trials had been concluded, aggression was simply an illegal act – a violation of international law.

At the start of and during the proceedings of the London Conference, therefore, aggression was not an international crime – a fact that was rightly insisted upon by France. Assertions to the contrary – particularly by the US during the London Conference – do not alter this crucial fact. Although it proved to be influential, the American assertion that aggression amounted to an international crime, as well as British, Soviet and French acquiescence to this position, were politically motivated. Great Power insistence that aggression amounted to an international crime served a web of political interests and goals that the great powers found important to secure in the post-war international order. It was not any factual change to do aggression's status that informed Great Power consensus on aggression's criminality, therefore; this came down entirely to political imperatives. The very fact that a provision on 'crimes against peace' came to feature in the Nuremberg Charter was down to Robert Jackson, the London Conference and politics (Schabas 2004: 29). And as Kemp argues, the actual provision on 'crimes against peace' was the result of differing concerns about the "content of a *crime* that was at that stage all but established under international law" (2016: 83; original italics)

The subsequent affirmation of the Great Powers' position by the Nuremberg Judgment similarly does not alter the fact, evidenced by the historical record, that aggression was not an international crime when war broke out in 1939. In fact, the Tribunal's conclusion – that aggression amounted to an international crime because the Kellogg-Briand Pact and the series of draft treaties and resolutions that preceded it made it both illegal and criminal – was fundamentally misplaced. On this issue, this thesis agrees with the criticism some commentators have levelled against the Nuremberg Judgment, namely, that its pronouncements on the criminality on aggression, as well as the basis of its criminality, were incorrect (Hula 1946a; Finch 1947; Gross 1947; Schick 1947; Schick 1948; Pompe 1953; Jescheck 2004; Cryer

2005; Kelly and McCormack 2008; May 2008; Glennon 2010; Dinstein 2011; Schmitt 2011; Grzebyk 2013; Werle and Jessberger 2014).

Many legal scholars, as highlighted earlier, are of the view that the Kellogg-Briand Pact neither transformed nor declared aggression to be an international crime (Hula 1946a; Glueck 1946; Finch 1947; Gross 1947; Schick 1947; Schick 1948; Pompe 1953; Jescheck 2004; Cryer 2005; Fournet 2006; Kelly and McCormack 2008; May 2008; Schmitt 2011; Werle and Jessberger 2014; Sellers 2013; Murphy 2015; Kemp 2016). For these writers, the Tribunal erred in construing the Kellogg-Briand Pact as a basis for aggression's criminality. Some writers have also taken issue with the Tribunal's reliance on interwar draft treaties and resolutions as further grounds for regarding aggression having been criminalized by virtue of the conclusion of the Kellogg-Briand Pact (Finch 1947; Gross 1947; Schick 1947; Schick 1948; Pompe 1953). None of these draft treaties and resolutions, in the view of these writers, were legally binding and as such, the legal significance the Tribunal attached to them was, to use Schick's words, "legally untenable" (1947: 784; 1948: 457). They represented neither "evidence to prove the evolution of an international custom" (Finch 1947: 26) and nor did they "disclose on the part of the governments concerned the necessary consent to or acquiescence in" (Gross 1947: 219) the principle that aggression was not merely illegal but also criminal.

To suggest that the Nuremberg Tribunal and Judgment reversed aggression's non-criminal status is to hold the view that an international crime can simply come into existence through the declarations of a select number of states and a subsequent legal judgment that affirms this. By contrast, this thesis suggests wider and deeper consensus within international society on an act's status as an international crime is needed before an international criminal norm can be said to have come into existence. In the case of aggression, there needed to be 'thicker' or

‘deeper’ agreement about its criminality and crucially, the historical record demonstrates this was notably absent.

There is evidence to suggest US officials themselves were cognizant of the need for greater international consensus on aggression’s criminality, an important point not often emphasized in the existing literature on aggression’s historical development. In a report to President Truman after the Nuremberg Tribunal had delivered its judgment, Francis Biddle – a United States member of the Nuremberg Tribunal – wrote the following:

“The time is therefore opportune for advancing the proposal that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind. Such action would perpetuate the vital principle that war of aggression is the supreme crime”¹³².

Following this, the US initiated a resolution at the General Assembly (GA) of the UN aimed at reaffirming the principles of international law recognized by the Nuremberg Charter and the Nuremberg Judgment¹³³. The desire to obtain broader international support for the way the Charter and the Judgment conceived of aggression centralizes how aggression’s status as an international crime was, even upon the conclusion of the Nuremberg Trials, not beyond dispute.

A further reason why an international criminal norm against aggression cannot be said to have been established by virtue of the Nuremberg Charter and the Nuremberg Judgment is that ‘crimes against peace’ was a legal charge without universal application. It was, as explained earlier, specifically characterized as a restricted and circumscribed crime: it applied only to the European Axis Powers. The decision to construct a crime with a “particular set of defendants

¹³² ‘Prosecution of Major Nazi War Criminals: Report from Francis Biddle to President Truman’ in US Department of State Bulletin, Vol 15 (1946), pg. 954-957 (Washington: Office of Media Services, Bureau of Public Affairs) (at 956-957)

¹³³ UNGA Sixth Committee ‘Sixth Committee, Delegation of the United States, Resolution Relating to the Codification of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal’ (15 November 1946) UN Doc A/C.6/69

in mind” was entirely deliberate (Grzebyk 2013: 95). As demonstrated, this choice was similarly grounded in political interests, namely, the desire to shield Allied actions from scrutiny and in doing so, ensuring their moral stature as the defeaters of Nazism would remain unblemished. This, then, was an undeniable instance of selective justice, a criticism commonly levelled against the Nuremberg proceedings. Crimes against peace did not apply to the nationals of the Allied Powers and indeed, those who planned or initiated the aggressive acts of the Allied States were not prosecuted (Schick 1948: 463; May 2008: 149). The obvious omissions of war-time events implicating the Allied Powers from the Tribunal’s proceedings – such as the conclusion of the Molotov-Ribbentrop Pact, a non-aggression pact between the Soviet Union and Germany, or British and French plans to invade Norway – made it far from an impartial trial (Finch 1947: 26-28; Sellers 2013: 149-160).

The more interesting point to emphasize, however, is that the novel legal charge introduced by the IMT Charter was denied general legal application. Rather, it was a crime that was, as Simpson puts it, “highly specific to the Nazi State” (2007: 149). While this meant, as Simpson argues further, crimes against peace had the “virtue of being tailored to the Nazi case”, it also gave it the “vice of being inapplicable to ordinary cases in which force was employed in the international system” (2007: 149). When seen alongside the fact that there have been no further international prosecutions for aggression since Nuremberg, Tokyo and the tribunals conducted under Allied Control Council No 10, it is evident that crimes against peace found application only in relation to the Axis Powers and in context of the Second World War. As Sellers has put it, the Allied Powers’ experiment with crimes against peace was “an historical anomaly” that was “born of the peculiar circumstances of the closing phases of the Second World War” (2013: 259). This makes it difficult, therefore, to see ‘crimes against peace’ as having established an international criminal norm against aggression. There was nothing universal about crimes

against peace. Rather, it operated with limited legal application and within an especially particular context:

“Thus the Nuremberg rule on crimes against peace, if somewhat more closely analysed, is not so much what any law is meant to be, that is, a general rule to be generally applied, but rather what [amounts to] *une loi de circonstance*. In other words, the Nuremberg rule on crimes against peace aims exclusively at a definite group of purposely selected men” (Hula 1946a: 17; original italics).

To conclude, the developments leading up to the IMT Charter and its Judgment did not result in the criminalization of aggression. The first stage of international criminalization, the development of an international criminal norm against aggression, did not emerge during this period for two main reasons. Firstly, aggression was simply not a crime when war broke out in 1939 and contrary to mainstream views, neither the IMT Charter nor its Judgment, in themselves, could reverse this historical fact. At most, the Nuremberg Charter and the Judgment heralded the prosecution of an entirely novel legal charge but crucially, a clear international consensus that crimes against peace constituted an international criminal act was absent at this stage. Secondly, in so far the IMT Charter and its Judgment is evidence of the prosecution of this novel legal charge, this was nevertheless one without universal and general legal application. Far from constituting an international criminal norm against aggression, crimes against peace was an ad hoc legal charge aimed exclusively at the Axis Powers for acts committed during a specific context, namely, the course of the Second World War.

**AFFIRMATION OF THE NUREMBERG PRINCIPLES:
AN INTERNATIONAL CRIMINAL NORM AGAINST AGGRESSION (1946)**

After the conclusion of the Nuremberg Trials, aggression found its way into the UN because of a US proposal¹³⁴ to affirm the principles of international law recognized by the Nuremberg Charter and Nuremberg Judgment. Through its Sixth (Legal) Committee, the GA took up the

¹³⁴ *Ibid.*

matter, whereupon a special subcommittee¹³⁵ convened over the course of three meetings in early December 1946 to study the US proposal.

The records of these meetings – the contents of which generally do not feature in conventional accounts of aggression’s historical development – reveal there was virtually no disagreement over the US proposal¹³⁶. Instead, the subcommittee members were mainly preoccupied with improving the wording of the US proposal. This agreement is worth emphasizing, particularly because these meetings represented the very first discussions on an international level that had a bearing on aggression’s further development immediately after the Nuremberg Trials. These meeting records represent, therefore, evidence of an initial desire on the part of an international body to ensure the principles espoused at Nuremberg would find more universal application and significance.

In its report to the Sixth Committee, the subcommittee recommended the GA adopt a resolution to affirm the principles of international recognized by the Nuremberg Charter and Judgment¹³⁷. This course of action was subsequently approved by the Sixth Committee, which then presented a draft resolution to the GA¹³⁸. The GA unanimously approved this resolution and consequently,

¹³⁵ This subcommittee consisted of representatives of the following countries: Belgium, Canada, China, Cuba, Czechoslovakia, Egypt, Norway, USSR, United Kingdom and United States.

¹³⁶ UNGA Sixth Committee ‘Sixth Committee: Sub-Committee 1, Summary Record of the Twelfth Meeting, Held at Lake Success, New York, on Tuesday, 3 December, at 11:00 a.m.’ (5 December 1946) UN Doc A/C.6/Sub.1/W.35; UNGA Sixth Committee ‘Sixth Committee: Sub-Committee 1, Summary Record of the Thirteenth Meeting, Held at Lake Success, New York, on Wednesday, 4 December, at 4:00 p.m.’ (5 December 1946) UN Doc A/C.6/Sub.1/W.34; UNGA Sixth Committee ‘Sixth Committee: Sub-Committee 1, Summary Record of the Fourteenth Meeting, Held at Lake Success, New York, on Wednesday, 5 December, at 11:00 a.m.’ (5 December 1946) UN Doc A/C.6/Sub.1/W.36

¹³⁷ UNGA Sixth Committee ‘Sixth Committee, Draft Report and Proposed Resolution Relating to the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, Adopted by Sub-Committee 1’ (4 December 1946) UN Doc A/C.6/116

¹³⁸ UNGA Sixth Committee ‘Progressive Development of International Law and its Codification, Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, Report of the Sixth Committee’ (10 December 1946) UN Doc A/236

Resolution 95(I) was adopted on 11 December 1946¹³⁹. The text of the resolution is concise: after noting that international military tribunals were established in Nuremberg and Tokyo, it goes on to state that the GA “Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal”¹⁴⁰. Evidently, the resolution does not expressly declare exactly what these principles are. By virtue of another resolution adopted the following year, the GA entrusted the task of formulating these principles to the then newly established International Law Commission (ILC)¹⁴¹.

Despite its brevity, the resolution was significant for aggression’s historical development. Nonetheless, there are differing views as to what this significance is. The resolution, it has been suggested, indicates political support for the principles on which the major war criminals were tried (Jessup 1947: 2); demonstrates acceptance of the law of Nuremberg as part of the existing law of the international community (Stone 1958: 319); signifies approval of the Nuremberg Charter as an expression of international law (Brownlie 1983: 190); elevated the pronouncements made at Nuremberg into norms of international law that are binding on all states (Lukashuk 1990: 133); and attests to how developments at Nuremberg now amount to customary international law (Cryer 2005: 49). While broadly endorsing these positive views, this thesis takes a slightly different position and suggests that Resolution 95(I)’s primary significance is that it heralded the completion of one aspect of aggression’s first stage of international criminalization, namely, the development of international agreement on aggression’s status as an international crime.

¹³⁹ UNGA ‘Fifty-fifth Plenary Meeting’ (11 December 1946) UN Doc A/PV.55; Resolution 95(I), *supra* note 19

¹⁴⁰ *Supra* note 19

¹⁴¹ UNGA ‘Resolution 177(II) Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal’ (21 November 1947) UN Doc A/RES/177

In this regard, Resolution 95(I) constitutes evidence that aggression took on the status of an international crime. Moreover, the resolution attests to the development of an international criminal norm against aggression, given the widespread agreement on aggression's status as an international crime. Prior to this, agreement over aggression's criminality was primarily confined to the Allied Powers and the 19 states who subsequently adhered to the London Agreement. By affirming the principles of international law recognized by the Nuremberg Charter and Judgment, therefore, the resolution signalled a clear message that broader global acceptance existed on the notion that aggression constitutes an international crime. In particular, the resolution indicates the firm desire on the part of states that aggression's character, established for the purposes of the Nuremberg Trials, should undergo a fundamental change. Rather than being confined to a legal charge that applied only to the former Axis Powers in connection with the Second World War, it ought to be internationalized. Put differently, aggression ought to be, from this moment on, a universal crime with general application to all contexts and circumstances.

Resolution 95(I) can thus be relied upon as a marker of aggression's international criminalization for two main reasons. Firstly, it represented the very first pronouncement to be made on aggression's criminality by an international body. The UN as a whole had never before pronounced itself on the Nuremberg Trials and as such, the resolution constituted its first action in this field (Pompe 1953: 318). The members of the GA at this time included fifty-five states¹⁴² and when seen alongside the fact that the resolution was adopted unanimously and without

¹⁴² The members of the General Assembly at this time included delegations from the following states: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, South Africa, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, and Yugoslavia.

debate, it is difficult to deny its importance. While GA resolutions do not constitute a source of international law, the contention here is that Resolution 96(1) expressed international consensus that aggression constitutes an international crime. It thus paved the way for the emergence of an international criminal norm against aggression and, ultimately, aggression's full criminalization.

Secondly, far from remaining merely a hortatory or symbolic pronouncement, Resolution 95(I) formed the basis for further international action within the UN on aggression. As highlighted earlier, the ILC was tasked with formulating the principles of international law recognized by the Nuremberg Charter and Judgment. This was accomplished in 1950 and in a report to the GA, the ILC presented seven principles of international law based upon the Nuremberg Charter and Judgment¹⁴³. Principle VI expressed aggression's status as an international crime: "crimes against peace" are "punishable as crimes under international law"¹⁴⁴. The ILC was also charged with preparing a draft code of offenses against the peace and security of mankind¹⁴⁵ for the GA's consideration, which was completed in 1954¹⁴⁶. Here, again, the criminality of aggression was re-affirmed: offences against the peace and security of mankind were deemed crimes under international law and aggression was included as one of these offences¹⁴⁷.

Mention should also be made of the subsequent establishment of UN special committees to study the question of defining aggression between the years 1952 and 1974; these efforts at reaching definitional consensus over aggression will be explored in the following chapter. All

¹⁴³ 'Report of the International Law Commission to the General Assembly, Document A/1316, Report of the International Law Commission covering its second session, 5 June – 29 July 1950' in Yearbook of International Law Commission [1950] Vol. II at pg. 364 (pgs. 374-378).

¹⁴⁴ *Ibid.* (pg. 376)

¹⁴⁵ *Supra* note 138

¹⁴⁶ 'Report of the International Law Commission to the General Assembly, Document A/2693, Report of the International Law Commission covering the work of its sixth session, 3 June – 28 July 1954' in Yearbook of International Law Commission [1954] Vol. II at pg. 140 (pgs. 149-152).

¹⁴⁷ *Ibid.* (pg. 151)

of this demonstrates that the consensus expressed in Resolution 95(1) over aggression's status as an international crime was given practical effect. It not only formed the basis of, but also concretely generated, further international action on aggression. That these subsequent efforts were all carried out by other UN bodies shows, furthermore, that aggression's criminality was both entrenched and embedded within international society at the time. Resolution 95(1) represents, therefore, cogent evidence of international acceptance that aggression amounts to an international crime.

The view suggested here departs from conventional legal accounts of aggression's criminalization, which tends to accord Resolution 95(I) with a marginal place within aggression's historical development. Legal commentators tend not to rely too heavily on Resolution 95(I) because it is far from clear, from their perspective, what the GA intended exactly by adopting the resolution. For instance, it has been debated whether the resolution represents confirmation that the Nuremberg Charter is being recognized as a part of international law; whether it merely expresses moral support for the Nuremberg proceedings and their outcome; or whether it implies the Nuremberg Charter could not become a part of international law until there had been further study, formulation and approval of its core principles (Brownlie 1983: 189). In addition, the wording of the resolution, as Sellers explains, invited more questions than it answered:

“If the Charter and the Judgment recognised pre-existing principles of international law, why then was it necessary for the Assembly to ‘affirm’ those principles? And why did the Assembly direct a new legal body to ‘formulate’ principles that had apparently already been formulated by the Tribunal?” (2013: 173)

Although the resolution does receive a passing mention in legal accounts, it is generally seen as having less importance than international treaties, for the simple reason that, as suggested above, GA resolutions are not legally binding and they do not constitute sources of international law. International treaties, by contrast, are a source of international law: they can introduce legal

principles and legal obligations that become legally binding upon states. Accordingly, legal accounts tend to treat either the Kellogg-Briand Pact or the Nuremberg Charter as the source of aggression's criminalization. Reflecting on conventional legal accounts of aggression's historical development, Bush states that

“International lawyers today have a narrative, a founding myth about the crime of aggressive war. It was first applied as a crime, they relate, at Nuremberg. Maybe it stood on slightly shaky ground there, since Kellogg-Briand did not expressly create a crime, but the treaty had come close enough to doing so. Nuremberg created the precedent for the aggression charge, and afterward the judgments, including those about aggressive war, were widely endorsed” (2002: 2387)

Bush disputes these legal narratives, arguing that aggression's story is “far more serpentine and interesting than the lawyers would have it” (2002: 2388). What is often omitted from accounts of aggression's history, Bush's study shows, are the role of micro-level developments, like the role of individuals such as William Chanler. While the accounts of historians such as Bush exposes the influence of domestic political developments upon the London Conference, they say very little about the concept that lies at the heart of aggression's historical development, namely, that of international criminalization. Many writers assume that it is synonymous with the conclusion of an international treaty that promulgates the existence of an international crime. The suggestion here, by contrast, is that if we avoid conceiving international criminalization as an exclusively legal phenomenon involving international codification and instead, view it as entailing the development of an international criminal norm and the translation of this norm into an international legal proscription, a different story about aggression's history emerges.

In the alternative account put forward in this thesis, aggression's criminalization did *not* begin with the conclusion of either the Kellogg-Briand Pact or the Nuremberg Charter. It began, rather, with the development of an international criminal norm against aggression. Importantly, this only emerged *after* the two aforementioned international treaties, when the GA adopted

Resolution 95(I) after the conclusion of the Nuremberg Trials. This is not to suggest that aggression's considerable history prior to this resolution is insignificant and indeed, Resolution 95(I) should not be viewed in isolation. For one, the resolution's adoption is all the more significant if we appreciate how developments in the years following the First World War, the interwar years, and the years immediately after the Second World War did not result in the criminalization of aggression. Moreover, it can also be argued that the resolution may not have been adopted had the Nazi leaders not been prosecuted for crimes against peace in Nuremberg after the Second World War.

Aggression certainly featured prominently during the three historical periods surveyed in this chapter. Emerging initially as a political notion at the end of the First World War, aggression subsequently evolved into a legal concept. Its legal existence then progressed in three distinct developments: firstly, aggression became a legal concept by virtue of being mentioned and included within the Covenant of the League of Nations; secondly, aggression became an international prohibited act after being outlawed by the Kellogg-Briand Pact; and finally, aggression emerged as a prosecutable legal charge after it was included as a crime within the jurisdiction of the Nuremberg Tribunal. Important as these developments were, they fell short, this chapter has sought to demonstrate, of transforming aggression into an international crime. In the analysis presented here, aggression was not criminalized earlier because the necessary international agreement on aggression's status – that it constituted an international criminal act – was simply lacking prior to the adoption of the GA's resolution.

Resolution 95(I) expressed international consensus on aggression's status and consequently, aggression moved into a novel chapter of its historical development: advancement into an international criminal norm. This was only the very first step in that evolution, however. Aside

from international agreement on status, an international criminal norm also required agreement on the particular *form* an act should assume as an international crime. In this regard, Resolution 95(1) was limited to international consensus over aggression's status. As the following chapter demonstrates, international agreement on aggression's form would come very much later and after many more decades of international debate and discussion – and it is towards exploring how and why aggression acquired its form as an international crime that we can now turn to.

5

**THE CRIMINALIZATION OF AGGRESSION:
AGGRESSION'S FORM AS AN
INTERNATIONAL CRIME**

The first stage of aggression's international criminalization began, the previous chapter argued, with the emergence of an international criminal norm against aggression, a development that is attributable to the adoption of Resolution 95(I) by the General Assembly (GA) of the United Nations (UN) on 11 December 1946. However, aggression still lacked precise form at this stage and it is to the question of when, how and why international agreement on aggression's form was achieved that this chapter turns. In doing so, the chapter demonstrates that agreement on aggression's form required defining two distinct notions of aggression for two separate purposes: firstly, the notion of '*political aggression*' for the purpose of international peace and security and secondly; the notion of '*criminal aggression*' for the purposes of international criminal law. Defining these two notions of aggression, it will be shown, did not amount to a single endeavour. Rather, two separate definitional enterprises were involved: efforts to define political and criminal aggression occurred at different junctures within aggression's historical development.

Efforts to define political aggression began in 1945 but a definition was only agreed upon on 14 December 1974, when the GA adopted Resolution 3314 (Definition of Aggression)¹. In the case of criminal aggression, the road towards an international legal definition was markedly longer. Here, attempts began in 1949 but international consensus on a definition was only reached in 2010, following the adoption of Article 8*bis* – an amendment to the Rome Statute

¹ UNGA 'Resolution 3314 (XXIX) Definition of Aggression' (14 December 1974) UN Doc A/RES/3314

of the International Criminal Court (ICC) (Rome Statute)² – by state parties at the first Review Conference of the Rome Statute in Kampala, Uganda on 11 June 2010. These two junctures in aggression’s history – 1974 and 2010 – jointly represent, this chapter argues, the moments when finality on aggression’s form was achieved. Relatedly, Resolution 3314 and Article 8*bis* together constitute the markers of international consensus on aggression’s form. The argument advanced here suggests there was not *one* critical moment when aggression’s form was agreed upon. Rather, two distinct moments, which are considerably separated in time, are of equal significance.

This departs from existing accounts of aggression’s historical development, which tend to treat the adoption of Article 8*bis* as the decisive moment when an international legal definition of aggression was established. When surveying the history of international efforts to define aggression, such accounts view developments between the years 1945 to 2010 as part of a singular historical effort, one which eventually culminates with the formulation of Article 8*bis*. However, this linear narrative is fundamentally misplaced. Crucially, it fails to distinguish between two distinct notions of aggression, namely, political aggression and criminal aggression. In turn, it does not sufficiently demonstrate how and why developments in the political and criminal streams proceeded separately and according to different imperatives, before eventually coinciding towards the endpoint of aggression’s path towards international criminalization.

Accordingly, the chapter is structured in two parts. The first part examines political aggression and it surveys international efforts between 1945 and 1973 that were directed at defining

² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute)

aggression for the purpose of international peace and security: the drafting of the UN Charter (1945); the International Law Commission (1950); the Sixth Committee of the GA (1952); and four Special Committees on the Question of Defining Aggression, established by GA between 1953 and 1974. The second part of the chapter turns to criminal aggression and focuses on the following initiatives that were aimed at defining aggression for the purpose of international criminal law between 1981 and 2010: the preparation of a Draft Code of Offences against the Peace and Security of Mankind by the International Law Commission (1981-1996); international negotiations in Rome (Rome Conference) to establish the ICC (1998); and the preparatory work undertaken by the Special Working Group on the Crime of Aggression in the lead-up to the Review Conference of the ICC in Kampala, Uganda (2010). The chapter closes with a discussion on why international agreement on the definitions of political and criminal aggression collectively represent the two moments when international consensus on aggression's form was achieved.

**POLITICAL AGGRESSION:
A DEFINITION FOR INTERNATIONAL PEACE AND SECURITY (1945-1974)**

Attempts to define political aggression began after the Second World War and more specifically, with the drafting of the UN Charter³ in 1945. This largely came about because the term 'aggression' was introduced into draft provisions within the UN Charter dealing with the collective security arrangements that would structure the post-war international order. Although the opportunity to define political aggression was consciously shelved at this point, this initial reluctance did not conclusively settle the matter. Rather, the missed opportunity in 1945 set into motion a series of further attempts, which stretched over the course of close to thirty years, to define political aggression. All throughout, the quest to define political

³ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

aggression was centred on the UN Charter and its core provisions on the maintenance of international peace and security. While this linked the definitional project with efforts to ensure the effectiveness of collective security arrangements, it also made it difficult to reconcile demands for a definition with the different political interests that coalesced around particular provisions of the UN Charter. As this section will show, various attempts to define political aggression in the 1950s and the 1960s were ultimately unsuccessful and international consensus on a definition was only reached in 1974.

United Nations Charter (1945)

The notion of aggression acquired legal and political significance in the post-war international order due to its inclusion in the international treaty that established the UN. The word ‘aggression’ features in two separate provisions of the UN Charter: Article 1⁴, which lays down the fundamental purposes of the UN, and Article 39⁵, which gives the Security Council its power and responsibility to maintain international peace and security. Nevertheless, the term ‘aggression’ is not defined in the UN Charter. This was a deliberate decision made when the governments of fifty states met at the San Francisco Conference to discuss the drafting of the UN Charter. Before this conscious choice was made, however, states were divided over whether aggression should be defined in the UN Charter.

⁴ Article 1(1) states one of the core purposes of the UN is “[t]o 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 of international disputes or situations which might lead to a breach of the peace.” (emphasis added)

⁵ In terms of Article 39, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of *aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” (emphasis added)

A grouping of small states – including Colombia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico, New Zealand and Uruguay – favoured a clear definition⁶. Three states also submitted concrete proposals: Czechoslovakia⁷; Bolivia⁸; and the Philippines⁹. Defining aggression was

⁶ United Nations Conference on International Organization, ‘Commission III – Security Council, Committee 3 Enforcement Arrangements, Summary Record of Ninth Meeting of Committee III/3’, Document 442, III/3/20 (May 19, 1945), Vol 12: pg. 341-342

⁷ The Czech definition read as follows:

“The aggressor in an international conflict shall, subject to the arrangements in force between the parties to the dispute, be considered to be that State which is the first to commit any of the following actions:

- 1) Declaration of war upon another State;
- 2) Invasion by its armed forces, with or without declaration of war, of the territory of another State;
- 3) Attack by its land, naval, or air-forces, with or without declaration of war, on the territory, vessels, or aircraft of another State;
- 4) Naval-blockade of the coasts or ports of another State;
- 5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive these bands of all assistance or protection.”

United Nations Conference on International Organization, ‘Observations of the Czechoslovak Government on the Dumbarton Oaks Proposal’, Document 2, G/14(b) (May 1, 1945), Vol 3: pg. 466-471

⁸ The Bolivian definition read as follows:

“A state shall be designated an aggressor if it has committed any of the following acts to the detriment of another state.

- a) Invasion of another state's territory by armed forces.
- b) Declaration of war.
- c) Attack by land, sea, or air forces, with or without declaration of war, on another state's territory, shipping, or aircraft.
- d) Support given to armed bands for the purpose of invasion.
- e) Intervention in another state's internal or foreign affairs.
- f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.
- g) Refusal to comply with a judicial decision lawfully pronounced by an International Court.”

United Nations Conference on International Organization, ‘Proposals of the Delegation of the Republic of Bolivia for the Organization of a System of Peace and Security’, Document 2, G/14(r), (May 5, 1945), Vol 3: pg. 577-586

⁹ The definition by the Philippines’ read as follows:

“Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts:

- 1) To declare war against another nation;
- 2) To invade or attack, with or without declaration of war, the territory, public vessel, or public aircraft of another nation;
- 3) To subject another nation to a naval, land or air blockade; and
- 4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation.”

United Nations Conference on International Organization, ‘Proposed Amendments to the Dumbarton Oaks Proposal Submitted by the Philippine Delegation’, Document 2, G/14(k), (May 5, 1945), Vol 3: pg. 535-539

essential, these states argued, for considerations of certainty and predictability¹⁰. Efficacy was also put forward as a further reason and it was suggested that the duties of the Security Council concerning international peace and security would be facilitated if a definition were included in the Charter. Here, the Bolivian delegate stated the “failure to specify [acts of aggression] detracts from the effectiveness and celerity of the system of world security for the urgent and timely repression of aggression”¹¹.

Underpinning these publicly stated considerations was an unsurprising desire to limit the powers of the Security Council’s permanent members (Grzebyk 2013: 44). Smaller states, as Wilson explains, were reluctant to give the Security Council “broad, sweeping discretionary powers”, as they feared it would allow them to justify action in circumstances that were more politically expedient to their interests (2009: 74). Yet, this concern coexisted with a recognition that allocating powers to the Security Council also represented the best way these smaller states could preserve their own security. Given that they were more vulnerable, smaller states advocated that the Security Council would be forced into taking action if certain specified acts of aggression had been committed. Defining aggression clearly, in their view, would make it more likely that there would be an immediate response from the Security Council (Solera 2007: 52). A definition of aggression, therefore, simultaneously served two interests: it would constrain the actions of the Security Council but it would also ensure the Security Council acted in all cases where international security was threatened.

On the other hand, the major powers – China, the Soviet Union, the United Kingdom and the United States – were opposed to defining aggression - and they were joined by a small grouping

¹⁰ *Supra* note 6.

¹¹ United Nations Conference on International Organization, ‘Commission III – Security Council, Committee 3 Enforcement Arrangements, Summary Record of Tenth Meeting of Committee III/3’, Document 502, III/3/22 (May 23, 1945), Vol 12: pg. 348-349.

of smaller states, including the Netherlands, Paraguay, Norway, and the Union of South Africa¹². Their opposition was based, firstly, on the view that it was impossible to enumerate all of the acts that might constitute aggression. Any list would necessarily be incomplete and in order to prevent the omission of potential acts of aggression, it would be simpler to determine aggression after it had been committed¹³. It was further argued that a pre-determined list of aggressive acts would compel the Security Council to act automatically in all cases of aggression¹⁴. This was seen as dangerous, as it might force premature collective action. What was deemed preferable, rather, was to give the Security Council the discretion to act after having decided if an act of aggression had been committed¹⁵.

Ultimately, these sentiments proved influential: no definition of aggression would be included in the UN Charter and the Security Council would be given complete discretion to determine what constituted an act of aggression¹⁶. In the official report that outlined the debates on this matter, two main justifications for this decision were offered. Firstly, it was stated that the evolving techniques of modern warfare made it difficult to specify in advance, through a definition, what acts might constitute aggression¹⁷. Moreover, it was contended that the San Francisco Conference was not the adequate forum to conduct negotiations on a definition of aggression and relatedly, that the UN Charter was not a suitable document for the definition of aggression¹⁸. This latter argument was not without merit. As Solera explains, the UN Charter was primarily conceived as a document to lay down the “constitutive body of norms of international law” and the general principles, organizational procedures and state obligations

¹² *Supra* note 6

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ United Nations Conference on International Organization, ‘Commission III – Security Council, Committee 3 Enforcement Arrangements, Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII Section B’, Document 881, III/3/46 (June 10, 1945), Vol 12: pg. 502-514.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

of the new post-war international order (2007: 62). A detailed definition of aggression, therefore, would not have been in the spirit of the UN Charter, which also leaves many other terms that feature therein – such as ‘threats to the peace’, ‘breaches of the peace’, and ‘use of force’ – undefined.

Given the competing interests between the great powers and the smaller powers, an outcome that favoured the former is perhaps unsurprising. Indeed, smaller states understood that the effectiveness of the new collective security system being established depended upon the active participation of the Security Council’s permanent members (Solera 2007: 54). Some degree of acquiescence to their wishes was thus inevitable. What is perhaps more surprising, however, is that despite no discernible consensus over what aggression fundamentally meant, the notion was consciously introduced into the institutional architecture of the post-war international order, where it was associated with one of the Security Council’s core responsibilities. This, as we will see, coloured subsequent attempts to define political aggression, as future debates would increasingly pivot around different perspectives on the powers of the Security Council. For those who wanted aggression to be defined, it was hoped such a definition could constrain what might otherwise be the unfettered powers of the Security Council. Meanwhile, opponents of a definition preferred the Security Council to have the freedom to label an act as aggression based upon appraisals conducted on a case-by-case basis.

International Law Commission (1950)

Established in 1947¹⁹, the International Law Commission (ILC) was created by the GA in order to promote the progressive development and codification of international law²⁰. One of the

¹⁹ UNGA ‘Resolution 174 (II) Establishment of an International Law Commission’ (21 November 1947) UN Doc A/RES/174(II)

²⁰ Article 1 of the Statute of the International Law Commission (adopted by the General Assembly in Resolution 174(II), *supra* note 19)

initial tasks assigned to the ILC centred on criminal aggression. As the second part of this chapter will demonstrate, the GA tasked the ILC with formulating, firstly, the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal (Nuremberg Principles), and secondly, preparing a Draft Code of Offences against the Peace and Security of Mankind (Draft Code)²¹. However, as a result of early Cold War tensions, the ILC also found itself having to examine political aggression.

After the outbreak of hostilities on the Korean peninsula in 1950, the Security Council condemned North Korea's armed attack on the Republic of Korea as a breach of the peace²². In response, the Soviet Union accused the United States and the Republic of Korea of being the aggressors (Lippman 2004: 1033). This early superpower confrontation brought the question of defining political aggression into the open because two states – Yugoslavia and the Soviet Union – formally submitted proposals before the GA on the determination of aggressors in international hostilities. Yugoslavia proposed a mechanical criteria for determining an aggressor: if it is engaged in hostilities, a state will automatically be considered an aggressor unless it publicly proclaims within twenty-four hours its readiness to declare a cease-fire and to withdraw its forces within forty-eight hours of the cease-fire²³. Meanwhile, the Soviet Union proposed that a state which is the first to commit one of the following specified acts – a declaration of war, invasion, bombardment, naval blockade and the landing of forces in another state without permission – would automatically constitute an aggressor²⁴.

²¹ UNGA 'Resolution 177(II) Formulation of the Principles Recognized in the Charter of the *Nürnberg* Tribunal and in the Judgment of the Tribunal' (21 November 1947) UN Doc A/RES/177(II)

²² UNSC 'Resolution 82 (1950) Complaint of Aggression upon the Republic of Korea' (25 June 1950) UN Doc S/RES/82 (1950)

²³ 'Duties of States in the Event of Hostilities' UN Doc A/C.1/604

²⁴ 'Union of Soviet Socialist Republics: Draft Resolution on the Definition of Aggression' (4 November 1950) UN Doc A/C.1/608

The ILC was subsequently asked by the GA to examine the Soviet Union's proposal²⁵. The matter was initially taken up by the ILC's Special Rapporteur (Jean Spiropoulos), who prepared a special report on the question²⁶. After reviewing unsuccessful attempts at defining aggression during the interwar period²⁷, the Special Rapporteur concluded it was neither possible nor desirable to define aggression. The notion of aggression, he argued, "is not susceptible of definition"²⁸. Moreover, any definition that might be formulated would amount to "an artificial construction" for two reasons: firstly, it was not possible to determine in advance which behaviour constitutes aggression; and secondly, the subjective element of aggression – aggressive intention – could not be captured down by a definition²⁹. Spiropoulos also argued that international practice demonstrated that when governments had to determine whether the behaviour of a particular state amounted to aggression, such determinations were based upon the subjective opinions of the individual governments concerned³⁰. Any specific criteria for what constitutes aggression that might have been established beforehand features in such decisions³¹. In sum, concrete cases of aggression did not lend themselves to definition but rather, were "instinctively perceived"³².

However, other ILC members disagreed with the Special Rapporteur, with many arguing it was both possible and desirable to define aggression. A number of definitions were therefore

²⁵ UNGA 'Resolution 378(V)(B) Duties of States in the Event of Outbreak of Hostilities' (17 November 1950) UN Doc A/RES/378(V)(B)

²⁶ 'Chapter II (Annex) The Possibility and Desirability of a Definition of Aggression' in 'Draft Code of Offences Against the Peace and Security of Mankind, Document A/CN.4/44, Second report by Mr. J. Spiropoulos, Special Rapporteur', Yearbook of International Law Commission [1951] Vol. II at pg. 43 (pg. 60)

²⁷ *Ibid.* (pgs. 61-66)

²⁸ *Ibid.* (pg. 69)

²⁹ *Ibid.* (pg. 68)

³⁰ *Ibid.*

³¹ *Ibid.*

³² Yearbook of International Law Commission [1951] Vol. I (pg. 89)

proposed³³ and thereby discussed over the course of various sessions. A draft formulation was eventually agreed upon, with political aggression being defined as follows:

“Aggression is the threat or use of force by a State or government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations”³⁴.

Nevertheless, when the ILC members voted on this definition, it was rejected³⁵. Consequently, the ILC reported back to the GA without a proposal for the latter to consider. In its report to the GA, the ILC explained the draft definition was regarded as unsatisfactory for the following

³³ The various proposed definitions read as follows:

“Any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations was an aggressive war” (submitted by Mr. Gilberto Amado); Yearbook of International Law Commission [1951] Vol. I at pg. 108

“Aggression is the use of force by one State or group of States, or by any Government or group of Governments, against the territory and people of other States or Governments, in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations”; ‘Question of Defining Aggression, Document A/CN.4/L.8, Proposal by Mr. Ricardo J. Alfaro’, Yearbook of International Law Commission [1951] Vol. II at pg. 33 (pg. 37)

“For the purposes of Article 39 of the United Nations Charter an act of aggression shall be understood to mean any direct or indirect use of violence (force) by a State or group of States against the territorial integrity or political independence of another State or group of States.

Violence (force) exercised by irregular bands organized within the territory of a State or outside its territory with the active or passive complicity of that State shall be considered as aggression within the meaning of the preceding paragraph.

The use of violence (force) in the exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter or in the execution of a decision duly adopted by a competent organ of the United Nations shall not be held to constitute an act of aggression.

No political, economic, military or other consideration may serve as an excuse or justification for an act of aggression” (submitted by Mr. Jesus Maria Yepes); Yearbook of International Law Commission [1951] Vol. II at pg. 132

“Aggression, that is, the direct or indirect employment by the authorities of a State or armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations. The threat of aggression should also be deemed to be a crime under this article.”; ‘Question of Defining Aggression, Document A/CN.4/L.10, Proposal by Mr. Roberto Cordova’, Yearbook of International Law Commission [1951] Vol. II at pg. 40

“Aggression, which is a crime under international law, is the hostile act of a State against another State, committed by (a) the employment of armed force other than in self-defence or the implementation of United Nations enforcement action; or (b) the arming of organised bands or of third States, hostile to the victim State, for offensive purposes; or (c) the fomenting of civil strife in the victim State in the interest of some foreign State; or (d) any other illegal resort to force, openly or otherwise”; ‘Question of Defining Aggression, Document A/CN.4/L.11, Proposal by Mr. Shushi Hsu’, Yearbook of International Law Commission [1951] Vol. II at pg. 40

“Aggression is an offence against the peace and security of mankind. This offence consists in any resort to force contrary to the provisions of the Charter of the United Nations, for the purpose of modifying the state of positive international law in force or resulting in the disturbance of public order” (submitted by Mr. Georges Scelle); Yearbook of International Law Commission [1951] Vol. II at pg. 133

³⁴ ‘Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951’, Document A/1858’ in Yearbook of International Law Commission [1951] Vol. II at pgs. 123-137 (pg. 133)

³⁵ *Ibid.*; The definition was rejected by 7 votes to 3.

reasons: it did not embrace all conceivable acts of aggression and its application might result in undue restrictions upon the freedom of action of UN organs³⁶.

The Sixth Committee of the General Assembly (1952)

As the ILC was unsuccessful in defining political aggression, the matter was reverted back to the GA – this time, to its legal committee, the Sixth Committee. The discussions within the Sixth Committee were lengthy, particularly because the committee was composed of representatives of sixty different states³⁷. Moreover, as these discussions represented the first time a diverse grouping of states collectively confronted the question of defining political aggression, genuine points of disagreement emerged as the discussion unfolded. As this section will detail, two key areas of contention, which exposed different political concerns over aggression's form, centred on the necessity of a definition and its substantive content.

1 THE NECESSITY OF A DEFINITION OF AGGRESSION

Two positions emerged within the Sixth Committee over whether political aggression ought to be defined. One group of states favoured a definition: this included three of the Security Council's permanent members – China, France and the Soviet Union – and a large grouping of non-Western states from the developing world. For these states, the underlying necessity of defining aggression was inextricably linked to the maintenance of international peace and security under the UN's system of collective security. Article 39 of the UN Charter, which assigned responsibility for determining the existence of an act of aggression to the Security

³⁶ *Ibid.*

³⁷ The Sixth Committee was composed of representatives of the following sixty UN member states: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Israel, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, Sweden, Syria, Thailand, Turkey, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yemen and Yugoslavia.

Council, was therefore a key focal point. Moreover, as the term ‘aggression’ was not defined in the UN Charter, a definition would usefully provide the Security Council with the criteria that could guide its determination of whether an act of aggression has occurred.

The following statement articulated by the Polish delegate is representative of this view:

“[A] definition [of aggression] was all the more necessary under the existing system of collective security. The Security Council, charged with the maintenance of international peace and security, should be given guidance to enable it to determine the aggressor in specific cases. A definition would facilitate the work of international organs and make collective security more effective; it would also be a warning to potential aggressors. [...] The collective security system required and would benefit from a definition of aggression, and the task of the Security Council under Article 39 of the Charter would thereby be facilitated”³⁸.

Concurring with this view was a large grouping of Latin American, Eastern European and Asian states: Chile³⁹, Byelorussian Soviet Socialist Republic⁴⁰, Poland⁴¹, Bolivia⁴², Burma⁴³, Cuba⁴⁴, China⁴⁵, Czechoslovakia⁴⁶, Uruguay⁴⁷, the Soviet Union⁴⁸,

³⁸ UNGA Sixth Session Official Records ‘Sixth Committee, 283rd Meeting, Friday, 11 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 181) at pgs. 181-182

³⁹ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 168; UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 173) at pg. 178;

⁴⁰ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 169; UNGA Seventh Session Official Records ‘Sixth Committee, 339th Meeting, Tuesday, 2 December 1952, at 3.20 p.m., Headquarters, New York’ UN Doc A/C.6/SR.339 (pg. 199) at pg. 199

⁴¹ UNGA Sixth Session Official Records ‘Sixth Committee, 283rd Meeting, Friday, 11 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 181) at pg. 183; UNGA Seventh Session Official Records ‘Sixth Committee, 337th Meeting, Friday, 28 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.337 (pg. 187) at pg. 188

⁴² UNGA Sixth Session Official Records ‘Sixth Committee, 284th Meeting, Friday, 11 January 1952, at 3.25 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 187) at pg. 187

⁴³ *Ibid.* at pg. 191

⁴⁴ UNGA Sixth Session Official Records ‘Sixth Committee, 285th Meeting, Monday, 14 January 1952, at 10.55 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.285 (pg. 193) at pg. 196; UNGA Seventh Session Official Records ‘Sixth Committee, 334th Meeting, Tuesday, 25 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.334 (pg. 169) at pg. 173

⁴⁵ *Ibid.* at pg. 197

⁴⁶ UNGA Sixth Session Official Records ‘Sixth Committee, 286th Meeting, Monday, 14 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.286 (pg. 199) at pg. 200; UNGA Seventh Session Official Records ‘Sixth Committee, 333rd Meeting, Monday, 24 November 1952, at 10.45 a.m., Headquarters, New York’ UN Doc A/C.6/SR.333 (pg. 165) at pg. 165-166

⁴⁷ UNGA Sixth Session Official Records ‘Sixth Committee, 288th Meeting, Wednesday, 16 January 1952, at 3.30 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.288 (pg. 211) at pg. 211

⁴⁸ *Ibid.* at pg. 212; UNGA Seventh Session Official Records ‘Sixth Committee, 331st Meeting, Friday, 21 November 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.331 (pg. 153) at pg. 153

Yugoslavia⁴⁹, Ukrainian Soviet Socialist Republic⁵⁰, Iran⁵¹, Egypt⁵², Afghanistan⁵³, Indonesia⁵⁴, Thailand⁵⁵, Peru⁵⁶, and Haiti⁵⁷.

A definition was perceived as having three principal advantages. Firstly, it would enable the Security Council to take quicker action under the UN Charter, thereby enhancing its effectiveness in discharging its responsibilities in matters of international peace and security. As the Swedish delegate argued, without “objective and easily identifiable criteria”, prompt decisions and sanctions against an aggressor would be hindered⁵⁸. In a similar vein, the Bolivian delegate argued a definition would “enable the Security Council to speed up its examination of a given situation” and “make it possible to avoid both the obstacle of the [Security Council’s] veto and lengthy discussions in the General Assembly”⁵⁹.

⁴⁹ UNGA Sixth Session Official Records ‘Sixth Committee, 289th Meeting, Thursday, 17 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.289 (pg. 217) at pg. 221-222; UNGA Seventh Session Official Records ‘Sixth Committee, 334th Meeting, Tuesday, 25 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.334 (pg. 169) at pg. 169-170; UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 184

⁵⁰ UNGA Sixth Session Official Records ‘Sixth Committee, 290th Meeting, Friday, 18 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.290 (pg. 223) at pg. 223; UNGA Seventh Session Official Records ‘Sixth Committee, 340th Meeting, Thursday, 4 December 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.340 (pg. 201) at pg. 201

⁵¹ *Ibid.* at pg. 227; UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 149

⁵² UNGA Sixth Session Official Records ‘Sixth Committee, 291st Meeting, Saturday, 19 January 1952, at 11 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.291 (pg. 231) at pg. 231-232

⁵³ UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 145

⁵⁴ *Ibid.* at pg. 146

⁵⁵ UNGA Seventh Session Official Records ‘Sixth Committee, 335th Meeting, Tuesday, 25 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.335 (pg. 175) at pg. 175

⁵⁶ UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 182

⁵⁷ *Ibid.* at pg. 183

⁵⁸ UNGA Seventh Session Official Records ‘Sixth Committee, 332nd Meeting, Saturday, 22 November 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.332 (pg. 161) at pg. 161

⁵⁹ UNGA Sixth Session Official Records ‘Sixth Committee, 284th Meeting, Friday, 11 January 1952, at 3.25 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 187) at pg. 187

Secondly, a definition would have important deterrent value. As a definition would make it clear what acts constituted aggression, this would provide advance warning to potential aggressors that their actions amounted to aggression⁶⁰; it would put obstacles in the way of a potential aggressor, thereby postponing the imminence of an act of aggression⁶¹; it would rouse world opinion against aggression⁶²; and finally, it would make it more difficult for governments to claim their acts of aggression were justified on particular pretexts⁶³.

A third advantage, articulated mainly by smaller states, centred on protection within the international system. Characterizing aggression as a “privilege of the powerful”, the Indonesian delegate argued that a definition would “protect the independence of weak peoples” by preventing the abuse of power in relation to weaker states⁶⁴. Pointing out that smaller states were “always the first victims of aggression” and that they often lacked the strength and resources to defend themselves from threats to their independence, the Iranian delegate argued that a definition of aggression would make it possible to identify and enable prompt action against aggressors⁶⁵. Finally, the Syrian representative argued the “dominated peoples” of the world regarded a definition of aggression as a “means of emancipation”, as it would help to reaffirm the sovereign equality of newly independent states⁶⁶.

⁶⁰ UNGA Sixth Session Official Records ‘Sixth Committee, 283rd Meeting, Friday, 11 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 181) at pgs. 182; UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 149

⁶¹ UNGA Sixth Session Official Records ‘Sixth Committee, 289th Meeting, Thursday, 17 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.289 (pg. 217) at pg. 219

⁶² UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 185

⁶³ UNGA Sixth Session Official Records ‘Sixth Committee, 289th Meeting, Thursday, 17 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.289 (pg. 217) at pg. 222

⁶⁴ UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 146

⁶⁵ UNGA Sixth Session Official Records ‘Sixth Committee, 290th Meeting, Friday, 18 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.290 (pg. 223) at pg. 227

⁶⁶ UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 182

A second bloc of states – consisting of Western states (Australia, Belgium, Canada, Denmark, Greece, the Netherlands, Sweden, UK and USA) and a number of Latin American, Asian and African states (Argentina, Brazil, Haiti, India, Liberia, Peru, Panama, Philippines, South Africa, Uruguay and Venezuela) – were opposed to defining aggression. Their opposition was grounded in four central reasons.

The first concerned aggression's perceived nature and characteristics. Here, some argued aggression was "inherently incapable of precise definition"⁶⁷ and that it could not be "satisfactorily defined"⁶⁸. As the Greek delegate put it, "a definition of aggression would always be artificial because it would inevitably leave out some possible cases of aggression and at the same time include certain acts which, if considered in their proper context, would not be felt by the conscience of the international community as being acts of aggression at all"⁶⁹. Similarly, the American delegate argued that any definition would be incomplete because "all the situations an aggressor might devise and all the complicated factors involved in aggression" could not be covered by a single definition⁷⁰. A definition would not succeed in adequately capturing the notion of aggression in its entirety. Meanwhile, others pointed out how the definitional task would be additionally complicated by the way in which aggression was always in flux. As the Norwegian⁷¹, Canadian⁷², Brazilian⁷³ and Venezuelan⁷⁴ delegates

⁶⁷ UNGA Sixth Session Official Records 'Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris' UN Doc A/C.6/SR.281 (pg. 165) at pg. 166

⁶⁸ UNGA Sixth Session Official Records 'Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris' UN Doc A/C.6/SR.282 (pg. 173) at pg. 174

⁶⁹ UNGA Sixth Session Official Records 'Sixth Committee, 279th Meeting, Monday, 7 January 1952, at 3.30 p.m., Palais des Chaillot, Paris' UN Doc A/C.6/SR.279 (pg. 153) at pg. 155

⁷⁰ UNGA Sixth Session Official Records 'Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris' UN Doc A/C.6/SR.282 (pg. 173)

⁷¹ UNGA Seventh Session Official Records 'Sixth Committee, 337th Meeting, Friday, 28 November 1952, at 3 p.m., Headquarters, New York' UN Doc A/C.6/SR.337 (pg. 187) at pg. 193

⁷² UNGA Seventh Session Official Records 'Sixth Committee, 339th Meeting, Tuesday, 2 December 1952, at 3.20 p.m., Headquarters, New York' UN Doc A/C.6/SR.339 (pg. 199) at pg. 200

⁷³ UNGA Seventh Session Official Records 'Sixth Committee, 332nd Meeting, Saturday, 22 November 1952, at 10.30 a.m., Headquarters, New York' UN Doc A/C.6/SR.332 (pg. 161) at pg. 163

⁷⁴ UNGA Seventh Session Official Records 'Sixth Committee, 329th Meeting, Wednesday, 19 November 1952, at 3.10 p.m., Headquarters, New York' UN Doc A/C.6/SR.329 (pg. 141) at pg. 143

argued, aggression was constantly changing and evolving. The key concern here was that new forms of aggression could develop in the future and that these could not be captured by a fixed, static definition. As the Australian delegate put it: “Aggression was constantly developing and taking newer and subtler forms and, as there was no reason to believe that that process of evolution had ceased, any definition would inevitably contain gaps and dangers”⁷⁵.

Secondly, a definition was opposed because it would limit the Security Council’s powers under Article 39. A definition, it was feared, would require the Security Council to automatically determine instances of aggression on the basis of a definition. This, it was argued, would bring “rigidity and artificiality” to the Security Council’s task, when what was required was “broad realism and practical judgment”⁷⁶. A rigid definitional formula, moreover, was unsuitable for complex and delicate political situations of international peace and security, which required the Security Council to examine every case in light of its own merits⁷⁷. As the Belgian delegate aptly maintained:

“To seek to circumscribe within a rigid formula the innumerable political situations to which such a definition should be applicable would be to sacrifice truth and reality to purely artificial simplicity. It would be preferable in so complex and delicate a field to have a formula allowing all the relevant facts to be taken into consideration at their true value, if it was desired to obtain a correct view of reality which might bring about a just determination of responsibilities in case of conflict between States. It seemed rash to attempt to base the determination of the aggressor on rudimentary machinery, the very automatic application of which might well run counter to the conscience of the international community.”⁷⁸

The permanent members of the Security Council were particularly vocal on this point. From the UK’s perspective, a definition would have the “serious disadvantage of tying the hands of any United Nations organ” which might be called upon to determine the existence of

⁷⁵ UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 148

⁷⁶ UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 148

⁷⁷ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 167

⁷⁸ UNGA Sixth Session Official Records ‘Sixth Committee, 287th Meeting, Tuesday, 15 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.287 (pg. 205) at pg. 206

aggression⁷⁹. In a similar view, the US stated “[t]he existence of a definition might hamper the freedom of United Nations action, already rendered sufficiently difficult by the use made of the veto”⁸⁰. However, these concerns were also shared by smaller states. India, for instance, stated that it was opposed to a definition as it considered it “more prudent” to leave the United Nations to determine whether aggression had taken place⁸¹. And in the view of the Uruguayan delegate, the “flexible system”⁸² embodied within Article 39 was preferable, for to oblige the principal organs of the United Nations to determine aggression in a “mechanical fashion” on the basis of a definition was not advisable⁸³.

Thirdly, it was contended that a definition would present negative effects. Far from deterring aggression, it would actually enable and encourage aggressors to commit acts of aggression.

This British delegate stated the following in this regard:

“[A]n incomplete [definitional] list would be extremely dangerous because it would almost inevitably imply that other acts not listed did not constitute aggression. States would thus be encouraged to commit the acts not listed, because, *prima facie* at any rate, they would not be regarded as acts of aggression. In addition, the existence of an incomplete list would show potential aggressors how to accomplish their aims without actually being branded as aggressors, for they would keep their acts within the precise letter of the definition and then claim that they were technically justified”⁸⁴.

A definition was also dangerous because it could be employed as a “propaganda weapon”⁸⁵. A definition, it was argued, could be misused “for the purposes of propaganda and as a basis for

⁷⁹ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 167

⁸⁰ UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 173) at pg. 175

⁸¹ UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 173) at pg. 177

⁸² UNGA Seventh Session Official Records ‘Sixth Committee, 338th Meeting, Monday, 1 December 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.338 (pg. 195) at pg. 197

⁸³ UNGA Sixth Session Official Records ‘Sixth Committee, 288th Meeting, Wednesday, 16 January 1952, at 3.30 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.288 (pg. 211) at pg. 212

⁸⁴ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 166

⁸⁵ UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 183

accusation”⁸⁶ against other states and instead of reducing international tensions, it would only serve to “endanger friendly international relations”⁸⁷.

Finally, a definition was opposed for pragmatic reasons: the prevailing political climate of distrust and suspicion meant the time was neither ripe nor conducive for reaching agreement on a definition⁸⁸. Cold War dynamics, it is important to note, pervaded the Sixth Committee, influencing the positions states adopted on the necessity of a definition. Crucially, the Soviet Union, its Eastern European bloc and other Soviet supporters from the non-Western and developing world found themselves in opposition with the Western bloc, who were against defining aggression. Moreover, the Sixth Committee’s discussions were especially acrimonious and as the records of the discussions show, the debates were used as platforms for the two Cold War blocs to level criticisms and accusations against each other.

The Soviet Union, for example, accused the US and its allies for opposing a definition of aggression because it would hinder their policies of imperial, capitalist expansion⁸⁹. Meanwhile, the United Kingdom challenged the Soviet Union’s support for a definition for being influenced less by altruism and more by “political motives”: a definition would provide a convenient “screen from behind which the USSR would be able to attack the acts and intentions of the western Powers with impunity”⁹⁰. These dynamics were keenly recognized by

⁸⁶ UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 149

⁸⁷ UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 183

⁸⁸ UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 173) at pg. 177; UNGA Sixth Session Official Records ‘Sixth Committee, 284th Meeting, Friday, 11 January 1952, at 3.25 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 187) at pg. 190

⁸⁹ UNGA Seventh Session Official Records ‘Sixth Committee, 331st Meeting, Friday, 21 November 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.331 (pg. 153) at pg. 157

⁹⁰ UNGA Seventh Session Official Records ‘Sixth Committee, 333rd Meeting, Monday, 24 November 1952, at 10.45 a.m., Headquarters, New York’ UN Doc A/C.6/SR.333 (pg. 165) at pg. 167

other delegates. As the Lebanese delegate argued, “The great Powers had shown themselves so mistrustful and suspicious of each other that he was most doubtful if any workable definition of aggression could be found so long as that mistrust had not been dispelled by a change in the international moral climate”⁹¹. Similarly, the Canadian representative made it clear that while his delegation was not opposed to a definition of aggression, “the prevailing state of world affairs” illustrated the “insurmountable difficulties” of arriving at a definition⁹².

2 THE CONTENT OF A DEFINITION OF AGGRESSION

Turning to the substantive content of a definition, delegates were divided, firstly, over the type of definition that ought to be formulated: an enumerative, a general or a mixed definition. The Soviet Union was a key proponent of an enumerative definition, which would present concrete cases of definition in list-form⁹³. According to the Soviet view, an enumerative definition would have the advantage of precisely and exhaustively specifying the particular acts that constituted aggression⁹⁴. However, this was criticized on several grounds. An enumerative definition could not contemplate all possible forms of aggression and would inevitably contain omissions and exclusions⁹⁵. Furthermore, an enumerative definition would not give the Security Council enough flexibility, as it would be compelled to make determinations on the

⁹¹ UNGA Seventh Session Official Records ‘Sixth Committee, 340th Meeting, Thursday, 4 December 1952, at 10.30 a.m., Headquarters, New York’ UN Doc A/C.6/SR.340 (pg. 201) at pg. 202

⁹² UNGA Seventh Session Official Records ‘Sixth Committee, 339th Meeting, Tuesday, 2 December 1952, at 3.20 p.m., Headquarters, New York’ UN Doc A/C.6/SR.339 (pg. 199) at pg. 200

⁹³ The Soviet Union submitted a definitional proposal which specified the following acts, if committed, would amount to aggression: a declaration of war; invasion of territory by armed forces; bombardment of territory by land, sea or air forces; the landing of land, sea or air forces inside the boundaries of another state without its permission; naval blockade of coasts or ports; and the support of armed bands invading the territory of another state; UNGA Sixth Session Annexes (Agenda Item 49) ‘Union of Soviet Socialist Republics: Draft Resolution’ UN Doc A/C.6/L.208

⁹⁴ UNGA Sixth Session Official Records ‘Sixth Committee, 278th Meeting, Saturday, 5 January 1952, at 11.10 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.278 (pg. 147) at pg. 151

⁹⁵ UNGA Sixth Session Official Records ‘Sixth Committee, 280th Meeting, Tuesday, 8 January 1952, at 3.30 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.280 (pg. 159) at pg. 163

basis of automatic criteria. The virtues of the Security Council not being constrained by an enumerative definition were pointed out by the UK delegate:

“In some cases, [the Security Council] might find itself bound to regard a certain State as having committed aggressive action even if it was perfectly clear from a study of all the facts that aggression had not really occurred. Similarly, in cases where it was perfectly clear that aggression had occurred, it might be politic to refrain from actually naming the State concerned an aggressor if there seemed to be any prospect of a settlement and the aggressor State seemed willing to desist from its action. That, however, would be very difficult if certain acts were listed in advance as definitely constituting aggression”.⁹⁶

The possibility of formulating a general definition was also proposed. Here, aggression would be defined in general and abstract terms, and no specific cases of aggression would be indicated within the definition itself. However, a general definition was regarded as unsatisfactory for the following reasons: firstly, it would be too wide in its scope and secondly, it would contain broad terms and concepts – such as ‘armed attack’, ‘force’ or ‘self-defence’ – which themselves required defining⁹⁷. For many supporters of a definition, therefore, the best approach would be to formulate a mixed definition, whereby a general definition would be supplemented by a non-exhaustive list of major examples of aggression.

Many non-Western states favoured this approach, which was regarded as presenting several advantages:

“The general definition [would] cover all conceivable elements of aggression, so that, while the character and structure of aggression might change with time, the general definition would continue to embody the essence of aggression. The illustrative list [would] mention only the generally recognized types of aggression, leaving the uncertain and secondary types to be decided upon in each case by the competent international organs, which should be allowed considerable latitude. By that method the disadvantages inherent in any automatic application of the definition would be avoided, and the international bodies concerned would be able to take all the attendant circumstances into consideration and to bear in mind the ultimate objectives of peace and the peaceful settlement of disputes”.

⁹⁶ UNGA Sixth Session Official Records ‘Sixth Committee, 281st Meeting, Wednesday, 9 January 1952, at 3 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.281 (pg. 165) at pg. 167

⁹⁷ UNGA Sixth Session Official Records ‘Sixth Committee, 280th Meeting, Tuesday, 8 January 1952, at 3.30 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.280 (pg. 159) at pg. 162; UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 173) at pg. 177

Clearly, a mixed definition represented a compromise solution and certainly, one which sought to address some of the shared concerns of the permanent members of the Security Council. However, a general definition was also criticized for being beset by the limitations and disadvantages of both a general and enumerative definition.

There was also disagreement over the scope of the notion of aggression. While it was generally agreed that aggression entailed the use of direct and armed force in some form, some states felt the definition should not be confined exclusively to ‘direct aggression’ but that it ought to also embrace ‘indirect aggression’. States differed, however, in their views as to which particular acts would constitute indirect aggression. For Canada, this concerned attacks upon the political integrity of a country by subversive action against its government or its people or by fomenting civil strife⁹⁸. China held a similar view and the particular instances of indirect aggression it wished to see within a definition were the arming of organized armed bands or of third states against a victim state and the promotion of subversion against the political and social order of a victim state⁹⁹.

Meanwhile, Bolivia adopted a drastically different perspective: indirect pressure upon a state could also come from the sphere of economic relations. In its view, economically powerful states are able to exert ‘economic aggression’ upon economically weaker states by, for instance, depriving the latter of its economic resources¹⁰⁰. It suggested, therefore, that ‘economic aggression’ be regarded as a form of indirect aggression, a point which other smaller states –

⁹⁸ UNGA Sixth Session Official Records ‘Sixth Committee, 282nd Meeting, Thursday, 10 January 1952, at 3.20 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.282 (pg. 177)

⁹⁹ UNGA Sixth Session Official Records ‘Sixth Committee, 278th Meeting, Saturday, 5 January 1952, at 11.10 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.278 (pg. 147) at pg. 152

¹⁰⁰ UNGA Sixth Session Official Records ‘Sixth Committee, 293rd Meeting, Monday, 21 January 1952, at 10.30 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.293 (pg. 243) at pg. 246

including Afghanistan, Brazil, Indonesia, Iran, and Cuba – agreed with¹⁰¹. Indonesia went one step further and pushed for ‘ideological aggression’ to also be taken into account. The motive of ideological aggression, its delegate argued, was aimed at dominating and exercising pressure upon the political existence of a state and as such, it should also be deemed a form of indirect aggression¹⁰². Finally, Peru argued ‘cultural aggression’ should also be covered by a definition of aggression¹⁰³.

It would not be entirely correct to conclude that it was primarily non-Western, developing states who supported the idea of including forms of indirect aggression within a definition. Egypt, for instance, was against indirect aggression and took the approach suggested by the UN Charter, which was confined to direct aggression: any attempt to expand aggression beyond armed attack would amount to a departure from the Charter’s provisions¹⁰⁴. Relatedly, it argued that the Charter’s collective security measures were not devised with minor conflicts, such as economic conflicts, in mind. Rather, they were envisaged to deal with the most serious threats to international peace¹⁰⁵. Broadly agreeing with these arguments, the Greek and British delegates stated that although economic and ideological aggression were serious, they could not be treated on the same footing as direct aggression involving armed attack; to do so would be to make the notion of aggression entirely meaningless¹⁰⁶.

¹⁰¹ UNGA Sixth Session Official Records ‘Sixth Committee, 284th Meeting, Friday, 11 January 1952, at 3.25 p.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.283 (pg. 187) at pg. 188

¹⁰² UNGA Seventh Session Official Records ‘Sixth Committee, 330th Meeting, Thursday, 20 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.330 (pg. 145) at pg. 144

¹⁰³ UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 182

¹⁰⁴ UNGA Sixth Session Official Records ‘Sixth Committee, 291st Meeting, Saturday, 19 January 1952, at 11 a.m., Palais des Chaillot, Paris’ UN Doc A/C.6/SR.291 (pg. 231) at pg. 232

¹⁰⁵ *Ibid.*

¹⁰⁶ UNGA Seventh Session Official Records ‘Sixth Committee, 335th Meeting, Tuesday, 25 November 1952, at 3 p.m., Headquarters, New York’ UN Doc A/C.6/SR.335 (pg. 175) at pg. 177; UNGA Seventh Session Official Records ‘Sixth Committee, 336th Meeting, Wednesday, 26 November 1952, at 10.40 a.m., Headquarters, New York’ UN Doc A/C.6/SR.336 (pg. 181) at pg. 183

To sum up, the Sixth Committee was fraught by major differences over the question of defining aggression. Very little headway in finding areas of agreement was therefore possible, worsened by broader Cold War tensions. Like the ILC, therefore, the Sixth Committee was unable to formulate a definition of political aggression. When reporting back to the GA on its proceedings, the Sixth Committee recommended a Special Committee be established in order to undertake a detailed study of aggression and thereafter, to formulate a draft definition¹⁰⁷.

*The United Nations Special Committee on the Question of Defining Aggression
(1953 – 1974)*

After the GA's Sixth Committee discussions, aggression remained a concern within the UN due to the establishment of a special committee dedicated to the task of defining aggression, the 'Special Committee on the Question of Defining Aggression'. Over the course of 21 years, four separate committees were established: the first and second committees met respectively during 1953 and 1956; the third committee met three times between 1957 and 1967; and finally, the fourth committee convened over seven separate sessions between 1968 and 1974. For reasons that will be elaborated upon below, the first three committees were unable to formulate a definition; concrete progress was only made in the fourth and final committee in 1974.

1 THE 1ST, 2ND AND 3RD UN SPECIAL COMMITTEES (1953-1967)

Two main reasons explain why the first three committees were unable to make headway with a definition. Firstly, their discussions simply rehearsed the debates the Sixth Committee had covered, namely, the possibility and desirability of a definition, the function of a definition and the type of definition that ought to be formulated¹⁰⁸. Moreover, states largely maintained the

¹⁰⁷ UNGA Seventh Session Annexes (Agenda Item 54) 'Report of the Sixth Committee' UN Doc A/2322 (17 December 1952)

¹⁰⁸ UNGA Official Records, Ninth Session, 'Report of the Special Committee on the Question of Defining Aggression, 24 August – 21 September 1953', Supplement No. 11, UN Doc A/2638; UNGA Official

positions they had adopted within the Sixth Committee. For instance, the USSR, along with a grouping of smaller African, Asian and Latin American states, remained in favour of defining aggression; in contrast, Western states remained opposed to a definition, viewing it as being neither possible (in light of the difficulties involved in formulating a definition) nor desirable (due to its potential negative effects). Not much progress was made, therefore, on pushing the debate into new terrains.

Secondly, broader Cold War dynamics continued to result in political intractability, thereby preventing accommodation amongst divergent positions. In particular, the two superpowers continued to adopt diametrically opposed positions, often joining forces with their key allies from the developing world to form discernible political blocs. For instance, the Soviet Union, whose previous proposals for a definition had never included the notions of economic or ideological aggression, now submitted a revised proposal that included both¹⁰⁹. While the Soviet delegate explained this was aimed at having “due regard”¹¹⁰ for the positions expressed by Asian and Latin American states, its changed position was arguably aimed at building and rallying a bloc of support amongst smaller communist-leaning states. Unsurprisingly, Western states continued to oppose the inclusion of both, on the basis that aggression in the UN Charter was strictly limited to direct uses of armed force and that any extension beyond this would weaken the concept of aggression¹¹¹.

Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’, Supplement No. 16, UN Doc A/3574

¹⁰⁹ ‘Draft resolution submitted by the Union of Soviet and Socialist Republics (A/AC.66/L.2/Rev.1)’ in UNGA Official Records, Ninth Session, ‘Report of the Special Committee on the Question of Defining Aggression, 24 August – 21 September 1953’, Supplement No. 11, UN Doc A/2638. (pg. 13)

¹¹⁰ *Ibid.* (pg. 9)

¹¹¹ *Ibid.*

Another issue that pitted the two superpowers against one another concerned the merits of including an objective factor within the definition. The Soviet Union, on the one hand, was in favour of including an objective factor – the ‘priority principle’ – to determine the existence of aggression. In terms of this principle, a state which first commits one of the specified acts of aggression would be automatically designated the aggressor¹¹². Supported by other states from the Eastern bloc such as Poland and Czechoslovakia, the Soviet delegate contended that the priority principle was derived from the principle of self-defence contained in Article 51 of the UN Charter, particularly because it permitted self-defence by a state in cases where another state had launched an armed attack first¹¹³. However, the USA, along with the UK, opposed this principle, emphasizing that the primary issue when determining whether an act of aggression has been committed should be a consideration of the act in light of all the facts and circumstances¹¹⁴.

Despite the impact of the Cold War confrontation, what was significant about the first three committees was the increasing role and participation of smaller countries from the non-aligned bloc. In this regard, the composition of the three committees all included a sizeable number of Asian, African and Latin American states¹¹⁵. This was a reflection of the decolonisation process

¹¹² ‘Union of Soviet Socialist Republics: draft resolution (A/AC.77/L.4)’ in UNGA Official Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 30-31)

¹¹³ UNGA Official Records, Twelfth Session ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 17)

¹¹⁴ *Ibid.* (pgs. 18-19)

¹¹⁵ The first committee comprised of the following fifteen members: Bolivia, Brazil, China, Dominican Republic, France, Iran, Mexico, Netherlands, Norway, Pakistan, Poland, Syria, the Soviet Union, the United Kingdom and the United States; *supra* note 150 (pg. 2).

The second committee comprised of the following eighteen members: China, Czechoslovakia, Dominican Republic, France, Iraq, Israel, Mexico, Netherlands, Norway, Paraguay, Peru, Philippines, Poland, Syria, the Soviet Union, the United Kingdom, the United States and Yugoslavia; *supra* note 155 (pg. 3)

The third committee comprised of twenty-one members. At its first session, members included Australia, Ceylon, China, Czechoslovakia, Ecuador, El Salvador, France, Greece, Indonesia, Ireland, Japan, Lebanon, Mexico, Nepal, Netherlands, Pakistan, Romania, the Soviet Union, the United Kingdom, the United States and Uruguay. At its second session, members included Argentina, Bulgaria, China, Costa Rica, Cyprus, Czechoslovakia, Denmark, France, Ghana, Greece, Italy, Liberia, Mexico, Netherlands, Niger, Panama,

throughout the 1960s, which saw the increased participation of newly-independent states, particularly within the UN context (Solera 2007: 145). More crucially, non-aligned states were actively involved in advancing concrete definitional proposals: Bolivia¹¹⁶ submitted a proposal in the first committee, while Paraguay¹¹⁷, Iran and Panama (jointly)¹¹⁸, Iraq¹¹⁹ and Mexico¹²⁰ proposed definitions in the second committee. This is not to suggest, however, that the non-aligned states always constitute a unified whole. For instance, despite favouring the inclusion of ‘indirect aggression’, they differed over its scope: for Bolivia, indirect aggression centred on economic aggression, while for Paraguay, Iran and Panama, and Mexico, this specifically referred to the organisation, encouragement, or support of armed bands for incursions into the territory of another state. There were differences, too, over the specific form a definition of aggression should take: Bolivia, Paraguay, Iran and Panama, and Mexico favoured a mixed definition, while Iraq put forward a general definition.

Philippines, Tunisia, the Soviet Union, the United Kingdom and the United States. The members of the third committee’s third session included Argentina, Bulgaria, Cameroon, Canada, Chile, China, Cyprus, El Salvador, France, Ghana, Guinea, Iceland, Netherlands, Romania, Somalia, Syria, Turkey, the Soviet Union, the United Kingdom, the United States and Venezuela; UNGA ‘Committee Established Under General Assembly Resolution 1181 (XII) (Question of Defining Aggression), Report of the Committee’ UN Doc A/AC.91/2 (24 April 1959) (pg. 2-3), UNGA ‘Committee Established Under General Assembly Resolution 1181 (XII) (Question of Defining Aggression), Second Session, Report of the Committee’ UN Doc A/AC.91/3 (13 April 1962) (pg. 2), and UNGA ‘Committee Established Under General Assembly Resolution 1181 (XII) (Question of Defining Aggression), Third Session, Report of the Committee’ UN Doc A/AC.91/5 (26 April 1965) (pg. 2-3)

¹¹⁶ ‘Working Paper submitted by Bolivia (A/AC.66/L.9)’ in UNGA Official Records, Ninth Session, ‘Report of the Special Committee on the Question of Defining Aggression, 24 August – 21 September 1953’ Supplement No. 11, UN Doc A/2638 (pg. 15)

¹¹⁷ ‘Paraguay: draft resolution (A/AC.77/L.7)’ in UNGA Official Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 31)

¹¹⁸ ‘Iran and Panama: draft resolution (A/AC.77/L.9)’ in UNGA Official Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 31)

¹¹⁹ ‘Iraq: revised draft resolution (A/AC.77/L.8/Rev.1)’ in UNGA Official Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 31-32)

¹²⁰ ‘Mexico: working paper (A/AC.77/L.10)’ in UNGA Official Records, Twelfth Session, ‘Report of the 1956 Special Committee on the Question of Defining Aggression, 8 October – 9 November 1956’ Supplement No. 16, UN Doc A/3574 (pg. 32)

As Western states were opposed to the entire definitional enterprise, they did not propose a definition before any of the first three committees. Importantly, this played into the non-aligned states' favour, as it gave them the opportunity to dominate the committees' attention with their definitions. What the Western powers' mainly focused upon was obstructing meaningful progress on a definition – by, for instance, pushing for the postponement or deferral of the committee's work. However, this proved to be an ineffective tactic, particularly because the Western powers occupied a minority position. When, for example, the Western powers proposed to defer the further continuation of the special committee after the completion of its term in late 1967¹²¹, twenty-six non-aligned states simply responded with a counter-proposal aimed at the establishment of a fourth special committee¹²². Given the non-aligned states' numerical dominance in the committee, a fourth committee was indeed established – despite opposition from the Western powers and their allies¹²³.

2 THE 4TH UN SPECIAL COMMITTEE (1968 TO 1974)

As will be shown, the fourth committee was able to formulate and agree upon a definition of political aggression. This was facilitated by a number of factors. Firstly, the committee undertook its work in a slightly different way to its predecessors: a smaller working group was established to examine key issues in detail and it was within this tighter, informal setting that many points of contention were smoothed out. Furthermore, the committee's discussions went beyond preliminary questions and instead were centred on the substantive content of three proposed definitions that had been submitted to it. Their discussions, moreover, were shaped

¹²¹ UNGA 'Need To Expedite The Drafting Of A Definition Of Aggression In The Light of The Present International Situation, Report of the Sixth Committee' (15 December 1967) UN Doc A/6988 (pg. 3-4)

¹²² *Ibid.* (pg. 6); The twenty-six grouping of states included the following: Algeria, Burma, Cameroon, Cyprus, Ghana, Guinea, India, Indonesia, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya Malaysia, Mauritania, Morocco, Nigeria, Romania, Sudan, Syria, the United Arab Republic, the United Republic of Tanzania, Yemen, Yugoslavia, and Zambia.

¹²³ *Supra* note 121 (pg. 13)

by the period of détente in international politics and the partial relaxation of Cold War antagonism between the two superpowers. This easing of tensions enabled greater accommodation between the Western and Eastern blocs on several points of prior disagreement. Before highlighting the content of the definition that was formulated, an overview of the three definitions that were proposed to the committee is provided, as well a discussion of the debates that led towards agreement upon the final definition.

A ***THREE DRAFTS DEFINITIONS OF AGGRESSION***

The Soviet Union's Draft

The Soviet Union's draft¹²⁴ offered the following general definition of aggression:

“Armed aggression (direct or indirect) is the use by a State, first, of armed force against another State contrary to the purpose, principles and provisions of the Charter of the United Nations”¹²⁵.

This definition suggested the use of armed force by one state against another represents aggression's core element. Importantly, this armed attack embraces both direct and indirect aggression; the use of armed force, therefore, may be committed by the attacking state itself or alternatively, by a proxy or agent of the attacking state.

This general definition was accompanied by a list of acts that would be considered acts of *direct aggression*: a declaration of war; the use of nuclear, bacteriological or chemical weapons; bombardment of a state's territory and population or attacks on a state's land, sea or air forces; and invasion, occupation or annexation of a state's territory, or the blockade of a state's coasts or ports¹²⁶. A distinct feature of the Soviet Union's definition was its inclusion of the 'priority

¹²⁴ UNGA Official Records, Twenty-Fourth Session, 'Report of the Special Committee on the Question of Defining Aggression, 24 February – 3 April 1969' Supplement No. 20, UN Doc A/7620 (pgs. 4-6)

¹²⁵ *Ibid.* (pg. 5)

¹²⁶ *Ibid.*

principle’: a state which is the *first* to commit one of the above specified acts of armed aggression would, in terms of its definition, be automatically designated the aggressor.

The Soviet proposal also indicated what would constitute acts of *indirect aggression*. Interestingly, the Soviet Union no longer included acts of economic or ideological aggression, which had been previously been included as a means to garner support amongst developing states. Now, indirect aggression related exclusively to instances where a state employed armed force against another state by sending armed bands, mercenaries, terrorists or saboteurs to that state’s territory, in order to promote internal upheaval¹²⁷.

Finally, the Soviet definition also preserved the power of the Security Council under Article 39 of the UN Charter to determine acts of aggression. Aggression included, therefore, any other act that the Security Council may deem to be an act of aggression¹²⁸.

The Thirteen-Power Draft

Whereas non-aligned states had previously submitted individual or joint proposals, they now altered their tactic and submitted one collective proposal. The ‘Thirteen-Power Draft’, as it came to be known, was proposed by the following states: Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia¹²⁹. Their definition placed similar emphasis on the use of armed force against another state:

“[A]ggression is the use of armed force by a State against another State, including its territorial waters or air space, or in any way affecting the territorial integrity, sovereignty or political independence of such State [...]”¹³⁰

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* (pg. 6)

¹²⁹ *Supra* note 124 (pgs. 6-8)

¹³⁰ *Ibid.* (pg. 7)

However, the explicit reference to territorial integrity, sovereignty and political independence – notably absent in the Soviet’s general definition – reflected a core concern of these newly-established states, namely, the preservation of their political independence and sovereignty. This was accompanied by a related concern with the struggle for independence on the part of colonized states. Here, the Thirteen-Power’ draft provided that none of its proposed clauses on aggression were to be interpreted as limiting the “right of peoples to self-determination, sovereignty and independence”¹³¹.

There were a number of other similarities between the Thirteen Powers’ and Soviet proposals. Firstly, the general definition was accompanied by a comparable list of enumerated acts of aggression (the only difference was the former’s exclusion of nuclear weapons). Secondly, the priority principle was included; although phrased differently, it specified a similar act of indirect aggression (“subversive and/or terrorist acts [directed against a state] by irregular, volunteer or armed bands organized or supported by another state”). Finally, it also preserved the Security Council’s powers and prerogative under the UN Charter¹³².

The Six-Power Draft

In a complete reversal of their long-standing position, Western states and their key allies – Australia, Canada, Italy, Japan, the US and the UK – put forward a proposal for the very first time¹³³. Although they emphasized the ‘Six-Power Proposal’ did not signify “a change in [their] long-standing reservations regarding the usefulness of a definition of aggression”¹³⁴, it was evident they had come to the realization that the demand for a definition, especially from developing states, was not going to go away and relatedly, that their obstructive tactic had had

¹³¹ *Ibid.* (pg. 8)

¹³² *Ibid.* (pgs. 7-8)

¹³³ *Supra* note 1624 (pgs. 8-9)

¹³⁴ *Ibid.* (pg. 24)

little effect on such demands (Sellers 2013: 277; Solera 2007: 155). While there were some similarities, the Six-Powers' definition differed from the other two in a three central ways.

Firstly, it made the link between aggression and the responsibilities of the Security Council absolutely clear; a specific clause stated the term 'aggression' is a term that is to be applied by the Security Council when exercising its responsibility, in accordance with the UN Charter, to maintain international peace and security¹³⁵. Secondly, it spelled out two instances which would not constitute aggression. These two exceptions mirrored the two circumstances when the use of force is permitted under the UN Charter: the use of force in the exercise of individual or collective self-defence and the use of force pursuant to decisions of, or authorized by, competent UN organs. Thirdly, the definition did not contain the priority principle, which Western were consistently opposed to. Rather, the notion of aggressive intent was included, which provided that aggression represents the use of force in order to:

- “(1) diminish the territory or alter the boundaries of another State;
- (2) alter internationally agreed lines of demarcation;
- (3) disrupt or interfere with the conduct of the affairs of another State
- (4) secure changes in the Government of another State; or
- (5) inflict harm or obtain concessions of any sort”¹³⁶

In terms of similarities, the Six Powers' proposal also contained a general definition that centred on the use of direct or indirect force by states: aggression is the “use of force in international relations, overt or covert, direct or indirect, by a State against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the Purposes of the United Nations”¹³⁷. In addition, an enumeration of acts of direct aggression was also included, which were broadly similar to those listed in the other two definitions¹³⁸. However, two additional acts featured in the Six Powers' enumeration: firstly, the “use of [a

¹³⁵ *Ibid.* (pg. 8)

¹³⁶ *Ibid.* (pg. 9)

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

state's] armed forces in another State in violation of the fundamental conditions of permission for their presence, or maintaining them there beyond the termination of permission” and secondly, the “inflicting [of] physical destruction on another State through the use of other forms of armed force”¹³⁹. Finally, indirect aggression similarly featured in the Six Powers’ enumeration but these were broken down into three distinct acts: the organizing, supporting or directing of armed bands in another state; violent civil strife or acts of terrorism in another state; and subversive activities aimed at the violent overthrow of the government of another state¹⁴⁰.

B NEGOTIATING A DEFINITION OF AGGRESSION

Although the spirit of détente facilitated a more conciliatory environment within the fourth committee, this did not detract from the fact that the three parties championed fundamentally different interests with their respective definitions. Indeed, each of the three drafts reflected its proponents’ key concerns. The Soviet Union’s definition reflected a concern with maintaining its security, both within its own territory and across the Eastern bloc. This explains its desire to designate challenges to the status quo, as well as the threat posed by nuclear-armed Western states, as acts of aggression (Sellers 2013: 266). In addition, as a Security Council member, an important way to circumvent the paralysis that often plagued the Security Council (due to the use of the veto) was to push for automatic determinations of aggression, which it did through its promotion of the priority principle.

Developing countries viewed a definition as an important way to preserve their territorial integrity and relatedly, to safeguard their more vulnerable position within the international

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

system (Bassiouni and Ferencz 2008: 220). Moreover, as the superpowers' proxy wars often resulted in them being the victims of indirect aggression, developing countries were keen to ensure indirect uses of force came within the scope of aggression's definition (McDougall 2013: 71). Finally, given the waves of decolonization that the 1950s and 1960s witnessed, smaller states were keen to ensure future struggles for self-determination would be exempted from the definition's scope. In other words, the use of armed force to bring about self-determination should not constitute aggression. Unsurprisingly, major Western powers, who would not countenance either "unruly challenges to the global status quo" or "disorderly assertions of self-determination", sought to exclude self-determination from the definition altogether (Sellers 2013: 285).

Western states also intended to secure a definition that would least disrupt existing institutional arrangements, particularly those which secured their privileged position within the international system. Maintaining and preserving the Security Council's powers was therefore an important concern – and the definition would have to proceed from the premise that the determination of any act of aggression was a power reserved exclusively for the Security Council. Accordingly, Western states opposed the priority principle espoused by the Soviet Union and smaller states, as the automatic determination of an aggressor on the basis of who committed an act of aggression first represented an usurpation of the Security Council's inherent powers. Western states were equally keen to preserve their freedom of action, especially concerning matters that impinged upon their national interests. As great powers with domestic and external interests to defend, a definition that circumscribed the right of states to engage in self-defence was unacceptable and they were keen, therefore, to ensure the definition did not alter existing arrangements concerning the legitimate uses of force in international affairs.

Despite these divergent interests, general agreement on a number of points was achieved after several rounds of debate: firstly, aggression should be limited to the use of armed force in international relations and relatedly, it should be explicitly linked to the general prohibition on the use of force contained in Article 2(4) of the UN Charter; secondly, legitimate uses of forces sanctioned by the UN Charter, such as individual or collective self-defence, would be excluded from aggression's scope; thirdly, a non-exhaustive list of acts of aggression should be included in the definition but crucially, this would not affect the power of the Security Council to determine other acts beyond this list amounted to aggression; fourthly, typical acts of aggression listed in the definition were to centre on attacks directed against a state, such as invasion, bombardment and attack upon its armed forces, ships or aircraft; and finally, indirect aggression should feature in the definition¹⁴¹. Nevertheless, points of contention still remained: the Soviet Union maintained the use of weapons of mass destruction ought to be included as a typical case of aggression; Western states pushed for the determination of aggression ought to include the notion of aggressive intent; and finally, developing countries argued that struggles for self-determination ought to be excluded from the concept of aggression¹⁴².

Ultimately, the only way to reconcile these outstanding disagreements was to formulate a definition that incorporated these contradictory views. What eventually emerged, therefore, was a carefully-negotiated definition, one which preserved in its text many of the outstanding differences between the three parties. Defining aggression's precise form, in other words, hinged less on principled decisions about what the notion of aggression should or should not embrace and more on the pragmatic need to satisfy competing interests, positions and views. As several commentators have noted, the definition contained "negotiated compromises and

¹⁴¹ UNGA Official Records, Twenty-Sixth Session, 'Report of the Special Committee on the Question of Defining Aggression, 1 February – 5 March 1971' Supplement No. 19, UN Doc A/8419 (pgs. 39-43)

¹⁴² *Ibid.* (pg. 44)

deftly obscured clauses which were deemed necessary in the process of the reaching a consensus” (Ferencz 1975: 709) and was “carefully worded in order to ensure a minimum logical coherence while [being] flexible and ambiguous enough for every party to be able to claim victory” (Solera 2007: 193). It is worth recalling that negotiations aimed at defining aggression had been ongoing since the early 1950s. This, it has been suggested, contributed to increased pressure to avoid the repeated failures of the preceding quarter-century and relatedly, the need on the part of the UN to ‘save face’ (Stone 1977: 245). The only way this could be achieved was to avoid absolute clarity or precision – itself difficult given the existence of divergent views – and instead, formulate a definition that captured the minimum level of consensus amongst states.

Resolution 3314: a definition of political aggression

The final definition¹⁴³ formulated by the fourth committee consisted of eight substantive articles, five of which are particularly important to highlight. Article 1 provided a general definition of aggression:

“Aggression is 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.”

The article’s wording was closely linked to Article 2(4) of the UN Charter, which laid down the general prohibition against the use of force in international relations. The association with Article 2(4) reflected a clear desire on the part of states to explicitly tie aggression with an existing international prohibition. The implication here is significant, as it meant aggression essentially denoted illegal uses of force employed in contravention of the UN Charter. This, in turn, centralized two further features of aggression that the majority of states found important

¹⁴³ UNGA Official Records, Twenty-Ninth Session, ‘Report of the Special Committee on the Question of Defining Aggression, 11 March – 12 April 1974’ Supplement No. 19, UN Doc A/9619 (pgs. 10-13)

to emphasize. Firstly, aggression involves the employment of *armed* force that is directed by one state against another. Possible cases of *non-armed* aggression, such as economic or ideological aggression, were therefore excluded from the scope of the definition. Secondly, aggression is exclusively a wrong *committed by one state against another*. Only a sovereign state can be regarded as an aggressor and consequently, the employment of *non-state actors* against a state does not fall within the scope of aggression.

Article 2 set down the criteria against which aggression is to be determined. Here, the conflicting principles of priority and intent were essentially left unresolved, as the article simply contained both:

“The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”

The words ‘first use’ alluded to the priority principle – and this would constitute ‘prima evidence’ of aggression unless rebutted. However, the power of the Security Council to decide otherwise, on the basis of ‘other relevant circumstances’, implied aggression could also be determined by non-chronological criteria.

Importantly, this could conceivably include aggressive intent, the principle that Western states defended. The wording of the article – a clear textual compromise – therefore allowed all parties to interpret the article in light of their preferred criteria. Arguably, then, no “clear-cut test for aggression” was laid down; instead, whether a particular situation amounted to aggression would depend upon a “case-by-case evaluation” (Grzebyk 2013: 59). Article 2 also reaffirms the requirement of gravity implicitly expressed in Article 1. Here, the phrase ‘sufficient gravity’ reaffirms that aggression deals only with the use of *armed* force, and not

with minor incidents that do not involve armed attacks (Cassin *et al* 1975: 596; Bassiouni and Ferencz 2008: 224; Sellers 2013: 278).

A list of seven acts that would qualify as aggression was also enumerated in Article 3:

“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State, which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

Many of the acts represented typical instances of armed conflict between states that prevailed during the decades when the definition was being negotiated (Weisbord 2009: 22). Taken together, they indicate that the underlying interest the definition fundamentally seeks to protect are violations of the physical and territorial sanctity of states. Such violations also include, as paragraph (g) makes clear, *indirect aggression*. This was not, however, the more encompassing notion of indirect aggression some developing states had in mind when they proposed the inclusion of economic and ideological aggression. Instead, the scope was more limited, namely, instances when a state does not act directly against another state but rather, through armed bands or mercenaries.

The enumerated acts constituted neither a closed nor definitive list, as Article 4 makes clear:

“The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”

This addressed key concerns shared by great and small powers alike: any enumeration could never capture all possible cases of aggression and provision was needed for new acts of aggression that may emerge in the future. A non-exhaustive list, which the Security Council could add to on a case-by-case basis, therefore gave aggression's scope the degree of flexibility many felt was needed in order to address evolving inter-state threats to international peace and security. However, Article 4 also satisfied the primary concern of the Security Council's permanent members: aggression's scope is dependent upon existing institutional arrangements that gives the Security Council the primary responsibility to make determinations on aggression.

Finally, Article 7 addressed, in a particularly verbose manner, another key sticking point between developing states and the great powers – the struggles for self-determination:

“Nothing in this definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.”

On the face of it, the concerns of non-aligned states seem to have prevailed: struggles could be conducted, and any assistance could be lawfully rendered, for liberationist ends without falling under the scope of aggression. Moreover, self-determination was termed a 'right', as opposed to a mere principle (Ferencz 1975: 715; Sellers 2013: 283). However, the great powers could also claim victory: firstly, the article's vague reference to 'struggle' seemed to exclude 'armed struggles'; and secondly, the insertion of the word 'forcibly' before 'deprived' appeared to deny the right of self-determination to those dominated by non-forcible means (Sellers 2013: 283). Again, two irreconcilable positions were essentially left unresolved: Article 7 embodied vagueness that suited all parties and allowed them interpret it to their own advantage (Bassiouni and Ferencz 2008: 227).

The GA approved this definition on 14 December 1974 and with the issuing of Resolution 3314¹⁴⁴, political aggression finally acquired concrete form. The definition has been criticized for its vagueness, with many commentators pointing out how the political compromises implicit within the definition results in ambiguity, inconsistencies and contradictions (Cassin *et al* 1975; Ferencz 1975; Garvey 1977; Stone 1977; Solera 2007; Bassiouni and Ferencz 2008; Grzebyk 2013; McDougall 2013; Sellers 2013). It has also been criticized for its lack of enforceability, particularly because the definition is contained within a GA resolution. Like all GA resolutions, it lacks the binding status of international law and the Security Council is therefore not obliged to apply the definition. Indeed, the Security Council has never actually relied upon the definition when making decisions concerning threats to international peace and security, a fact which raises questions about the definition's functionality and its influence on the practice of the Security Council (Bassiouni and Ferencz 2008: 227; Sayapin 2014: 104; McDougall 2013: 83). Inevitably then, it has been Security Council's political interests – as opposed to an “a priori definition establishing a standard of what ‘ought’ to be deemed ‘aggression’” – that has dictated whether a particular situation becomes labelled as aggression (Garvey 1977: 197).

From the perspective of criminalization, however, Resolution 3314 may not be as problematic as has been suggested. It does shed sufficient clarity on what the two core elements of political aggression are: firstly, it amounts to the illegal use of armed force by one state against another; and secondly, it involves forceful acts that represent attacks upon the physical and territorial sanctity of states. Resolution 3314 also makes it clear that political aggression exists within a particular normative framework. It is circumscribed by provisions of the UN Charter on the legitimate uses of force (aggression excludes, therefore, self-defence and self-determination)

¹⁴⁴ *Supra* note 1

and it is intimately related to institutional mechanisms that define existing collective security arrangements (the responsibility, as well as the discretionary power, to establish the nature and existence of acts of aggression, rests exclusively with the Security Council). Taken together, these elements symbolize the crystallization of normative consensus on the contours of political aggression and Resolution 3314 should thus be viewed as having formally delineated what aggression in the sphere of *international peace and security* means.

CRIMINAL AGGRESSION: A DEFINITION FOR INTERNATIONAL CRIMINAL LAW (1981-2010)

Although criminal aggression was one of the central legal charges against the former Nazi leaders, it was not given a definition for the purpose of the Nuremberg Trials. This omission, as the previous chapter showed, was a decision the Allied Powers deliberately made when they established the Nuremberg Tribunal at the London Conference in 1945. Instead, ‘crimes against peace’, as it was termed in the Nuremberg Charter, was simply given a broad descriptive characterization¹⁴⁵. In the immediate aftermath of the Nuremberg Trials and notably, throughout the entire Cold War period, criminal aggression remained undefined. Moreover, no substantive efforts were undertaken during this period to clarify aggression’s form for the purpose of international criminal law. To a large extent, this is attributable to the fact that efforts were mainly concentrated on political aggression, which consumed, as we have seen, close to thirty years. And indeed, genuine attempts to define criminal aggression only gained momentum once political aggression had been defined in 1974. As with political aggression, it would also take

¹⁴⁵ In Article 6(c) of the Charter of the International Military Tribunal, crimes against peace was characterized as “[the] planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreement, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”; Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force on 8 August 1945) 82 UNTC 280

close to another thirty years before criminal aggression finally came to be defined and acquired precise form.

Efforts to define criminal aggression emerged in relation to two broader developments within the then nascent sphere of international criminal justice. The first centred on the preparation of a Draft Code of Offences against the Peace and Security of Mankind (1981-1996) – an initiative aimed at the codification of international and transnational crimes in existence at the time – by the ILC. Although the ILC did put forward a definition of criminal aggression, this was not a significant departure from the Nuremberg Charter’s characterization. A second opportunity arose during international negotiations aimed at the establishment of the present-day International Criminal Court (ICC). At the Rome Conference (1998), the question of defining aggression arose in connection with which international crimes should be included within the new court’s jurisdiction. Once again, a definition failed to be formulated. However, aggression was nevertheless included as one of the international crimes falling within the ICC’s jurisdiction and for the first eight years of the ICC’s functioning, aggression continued to exist as an undefined international crime. It was only in 2010, following a Review Conference aimed at negotiating amendments to the ICC’s founding treaty, that states finally agreed upon a definition of criminal aggression.

Draft Code of Offences against the Peace and Security of Mankind (1981-1996)

Established in 1947¹⁴⁶, the ILC was created by the GA in order to promote the progressive development and codification of international law¹⁴⁷. Aside from broader questions of international law, the ILC was also entrusted with codifying what was then an emerging body

¹⁴⁶ *Supra* note 19
¹⁴⁷ *Supra* note 20

of international criminal law. This centred on two tasks: formulating the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal (Nuremberg Principles) and preparing a Draft Code of Offences against the Peace and Security of Mankind (Draft Code)¹⁴⁸. While both of these tasks required the ILC to engage with criminal aggression, the question of formulating its definition only really came to the fore during the ILC's work on the Draft Code between 1981 and 1996¹⁴⁹.

Debates over criminal aggression's definition took place over the course of eleven years, after which the ILC proposed the following definition in its final version of the Draft Code:

“An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”¹⁵⁰.

What is striking about this proposed definition is that it simply reiterates aggression's Nuremberg-era characterization, a point the ILC itself confirmed in its accompanying commentary¹⁵¹. Remarkably, no new definitional ground was being broken fifty years after the Nuremberg Charter had been drawn up, which centralizes just how powerful and enduring Nuremberg's legal precedent was, despite all of its controversies. What the ILC's definition did make more explicit – and which the Nuremberg Charter did not – was that the crime of aggression generates individual criminal responsibility. Yet, here too, the ILC was merely

¹⁴⁸ *Supra* note 21

¹⁴⁹ The ILC commenced its work on the Draft Code in 1950 but further work between 1954 and 1981 was suspended because the GA felt the Draft Code raised problems closely related to that of defining political aggression, which the UN Special Committee on the Question of Defining Aggression had been entrusted with at the time. The ILC therefore only resumed its work on the Draft Code after the definition of political aggression had been agreed upon in 1974. See UNGA 'Resolution 897 (IX) Draft Code of Offences against the Peace and Security of Mankind' (4 December 1954) UN Doc A/RES/897(IX) and UNGA 'Resolution 36/106 Draft Code of Offences against the Peace and Security of Mankind' (10 December 1981) UN Doc A/RES/36/106

¹⁵⁰ 'Report of the Commission to the General Assembly on the work of its forty-eighty session (6 May-26 July 1996), Document A/51/10' in Yearbook of International Law Commission [1996] Vol. II, Part Two at pgs. 15-56 (pg. 42)

¹⁵¹ In its commentary, the ILC stated that “[its] characterization of aggression [...] is drawn from the relevant provision of the Charter of the Nürnberg Tribunal as interpreted and applied by the Nürnberg Tribunal”; *Ibid.* (pg. 43)

reaffirming a legal principle the Nuremberg Judgment had laid down, namely, that criminal responsibility for aggression attaches to an individual and not to a state.

Before settling on this formulation, the ILC did consider drawing more strongly on the definition of political aggression contained in Resolution 3314. In this regard, earlier drafts of the Draft Code completed in 1985¹⁵², 1988¹⁵³ and 1995¹⁵⁴ incorporated aspects of the 1974 definition in varying degrees. This reflected the view, held by some ILC members, that the 1974 definition needed to be reflected in some way within the definition of criminal aggression, because it represented a minimum level of agreement amongst states¹⁵⁵. However, the majority of ILC members found the 1974 definition unsatisfactory: as a definition intended as a guide for the Security Council in its performance of its Charter responsibilities, it was too political and too vague to determine individual criminal responsibility for the crime of aggression¹⁵⁶. Several states – the USA, the UK and Switzerland – also echoed these criticisms when commenting on earlier versions of the Draft Code. Resolution 3314, it was argued, was adopted to assist the Security Council by clarifying a key concept in the UN Charter and as such, it was inappropriate to rely upon it when formulating a definition for the purposes of international criminal prosecution. The ILC therefore reverted back to the Nuremberg Charter and in doing so, momentarily closed the debate on the relationship between the definition of political aggression and the definition of criminal aggression. However, as we will see below, this

¹⁵² ‘Report of the International Law Commission on the work of its thirty-seventh session (6 May-26 July 1985), Document A/40/10’ in Yearbook of International Law Commission [1985] Vol. II, Part Two at pgs. 7-18 (pgs. 15-16)

¹⁵³ ‘Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), Document A/43/10’ in Yearbook of International Law Commission [1988] Vol. II, Part Two at pgs. 55-73 (pgs. 67 and 71-73)

¹⁵⁴ ‘Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995), Document A/50/10’ in Yearbook of International Law Commission [1995] Vol. II, Part Two at pgs. 15-32 (pgs. 20-22 and 71-73)

¹⁵⁵ *Supra* note 153 (pg. 73); *Ibid.* (pg. 20)

¹⁵⁶ *Supra* note 154 (pg. 20)

question would be reopened several decades later during the Review Conference of the ICC in 2010.

*United Nations Diplomatic Conference of Plenipotentiaries on the
Establishment of an International Criminal Court
(Rome Conference, 15 June – 17 July 1998)*

The question of defining criminal aggression re-emerged during international negotiations aimed at the establishment of the ICC, particularly because aggression was proposed as one of the international crimes – along with genocide, war crimes and crimes against humanity – that would fall under the ICC’s jurisdiction. At the Rome Conference, state delegates were presented with three draft definitions to consider; these had been prepared by the Preparatory Committee on the Establishment of an International Criminal Court in the lead-up to the Rome Conference. Each definition relied upon different historical-legal precedents as its starting-point: the first (Option 1) re-cast the definition of ‘crimes against peace’ in the Nuremberg Charter; the second (Option 2) was largely based upon the definition of ‘political aggression’ in Resolution 3314; and the third definition (Option 3) drew upon the prohibition against the use of force in international relations contained in Article 2(4) of the UN Charter¹⁵⁷. Importantly, these definitions departed from their historical precedents in one crucial way: by providing that the crime of aggression is committed by an individual in the position of exercising control over the military action of a state, all of them expressly incorporated the principle of individual criminal responsibility. This represented, therefore, a notable influence of the ILC’s earlier definition of criminal aggression.

Following an initial debate, state delegates were divided along three positions¹⁵⁸. A large grouping of developed and developing states favoured Option 3, which was regarded as having

¹⁵⁷ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume III, Reports and other documents), Report of the Preparatory Committee on the Establishment of an International Criminal Court (14 April 1998), UN Doc A/CONF.183/2 at pgs. 5-15 (pg. 15)

¹⁵⁸ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the

the following advantages: it limited the crime to important cases of the use of armed force and in particular, to armed attacks undertaken in violation of the UN Charter; and it met the legal standards of precision and clarity required when defining a crime and establishing individual criminal responsibility¹⁵⁹. Option 2 was largely preferred by a grouping of Arab and North African states – including Syria, Iraq, Tunisia, Libya, Algeria, United Arab Emirates, Sudan, Egypt, Lebanon, Saudi Arabia, Iran and Oman – though Italy, Spain and Cuba also indicated their support. For these states, it was important to draw upon the accumulated efforts and prior consensus that had already been achieved in past efforts to define aggression and which was embodied within Resolution 3314¹⁶⁰. And finally, a small group of states – Norway, Pakistan, Israel, Morocco, Mexico, USA and Brazil – were completely opposed to defining criminal aggression, as they felt the international crime should be altogether excluded from the Court’s jurisdiction.

The records of the debate reveal there was not much discussion among state delegates on the substantive content of the three definitions that were put forward¹⁶¹. Importantly, this was

meetings of the Committee of the Whole), 6th Meeting, Thursday, 18 June 1998, at 3.25 p.m., UN Doc A/CONF.183/C.1/SR.6 (pgs. 170-179); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 7th Meeting, Friday, 19 June 1998, at 10.30 a.m., UN Doc A/CONF.183/C.1/SR.7 (pgs. 180-182)

¹⁵⁹ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 6th Meeting, Thursday, 18 June 1998, at 3.25 p.m., UN Doc A/CONF.183/C.1/SR.6 (pg. 171)

¹⁶⁰ *Ibid.* (pg. 172)

¹⁶¹ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 25th Meeting, Wednesday, 8 July 1998, at 10.25 a.m., UN Doc A/CONF.183/C.1/SR.25 (pgs. 268-273); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 26th Meeting, Wednesday, 8 July 1998, at 3.15 p.m., UN Doc A/CONF.183/C.1/SR.26 (pgs. 276-282); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 27th Meeting, Wednesday, 8 July 1998, at 6 p.m., UN Doc A/CONF.183/C.1/SR.27 (pgs. 282-288); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 28th Meeting, Wednesday, 8 July 1998, at 9 p.m., UN

because the debate shifted to a different issue, namely, the conditions under which the future ICC's jurisdiction over criminal aggression were to be exercised. The key question here centred on the relationship between the Security Council and the ICC, and whether the ICC's jurisdiction over aggression should be made contingent upon a prior determination of the existence of acts of aggression by the Security Council. A number of states – including the permanent members of the Security Council – argued that the Security Council's powers under Article 39 of the UN Charter was a necessary precondition to the ICC's exercise of jurisdiction over aggression. However, others argued that making the ICC's jurisdiction conditional upon a Security Council determination would impair the Court's independence and unduly politicize the Court. When it became evident that state delegates were unable to reconcile their opposing views, the debate then shifted to a more fundamental question: whether or not, given the lack of consensus on both jurisdiction and a definition, criminal aggression should be excluded from the Rome Statute¹⁶².

Doc A/CONF.183/C.1/SR.28 (pgs. 288-294); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 29th Meeting, Wednesday, 9 July 1998, at 10.15 a.m., UN Doc A/CONF.183/C.1/SR.29 (pgs. 295-304); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 30th Meeting, Wednesday, 9 July 1998, at 3.10 p.m., UN Doc A/CONF.183/C.1/SR.30 (pgs. 306-312); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 31st Meeting, Wednesday, 9 July 1998, at 6 p.m., UN Doc A/CONF.183/C.1/SR.31 (pgs. 313-318)

¹⁶² Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 33rd Meeting, Monday, 13 July 1998, at 10.20 a.m., UN Doc A/CONF.183/C.1/SR.33 (pgs. 319-326); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 34th Meeting, Monday, 13 July 1998, at 3.05 p.m., UN Doc A/CONF.183/C.1/SR.34 (pgs. 327-334); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 35th Meeting, Monday, 13 July 1998, at 6.05 p.m., UN Doc A/CONF.183/C.1/SR.35 (pgs. 334-343); Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 36th Meeting, Monday, 13 July 1998, at 9 p.m., UN Doc A/CONF.183/C.1/SR.36 (pgs. 343-348)

The majority of states were unwilling to exclude aggression from the Rome Statute but with the deadline of the Rome Conference nearing, there was insufficient time for further negotiation on a definition and jurisdictional conditions. A compromise solution was therefore reached: aggression would be included in the Rome Statute as one of the international crimes falling within the ICC's jurisdiction but this jurisdiction could only be exercised once provisions setting out its definition and jurisdictional conditions were agreed upon in the future¹⁶³. At the moment when the Rome Statute was concluded, therefore, criminal aggression was in the unique position of being the only international crime without an international legal definition. Crucially, the historical records demonstrate this had less to do with fundamental disagreements over the contents of the three proposed definitions, as they received very little consideration during the deliberations. Rather, it had more to do with the fact that the initial debate over a definition was superseded by the procedural question of how and when the ICC would be able to prosecute criminal aggression. And so while the Rome Statute was momentous for having established the first permanent international criminal court, it had less importance in terms of the question of the specific form criminal aggression should assume as an international crime. The result of the Rome Conference was, as Schuster has put it, a "codified impasse" (2003: 1).

The Special Working Group on the Crime of Aggression (2003-2009)

The Rome Statute provided that a Review Conference was to be convened in order to consider amendments to the international treaty seven years after it came into force¹⁶⁴. Preparatory discussions for the Review Conference – which was to be held in Kampala, Uganda from 31 May to 11 June 2010 – began soon after the ICC was established, and formulating a definition

¹⁶³ Article 5(2) of the Rome Statute (now deleted in terms of 'Resolution RC/Res.6 'The crime of aggression' (11 June 2010)

¹⁶⁴ Article 123 of the *Rome Statute*

of criminal aggression was an urgent priority of these preparatory talks. Between 1999 and 2002, a Preparatory Commission for the International Criminal Court (Preparatory Commission) was tasked with preparing proposals on the definition of criminal aggression¹⁶⁵. However, negotiations within the Preparatory Commission failed to result in a definition and consequently, criminal aggression continued to remain undefined when the Rome Statute came into force in 2002¹⁶⁶. Major progress only came between 2003 and 2009, after a Special Working Group on the Crime of Aggression (SWGCA)¹⁶⁷ was established to continue the work of the Preparatory Commission. The SWGCA, this section will demonstrate, succeeded in formulating a definition that state parties subsequently adopted at the Review Conference in June 2010 in Kampala.

In the years leading up to the Conference, the SWGCA held a series of meetings, which brought together state delegations¹⁶⁸ as well as representatives of non-governmental organisations

¹⁶⁵ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Volume I, Final Documents), Resolution F of Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998), UN Doc A/CONF.183/10 at pgs. 72-73

¹⁶⁶ For accounts and commentaries of the discussions during the Preparatory Commission, see Silvia A. Fernandez de Gurmendi, *The Working Group On Aggression at the Preparatory Commission For The International Criminal Court* (2001) Fordham International Law Journal, 25(3): 589-605; Roger S Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court* (2002), Leiden Journal of International Law, 15(4): 859-890; Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot In Search of a Sword* (2003), Criminal Law Focus, 14(1): 1-57 (especially at pgs. 19-49); Oscar Solera, *Defining the Crime of Aggression* (2007) at pgs. 374-395; Stefan Barriga, *Negotiating the Amendments on the crime of aggression*, in Stefan Barriga and Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) at pgs. 8-14; M Cherif Bassiouni and William A Schabas (eds.), *The Legislative History of the International Criminal Court (Volume 1)* (2016) at pgs. 114-123. See also the various contributions in Mauro Politi and Giuseppe Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004), especially those by Muhammad Aziz Shukri (*Will Aggressors Ever be Tried Before the ICC?*), Mauro Politi (*The Debate within the Preparatory Commission for the International Criminal Court*), Phani Dascalopoulou-Livada (*Aggression and the ICC: View on Certain Ideas and their Potential for a Solution*), Ioana Gabriela Stancu (*Defining the Crime of Aggression or Redefining Aggression?*), and Hans-Peter Paul (*The Crime of Aggression: Definitional Options for the Way Forward*)

¹⁶⁷ Resolution on the Continuity of Work in respect of the Crime of Aggression, Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September 2002, Official Records, ICC Doc ICC-ASP/1/3 at pg. 328

¹⁶⁸ The SWGCA was open to all UN member states, members of specialized UN agencies and members of the International Atomic Energy Agency.

(NGOs). This inclusiveness was important, as it allowed NGO representatives with legal expertise to participate on an equal basis with government delegates and to introduce legal perspectives and concerns into what inevitably amounted to political negotiations (McDougall 2013: 13). Apart from formal meetings conducted during annual meetings of the Assembly of State Parties¹⁶⁹, regular informal meetings held away from UN Headquarters were also organized at Princeton University.

The ‘Princeton Process’, as it became known, has been applauded for facilitating the groundbreaking progress that the SWGCA achieved: the informal setting allowed delegates to frequently discuss issues more frankly and openly than at formal negotiations; retreating to an academic environment developed a sense of camaraderie amongst delegates; and the informal nature of the meetings allowed state delegates to constructively explore ideas that did not necessarily represent the views of their governments (Barriga 2010: 624; Barriga 2012: 15-16). Furthermore, the leadership and working methods of the SWGCA’s Chairman, Ambassador Christian Wenaweser, also helped to sustain continuous momentum. In contrast with usual international negotiations, which often centre on the discussions of national proposals, the SWGCA’s discussions were based instead on negotiation papers drawn up by the Chairman himself, which were drafted to reflect the variety of views across the negotiation table (Barriga 2012: 17). Over time, this allowed delegations to move towards an emerging consensus over narrower sets of issues and at the same time, made it more difficult for them to introduce proposals that deviated from the thrust of the Chairman’s papers (McDougall 2013: 14; Barriga 2012: 17-18).

¹⁶⁹ The Assembly of State Parties (ASP) is composed of state representatives who have ratified or acceded to the Rome Statute and it represents the ICC’s management oversight and legislative body. The ASP meets annually to consider a number of issues relating to the ICC. See: <https://www.icc-cpi.int/asp> (last accessed: 3 October 2017)

Turning to the SWGCA's efforts on formulating a definition, an important breakthrough centred on the SWGCA's appreciation of aggression's duality. While it recognized criminal and political aggression were conceptually distinct, it also found it important to establish how the two concepts were related and in turn, to determine how that relationship ought to feature within an international legal definition being negotiated for the purposes of international criminal law. Although previous proposals by the ILC and at the Rome Conference can be seen as early attempts to marry both notions of aggression, what was lacking at these earlier stages was clarity over whether, how and the extent to which the notion of political aggression ought to be accommodated within a definition of criminal aggression. As we have seen, the ILC simply reformulated the Nuremberg Charter's characterization of 'crimes against peace' and at the Rome Conference, two main definitions that were proposed respectively drew upon the Nuremberg Charter and Resolution 3314.

By contrast, confronting aggression's duality and explicating the interrelationship between the two notions of aggression was central to the SWGCA's endeavour to define criminal aggression. In this regard, the SWGCA's crucial intervention rested on positing the following starting point: a prior act of political aggression was necessary for the existence of criminal aggression. In other words, a precondition of the international crime of aggression was the existence of political aggression. Establishing this connection was decisive for the SWGCA's effort to define criminal aggression, as it enabled the SWGCA to identify three key issues on which to anchor its discussions: the elements of criminal aggression, the elements of political aggression and finally, the specific conditions or circumstances that would link these two notions together.

1 THE CRIME OF AGGRESSION

The SWGCA's¹⁷⁰ discussions on the elements of criminal aggression – or, the ‘crime of aggression’, as the SWGCA referred it to – were relatively uncontentious, and consensus on both its substance and wording was progressively achieved without much controversy. The SWGCA's focus on criminal aggression centred on the *individual perpetrator* who commits the ‘crime of aggression’ and this, in turn, required clarity on two elements: the *perpetrator* (who can commit a crime of aggression?) and his *conduct* (what does the commission of the crime of aggression entail?).

Importantly, the SWGCA identified a set of specific actions that would describe the actual physical conduct of the perpetrator and thereby link an act of political aggression with the commission of the crime by an individual perpetrator. After considering several options¹⁷¹, the SWGCA eventually turned to an existing historical precedent, namely, the characterisation of ‘crimes against peace’ in the Nuremberg Charter. As the SWGCA's members found it beneficial to closely adhere to the language used in the Nuremberg Charter, it agreed that the words the Nuremberg Charter employed to describe the actual conduct involved in ‘crimes against peace’ – “planning, preparation, initiation” – was also the best way to describe the conduct element of the crime of aggression¹⁷².

¹⁷⁰ While full references of documents relating to The Special Working Group on the Crime of Aggression discussions appear in the footnotes, all page numbers quoted hereafter refers to the pages of the following compilation: Barriga, S. and Kreß, C. (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge: Cambridge University Press (2012).

¹⁷¹ This included considering the conduct verbs “organize and direct”, “direct”, “order”, “lead” and engaging a State” to describe the conduct of the perpetrator; ‘Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 8 to 11 June 2006’, ICC-ASP/5/SWGCA/INF.1, in ASP Official Records, ICC-ASP/5/32, Annex II, 387 (pg. 511-512)

¹⁷² ‘Report of the Special Working Group on the Crime of Aggression’, ICC-ASP/5/SWGCA/2, in ASP Official Records, ICC-ASP/5/35, Annex II, 9 (pg. 585)

Turning to the perpetrator element, there was strong consensus within the SWGCA that the crime of aggression amounted to a “leadership crime”¹⁷³. This was understood to mean the perpetrators centred exclusively on the “direct leaders”¹⁷⁴ of a state who possessed “the ability to influence [that state’s] policy”¹⁷⁵. Agreement on this particular point effectively meant the SWGCA envisioned only a small circle of individuals as the possible perpetrators of the crime. Importantly, this circle excluded, for instance, ordinary soldiers of a state but included those persons with formal political roles within government circles¹⁷⁶. In essence, only those in formal positions of power, and with the ability to control the political or military affairs of a state, can be perpetrators of the crime of aggression.

2 THE ACT OF AGGRESSION

Having established that the ‘crime of aggression’ requires a prior act of political aggression, the SWGCA then had to determine how political aggression would feature within the overall definition of criminal aggression. What had to be decided, in the first instance, was how political aggression would be described within the definition and here, the following terms were proposed and considered: ‘use of force’, ‘use of armed force’, ‘armed attack’ and ‘act of aggression’¹⁷⁷. All of these proposed terms, it is worth noting, feature within the UN Charter, specifically in articles dealing with the prohibition and the permissible limits on the use of force in international relations¹⁷⁸. Moreover, that each of these proposed terms essentially described

¹⁷³ ‘Informal intersessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005’, ICC-ASP/4/SWGCA/INF.1, in ASP Official Records, ICC-ASP/4/32, Annex II, A, 357 (pg. 453); *Supra* note 171 (pg. 511)

¹⁷⁴ ‘Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007’, ICC-ASP/6/SWGCA/INF.1, in ASP Official Records, ICC-ASP/6/20, Annex III, 96 (pg. 561)

¹⁷⁵ *Supra* note 171 (pg. 511)

¹⁷⁶ *Supra* note 172 (pg. 586)

¹⁷⁷ ‘Discussion Paper 3: Definition of Aggression in the Context of the Statute of the ICC’, in ASP Official Records, ICC-ASP/4/32, Annex II, D, 388 (pg. 485)

¹⁷⁸ Articles 2(4), 39 and 51 of the UN Charter

objectionable actions committed by one state in the sphere of international peace and security demonstrates the core idea behind political aggression was not in dispute at this stage. And indeed, the records of the SWGCA's deliberations show an absence of contestation over the fundamental meaning of political aggression.

Rather, there was contestation over which of the proposed terms would be more suitable within the definition. Some delegates preferred the term 'armed attack', as it was seen as a good way to ensure only the gravest violations of the UN Charter would fall within the scope of the international crime¹⁷⁹. However, other delegates felt using a term that had not been defined in either the UN Charter itself or in other international treaties was unwise; they preferred, rather, to draw upon a term that had already been defined¹⁸⁰. Broader support was therefore expressed for 'act of aggression', the actual term used in Resolution 3314¹⁸¹. Resolution 3314, many argued, was a carefully negotiated instrument that reflected current international consensus under international law¹⁸². Ultimately, it was the appeal of an existing precedent that directed the SWGCA's decision, and it opted to describe political aggression as 'an act of aggression' for the purposes of the definition of criminal aggression.

The decision to rely upon Resolution 3314 thereby opened up two further questions for the SWGCA to consider. The first, and more substantive, issue centred on whether the scope of political aggression ought to be qualified. More specifically, could *all* or only *some* acts of political aggression form the underlying basis of the international crime? This was a significant question because if it were the latter, then further agreement was needed on the criteria that

¹⁷⁹ *Supra* note 172 (pg. 538)

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² 'Report of the Special Working Group on the Crime of Aggression', in ASP Official Records, ICC-ASP/6/20/Add.1, Annex II, 9 (pg. 608)

would govern this qualification. Two views emerged within the SWGCA on this matter. Some delegates felt all acts of aggression could lie at the heart of the international crime and as such, its scope did not require further circumscription. In their view, the fact that Resolution 3314 defined an ‘act of aggression’ as an attack against the sovereignty, territory and political independence of another State necessarily implied that only acts of an extremely serious nature were in question¹⁸³. The high level of gravity implicit within the very meaning of political aggression meant, in turn, that only grave acts would constitute the basis of the international crime. Aggression, it was also argued, had been included as one of the four acts falling within the ICC’s jurisdiction because it amounted to, in the language of the Rome Statute, one of the ‘most serious crimes of international concern’. As *all* acts of aggression had been deemed appropriately grave enough to warrant the ICC’s jurisdiction, there was no need to introduce any further qualification¹⁸⁴. According to this perspective, therefore, the very idea of political aggression, as evidenced by its definition and its characterization in the Rome Statute, implied a level of severity and no further qualification, for the purposes of the crime, upon its scope was required.

However, other delegates held an opposing view and were in favour of circumscribing political aggression for the following reasons: firstly, to exclude cases of insufficient gravity that might nevertheless be deemed acts of aggression due to the use of force being involved, such as border skirmishes; and secondly, to exclude borderline cases or those falling within a “grey area”, such as humanitarian intervention¹⁸⁵. The key concern, from this perspective, was to ensure only unquestionably serious acts of political aggression could form the basis of the international crime. In order, then, to distinguish between those acts of political aggression that would

¹⁸³ *Supra* note 171 (pg. 499)

¹⁸⁴ *Ibid.*; *Supra* note 172 (pg. 539)

¹⁸⁵ *Supra* note 177 (pg. 486); *Supra* note 171 (pg. 499); *Supra* note 172 (pg. 539); *Supra* note 182 (pg. 606)

qualify as the basis of the international crime and those which would not, the introduction of a threshold clause within the definition of criminal aggression was proposed.

Here, too, an existing normative precedent figured highly as a referent point, namely, the UN Charter itself. In terms of the proposed threshold clause, only those acts of aggression which, by their “character, gravity and scale”, constituted a “manifest violation” of UN Charter would qualify as the basis for criminal aggression¹⁸⁶. The intended effect of this threshold clause was to ensure the crime of aggression would not arise in relation to all possible instances of political aggression but rather, only in the case of acts of aggression of an exceptionally serious and grave nature. As this threshold clause was favoured by a majority, it was agreed that it would form part of the definition of criminal aggression¹⁸⁷.

A final question concerned the extent to which Resolution 3314 should feature within the definition of criminal aggression: would a generic reference suffice, should reference be made to specific parts of the resolution, or should specific parts of the resolution should be reproduced verbatim¹⁸⁸. There were delegates who were opposed to Resolution 3314 being referred to at all because for them, the resolution amounted to a “political instrument” that had been negotiated in an altogether different context¹⁸⁹. This was, of course, not entirely incorrect. Resolution 3314, as demonstrated, was the outcome of efforts to define political aggression within the sphere of international peace and security. However, the prior decision to draw upon Resolution 3314 in order to link political aggression with the international crime meant that the question of the resolution’s place within the context of international criminal law could not be ignored. In this regard, the majority held the view that the main thrust of Resolution 3314

¹⁸⁶ ‘Discussion Paper Proposed by the Chairman’, 16 January 2007, ICC-ASP/5/SWGCA/2 (pg. 527)

¹⁸⁷ *Supra* note 182 (pg. 607)

¹⁸⁸ *Supra* note 171 (pg. 501)

¹⁸⁹ *Supra* note 172 (pg. 540)

centred on two specific provisions and that it was these that ought to feature in the criminal aggression's definition: Article 1 (which provided the general definition of political aggression) and Article 3 (which provided a non-exhaustive list of specific acts of political aggression). What influenced this decision, the records of the meetings reveal, were the following considerations: Articles 1 and 3 were viewed as being precise enough for the purposes of a defining an international crime; the non-exhaustive list of acts was sufficiently open to cover future forms of aggression; and overall, the substantive integrity of the resolution as a whole was preserved¹⁹⁰.

To sum up, the SWGCA's efforts to establish the core features of political aggression were strongly anchored and based upon an already-existing precedent, namely, the definition of political aggression in Resolution 3314. In this regard, the core thrust of the 1974 definition – that political aggression represents an unlawful armed attack against the sovereignty and territory of a state – remained uncontested, despite the passage of approximately 25 years. New ground was tread, however, in the formulation of threshold clause, aimed at specifying the particular conditions that would link political aggression with criminal aggression. Here, only acts of aggression which by their character, gravity and scale amounted to manifest violations of the UN Charter would qualify as the basis of the crime of aggression.

Article 8bis: a definition of criminal aggression

After 6 years of negotiations, the SWGCA formulated a final definition of criminal aggression. The definition was put forward in Article *8bis*, which was to complement existing articles in the Rome Statute that defined the other three international crimes. Article *8bis* comprised of two parts – an opening paragraph that defined the 'crime of aggression' and a second paragraph

¹⁹⁰ *Supra* note 182 (pg. 608)

that defined the ‘act of aggression’ – and read together, it embodied the core elements of criminal and political aggression that the SWGCA had agreed upon: the perpetrator of the crime (persons in formal positions of leadership), the necessary conduct (an act of aggression), the specific conditions that would link the two notions of aggression (the threshold clause) and the meaning of an ‘act of aggression’ (references to Resolution 3314).

The text of Article 8*bis* is as follows:

1. For the purpose of this Statute, “crime of aggression” means 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.
2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
 - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁹¹

Article 8*bis* was presented to state parties at the Review Conference and crucially, no changes were either proposed or made to Article 8*bis* at this stage. The SWGCA had, therefore,

¹⁹¹ ‘Report of the Special Working Group on the Crime of Aggression’, ICC-ASP/7/SWGCA/2, in ASP Official Records, ICC-ASP/7/20/Add.1, Annex II, 20 2009 (pg. 663)

succeeded in formulating a definition of criminal aggression that garnered international support. On 11 June 2010, at the end of the Review Conference, Article 8*bis* was adopted by states as part of a resolution containing amendments to the Rome Statute¹⁹².

Existing accounts generally treat the adoption of Article 8*bis* in 2010 as the decisive moment when aggression acquired its international legal definition. By contrast, this chapter offers a different interpretation. Finality on aggression's form hinged upon *two* separate moments which, although considerably separated in time, collectively represent the crystallization of international consensus on aggression's precise contours. The alternative interpretation suggested here places more emphasis on aggression's inherently dualistic nature. This duality represents a fundamental part of aggression's story towards international criminalization. As this chapter has demonstrated, international agreement on aggression's form required the formulation of two distinct definitions: one for political aggression, and another for criminal aggression. Each of these definitional endeavours constituted distinct streams within aggression's path towards international criminalization – and not, as is commonly portrayed, one singular overarching effort. This is evident from how efforts to define these two notions of aggression occurred in different realms and eras of international politics, and how they unfolded in very different ways.

The quest to define political aggression was situated within broader efforts to consolidate collective security arrangements aimed at the maintenance of international peace and security. As these arrangements, and the fundamental principles upon which the post-war international

¹⁹² Review Conference of the Rome Statute of the International Criminal Court (Kampala, 31 May – 11 June 2010), Official Records, 'RC/Res.6 'The crime of aggression'' (11 June 2010), RC 11, Part II, pg. 17-18

order would rest upon, were enunciated in the UN Charter, defining political aggression was inextricably linked to the UN Charter, its core values and primary purposes. However, it was the perceived limitations of the UN Charter itself that helped to spur and sustain demands for a definition. When the opportunity to define political aggression during the drafting of the UN Charter itself was deliberately rejected, subsequent definitional efforts thereafter were all driven with the aim of clarifying a term that had been included but which had not been defined in the UN Charter. Complicating this task, however, were broader Cold War dynamics and political tensions, which magnified the political interests that coalesced around key provisions of UN Charter. Here, key issues around which divergent perspectives on a definition of political aggression revolved around included: the role and powers of the Security Council (Article 39); the general prohibition against the use of force (Article 2(4)); and the legitimate uses of force in international relations (Article 51). Consequently, consensus on a definition in the early 1950s and throughout the 1960s proved difficult to achieve and a cooling-down of international political tensions was needed before significant progress towards a definition could be made. This, as we have seen, was achieved in 1974 with the adoption of Resolution 3314 by the GA.

Meanwhile, attempts to define criminal aggression were rooted within broader efforts relating to the progressive development of international criminal law. This also commenced in the immediate aftermath of the Second World War but crucially, after a definition of political aggression had been agreed upon. Initial proposals for a definition were advanced in the context of the ILC's preparation of a Draft Code of Offences against the Peace and Security of Mankind between the 1980s and 1990s. However, genuine momentum on the definitional front only gained steam once the contemporary system of international criminal justice had been consolidated – and more specifically, once the first permanent international criminal court had been established. Indeed, while more significant movement on a definition transpired during

international negotiations aimed at the establishment of the ICC in 1998, concrete progress was really only forthcoming in the years after the ICC came into operation. At this point, establishing criminal aggression's form acquired greater significance, as a definition of this international crime was required in order to fill an omission in the Rome Statute that been deliberately agreed upon at the Rome Conference. International talks aimed at negotiating a definition and which culminated in the Review Conference of 2010 were particularly decisive in this regard – and a definition was finally agreed upon after Article 8*bis* was adopted at the Review Conference in 2010.

The outcome of *both* of these definitional enterprises, this chapter argues, collectively represents the point when finality on aggression form was achieved. Given that two definitions were formulated for two distinct purposes at different points in time, it might be tempting to treat each definition, and the history leading up to them, as independent developments. If one were interested in the history of aggression, therefore, one could conceivably choose to focus on either political or criminal aggression – or indeed, choose not to draw such a distinction and instead, as existing accounts do, conflate the two. However, from the perspective of international criminalization, it is analytically useful to accord equal emphasis to both definitions, as they illuminate what was especially unique about the process by which aggression came to acquire its eventual form. This involved, as already mentioned, efforts to define aggression for the separate purposes of international peace and security and international criminal law. In this regard, the two streams of ‘the political’ and ‘the criminal’ developed separately. However, what is not often emphasized and which needs to be better appreciated, is that these two distinct streams eventually converge – and herein lies the uniqueness of the process by which aggression acquires its distinctive form.

We see the narrowing and the coming together of the two streams in the years after the ICC's establishment, particularly during the SWGCA's negotiations leading up the Review Conference. At this juncture, political and criminal aggression intersected with one another, predominantly because the SWGCA, unlike the ILC and delegates at the Rome Conference, found it important to establish a relationship between the two notions. In positing that criminal aggression is dependent on political aggression – or to put it differently, that the crime of aggression rests upon a prior act of aggression – the SWGCA paved the way, though perhaps not by intentional design, for both notions to be more firmly linked than ever before. From that point on, therefore, formulating a definition of criminal aggression inevitably required drawing upon the already-existing definition of political aggression. The point being made here is not simply that the definition of criminal aggression incorporated aspects of Resolution 3314. This was certainly the case, as the text of Article 8*bis* shows. The more significant point is that a definition of criminal aggression would not have been possible without *prior* international agreement on a definition of political aggression. Aggression's final form, which we now see in the Rome Statute, embodies international consensus on the content of both political aggression and criminal aggression. Accordingly, *both* Resolution 3314 and Article 8*bis* need to be viewed as the markers of international agreement on aggression's form.

6 PIRACY: A CASE OF A NON-INTERNATIONAL CRIME

Piracy does not fall within the jurisdiction of the International Criminal Court (ICC); it is not an offence, therefore, that can be prosecuted by and before the ICC. This suggests piracy is nowhere as egregious as the four existing international crimes. Put differently, it neither “shock[s] the conscience of humanity” nor amounts to one of “the most serious crimes of concern to the international community as a whole”¹. However, the position in international legal scholarship is not as clear as international law itself might imply: there is divergence in the scholarship as to whether piracy constitutes an international crime or a transnational crime. In light of piracy’s disputed status, this chapter weighs in on this debate by demonstrating how the concept of international criminalization can help determine piracy’s criminal character more conclusively.

In doing so, the chapter begins by introducing piracy’s international legal definition and its core elements. Thereafter, it surveys the two rival conceptualizations of piracy within contemporary international legal scholarship, giving particular attention to the justifications underpinning these two different views. The rest of the chapter examines piracy’s historical development during the twentieth century in relation to the process of international criminalization. This is directed at assessing, firstly, whether an international criminal norm against piracy was established and secondly, whether it was thereafter embodied in an international legal proscription. The historical analysis is structured according to four distinct phases, which saw different actors and organizations being involved in key moments of

¹ Preamble of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

piracy's history: the League of Nations (1924-1927); the Harvard Research in International Law (1931-1932); the International Law Commission (ILC) (1949-1956); and the General Assembly (GA) of the United Nations (UN) (1958).

As this chapter will demonstrate, the two stages of international criminalization were absent in piracy's case. Throughout piracy's historical development in the twentieth century, an international criminal norm against piracy never developed because piracy was not thought of as deserving the status of an international crime in the same way genocide and aggression did. Piracy, did, however, acquire an international legal definition, which was codified in an international treaty in 1958. However, this definition was not obtained for the purposes of international criminalization, namely, to specify the form piracy ought to assume as an international crime. Rather, efforts to accord piracy with an international legal definition were undertaken as part of broader efforts to codify international law in the twentieth century. In this regard, defining piracy was considered as important for the purposes of codifying the international law of the seas. The second stage of international criminalization also did not occur in piracy's case. Given that the first stage of international criminalization did not occur, there was simply no international criminal norm to translate into an international legal proscription. Piracy cannot, therefore, be regarded as an international crime. Rather, it is better conceived as a transnational crime.

PIRACY UNDER INTERNATIONAL LAW

Piracy is defined in the United Nations Convention on the Law of the Sea (UNCLOS)². Established to create a "legal order for [the] seas and oceans"³, this international treaty codifies

² 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS)

³ Preamble of UNCLOS

international rules regulating almost every possible detail on, in, under, and over the sea (Churchill 2015a: 15). Comprising 320 articles, UNCLOS governs the peaceful uses of the seas and oceans, the equitable and efficient utilization of its resources, the conservation of its living resources, and the study, protection and preservation of the marine environment⁴. Under the UNCLOS regime, the waters of the earth are stratified into different juridical categories, namely, the territorial seas⁵, contiguous zones⁶, exclusive economic zones⁷ and the high seas⁸.

The category of the ‘high seas’ features in piracy’s international legal definition and furthermore, the provisions on piracy in UNCLOS are addressed under the section regulating ‘the high seas’. This makes it important to highlight how in terms of the principle ‘freedom of the high seas’⁹, the high seas are open to all states and no state may subject the high seas to its sovereignty¹⁰. Simply put, the high seas are not the territory of any state but are open to all states on an equal basis (Talbee 2009: 195; Palmer 2014: 8). With this in mind, piracy refers to the following:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any other act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)¹¹

⁴ *Ibid.*

⁵ Territorial seas extend 12 nautical miles from a coastal state’s coastline, and are part of that state’s sovereign territory (Article 3 of UNCLOS).

⁶ Contiguous zones extend 24 nautical miles from a coastal state’s territorial seas and such states are entitled to exercise control in this zone (Articles 33(1) and 33(2) of UNCLOS).

⁷ Exclusive economic zones extend 200 nautical miles from a coastal state’s territorial seas and such states have sovereign rights over the economic resources in this zone (Articles 56 and 57 of UNCLOS).

⁸ The high seas are the remainder of the world’s oceans that do not constitute territorial seas, contiguous waters, or exclusive economic zones (Article 86 of UNCLOS).

⁹ Article 87 of UNCLOS

¹⁰ Articles 89 and 90 of UNCLOS

¹¹ Article 101 of UNCLOS

Five essential elements are specified by this international legal definition. Firstly, piracy requires an illegal act of *violence or depredation*. Although often thought of as denoting ‘robbery at sea’, piracy is not confined to this but includes any form of unauthorized force (Boister 2012: 19; Churchill 2015b: 13; Murphy 2010: 7). Secondly, piracy can only occur on the *high seas*. This means piracy can never occur within the territorial waters of states, even if acts similar to piracy’s definition are involved. When committed within territorial waters, such acts amount to ‘armed robbery at sea’ (Boister 2012: 31; Petrig 2015: 850). Thirdly, piracy requires *two vessels*, with one launching a piratical attack against another. Commonly referred to as the ‘two-ship requirement’, this element excludes acts of mutiny or revolt from piracy’s scope (Boister 2012: 31; Campbell 2010: 25; Guilfoyle 2014a: 372; Heinze 2013: 52). Attacks committed by persons already on board a vessel – either passengers or crew – do not amount to piracy, therefore.

Fourthly, piracy can only be committed by the crew or passengers of a *private ship*. Public vessels, such as warships or ships affiliated with a state, are therefore entirely excluded piracy’s scope (Churchill 2015b: 18; Hodgkinson 2015: 19). This element implies piracy is “an act of private violence”, namely, one that can only be committed by non-state actors (Kritsiosis 2011: 7). And indeed, this is reinforced by the final element: piracy must be committed for *private ends*. This refers, firstly, to the actor involved in piracy: only private actors can commit piracy (Reydam 2004: 58; Hodgkinson 2015: 19). Consequently, the actions of public actors – such as states – do not fall within piracy’s scope (Boister 2012: 20). The second aspect of this requirement concerns the motivation behind piratical acts. Piracy, in this regard, is restricted to acts motivated by private gain, such as financial gains or profits (Cronin 2013: 194; Heinze 2013: 53). Acts driven by other motivations – such as politically or ideologically motivated

acts like maritime terrorism or violent ecological activism at sea – do not, therefore, constitute piracy (Guilfoyle 2009: 32; Heinze 2013: 53; Petrig 2015: 847).

Apart from this definition, UNCLOS establishes the duty of states to “cooperate to the fullest possible extent in the repression of piracy”¹². UNCLOS also provides any state may seize and arrest a pirate ship; moreover, the courts of the state that carried out the seizure may decide on the penalties to be imposed¹³. Although any state is entitled to take action against pirates, UNCLOS does not make it obligatory for states to do so (Nanda 2015: 73). International law is permissive in this regard: states can choose to exercise their right to seize, arrest and prosecute pirates and are not obliged to do so (Guilfoyle 2009: 30-31; Heinze 2013: 52; Klabbers 2015: 334; 341). It is worth mentioning that the legal provisions on piracy represent a very small part of UNCLOS, merely eight articles. However, they are widely regarded as international customary law (Azubuike 2009; Boister 2012; Campbell 2010; Churchill 2015b; Dutton 2013; *Fernández* 2012; Guilfoyle 2009; Guilfoyle 2014a; Petrig 2015; Petrig and *Geiß* 2011; Hodgkinson 2015). This means non-signatory states, currently including the United States and Israel, are nevertheless bound by the provisions on piracy¹⁴.

PIRACY: AN INTERNATIONAL OR A TRANSNATIONAL CRIME?

Although piracy has a settled definition, there is less clarity about the nature of its criminality. Here, it is important to point out the word ‘crime’ is not used anywhere in the eight provisions on piracy in UNCLOS (Churchill 2015b: 9). Nevertheless, piracy is frequently characterized as an *international crime* (Bassiouni 1996, 2001, 2008; Colangelo 2006; Dickinson 1925;

¹² Article 100 of UNCLOS

¹³ Article 105 of UNCLOS

¹⁴ By mid-2017, 168 parties were signatories to UNCLOS. Internet: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last accessed: September 2017)

Joyner 1996; Kritsiotis 2011; Oppenheim 1920; Simpson 2006, 2007; Yarnold 1994)¹⁵. Some scholars also see piracy as the first international crime to have been established in the international legal order (Shearer 2010; Simpson 2006, 2007).

Piracy is not subject to traditional rules of jurisdiction¹⁶ but has always been subject to universal jurisdiction (Bassiouni 2001; Colangelo 2006; Goodwin 2006; Gould 2010; Randall 1988). Universal jurisdiction, a principle of customary international law, provides all states with jurisdiction over offenses generally recognized as being of universal concern¹⁷ (Colangelo 2006: 10; Randall 1988: 788). Unlike the traditional bases of jurisdiction, no specific link between a state and the offence, perpetrator, or victim is required. Rather, it is solely the nature of the offence itself that comes into play with universal jurisdiction (Princeton Project on Universal Jurisdiction 2001: 43). In this regard, some offences constitute violations against the whole of mankind: they have a quality of “extraordinary heinousness” and are universally condemned (Gould 2010: 82; Kontorovich 2004: 186). Universal jurisdiction, therefore, is a “means of highlighting forms of conduct which attract the opprobrium of the international community” (Evans and Galani 2015: 345). More crucially, it enables any state to punish perpetrators of the “world’s worst and most heinous crimes” (Kontorovich 2004: 185). As

¹⁵ Other cognate terms used to refer to piracy’s criminality include ‘core universal crime’, ‘crime *jure gentium*’, ‘*ius cogens* international crime’, and ‘an offence against the law of nations’.

¹⁶ ‘Jurisdiction’ refers to “a State’s international capacity or competence under international law to prosecute and punish [the] commission of a crime” (Reydams 2003: 4). States can assert jurisdiction on the basis of four principles; each of these establishes a material link between an offence and the interests of the state asserting jurisdiction (Gould 2010: 83). In terms of the ‘territorial principle’, states can assert jurisdiction over crimes committed within their territory, while the ‘nationality principle’ gives states jurisdiction over crimes committed by their nationals, whether in or outside their territory (O’Keefe 2004: 736; Randall 1988: 787) States can also assert jurisdiction over their nationals who have been victims of a crime on the basis of the ‘passive personality principle’ (Gould 2010: 83). Finally, the ‘protective principle’ gives states jurisdiction in cases where a crime committed abroad has damaging consequences to that state’s fundamental national interests (O’Keefe 2004: 739; Reydams 2003: 22).

¹⁷ Aside from piracy, slavery, the four international crimes and some acts prohibited by multilateral treaties, like apartheid, torture, terrorism, hijacking, currency counterfeiting, and drug trafficking, are also subject to universal jurisdiction (Bassiouni 2001; Gould 2010; Joyner 1996; Kraytman 2005; Randall 1988; Reydams 2003). However, this list is not exhaustive, as new acts may be subjected to universal jurisdiction in the future (Princeton Project on Universal Jurisdiction 2001: 48).

Bassiouni explains, the rationale behind universal jurisdiction is to ensure accountability for the perpetration of universal offences and furthermore, to preserve interests that are commonly shared and accepted by the international community as a whole (2001: 88; 96).

Piracy has a long-standing association with universal jurisdiction and according to some scholars, it has been subject to universal jurisdiction since at least the seventeenth century (Kontorovich 2004: 190; Kraytman 2005: 97; Randall 1988: 791; Taulbee 2009: 194). For over hundreds of years, moreover, piracy was the *only* offence subjected to universal jurisdiction (Abi-Saab 2003: 599; Goodwin 2006: 987; Hodgkinson 2015: 15; Kontorovich 2004: 184; Shearer 2010). Piracy is commonly portrayed, therefore, as “the oldest offence that invokes universal jurisdiction” (Randall 1988: 791)¹⁸. The most common explanation for why piracy has been subject to universal jurisdiction is that pirates have historically been regarded as *hostes humani generis* (Bassiouni 2001; Goodwin 2006; Gould 2010; Halberstam 1988; Nanda 2015; Oppenheim 1920; Radin 1946a; Randall 1988; Tuerk 2009). Originating from Roman times, this Latin term (which translates into ‘enemies of mankind’) refers, in contemporary political discourse, to offences that are deemed unacceptable to the international community (Greene 2008: 700). In piracy’s case, the term has resulted in pirates being described as: “the enemy of every State” (Oppenheim 1920), “enemies of the entire human race” (Kritsiotis 2011; Radin 1946a), “an international outlaw” (Dickinson 1925; Randall 1988; Shearer 2010; Taulbee 2009), “international criminals” (Dickinson 1925), “criminals against the laws of all mankind” (Amirell and Müller 2014), and “offenders of international law” (Kontorovich 2010).

¹⁸ Other similar characterizations include: “the paradigmatic [...] case of universal jurisdiction” (Abi-Saab 2003: 599); the “oldest and singularly most accepted application of the universality principle” (Kraytman 2005: 97); “the first widely accepted crime of universal jurisdiction” (Scharf 2001: 81); the “paradigmatic crime for which international law authorizes and even requires universal enforcement and punishment” (Kontorovich 2010: 246); and the “international crime *par excellence* to which [the] universality [principle] applies” (Bassiouni 2001: 111; original emphasis).

This begs the question why pirates have been specifically depicted as *hostes humani generis*.

A review of the literature reveals two principal reasons, which are aptly articulated by Simpson:

“[Pirates] disrupted international commerce, they were an irritant to Empire, they acted in pursuit of disqualified ends (greed, anarchy), they were *res nullius* (having allegiance to no state) and they behaved abominably, showing no regard at all for the ‘laws of war’ or the principles of maritime civility or the *ius ad bellum*” (2007: 161; original italics; see also Greene 2008: 688).

Firstly, then, pirates commit heinous and indiscriminate acts of violence and plunder (Dickinson 1925: 336; Joyner 1996: 165; Randall 1988: 794; Scharf 2001: 80). Pirates’ actions, moreover, challenged the idea of the sovereign state: by deliberately operating outside the confines of the law, they questioned everything the state-based system stood for (Guilfoyle 2009: 37; Simpson 2007: 172). Piracy has been viewed, therefore, as a wildly depraved practice [that] lies entirely outside the bounds of civilized conduct” (Kontorovich 2004: 222). By committing piratical acts, pirates placed themselves outside the moral boundaries of the international order, thereby rendering themselves enemies of all mankind. Secondly, pirates negatively affect the common economic interests of states (Goodwin 2006: 981-982; 989; Halberstam 1988: 288; Tuerk 2009: 15). In particular, pirates disrupted international commerce and trade; disturbed the freedom of navigation upon the high seas; and threatened the safety of international shipping (Greene 2008: 701; Guilfoyle 2009: 38; Kontorovich 2010: 252; Randall 1988: 794). In doing so, pirates challenged states’ interest in maintaining law and order over the oceans (Amirell and Müller 2014: 17; 21). Pirates, therefore, represent enemies to the smooth functioning of international commerce: “they infested the [highway] between legitimate trading nations and repeatedly disrupted the otherwise orderly world of reciprocal commercial relations” (Greene 2008: 701).

However, the characterization of piracy as an international crime has been criticized as a “misstatement that has come into usage from convenience and not legal accuracy” (Kraytman 2005: 99). Piracy, therefore, has also been conceived as a *transnational crime* (Boister 2012;

Churchill 2015b; Klabbers 2015; Kraytman 2005; Guilfoyle 2014a; Taulbee 2009). In fact, one scholar goes as far as suggesting piracy is the “first historical example of a transnational crime” (Boister 2012: 27), while another argues it represents the “prototypical *transnational* crime” (Guilfoyle 2014a: 366; original emphasis). Transnational crimes, it will be recalled, are acts states have chosen to control and suppress through international conventions (Boister 2003: 955; Gaeta 2009: 63). Two central considerations underpin this alternative view on piracy.

Firstly, an international convention has been concluded to specifically deal with piracy. UNCLOS, it is argued, operates like other existing suppression conventions: it does not establish a substantive offence of piracy under international law but rather, simply provides a broad framework for states to take individual action against piracy (Klabbers 2015: 333; Azubuike 2009: 12). Crucially, UNCLOS does not prescribe action against piracy in terms of international law. Rather, states are free to deal with piracy through national laws and domestic courts (Boister 2012: 28; Haywood and Spivak 2012: 79; 94; Petrig 2015: 859).

Secondly, piracy’s historical association with universal jurisdiction does not, it has been argued, automatically render it an international crime. Rather, universal jurisdiction places piracy under special jurisdictional rules, so that states can exercise jurisdiction over piratical acts (Boister 2014: 28; Kraytman 2005: 103). Piracy, it has therefore been suggested, is simply “the basis of an extraordinary jurisdiction” (Randall 1988: 796). Ordinarily, states’ jurisdiction over the high seas is governed by two legal principles. Under the *mare liberum* principle (freedom of navigation of the seas), the high seas are open to ships of all states: all vessels have the right of free passage through international waters and no state may police the high seas (Goodwin 2006: 988; Reydams 2003: 57; Struett and Nance 2013: 6; Treves 2015: 4). However, in terms of the ‘flag principle’, states are entitled to exercise jurisdiction over vessels

that that bear its flag (Randall 1988: 793; Struett and Nance 2013: 6). Universal jurisdiction provides an exception to both these rules in the case of piracy: firstly, it gives states jurisdiction over pirates, even though they are ordinarily not allowed to police the high seas and secondly, it allows states to exercise jurisdiction over pirate ships, even if they may not be flying their flag. And so although the high seas are usually beyond the sovereign control of states, these two exceptions allow states to enjoy “extraordinary extra-territorial rights” over the seas in the case of piracy (Simpson 2007: 163).

THE HISTORICAL DEVELOPMENT OF PIRACY: AN INSTANCE OF INTERNATIONAL CRIMINALIZATION?

Whether conceived as an international or transnational crime, existing accounts of piracy do not discuss piracy in relation to the concept of international criminalization. Yet, it is precisely this concept that can help ascertain more definitively whether piracy represents an international crime. In this section, key moments in piracy’s history during the twentieth century will be reviewed in relation to the two-stage process of international criminalization, in order to establish whether it is possible to speak of an international crime of piracy. Here, it is important to appreciate that piracy’s historical development in the modern international legal order was closely intertwined with efforts to codify international law during the twentieth century. Piracy, moreover, was the subject of investigation by four different bodies, all of whom were involved in international efforts to codify international law: the League of Nations, the Harvard Law School, the International Law Commission and the General Assembly of the UN.

League of Nations (1924-1927)

On 22 September 1924, the League's Assembly requested its Council to convene a committee of experts on the codification of international law¹⁹. The 'Committee of Experts for the Progressive Codification in International Law'²⁰ (Committee of Experts) was thereby established and it was tasked with preparing a provisional list of issues which might be suitable for international regulation by international agreement²¹. Piracy was included in this list²² and a subcommittee consisting of two legal experts – Ambassador Matsuda (Japanese Ambassador to Rome) and Dr Wang Chung-Hui (Deputy Judge of Permanent Court of International Justice) – was appointed to examine whether an international convention on piracy could be established²³.

The subcommittee answered this affirmatively and it included a draft convention on piracy ('Draft Proposal for the Suppression of Piracy') in its report (the Matsuda Report)²⁴. Piracy, the Matsuda Report stated, consists of "sailing the seas for private ends without authorization from the Government of any state with the object of committing depredations upon property or acts of violence against persons"²⁵. It also elucidated the subcommittee view on piracy's key

¹⁹ "Resolution Adopted by the Assembly of the League of Nations at Its Meeting Held on Monday, September 22nd, 1924", reproduced in *The American Journal of International Law Supplement* (1928) 22(1): v

²⁰ Included in the committee were legal experts from Sweden, Italy, Great Britain, France, Salvador, Netherlands, Portugal, Czechoslovakia, Japan, India, Poland, Germany, Argentina, Belgium, China and the United States of America; "Composition of the Committee of Experts Appointed by the Council of the League of Nations", reproduced in *The American Journal of International Law Supplement* (1928) 22 (1): v-vi

²¹ *Supra* note 19

²² Other issues selected for investigation included: nationality; territorial waters; diplomatic privileges and immunities; responsibility of states in respect of injury caused in their territory to the person or property of foreigners; procedure of international conferences for the conclusion and drafting of treaties; and exploitation of the products of the sea; "Second Session of the Committee of Experts for the Progressive Codification of International Law", reproduced in *The American Journal of International Law Special Supplement* (1926) 20(3): 17–20

²³ "First Session of the Committee of Experts for the Progressive Codification of International Law", reproduced in *The American Journal of International Law Special Supplement* (1926), 20(3): 12–16

²⁴ "Questionnaire No. 6: Piracy", reproduced in *The American Journal of International Law Special Supplement* (1926) 20(3): 222-229

²⁵ *Ibid.* (pg. 223-224)

features: piracy can only be committed by a private vessel; piracy is committed for private ends; pirates can be seized, captured and arrested by any state; piracy constitutes a danger against the security of commerce on the high seas; piratical attacks are directed against the interests of international maritime commerce and as such, are harmful to the international community of states; and finally, pirates are enemies of the human race²⁶. The first four of these features, it is interesting to note, are almost identical to the piracy provisions in UNCLOS.

The Matsuda Report solicited replies from governments²⁷. Twenty-three governments favoured an international convention on piracy but three distinct positions were discernible²⁸. Eleven governments were unequivocally in favour of an international convention on piracy, including the British Empire, Cuba, India, Salvador, Venezuela, Netherlands, Poland, Bulgaria, Egypt, New Zealand and the Kingdom of the Serbs, Croats and the Slovenes²⁹. Three governments – Germany, Brazil and Sweden – did not think the international regulation of piracy was especially important or urgent but they did not object to an international convention³⁰. While replying in the affirmative, nine other governments – Australia, Belgium, Spain, Greece, Italy, Japan, Portugal, Czechoslovakia, and Romania – submitted minor reservations³¹. For instance, Australia and Belgium suggested an international conference be convened to formulate rules on piracy; Greece and Italy stated they reserved their right to observations before any

²⁶ *Supra* note 23 (pg. 223-226)

²⁷ The replies of governments are compiled in the annex to “Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation, Questionnaires Nos. 1 to 7, Adopted by the Committee at its Third Session, held in March-April 1927”, see League of Nations Publication V.Legal.1927.V.28 (pg. 127-260)

²⁸ “Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation, Questionnaires Nos. 1 to 7”, reproduced in *The American Journal of International Law Special Supplement* (1928) 22(1): 4–38 (pg. 25)

²⁹ *Ibid.* (pg. 25 and 27-28)

³⁰ *Supra* note 28 (pg. 25 and 32-33)

³¹ *Supra* note 28 (pgs. 25 and 28-32)

agreement is concluded; and Japan stated its authorities were currently studying the issue of piracy³².

Only two states vocally opposed an international convention on piracy. As piracy was nearly extinct, the United States felt its regulation by international agreement was of little importance³³. Meanwhile, France found it undesirable because the conditions required for its international regulation – such as each state needing powers of supervision and jurisdiction over ships – were not, in its view, present³⁴. Finally, six states – Austria, Denmark, Estonia, Finland, Norway and Switzerland – did not submit substantive opinions on piracy, with many of them stating piracy was either of little or indirect importance to their countries³⁵.

The minority view against an international convention on piracy was echoed within the League's Council. After studying the Matsuda Report, the Council came to the following conclusion:

“It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement”³⁶.

It also recommended piracy be excluded from the League of Nations' future efforts on the codification of international law. While this effectively brought an end to the initial concern piracy received within the League of Nations, the events leading up to this are instructive from the perspective of international criminalization. It demonstrates, in particular, that international

³² *Ibid.* (pgs. 28-29)

³³ *Supra* note 28 (pg. 33)

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ “Resolution Adopted by the Council on June 13th, 1927: Report Presented to the Council by the Polish Representative and Minutes of the Proceedings in the Council”, reproduced in *The American Journal of International Law Special Supplement* (1928) 22(1): 215-233 (pg. 222)

agreement on status and form – the two elements required for the first stage of international criminalization – were absent in piracy’s case.

Firstly, there was an absence of views that piracy deserves the *status* of an international crime. Piracy was neither designated nor referred to as an ‘international crime’ in the Matsuda Report. Rather, piracy was primarily conceived as a threat to international commerce. And indeed, the proposed draft international convention on piracy in the Matsuda Report did not suggest piracy be declared as an international crime. In fact, the term ‘international crime’ did not feature at all in the proposed draft. Similar sentiments on piracy’s lack of criminality were evident on the part of governments at the time. Although many favoured an international convention on piracy, this preference was not accompanied by views that piracy also ought to be designated as an international crime in a convention that may be concluded in the future. What is particularly telling, in this regard, is that the term ‘international crime’ does not appear in the replies governments submitted. In fact, even the word ‘crime’ was infrequently associated with piracy: there are only three instances where the word ‘crime’ is used in relation to piracy³⁷.

During this period, piracy also lacked a definitive *form* in international law, a point keenly appreciated by Matsuda Reports’ authors. Noting how legal scholars of the time held different opinions on what piracy constitutes³⁸, they argued “adopt[ing] a clear definition of piracy [that would be] applicable to all States in virtue of international law” was desirable³⁹. All of this suggests the two elements required for the development of an international criminal norm against piracy were absent during this period. Piracy can be regarded as having stumbled at the very first hurdle of international criminalization, therefore.

³⁷ Only the governments of Brazil, Greece and Romania used the term ‘crime’ in relation to piracy; *supra* note 27 (pgs. 32, 168 and 216)

³⁸ *Supra* note 24 (pg. 223)

³⁹ *Ibid.* (pgs. 228-229)

Here, it is worth recalling that international action on piracy at this time took place in connection with the League's efforts to codify international law. In this regard, the examination of piracy was viewed as the continuation of previous efforts aimed at meeting "the legislative needs of international relations", which had been achieved by concluding international conventions on various issues of international concern – such as communications and transit, custom formalities, international labour legislation, the protection of minorities and the suppression of the trafficking in women and children⁴⁰. The League's primary concern, therefore, was the *international regulation* of piracy. Put differently, piracy was not being investigated as a candidate of international criminalization. This points towards an emerging view that piracy amounts to what is now referred to as a transnational crime, an activity states have chosen to internationally suppress through an international treaty. This view, as will be demonstrated, begins to crystallize in the decades following piracy's brief appearance within the League of Nations.

The Harvard Research in International Law (1931-1932)

In November 1927, the Harvard Law School established a research committee – The Harvard Research in International Law (Harvard Research) – to study various issues of international law⁴¹. Piracy was one of the topics⁴² examined and under the guidance of Joseph W. Bingham, a law professor at Stanford University, sixteen legal scholars investigated the question of piracy over the course of nine sessions between 1930 and 1931⁴³. The outcome of these deliberations

⁴⁰ *Supra* note 19 (pg. v)

⁴¹ "General Introduction" of Harvard Research in International Law, reproduced in *The American Journal of International Law Supplement* (1932) 26(1): 1–14 (pg. 5)

⁴² The other topics included, for instance, nationality, state responsibility, territorial waters; and diplomatic privileges and immunities.

⁴³ *Supra* note 41 (pgs. 12-13)

was a draft international convention on piracy, the 1932 Harvard Draft Convention on Piracy (Harvard Draft)⁴⁴.

The Harvard Draft exhaustively analysed prevailing views on piracy as espoused in legal doctrine and case law at that time. Consequently, it has been valued for providing an “excellent snapshot of the concept of piracy at that time” (Campbell 2010: 23) and “summarizing the doctrinal debate on piracy as it stood in 1932” (Petrig and Geiß 2011: 39). Moreover, the Harvard Draft had a strong influence on codification efforts on piracy that would later be undertaken within the UN: it substantively informed legal provisions on piracy that were codified in, firstly, the Convention on the High Seas (1958) and secondly, in the latter’s successor, UNCLOS. Two aspects of the Harvard Draft are especially significant for the analysis here.

Firstly, it disputed piracy’s traditional characterization as an offence against the law of nations, designating it instead as an offence with “extraordinary jurisdiction” under international law⁴⁵. In particular, it took issue with descriptions of piracy as an “international law crime” and pirates as “cosmopolitan criminals” and “enemies of the human race”⁴⁶. Here, it argued piracy does not constitute an offence under the law of nations because, firstly, there was “no international agency to capture [pirates]” and secondly, there was “no international tribunal to punish [pirates]”⁴⁷. Pirates, it also stated, have only been seized, prosecuted and punished through the voluntary actions of states; states were not obliged in terms of an international duty under international law to prosecute pirates⁴⁸. According to the Harvard Draft, piracy is simply an

⁴⁴ “Part IV-Piracy” of Harvard Research in International Law, reproduced in *The American Journal of International Law Supplement* (1932) 26(1): 739–885

⁴⁵ *Ibid.* (pg. 760)

⁴⁶ *Ibid.* (pgs. 752-753)

⁴⁷ *Ibid.* (pg. 756)

⁴⁸ *Ibid.* (pgs. 755-756)

offence subject to “special ground of state jurisdiction”⁴⁹. Unlike other offences, all states share common jurisdiction over pirates, meaning international law permits any state to seize and prosecute pirates⁵⁰. Pirates, consequently, are not international criminals and the much repeated idea that they are *hostis humani generis* is simply an “epithet” that expresses “verbal condemnation” of the “vituperative quality” of the conduct of pirates⁵¹.

The Harvard Draft also made a brief but critical pronouncement concerning piracy’s definition: “[t]here is no authoritative definition” of piracy⁵². Rather, a “chaos of expert opinion” exists on what piracy denotes⁵³. This explains why the lengthiest section of the Harvard Draft is a discussion of existing proposals on piracy’s definition. Over the course of more than fifty pages, the authors of the Harvard Draft surveyed definitions of piracy within legal treatises and case law, before introducing their own definition. As the Harvard Draft’s definition assumes significance at a later stage of piracy’s historical development, it is fitting to introduce it here.

Piracy denotes

“any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air”⁵⁴.

There are four central elements to this definition: piracy can only occur on the *high seas*; the violence or depredation must be committed with a particular *intention*, namely, to rob, rape, wound, enslave, imprison or kill a person or, in the case of property, to steal or destroy; piracy is committed for *private ends*; and piracy involves *two vessels*, which may be ships or aircraft.

⁴⁹ *Ibid.* (pg. 760)

⁵⁰ *Ibid.* (pg. 757)

⁵¹ *Ibid.* (pgs. 757; 803)

⁵² *Ibid.* (pg. 769)

⁵³ *Ibid.*

⁵⁴ *Ibid.* (pg. 743)

As the Harvard Draft extensively surveyed legal thought and case law on piracy at the time, it represents important evidence for how piracy was conceived in the 1930s. For the analysis here, it demonstrates an international criminal norm against piracy was still absent in the 1930s. In fact, no changes from previous decade were discernible: no new consensus that piracy ought to be conceived as an international crime developed and equally, piracy's form continued to be marked by a lack of international agreement. Again, an international criminal norm against piracy cannot be said to have developed during this time. Perhaps the most that can be said is that despite having been side-lined at the League of Nations, keenness for piracy to be codified within an international convention did not entirely disappear in the 1930s. Yet, this preference, it must be emphasized, was not accompanied by the desire to criminalize piracy under international law.

International Law Commission (1949 to 1956)

Further developments on piracy only took place after the Second World War, when it was taken up by the International Law Commission (ILC) of the UN. Tasked with the progressive development and codification of international law⁵⁵, the ILC's engagement with piracy occurred in relation with its work on the codification of international rules on the high seas. Under the direction of Mr. J. P. A. François (the Special Rapporteur for the regime of the high seas), the ILC's members⁵⁶ worked on the codification of the high seas from 1950 until 1956. Initially, piracy was referred to only occasionally during the ILC's proceedings⁵⁷. Indeed,

⁵⁵ The 'progressive development' of international law entailed the preparation of draft conventions on subjects not yet regulated by international law, while its 'codification' concerned the formulation and systematization of international rules of international law in fields where extensive state practice, precedent and doctrine exists; UNGA 'Establishment of an International Law Commission' (21 November 1947) UN Doc A/RES/174(II)

⁵⁶ During its inaugural session, the ILC members were fifteen international law experts from Panama, Brazil, United Kingdom, Mexico, Netherlands, China, United States of America, Syria, Union of Soviet Socialist Republics, India, Sweden, Greece, Colombia, and Czechoslovakia.

⁵⁷ For instance, piracy was briefly discussed in relation to the principles of the freedom of the high seas and the 'right of approach' in the early 1950s. After these short debates, the ILC concluded it was not necessary to deal more extensively with piracy, as it was deemed sufficiently well-established and familiar to states;

piracy only emerged as a substantive topic of discussion four years after formal codification work on the high seas had begun, when the Special Rapporteur issued his ‘Sixth Report on the Regime of the High Seas’⁵⁸ in 1954.

In this report, six articles specifically dealing with piracy were inserted within a draft international convention on the high seas: the terms ‘piracy’ and ‘pirate ship’ were defined, while the remaining provisions dealt with the seizure of pirate ships on the high seas⁵⁹. In his accompanying commentary, the Special Rapporteur explained he found it “indispensable to include in his report certain principles pertaining to protection against acts of piracy” because other articles of the draft convention made mention of piracy⁶⁰. The Special Rapporteur also made it clear the piracy articles in his report had been taken *verbatim* from the Harvard Draft of 1932, which he regarded as a useful basis for ILC discussions on the subject⁶¹. And indeed, the Special Rapporteur’s definition of piracy was identical to the one proposed in the Harvard Draft.

This prompted a debate on piracy, during which lively discussions on piracy’s form ensued. Notably, there was a conspicuous absence of interest on piracy’s status. Although several members introduced ideas on piracy’s status during the debate – Mr. Gilberto Amado (Brazil) stated piracy was a “crime against the *jus gentium*” under customary international law⁶², while Mr. Jaroslav Zourek (Czechoslovakia) similarly mentioned piracy was an “international crime”

ILC ‘Memorandum on the Regime of the High Seas (prepared by the Secretariat)’ (14 July 1950) UN Doc A/CN.4/32 (pg. 5-6) and Yearbook of the International Law Commission [1951] Vol. I at pgs. 350-354 and 359-361

⁵⁸ International Law Commission (ILC) ‘Sixth Report on the Regime of the High Seas by J.P.A. Francois Special Rapporteur’ (22 March 1954) UN Doc A/CN.4/79

⁵⁹ *Ibid.* (pgs.25-27)

⁶⁰ *Ibid.* (pg. 26)

⁶¹ *Ibid.* (pg. 27)

⁶² Yearbook of the International Law Commission [1955] Vol. I at pgs. 39-42 (pg. 42; original emphasis)

under customary international law⁶³ – these statements failed to provoke responses from other members. As the historical record demonstrates, the key issue the ILC was preoccupied with was piracy’s form and specifically, its definition⁶⁴. In this regard, alternative definitions were proposed⁶⁵ and a debate on piracy’s definitional elements ensued. The ILC reached agreement on this surprisingly quickly, whereupon a set of eight articles on piracy were formulated.

Along with the draft international convention on the high seas, the piracy articles were forwarded to the GA⁶⁶ to solicit government comments. Only nine governments⁶⁷ specifically responded to the piracy articles and crucially, none of these drastically altered their substantive content⁶⁸. Only textual improvements were proposed, which the Special Rapporteur considered when effecting his final revisions⁶⁹. In 1956, the final draft⁷⁰ of an international convention on the high seas was completed, marking the conclusion of the ILC’s work on the codification of the high seas.

Of the eight provisions on piracy included in the draft international convention, three deserve to be specifically highlighted. Article 39 defined piracy as:

- “(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
- (a) On the high seas, against another ship or against persons or property on board such a ship;
 - (b) Against a ship, persons or property in a place outside the jurisdiction of any State;

⁶³ *Ibid.* (pg. 43)

⁶⁴ *Ibid.* (pgs. 51-57; 228-229; 266-267)

⁶⁵ *Ibid.* (pgs. 51-52)

⁶⁶ ‘Report of the International Law Commission to the General Assembly, Report of the International Law Commission covering the work of its seventh session, 2 May – 8 July 1955’ in Yearbook of the International Law Commission [1955] Vol. II at pg. 19 (pgs. 25-26)

⁶⁷ This included Belgium, China, Israel, Italy, Netherlands, Norway, Union of South Africa, United Kingdom and Yugoslavia.

⁶⁸ ‘Summary of replies from Governments and conclusions of the Special Rapporteur’ in Yearbook of the International Law Commission [1956] Vol. II at pg. 13 (pgs. 18-20)

⁶⁹ Yearbook of the International Law Commission [1956] Vol. I (pgs. 46-48)

⁷⁰ ‘Report of the International Law Commission to the General Assembly, Report of the International Law Commission covering the work of its eighth session, 23 April – 4 July 1956’ in Yearbook of the International Law Commission [1956] Vol. II at pg. 253 (pgs. 256-264)

- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article”⁷¹.

A general provision on the repression of piracy was provided in Article 38 – “All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”⁷² – and finally, Article 43 provided all states with the right to seize pirate ships on the high seas:

“On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”⁷³

From the perspective of international criminalization, the attention piracy received from the ILC brought it extremely close to acquiring a formal international legal definition. Indeed, the only remaining step required was the codification of the ILC’s proposed definition in an international treaty. When compared with the two earlier periods of piracy’s historical development, therefore, there is notable progress on form during this phase: international agreement on piracy’s international legal definition begins to take concrete shape. Nevertheless, it would be remiss not to emphasize how the ILC’s engagement with piracy’s definition was somewhat inadvertent. Defining piracy was not a topic that emerged in its own right; rather, it was derivative of broader discussions concerning the codification of international rules on the high seas. Indeed, as the proceedings’ records show, piracy’s definition constituted a small portion of the ILC’s overall discussions. Moreover, a definition was formulated relatively swiftly after some – but certainly not protracted – debate.

⁷¹ *Ibid.* (pgs. 260-261)

⁷² *Ibid.* (pg. 260)

⁷³ *Ibid.* (pg. 261)

However, no novel developments on piracy's status were evident during this phase. Debates on piracy's status were glaringly absent from the ILC's discussions and there were virtually no discussions, in particular, on whether piracy ought to be elevated to an international crime. Given that the ILC relied heavily on the Harvard Draft when formulating its piracy provision, it is interesting that it did not engage with the firm stance espoused by the Harvard Research collective, namely, that piracy did not amount to an international crime but was only a special ground for jurisdiction. All of this suggests piracy was not considered to be an international crime and a possible change was neither envisaged nor contemplated. An international criminal norm against piracy also did not develop, therefore, during this third phase of piracy's history.

General Assembly (1958)

After receiving the ILC's draft international convention on the high seas, the GA convened an international conference – the United Nations Conference on the Law of the Sea – in order to conclude an international treaty that would codify the law of the sea⁷⁴. Held from 24 February until 27 April 1958, five separate committees⁷⁵ were established to deal with different clusters of issues during the diplomatic conference, with piracy falling under the purview of the Second Committee. Over the course of two meetings, the Second Committee briefly debated the question of piracy and here, only one substantive matter arose, namely, whether piracy deserved to be included at all within an international convention on the high seas.

⁷⁴ UNGA 'International conference of plenipotentiaries to examine the law of the sea' (21 February 1957) UN Doc A/RES/1105(XI)

⁷⁵ The five committees were: First Committee (territorial sea and contiguous zone); Second Committee (high seas: general regime); Third Committee (high seas: fishing and conservation of living resources); Fourth Committee (continental shelf); and Fifth Committee (question of free access to the sea of land-locked countries); Rules of Procedures, UN Doc A/CONF.13/35, reproduced in United Nations Conference on the Law of the Sea (1958) Official Records (Vol II) at xxxi (pg. xxxiv)

During this debate, a small number of states expressed reservations over including piracy within the draft international convention. Led by Uruguay, Czechoslovakia and Albania, these states proposed piracy be entirely excluded from the final convention⁷⁶. Piracy “no longer constituted a general problem”, the Uruguayan delegate argued, while the Czechoslovakian delegate stated that because the “notion of piracy put forward in [the ILC’s draft articles] was an obsolete one”, it would be “out of all proportion for the [...] draft to contain eight articles dealing with an eighteenth century concept”⁷⁷. In a similar vein, the Romanian delegate argued the ILC had been “mistaken in devoting so many articles to piracy [as] it no longer constituted a very real problem”⁷⁸. However, when these proposal were put to the vote, they were rejected by a majority⁷⁹. In this regard, the United Kingdom delegate argued “any comprehensive convention on the law of the sea must deal with the important issue of piracy”⁸⁰. Interestingly, the records of the debates demonstrate no further views on why piracy ought to be included in the final convention were expressly articulated.

Thereafter, the Second Committee’s remaining discussions revolved around textual refinements to the piracy articles⁸¹. As these were minor wording improvements, they were swiftly dealt without controversy through a series of votes and thereafter, eight final articles on piracy were adopted⁸². At the plenary meeting of the Conference, these articles received the

⁷⁶ UNGA ‘Twenty-seventh meeting, Wednesday, 9 April 1958, at 10:15 a.m., Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159)’ UN Doc A/CONF.13/C.2/SR.27, reproduced in United Nations Conference on the Law of the Sea (1958) Official Records (Vol IV) at 76 (pg. 78)

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* (pg. 79)

⁷⁹ UNGA ‘Twenty-ninth meeting, Thursday, 10 April 1958, at 3 p.m., Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159)’ UN Doc A/CONF.13/SR.29, reproduced in United Nations Conference on the Law of the Sea (1958) Official Records (Vol IV) at 83 (pg. 84)

⁸⁰ *Supra* note 76 (pg. 78)

⁸¹ *Supra* note 79 (pg. 84)

⁸² *Ibid.*

final approval of states; the majority of state representatives voted in favour of adopting all eight articles without any further debate⁸³.

The adoption of these eight articles marked piracy international codification within an international treaty, the Convention on the High Seas⁸⁴. Three of these articles deserve particular mention: states are required to cooperate in the suppression of piracy (Article 14); piracy refers to the illegal acts of violence committed on the high seas by a private ship against another vessel (Article 15); and all states have the right to seize pirate ships on the high seas (Article 19). While Article 14 laid down piracy's international legal definition, Article 19 enshrined the principle of universal jurisdiction in relation to piracy. In 1982, the Convention on the High Seas was superseded by UNCLOS⁸⁵ but piracy was unaffected by this change: the 1958 piracy provisions were simply imported into UNCLOS with minor changes (Rubin 1988; Menefee 1989; Campbell 2010; Petrig and Geiß 2011; Fernández 2012; Guilfoyle 2014a; Guilfoyle 2014b; Petrig 2015). Piracy, therefore, is currently codified in Articles 100 to 107 of UNCLOS.

Although brief and uncomplicated, the final phase of piracy's historical development is instructive from the perspective of international criminalization. By the end of the 1950s, piracy finally acquires a clearly defined form – and this comes about because of consensus amongst states on its international legal definition. However, states did not conceive piracy as an international crime. This is evident from how no pronouncements, statements or even passing remarks were made as to piracy's criminality during discussions held at this phase. And indeed,

⁸³ UNGA 'Tenth Plenary Meeting, Wednesday, 23 April 1958, at 10.15 a.m., Consideration of the report of the Second Committee (A/CONF.13/L.17 to L.19)' UN Doc A/CONF.13/SR.10, reproduced in United Nations Conference on the Law of the Sea (1958) Official Records (Vol II) at 20 (pgs. 21-22)

⁸⁴ 1958 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11

⁸⁵ *Supra* note 2

none of the codified piracy articles characterize it as a crime; in fact, ‘crime’ and ‘offence’, terms often associated with piracy, do not appear anywhere in the international treaty. As with earlier phases of its history, therefore, no international criminal norm against piracy developed.

In the understanding of crimes and criminalization advanced in this thesis, piracy does not amount to an international crime because it did not undergo the process of international criminalization. As this chapter has shown, the first stage of international criminalization did not occur in piracy’s case. Although international agreement over piracy’s form was eventually reached, this was not matched by consensus over its status as an international crime. Piracy was not perceived as an international crime during the period of the League of Nations, judging from the complete absence of engagement over this issue on the part of the Committee of Experts, governments and the organs of the League. Several years later, the Harvard Research Group went as far as explicitly stating piracy ought not to be conceived as an international crime. And finally, not even the slightest deliberations over piracy’s status, or potential future status, as an international crime took place during the ILC’s or GA’s discussions on piracy throughout the 1940s and 1950s. This makes it possible to argue, therefore, that an international criminal norm against piracy never developed. Moreover, the persistent lack of engagement over piracy’s criminality centralizes how piracy was never considered a candidate of international criminalization in the same way genocide or aggression was.

Given an international criminal norm against piracy was never established, it is not unsurprising that the second stage of international criminalization did not ensue in piracy’s case. Without an international criminal norm in existence, there was nothing to translate into an international legal proscription. Moreover, efforts to define piracy under international law

were not accompanied by the desire to enunciate a formal international legal prohibition against piracy under international law. Indeed, as the historical material demonstrates, this possibility was neither contemplated nor raised by the different bodies that played a part in piracy's historical development. This, in turn, is explained by the fact that defining piracy was part of broader efforts to codify international rules regulating the high seas. Unlike genocide and aggression, the definitional enterprise was not aimed at specifying the precise form a new international crime ought to assume under international law. Piracy's eventual codification within an international treaty did not, therefore, establish an international legal prohibition against piracy. Rather, it simply gave piracy a formal place within international law as an internationally-defined act whose suppression states have agreed to cooperate over. Piracy, therefore, is better conceived as a *transnational crime* – an activity that states have collectively agreed to regulate, control and suppress through an international treaty.

7

**CRIMINALIZATION IN WORLD POLITICS:
GENOCIDE, AGGRESSION AND PIRACY**

This final chapter returns to the overarching question this thesis has been concerned with, namely: *How and why have certain acts been criminalized in international society?*

Answering this question, this thesis has argued, requires a deeper conceptual understanding of the process of international criminalization, as well as a historical analysis of how particular international crimes were established as a consequence of undergoing this process. The process of international criminalization, this thesis has suggested, is marked by two stages. The first stage centres on the emergence of an international criminal norm and for this to occur, an international social consensus on two specific aspects are required: *status* (agreement that a particular act deserves to be elevated to the status of an international crime) and *form* (agreement on the specific form that an act ought to assume as an international crime). In the second phase, the international criminal norm is then translated into an international legal proscription. With the completion of these two stages, an international crime comes into existence.

The initial analytical framework also suggested that the process of international criminalization will be driven by a set of particular factors. A pivotal event in international society initially sets the process of international criminalization into motion, and this is followed by political contestation amongst agents of criminalization over the status and form of acts that have emerged as candidates for international criminalization. The outcome of this contestation was expected to depend, in turn, on three key factors: the degree of compatibility with existing norms; the status of the agents of criminalization; and finally, their interests in maintaining a distinction between the criminals and non-criminals within international society.

Using this analytical framework to structure the discussion below, this chapter summarizes this study's core empirical findings and assesses the extent to which the factors initially identified offer explanatory insights for this study's cases of international criminalization. The chapter begins by demonstrating how a political shock set the process of international criminalization into motion in the cases of genocide and aggression. It also argues that the absence of a political shock in piracy's case partly explains why the process of international criminalization was never provoked throughout piracy's historical development.

Turning then to the initial stage of international criminalization, the chapter reviews the historical development of international criminal norms against genocide and aggression. In doing so, it summarizes when and how international agreement on status and form were obtained in these two cases. The chapter also shows how an international criminal norm against piracy never developed due to the lack of international agreement on piracy's status as an international crime. This therefore provides an additional reason for why the process of international criminalization was absent in piracy's case and relatedly, why piracy was never established as an international crime in international society. In the final section, the chapter briefly comments on how the translation of the international criminal norms of genocide and aggression into international legal proscriptions completed the process of international criminalization in both of these cases.

Reflecting on these empirical findings, the chapter demonstrates how despite constituting very different international crimes, the historical development of these two international criminal norms share a remarkable similarity. Here, it will be argued that the international criminalization of both genocide and aggression were driven by a similar factor, namely, the degree of compatibility with existing norms. However, as this chapter will go on to show, this

factor of norm compatibility operated differently throughout the historical development of these two international criminal norms. In the case of the development of international agreement on genocide's and aggression's status, what mattered more was the perceived need to *depart* from existing norms that were regarded as being deficient. As this chapter will demonstrate, international agreement on genocide's and aggression's status were both driven by views that their recognition as international crimes were necessary departures from unsatisfactory norms that were already in existence. In this regard, a new international crime of genocide would remedy the perceived limitations of an already-existing international crime, namely, crimes against humanity. Meanwhile, recognizing aggression as an international crime would rectify what many states considered to be its primary shortcoming, namely, that it amounted to an *ad hoc* legal charge that was too closely linked to the controversial circumstances surrounding the Nuremberg Trials, as well as the specific context of the Second World War.

In contrast, the development of international agreement on genocide's and aggression's form both centred on the need to ensure maximum *compatibility* with existing norms. In genocide's case, cultural genocide was excluded from its form because the protection of cultural groups was perceived as being more compatible with an existing norm within international human rights, namely, the protection of minorities. In addition, political genocide was excluded from genocide's form because the existing norm of state sovereignty would be least disrupted if the political groups were excluded as a protected group under genocide's definition. Turning to aggression, the chapter argues international agreement on its form, which firstly required defining the notion of 'political aggression', was informed by the desire to ensure compatibility with two existing norms contained in the Charter of the United Nations (UN): the prohibition against the use of force in international relations in Article 2(4) and Article 39, which provides

the Security Council with the primary responsibility for determining the existence of acts of aggression. On the other hand, the definition of ‘criminal aggression’, which constituted the second component of aggression’s form, was driven by the desire to ensure compatibility with the formulation of ‘crimes against peace’ in the Nuremberg Charter, as well as the definition of political aggression contained in Resolution 3314 of 14 December 1974.

THE PRECURSOR TO INTERNATIONAL CRIMINALIZATION: THE EXISTENCE OF A POLITICAL SHOCK

The pivotal event that prompted the process of international criminalization into motion in the cases of genocide and aggression were political shocks. Although this thesis identifies two different political shocks in the cases of genocide and aggression, it is important to note that both were rooted in a similar historical context, namely, the aftermath of the Second World War. This shared historical context goes some way towards explaining why these two instances of international criminalization were, in their initial phases, contemporaneous events. As will be later demonstrated in this chapter, international agreement on the status of both genocide and aggression centred on a similar moment, namely, on 11 December 1946. On this date, the General Assembly (GA) recognized these two acts as international crimes through the issuing of two separate international resolutions.

The political shock in genocide’s case were the atrocities committed by the former Nazi state. In this regard, the persecution by the Nazi state of its domestic populations – and of the Jewish population, in particular – represented a major historical event which provoked normative concern within the international system, as well as an impetus for change. Apart from causing political and moral outrage within international society, it also spurred the creation of the concept of genocide. As Chapter 3 explained, the Polish jurist Raphael Lemkin coined the word ‘genocide’ in his book about German occupation in Europe to describe acts which the

international community had not previously witnessed before in recent memory, namely, the large-scale destruction of human groups based on their religious or racial identity. Due to personal convictions that such destructive acts could not be left ignored, Lemkin then campaigned for international action to be taken on genocide. This ensured genocide – and in particular, its prospect of undergoing the process of international criminalization – remained on the agenda within international diplomatic circles before the newly-established UN.

With aggression, the political shock that prompted its criminalization were the Nuremberg Trials. Two important consequences resulted from this historical event: firstly, aggression, which had previously been delegitimized as an illegal act in international society, was transformed into a criminal charge; and secondly, individuals were now being held criminally responsible by an international court for having committed aggression. Importantly, however, the Nuremberg Charter did not endow aggression with broader universal applicability as an international crime. Rather, aggression was simply designated as an *ad hoc* legal charge, created for the specific purposes of the Nuremberg Trials and directed specifically against the former Nazi leaders. Once the Nuremberg Trials had concluded, it was this central shortcoming that fuelled the desire, particularly on the part of smaller states, to effect a fundamental change to aggression's character. This, in turn, centred on the effort to make aggression a universal crime – one which not be tied to the specific circumstances surrounding the end of the Second World War but rather, applicable to all contexts.

In piracy's case, however, there was no particular political shock to set the process of international criminalization into motion. In this regard, piracy ceased to be a major issue of international concern because incidences of piracy significantly reduced throughout the twentieth century. Consequently, no major doubts were cast over the efficacy of existing

arrangements that had been historically been put into place to deal with piracy, namely, subjecting it to special jurisdictional arrangements under the principle of universal jurisdiction. Rather, this existing arrangement was continuously perceived as being adequate throughout piracy's historical development. A fundamental reconfiguration of piracy's relationship with international law – namely, establishing it as a crime under international law – was therefore never required. International criminalization, in particular, was never deemed necessary in piracy's case.

The absence of a political shock partly explains why piracy did not undergo the two-stage process of international criminalization. There was simply no event or situation of grave concern in international society, as there was with genocide and aggression, to provoke a normative re-evaluation of piracy's status and form. Unlike genocide and aggression, therefore, international law was not utilized in piracy's case for the purposes of international criminalization. Rather, it was used to bring about greater international regulation of piracy. This, in turn, centred on international codification and as Chapter 7 demonstrated, international efforts undertaken in relation to piracy were closely intertwined with the broader project of codifying international law throughout the twentieth century. In this regard, greater international regulation of piracy was achieved by codifying three key aspects concerning piracy – its international legal definition, the obligation of states to cooperate in its repression, and its special jurisdictional arrangements under international law – within an international treaty, namely, the United Nations Convention on the Law of the Sea (UNCLOS).

THE FIRST STAGE OF INTERNATIONAL CRIMINALIZATION: THE EMERGENCE OF AN INTERNATIONAL CRIMINAL NORM

The criminalization of genocide and aggression both entailed the emergence of international criminal norms. In this regard, these two international criminal norms emerged in international

society because of the development of international agreement on the status and form of these two acts. What distinguishes these two instances of international criminalization is the length of time it took for these two international criminal norms to become established. Although international agreement on genocide's status and form was attained at different points in time, both were achieved over the course of the two years (1946-1948) when state representatives met to negotiate the conclusion of the Genocide Convention. In contrast, an international criminal norm against aggression took considerably longer to develop. While international agreement on aggression's status was obtained on 11 December 1946, consensus on its form was achieved on 11 June 2010, namely, sixty-four years later.

In both of these cases, similar agents of criminalization were responsible for adopting decisions concerning status and form, namely, diplomats and legal experts representing states within the United Nations (UN). In particular, the General Assembly (GA) played a critical role with respect to both genocide and aggression: by issuing Resolution 95(I) and Resolution 96(I) on 11 December 1946, the GA accorded both of these acts with the status of an international crime. In genocide's case, international consensus within an additional UN body – the Sixth Committee of the GA – was also important for agreement on its status. While state representatives negotiating under the auspices of the UN were also responsible for decisions on form, there was a slight difference between genocide and aggression. Finality on genocide's form was the result of consensus amongst state representatives within the Sixth Committee of the GA. In aggression's case, however, consensus among state representatives within the GA and the Special Working Group on the Crime of Aggression (SWGCA) proved critical.

By contrast, an international criminal norm against piracy was never established. This is explained by the fact that at no point throughout its historical development was there

international consensus that piracy ought to acquire the status of an international crime. Although international agreement on piracy's definition was reached and was eventually codified in an international treaty, international efforts to define piracy were not aimed at specifying the precise form piracy ought to assume as an international crime, as was the case with genocide and aggression. Rather, international agreement on piracy's definition was rooted in broader efforts to codify international law – and in particular, the international law of the sea – throughout the twentieth century. Unlike genocide and aggression, therefore, piracy did not undergo the first stage of international criminalization and consequently, piracy is better conceived as an a transnational crime.

1 INTERNATIONAL AGREEMENT ON STATUS

International agreement on genocide's status required consensus on two particular questions: firstly, whether genocide deserves to be recognized as an international crime; and secondly, whether genocide ought to be made into a new and distinct international crime in its own right. Formal diplomatic decisions on these two questions were taken by the GA at different points in time: on 11 December 1946, the GA recognized genocide as an international crime, while on 6 October 1948, the GA's Sixth Committee designated genocide as an autonomous international crime in its own right. Importantly, this centralizes how consensus on the preliminary issue of status may not occur instantly. Rather, it may gradually and progressively develop over a period of time.

Whether genocide deserved to be recognized as an international crime was a relatively uncontroversial question. In this regard, the majority of diplomats and lawyers representing states within the GA's Sixth Committee agreed that genocide ought to be designated as an international crime. This agreement was formalized through the adoption of Resolution 96(I)

by the GA on 11 December 1946. In terms of this resolution, states made the unanimous pronouncement that genocide is a ‘crime under international law’ which ‘shocks the conscience of mankind’ and is ‘contrary to the moral law and to the spirit and aims of the United Nations’. A close analysis of the historical record that culminated in the issuing of Resolution 96(I) – including the Sixth Committee’s official meeting records and statements submitted by state representatives during these proceedings – revealed that international agreement on genocide’s status was driven, firstly, by beliefs as to what the act of criminalization could accomplish. In this regard, criminalizing genocide would help to counter potential threats to international stability and also allow for genocide to be punished and prevented in the future. A further motivating factor concerned prevailing social beliefs as to genocide’s inherent wrongfulness: genocide was seen as intrinsically wrong because it violated human dignity and universal morality.

What proved more difficult to reach consensus on was the second question concerning genocide’s status, namely, whether genocide ought to constitute a distinct international crime in its own right. And indeed, debates on this question, which began shortly after the issuing of Resolution 96(1), lasted close to two years. A decision was only reached on 6 October 1948, when the Sixth Committee voted to designate genocide as an autonomous international crime in the final draft of the Genocide Convention. However, this outcome was neither automatic nor inevitable, and until the final decision was made, there was a real possibility that genocide would have been designated as a sub-type of an already-existing international crime, namely, crimes against humanity. As the analysis in Chapter 2 demonstrated, the very first draft of the Genocide Convention, which was completed by the UN Secretariat, envisaged genocide as an entirely new international crime. However, the second draft by the Ad Hoc Committee on Genocide designated genocide as a type of crime against humanity.

The official meeting records of the Sixth Committee reveals the final decision to establish genocide as an independent international crime distinct from crimes against humanity was driven by two main considerations. Firstly, the majority of state representatives – particularly those from non-Western states in Asia and Latin America – regarded crimes against humanity as having an unduly restricted scope of application. As a crime confined to war-time atrocities, atrocities committed during peace-time had been left unpunished under international law. Creating a new international crime that would cover atrocities committed during both war-time and peace-time was seen, therefore, as a way to remedy the lacuna that resulted from crimes against humanity’s restricted application.

Secondly, smaller states from Asia and Latin America also had reservations about the legitimacy of the Nuremberg Trials, which they saw as an instance of victor’s justice. These particular states were therefore keen to ensure genocide would not be tainted by the historical controversies that surrounded the establishment of the Nuremberg Trials. Relatedly, these same smaller states found it advantageous to de-link genocide from the exceptional historical circumstances that brought about the Nuremberg Trials, as it would enable genocide to exist without being context-specific or context-dependent.

The development of international agreement on these two questions concerning genocide’s status was driven, this thesis argues, by the departure from existing norms. Firstly, conceiving genocide as an international crime was a radically novel idea. Prior to the issuing of Resolution 96(I) in December 1946, there was no historical precedent for considering genocide as an international crime. Moreover, given that the very notion of an ‘international crime’ was still very much in its infancy at this time, bringing genocide under this new label – as opposed to simply condemning it as a threat to the international order or as violations of human dignity

and universal morality – marked a departure from existing practices. Criminalizing genocide, therefore, marked a fundamental departure from existing norms. That this idea was proposed by smaller states demonstrates, additionally, that considerations of power and influence were of little relevance. And while subsequent support of this idea by the Great Powers was important, the case of genocide demonstrates that ideas on status can be successfully proposed and adopted even without the active initiation of more powerful states within international society.

Secondly, the decision to establish genocide as a new and distinct international crime, as opposed to designating it as a type of crime against humanity, was also a novel idea at the time. This, too, was an idea that smaller states consistently and successfully pushed for – and importantly, despite active opposition from the Great Powers. From the perspective of smaller states, differentiating genocide from crimes against humanity presented the advantage of creating an international crime with universal application. Unlike crimes against humanity, which at the time only applied to the defeated states of Germany and Japan, a new international crime of genocide could be uniformly applied to small and powerful states alike and crucially, without the attendant controversies that surrounded the Nuremberg Trials. If genocide had instead been designated a type of crime against humanity, this would have suggested its criminalization was driven by the desire to adhere to existing norms. Rather, what made the crucial difference in genocide's criminalization was the departure from existing norms, specifically by establishing an entirely new and distinct international crime.

While the development of international agreement on genocide's status as an international crime is attributable to two decisions, consensus on aggression's status centred on a single decision. In this regard, the GA recognized aggression as an international crime on 11

December 1946 through the issuing of Resolution 95(I). It is important to note that this resolution was adopted on the *same* day as the resolution that declared genocide as an international crime, Resolution 96(I). Far from being a matter of coincidence, this strongly indicates how international discussions on the status of two different acts were undertaken concurrently by the GA at the time. It also suggests that the issuing of both resolutions were not isolated but rather, closely-linked developments. This, in turn, suggests that an international social consensus on the criminality of two different acts took hold in the same historical period, namely, immediately after the Second World War.

Although concluded on the same day, the two resolutions differed from one another in two principal ways. While genocide was the sole focus of Resolution 96(I), the contents of Resolution 95(I) did not exclusively concern aggression. Here, it will be recalled that Resolution 95(I), which was issued after the conclusion of the Nuremberg Trials, represented the GA's affirmation of the principles of international law recognized by the Nuremberg Charter and Judgment. Aside from aggression's international criminality, this affirmation also expressed states' political support for the international legal principles that guided the prosecution of war crimes and crimes against humanity before the Nuremberg Tribunal. Moreover, while Resolution 96(I) explicitly declared genocide to be an international crime, a direct declaration to this effect is absent in the case of Resolution 95(I). Rather, the wording of resolution was confined to affirming the principles of international law recognized at Nuremberg and secondly, directing that work on codifying these principles be undertaken in the near future.

Nevertheless, Resolution 95(I) represents evidence of international agreement on aggression's status for two principal reasons. Firstly, it was the first international pronouncement on

aggression's criminality issued by a diverse grouping of states within a formal, multilateral context. Prior to this, agreement over aggression's criminality was confined to the four Allied Powers and their principal allies, which included nineteen states who signalled their approval of the establishment of the Nuremberg Tribunal by adhering to the international treaty (London Agreement) that brought about its establishment. Through the issuing of Resolution 95(I), a broader collective of fifty-five states – which included the Great Powers, as well as smaller states from Asia, Africa, Europe and Latin America – unanimously affirmed that aggression amounted to an international crime. In addition, these states also affirmed that following the conclusion of the Nuremberg Trials, aggression ought to now be a universal crime with general application to all contexts and circumstances. Secondly, the resolution formed the basis for further international action within the UN on aggression, all of which gave practical effect to the international consensus on aggression's criminality embodied in Resolution 95(I).

This thesis argues that international agreement on aggression's status was obtained because the idea of recognizing aggression as an international crime represented a marked departure from existing norms. This, then, centralizes a similarity between the criminalization of aggression and genocide: international agreement on their status were both driven by the view that according these two acts with the status of an international crime amounted to a desirable departure from existing norms. In aggression's case, the idea that it ought to be recognized as an international crime found support amongst the diplomats representing states within the GA because aggression's status within international society in the immediate aftermath of the Second World War was perceived as being inadequate. Although it had been established as a criminal charge for the purposes of the Nuremberg and Tokyo Tribunals, aggression nevertheless represented an *ad hoc* legal charge, which was only applicable to the defeated Axis Powers and closely tied to the specific context of the Second World War. Elevating it to

the status of an international crime would therefore universalize aggression's scope and by extension, remedy its perceived limitations.

Effecting this fundamental change to aggression's status was deemed attractive to both small and powerful states alike. For smaller states, whose vulnerability within the international system made them more prone to being victims of aggression, a universal crime of aggression afforded them a greater measure of international legal protection against possible aggressors. The idea was also palatable to the Great Powers, particularly because a universal crime of aggression would help to lessen the political controversy that surrounded the Nuremberg Trials, namely, that they represented an instance of victors' justice. Having consciously established the legal charge of 'crimes against peace' in such a way that their actions during the Second World War were excluded from being the subject of international prosecutions, Great Power support for a new international crime with universal applicability was perceived as being politically convenient, as it would potentially help to restore some of the damage their reputations suffered in the aftermath of the Nuremberg Trials.

In contrast with genocide and aggression, international views on piracy that were expressed throughout its historical development never centred on it possessing inherent qualities of criminality. In particular, an international social consensus that piracy amounted to an international crime never took hold throughout the twentieth century. Moreover, there was equally no movement towards the progressive development of a new consensus that it ought to be recognized as such in the future. As Chapter 6 demonstrated, the League of Nations' Committee of Experts for the Progressive Codification of International Law (Committee of Experts) – who explored the possibility of concluding an international convention aimed at the suppression of piracy during the 1920s – did not characterize piracy as an international crime.

Rather, its report designated piracy as a threat to international maritime commerce. Moreover, although state representatives expressed support for an international convention on piracy, this was rooted more in concerns about the need to codify international maritime law, as opposed to views on piracy's criminality. In fact, there was a complete absence of debate – and no strong views were expressed either – on the connection, or possible future association, between piracy and the notion of an international crime at the League of Nations.

Further discussions on piracy followed in the 1930s, when a research committee on international law based at the Harvard Law School (Harvard Research in International Law) undertook a thorough study of piracy and prepared a draft international convention on piracy (1932 Harvard Draft Convention on Piracy). In this draft international treaty, piracy was not designated as an international crime. Instead, piracy was characterized as an act that is subject to special jurisdictional rules under international law, namely, universal jurisdiction. During international discussions under the auspices of the UN in the 1950s, views as to piracy's criminality were also conspicuously absent. On the one hand, the International Law Commission (ILC) reiterated the Harvard Research in International Law's characterization of piracy as an act subject to special jurisdictional rules. In addition, the main concern with piracy on the part of state representatives within the GA revolved primarily around international efforts to codify the law of the sea. Notably, throughout the course of these diplomatic negotiations, state representative neither raised nor discussed possible changes to piracy's status under international law.

The historical evidence strongly suggests, therefore, that, unlike genocide and aggression, there was no intention within international society at any point in piracy's historical development to recognize it as an international crime. Rather, prevailing views on piracy's special quality

centred on it amounting to an exception to traditional jurisdictional rules under international law. As this view persisted and remained uncontested throughout its historical development, the question as to whether piracy ought to be fundamentally reconfigured as an international crime simply never arose. From the perspective of international criminalization, therefore, what is notable in piracy's case is that the first component necessary for an international criminal norm against piracy to emerge – international agreement that it deserves the status of an international crime – was entirely absent. This, alongside the fact that there was no political shock to provoke a normative re-evaluation of either piracy's status under international law or existing international arrangements dealing with piracy, prevented the process of international criminalization from unfolding in piracy's case. Accordingly, this thesis has argued that piracy is better conceived as a transnational crime – an act that international society collectively agreed to regulate and suppress through the conclusion of an international treaty.

2 INTERNATIONAL AGREEMENT ON FORM

International agreement on genocide's form required consensus on its international legal definition. Here, two issues emerged as key points of debate: whether genocide ought to embrace the notions of 'cultural genocide' and 'political genocide'. Although there were views that both notions ought to be included within genocide's definition, cultural and political genocide were both eventually excluded. Consequently, genocide acquired a particularly circumscribed form and indeed, as its international legal definition makes clear, genocide exclusively refers to the intentional destruction of national, ethnical, racial or religious groups. Put differently, the international crime of genocide can only be committed against these four specified groups.

Despite being included in early drafts of the Genocide Convention prepared by the UN Secretariat and the Ad Hoc Committee on Genocide, the GA's Sixth Committee voted to remove cultural genocide from the final draft. In this regard, the majority of Western and Latin American states saw the protection of cultural groups as a human rights issue that could be adequately addressed by an already-existing norm in international human rights, namely, the protection of national minorities. Put differently, there was no need to specifically include cultural genocide within genocide's form because cultural groups could be adequately protected by the existing norm of minority protection. In addition, separating what these states considered as a human rights issue from the scope of the new international crime was regarded as necessary, as it would create a fundamental distinction between international crimes and international human rights. This, in turn, would elevate the category of international crimes as a higher-order form of transgression in international society, thereby preserving the notion of an international crime as a unique and special category.

The exclusion of cultural genocide was primarily driven by, this thesis argues, its perceived compatibility with the existing norm of minority protection. In contrast, no existing norm under international law at the time specifically afforded national, ethnical, racial or religious groups with international legal protection – and indeed, it was precisely this shortcoming that the establishment of genocide was aimed at remedying. Protecting these four specific groups could only be achieved, therefore, by criminalizing their intentional destruction through the establishment of a new international crime. Moreover, the fact that views for and against cultural genocide found roughly equal support across smaller and more powerful states demonstrates that power considerations were not particularly decisive in determining the eventual outcome. Here, it will be recalled that states who opposed the inclusion of cultural genocide included the United States of America (USA) and a grouping of European and Latin

American states, while those who favoured its inclusion included the Soviet Union and a grouping of Arab and Asian states. Rather, what was more critical were shared views between stronger and smaller states alike as to cultural genocide's perceived compatibility with the existing norm of minority protection.

Political genocide was also included in earlier drafts of the Genocide Convention but was eventually removed in the final draft through a vote by the GA's Sixth Committee. A close analysis of the drafting records revealed that this decision was driven by mutual state interests. In this regard, the majority of states – which included the two superpowers as well as Western, Asian and Latin American states – opposed the inclusion of political genocide due to internal and external concerns over state sovereignty. Firstly, states were concerned that the inclusion of political genocide would pose a fundamental threat to their freedom to uphold internal political control, particularly because action against internal political groups might expose them to charges of committing political genocide. Apart from circumscribing states' ability to take action against subversive internal political groups, the inclusion of political genocide would afford such groups international protection for internally revolting against states' authority. In addition, states were equally concerned about the consequences of political genocide upon their external sovereignty. From the perspective of smaller powers, political genocide unduly exposed their internal domestic matters to international scrutiny. Meanwhile, the inclusion of political genocide posed an additional concern for the two superpowers: it would potentially result in their proxy wars of intervention in each other's spheres of influence as being criticized as instances of political genocide.

Excluding political genocide thus presented mutual political advantages to smaller and more powerful states alike. And indeed, as the historical evidence demonstrates, smaller states from

Europe, Africa, Asia and Latin America all found common ground on this point. Moreover, despite their broader ideological confrontation during the Cold War, the two superpowers also succeeded in finding agreement on the question of political genocide. Ultimately, then, this suggests that states' views on political genocide were primarily driven by their perceived need to ensure genocide's form would find maximum compatibility with the existing norm of state sovereignty. To put it differently, states saw a pressing need to ensure existing norms and practices of sovereignty would not be disrupted by the eventual form that genocide would assume under international law. In this regard, states found the idea of political genocide unattractive because it would fundamentally disrupt the rights and privileges that accrued to them as sovereign entities within the international order. The centrality that sovereignty concerns assumed makes it possible to argue, therefore, that the exclusion of political genocide from genocide's form was also driven by compatibility with existing norms.

While agreement within international society on aggression's status was reached on 11 December 1946, consensus on its form was only attained sixty-four years later. This represents a marked difference with genocide, where international agreement on its status and form were attained over a period of two years. For much of the twentieth century, therefore, aggression existed without definite form. Finality on aggression's form as an international crime was considerably complex to achieve, as it involved international negotiations to define two separate notions, namely: 'political aggression' and 'criminal aggression'. Two separate definitional enterprises were therefore involved and these two definitions were agreed upon at different points in time. Agreement on the definition of political aggression arose first, on 14 December 1974, while the definition of criminal aggression was only formulated thirty-six years later, on 11 June 2010.

As detailed in Chapter 5, debates on the definition of ‘political aggression’ revolved around broader discussions on collective security arrangements aimed at the maintenance of international peace and security in the post-war international order. This is because the notion of political aggression was included but deliberately left undefined in the UN Charter during its drafting in 1945. In this regard, the notion of political aggression featured in two provisions dealing with international peace and security: in Article 1, which states that one of the UN’s core purposes is to take effective collective measures to suppress “acts of aggression”, and in Article 39, which vests the Security Council with primary responsibility for determining the existence of an “act of aggression”.

During initial rounds of negotiations, smaller states pushed for a definition to be included in the UN Charter. From their perspective, a definition would provide greater clarity and certainty to the Charter’s collective security mechanisms; it would help constrain the Security Council’s unfettered powers; and it would provide them with greater security from external threats of aggression. Opposition to a definition came from the major powers, who, as permanent members of the Security Council, were keen to ensure their discretion in determining instances of aggression would remain unfettered by a formal definition. Fuelled by continued demands from smaller states, lively debates about a definition continued throughout the early decades of the Cold War. However, divergent political concerns, which were exacerbated by Cold War political tensions during the 1950s and 1960s, made it difficult for state representatives negotiating within the GA’s Sixth Committee and the UN Special Committee on the Question of Defining Aggression to reconcile opposing views on the necessity and substance of a possible definition.

Facilitated by the cooling-down of Cold War tensions in the late 1960s and early 1970s, as well as greater political accommodation on the part of both the superpowers and smaller states, a definition was eventually agreed upon on 14 December 1974 by state representatives within the GA. This definition was formally adopted and issued by the GA in Resolution 3314. The international social consensus reflected in this international resolution suggests, this thesis argues, that the key factor that facilitated states' agreement on the definition of political aggression was that of compatibility with existing norms. Here, two existing norms embodied in the UN Charter proved especially influential: the prohibition on the use of force in international relations (Article 2(4) of the UN Charter) and the responsibility of the Security Council to determine the existence of acts of aggression (Article 39 of the UN Charter). Crucially, definitional proposals that garnered the most political support during international negotiations were those which were perceived as having the most congruence with these two existing norms.

In this regard, the final definition that was agreed upon was one that exhibited strong consistency with the normative framework laid down by the UN Charter in two central ways. Firstly, the majority of states preferred the definition of political aggression to be worded as closely as possible to Article 2(4) of the UN Charter. And indeed, the definition contained in Resolution 3314 – “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State” – very closely matched how the international prohibition against the use of force was worded in the UN Charter. Ensuring aggression's definition corresponded closely with this foundational norm of the post-war international order was deemed important for two main reasons: firstly, it would limit the scope of aggression to acts involving the use of direct and armed force by states; and secondly, it would exclude legitimate uses of force, such as self-defence, from the scope of aggression.

Consequently, definitional proposals that departed from this existing norm – notably, suggestions to include non-armed or indirect acts of aggression, such as ideological or economic aggression, within the scope of the definition – were not particularly well-received by both smaller and more powerful states.

The final definition also met the approval of state representatives within the GA because it did not disrupt the institutional arrangements laid down in the UN Charter concerning the maintenance of international peace and security. Although there were some views to the contrary, the majority of smaller and more powerful states both appreciated that the Security Council required flexibility in order to effectively discharge its responsibilities in terms of Article 39 of the UN Charter. Minimal disruption to collective security arrangements that had been devised in 1945 was achieved, therefore, in the following ways: firstly, although a list of typical acts of aggression was included as part of the definition, this list did not constitute an exhaustive one; and secondly, a further provision of the definition provided that the Security Council would have the power to specify further acts of aggression beyond this list. Ultimately, then, the final definition ensured aggression's scope remained subject to existing collective security arrangements, namely, the discretionary powers of the Security Council.

Efforts to define 'criminal aggression' took place in the decades after the definition of political aggression had been agreed upon. As these negotiations unfolded in the context of the progressive development of international criminal law, a different set of actors – though they were still strongly associated and embedded within the UN system – to the ones in the definition of political aggression were involved. An initial attempt to define criminal aggression was undertaken by the ILC in the late 1980s and early 1990s, as part of the ILC's work in preparing a Draft Code of Offences against the Peace and Security of Mankind. However, what prevented

the ILC's members from formulating a definition were differing views on whether the definition of political aggression in Resolution 3314 ought to feature in the definition of criminal aggression. A further definitional attempt came at the Rome Conference in 1998, during multilateral negotiations aimed at the establishment of the International Criminal Court (ICC). However, because state delegates were more preoccupied with the question of the conditions under which the ICC would be allowed to exercise jurisdiction over the crime of aggression during their discussions, there was insufficient time to agree upon a definition before the closing of the Rome Conference. And so while state delegates agreed the ICC would indeed have jurisdiction over the undefined crime of aggression, its jurisdiction would only come into operation once a definition is agreed upon in the future.

An international social consensus on a definition only began to take shape between 2003 and 2007, when the Special Working Group on the Crime of Aggression (SWGCA) focused on isolating the core aspects of criminal aggression that ought to feature in its definition. Here, important breakthroughs were made following agreement on the following: firstly, the perpetrator of the crime of aggression would only include individuals in formal positions of power and with the ability to control a state's political or military affairs; secondly, the actual conduct involved in the commission of the crime centred on the planning, preparing, initiation or execution of an act of political aggression; and thirdly, only extremely serious acts of political aggression, which by virtue of their character, gravity and scale constituted a manifest violation of the UN Charter, would qualify as the basis of the international crime. These three core elements formed the basis of the definition of formulated by the SWGCA and for clarity and completeness, references to the definition of political aggression in Resolution 3314 were also included as part of the definition. Drafted as an amendment to the Rome Statute (Article

8bis), the SWGCA's definition was presented to state parties at the ICC Review Conference in Kampala, Uganda, where it was formally adopted by states on 11 June 2010.

The desire to ensure compatibility with existing norms also underpinned international agreement on the definition of criminal aggression. However, unlike the definition of political aggression, the existing norms in question were not those embodied in the UN Charter. Rather, what proved particularly influential was, firstly, the Nuremberg Charter – and more specifically, the description of ‘crimes against peace’, as the crime of aggression was then known, in Article 3(a) of the Nuremberg Charter. Despite the controversies that surrounded the Nuremberg Trials, the Nuremberg Charter retained significant normative value because even after the passing of over six decades, its description of ‘crimes against peace’ represented the only existing characterization of aggression that had been formulated for the purposes of criminal legal proceedings. The Nuremberg Charter offered, therefore, an appealing historical precedent upon which to model the definition of criminal aggression for the purposes of the Rome Statute of the ICC. And indeed, as shown in Chapter 5, although proposals to employ altogether different words to that of Article 3(c) were tabled and discussed, these were not particularly well-received. Rather, the majority of the SWGCA's members found it more appealing to rely upon similar words used in the Nuremberg Charter – in particular, “planning, preparation, initiation or execution” – which, in turn, suggests that conformity with Article 3(a) proved particularly decisive.

Furthermore, as the SWGCA agreed that only serious acts of political aggression would constitute the basis of criminal aggression, this brought the notion of political aggression back into focus at the negotiating table. Importantly, the definition of political aggression contained in Resolution 3314 of 14 December 1974 retained considerable normative primacy. Despite

the passage of time, it remained the only formal definition of political aggression that international society had thus far expressed agreement on. Like Article 3(a) of the Nuremberg Charter, therefore, the SWGCA's members regarded Resolution 3314 as an important referent point for the new definition that was to be formulated. And indeed, core elements of Resolution 3314 – notably, the general definition of political aggression and the list of typical acts of aggression – were consciously reiterated in Article 8*bis*. Crucially, then, the definition of criminal aggression that was formulated for the purposes of the ICC deliberately built upon prior normative consensus on the definition of political aggression. This therefore suggests that international agreement on the definition of criminal aggression was additionally driven by another existing norm, namely, the definition of political aggression contained in Resolution 3314.

The question of piracy's form received considerable attention during international discussions on piracy throughout its historical development. In this regard, early efforts to define piracy – undertaken by the Committee of Experts and the Harvard Research Group – were rooted in the concern that no authoritative definition of piracy existed under positive international law at the time. However, because international society did not regard the drafting of an international convention on piracy as a pressing concern during this time, no political opportunity to consider these early definitional proposals arose. Subsequent efforts to define piracy only re-emerged in the 1950s and crucially, they were derivative of the ILC's broader work on the codification of the regime of the high seas. Drawing heavily on the Harvard Draft's proposed definition, the ILC formulated a definition, which was then forwarded to the GA for its consideration. The GA's approval of this definition brought about two key consequences: firstly, piracy acquired a definitive form and secondly, its definition was codified in an international treaty (the Convention of the High Seas and then UNCLOS, which replaced the former). In terms of this

definition, piracy amounts to the following: an illegal act of violence that is committed on the high seas by a private vessel against another.

Importantly, the driving motivation behind defining piracy was altogether different from that of genocide and aggression. In these latter cases, the definitional enterprise ensued after international agreement on their status as international crimes were obtained, in order to specify the precise contours these two acts would assume as international crimes. Given that piracy never acquired the status of an international crime, concerns about its form were not grounded in the need to establish, as it did with genocide and aggression, clarity and precision over its central criminal elements. In contrast with genocide and aggression, therefore, international discussions on piracy's definition were not dominated by broader normative discussions about its criminality in international society.

Rather, the central preoccupation with piracy's definition was rooted in broader efforts to codify international law throughout the twentieth century. In particular, progress and momentum on piracy's definition was closely connected to efforts to utilize international law in order to govern aspects concerning the oceans and the seas. Indeed, it is telling that piracy's international legal definition was eventually codified in an international treaty that regulates almost every conceivable aspect relating to the oceans and the seas. By contrast, genocide's international legal definition was formulated for an international treaty devoted to its punishment and prevention, while aggression's definition was devised for the purposes of establishing a permanent international criminal court to prosecute and punish individuals for committing international crimes.

Despite having taken place during the Cold War, international negotiations on piracy's definition proceeded without major political disagreements. This differs from international negotiations on genocide's and aggression's form, which were politically charged and especially complex, partly because of broader Cold War dynamics. Indeed, the reaching of international agreement on piracy's definition was obtained without difficulty or controversy. Here, the fact that the ILC's proposed definition, which state representatives in the GA eventually accepted without modification, did not significantly depart from those proposed decades earlier by the Committee of Experts and the Harvard Research Group is particularly instructive. It demonstrates that an informal international consensus on what piracy referred to was already in existence before a formal definition was confirmed and subsequently codified under international law. The process by which this informal consensus crystallized into a codified definition was therefore relatively straightforward, which goes some way towards demonstrating how Cold War dynamics did not have a significant impact on international negotiations on piracy's definition.

THE SECOND STAGE OF INTERNATIONAL CRIMINALIZATION: TRANSLATION INTO AN INTERNATIONAL LEGAL PROSCRIPTION

Following the completion of the first stage of international criminalization, the two international criminal norms of genocide and aggression were both subsequently translated into formal international legal proscriptions. As suggested in Chapter 1, this additional step of international criminalization can occur in one of two ways: either through the conclusion of an international treaty or through the development of international customary rules. With genocide and aggression, international legal proscription was effected through the former: both international criminal norms were formally translated into an international treaty. In both cases, therefore, international legal proscription occurred through the act of international legal codification.

In genocide's case, this centred on the adoption of the Genocide Convention on 9 December 1948. Genocide is unique, in this regard, as it is an international crime whose legal proscription is embodied within an international treaty that is exclusively devoted to it. By contrast, aggression's international legal proscription is contained within an international treaty that was aimed at the establishment of a permanent international criminal court, namely, the Rome Statute of the ICC. Here, it is important to point out again that when the Rome Statute was adopted on 17 July 1998, international society had not yet agreed upon aggression's international legal definition. International agreement on aggression's form only arose on 11 June 2010, following the adoption of an amendment to the Rome Statute (Article 8*bis*) at the first Review Conference of the ICC in Kampala, Uganda¹. This thesis therefore takes this later date as the moment when the international criminal norm against aggression was formally translated into an international legal proscription. Aggression's international legal proscription is therefore technically contained in an amendment to the Rome Statute but ultimately, this international treaty represents evidence of aggression having completed the second stage of international criminalization.

International codification was also present in piracy's case. As the codified provisions on piracy in UNCLOS make clear, current international law recognizes that: a legal duty exists on the part of states to cooperate in the suppression of piracy (Article 100); piracy refers to illegal acts of violence committed on the high seas and for private ends, by one private vessel against another (Article 101); and all states have the right to seize pirate ships on the high seas (Article 105). However, international codification in this instance did not amount to the second phase

¹ At the Sixteenth Session of the Assembly of States Parties (ASP) to the Rome Statute in New York (December 2017), it was agreed that the provisions of Article 8*bis* will come into force on 17 July 2018, which marks the 20th anniversary of the ICC's establishment; 'Activation of the jurisdiction of the Court over the crime of aggression', Resolution ICC-ASP/16/Res.5 (14 December 2017).

of international criminalization. As this thesis has argued, an international criminal norm against piracy never emerged throughout piracy's historical development. Unlike genocide and aggression, therefore, there was simply no international criminal norm to embody within an international legal proscription.

Despite undergoing international codification, this was not aimed at ensuring the two principal consequences of international criminalization would apply in piracy's case. As this thesis has suggested, the second stage of international criminalization operates, firstly, to provide an international criminal norm with formal legal existence under international law, and secondly, to enable its legal enforcement through criminal prosecution under international law. In piracy's case, inclusion within UNCLOS centred on the broader project to codify the relevant international principles concerning the law of the sea. Consequently, UNCLOS cannot be viewed as having inaugurated an international legal proscription against piracy. Rather, it simply formalizes that under current international law, piracy represents an act that international society has agreed to suppress and regulate, in order to promote the orderly international regulation of the oceans and the seas.

International legal proscription, as the cases of genocide and aggression demonstrate, constitutes what can be regarded as the more procedural step of the two stages of international criminalization. In these two cases, the additional step of international legal proscription simply entailed formally codifying the international social consensus that arose during the preceding stage within an international legal instrument, namely, an international treaty. Put differently, international legal proscription centred on formally embodying the decisions made during the first stage of international criminalization into a formal provision of international law. By contrast, the first stage of international criminalization requires, as this thesis has shown, the

historical development of international social consensus on the status and form of an act that has been subjected to the criminalization process. As this thesis has demonstrated, this international social consensus arises through international diplomatic negotiations amongst diplomats and legal experts representing states within formal multilateral contexts. Given that this thesis has been primarily interested in the social dimensions of international criminalization, it has devoted more attention and analysis to what it has considered to be the more social step within the overall process, namely, the historical emergence of international criminal norms.

However, as the introduction of this thesis stated, this is not to dismiss the importance of the second stage of international criminalization. International legal proscription constitutes an important and necessary part of the overall process of international criminalization for two central reasons: firstly, it endows the international criminal norm with binding quality under international law; and secondly, it enables the norm to be legally enforced through criminal prosecution and punishment under international law. Here, it is important to recall that the evidence for the historical development of the two international criminal norms of genocide and aggression centred on non-binding sources of international law: in genocide's case, an international resolution of the GA and decisions of the GA's Sixth Committee; while with aggression, this included two resolutions of the GA and a further resolution of the Assembly of State Parties (ASP) to the Rome Statute. Although these international documents embody international social consensus on genocide's and aggression's status and form, they do not, on their own, constitute binding provisions of international law. In order to acquire the quality of bindingness under international law, they needed to be made into a formal provision of international law. Crucially, this was achieved through the adoption of the Genocide Convention and the Rome Statute, which formally elevated the international consensus on

status and form into binding legal provisions. Without the additional step of international legal proscription, therefore, the international criminal norms of genocide and aggression would have remained non-binding and non-enforceable international criminal norms within international society.

To bring this chapter to a close, the discussion below provides some reflections on the analytical framework that has guided this thesis, particularly with regards to where it has offered greatest explanatory purchase and where it has proved less useful. In doing so, it focuses on the following aspects of the analytical framework: the definition of international criminalization; the two-stage process of international criminalization; and driving factors behind the process of international criminalization.

This thesis suggested the concept of international criminalization be defined as *the historical process by which particular acts are recognized as international crimes in international society and are thereby accorded a legal existence in international law*. This definition has allowed this thesis to show that international crimes, far from simply amounting to legal constructs, also constitute social constructs. As social constructs, international crimes are acts that have been socially recognized as being worthy of the status of an international crime. In addition, they are acts that assume a particular form because of the development of an international social consensus on their international legal definition. Relatedly, the definition also enabled this thesis to demonstrate how the process of international criminalization is not simply a legal one. While it does include the legal act of international legal proscription, it also entails a social process, which specifically centres on the historical development of an international criminal norm in international society.

This definition was formulated with the principal aim of this study in mind, namely, to better understand the social process that precedes the moment when an international crime is legally established in international society. As such, the definition focused greater analytical attention on this initial act of international criminalization. In doing so, it excluded ensuing practices of international criminalization that follow after an international crime has been formally established. This includes the initial moment when an international crime is prosecuted before a court of law, as well as the evolving body of legal jurisprudence that develops from different instances of prosecution across time. This exclusion therefore represents a principal limitation of the definition of international criminalization offered here. And indeed, if this definition is to inform a wider study of international criminalization that aims to include the international prosecution of international crimes, it would need to be refined to include ongoing practices of international criminalization.

In order to account for the social dimensions outlined above, which existing accounts in the literature neglect, this thesis suggested the process of international criminalization be conceived as a two-stage process. Conceiving international criminalization in this way allowed this thesis to offer a different explanation for how and why international crimes come to be established in international society. While conventional accounts within international legal scholarship suggest international crimes arise due to a legal process that pivots on the act of international legal codification, this thesis has been able to show that an initial social step precedes international legal codification, namely, the development of international social consensus amongst state diplomats on the status and form of an international criminal norm. This, in turn, has enabled this thesis to demonstrate what existing accounts do not adequately capture: international criminalization is not simply a legal process but rather, it also embraces

a social process that centres on international diplomatic negotiations amongst state diplomats and legal experts.

The two-stage process of international criminalization also proved useful for this study's empirical analysis of the historical development of two international crimes. Here, the thesis was able to demonstrate how the criminalization of genocide and aggression do not centre, as is commonly portrayed, on a single moment. Rather, multiple moments were involved, and these different moments need to be collectively understood as significant markers of their criminalization. In the case of genocide, pivotal moments within its criminalization included the following: the reaching of international agreement on its status (11 December 1946 and 6 October 1948); the reaching of international agreement on its form (25 October 1948 and 29 November 1948); and finally, the translation of the international criminal norm against genocide into an international legal proscription (9 October 1948). This stands in contrast to existing accounts of genocide's criminalization, which treat the date upon which the Genocide Convention was adopted – 9 December 1948 – as the singular moment when genocide was criminalized and thereby established as an international crime.

Turning to aggression, this thesis showed the key markers of its international criminalization centred on the following moments: the reaching of international agreement on its status (11 December 1946); the reaching of international agreement on its form (14 December 1974 and 11 June 2010); and the translation of the international criminal norm against aggression into an international legal proscription (11 June 2010). This also differs from existing accounts in the literature, which treat the adoption of an international treaty as the definitive marker of aggression's criminalization. Here, two different views are evident: while one treats the conclusion of the Kellogg-Briand Pact on 27 August 1928 as the moment when aggression was

established as an international crime, another view sees the conclusion of the London Agreement on 8 August 1945 as more significant.

However, the empirical analysis of genocide and aggression provided one central insight about the social dimension of the process of international criminalization, which the initial analytical framework did not fully capture. In this regard, the analytical framework also did not anticipate that the development of international agreement on status and form may embrace multiple decisions that are taken at different points in time. On the one hand, the empirical chapters indicate that international agreement on status may involve more than one decision. As the analysis of genocide demonstrates, consensus on its status hinged on two separate decisions that were taken at two different junctures: an initial decision about recognizing it as an international crime and a later decision about designating genocide as a distinct international crime in its own right. With regard to international agreement on form, the empirical analysis similarly shows multiple issues are involved, and that finality on these decisions are reached across a considerable period of time. In genocide's case, consensus was required on the two questions of cultural genocide and political genocide, while in aggression's case, consensus was needed on the two definitions of political aggression and criminal aggression.

The two-stage process of international criminalization also provided an analytically valuable framework for analysing this study's negative case, piracy. In particular, it allowed this thesis to contribute to existing debates on piracy's character in contemporary international society by establishing more conclusively whether piracy amounts to an international or a transnational crime. Here, this thesis was able to show that the overall process of international criminalization was entirely absent in piracy's case. This, in turn, made it possible to argue that piracy does not, contrary to what some scholars and commentators suggest, constitute an

international crime. This therefore centralizes how the two-stage process of international criminalization also offers analytical purchase when examining non-international crimes. In this regard, it can be employed to ascertain whether other acts with a similar contested status underwent the process of international criminalization, as well as why certain acts were never established as international crimes despite being condemned or de-legitimized in international society.

Turning to the driving factors of international criminalization, the notion of a pivotal event was particularly useful for illuminating the role of history and historical contingency in particular instances of international criminalization. As the analysis of genocide and aggression demonstrated, what initially propelled their establishment as international crimes were political shocks that prompted the normative re-assessment of existing norms, ideas and practices within international society. Moreover, as these two political shocks were both closely linked to the Second World War, the empirical analysis valuably demonstrated a principal connection between what otherwise amounts to two different instances of international criminalization. In this regard, the criminalization of genocide and aggression suggests that international society chose to establish two distinct international crimes in order to address two distinct but inter-related normative concerns that arose at the end of the Second World War. The method employed in this study to identify the relevant political shocks in question has primarily centred on interpretation, albeit one grounded in a close analysis of two international crimes' histories. There is a possibility, then, that an altogether different interpretation to the one offered here might result in the identification of different political shocks. This, then, is possibly where the analytical framework could be refined, namely, by specifying more clearly the particular means by which a political shock is to be established.

A further factor that has driven the two instances of international criminalization examined in this study have been agents of criminalization, who constitute the main actors involved in the historical development of international criminal norms. While the analytical framework suggested these agents may include state and non-state actors, the empirical analysis revealed that state actors constitute the primary actors involved in the process of international criminalization. This is not to suggest non-state actors were entirely insignificant and indeed, in genocide's case, prominent international legal experts at the time – notably, Raphael Lemkin, Donnedieu de Vabres and Vespasian Pella – were closely involved in early discussions on genocide's status and form. It will also be recalled that early ideas on aggression's status were articulated by William Chanler (an American lawyer who joined the US War Department) and Aron Naumovich Trainin (a Soviet expert of international law). In addition, international discussions on aggression's form involved contributions by international legal experts within the ILC. All of these non-state actors, it is important to point out, were legal experts. The fact that other types of non-states actors – such as non-governmental organizations or transnational social movements – were not involved goes some way towards demonstrating how the process of international criminalization in these two cases was predominantly confined to international legal circles.

Crucially, though, the involvement of these legal experts were confined to the initial period of the overall process of international criminalization. Following this, non-state actors largely fall off the scene, thereby leaving the process predominantly in the hands of state actors. Reflecting on the empirical analysis, it is now clear that the most important state actors during the process of international criminalization are diplomats and legal experts who represent states in the following multilateral forums: the GA; the Sixth Committee of the GA; the UN Special Committee on the Question of Defining Aggression; and the SWGCA. This centralizes how

international criminalization is a process that is primarily driven by diplomats and legal experts that represent states within multilateral organizations.

Of the three factors that were advanced to account for why only certain ideas prevail during the political contestation amongst the agents of criminalization, the factor that proved the most analytically powerful was that of the degree of compatibility with existing norms. Despite envisaging this factor would have a role within the criminalization process, the analytical framework did not fully anticipate the following: firstly, that the driving factor behind the emergence of international criminal norms against genocide and aggression would similarly centre on this single factor; and secondly, that this factor would operate according to similar dynamics across these two cases. As the analysis has showed, proposed ideas that eventually formed the basis of international agreement on status were, in the cases of both genocide and aggression, those that departed from existing norms. Meanwhile, the ideas that found greatest political support in the case of genocide's and aggression's form were those that displayed compatibility with existing norms. Taken together, this reinforces the role of extra-legal factors within the process of international criminalization, particularly within the first stage of the process. In this regard, international criminal norms do not develop in a vacuum; rather, they emerge either in relation to existing norms within international society that are perceived as having normative appeal, or in opposition to the perceived deficiencies of these norms.

Although power was accommodated within the analytical framework, the empirical analysis demonstrated that the status of the agents of criminalization was not an especially decisive driving factor behind genocide's or aggression's criminalization. In both cases, proposed ideas about their status and form that eventually found the greatest political support were not those that were exclusively proposed by powerful states. Rather, what is evident in both cases is the

following: it was smaller states who successfully pushed for ideas about genocide's and aggression's status, even in the face of clear opposition from more powerful states; and secondly, ideas about genocide's and aggression's form were those that were mutually championed by, and consequently met the mutual support of, smaller and more powerful states alike. What is to be appreciated, then, is that power operated in a less decisive way than the analytical framework initially anticipated. Crucially, this demonstrates how the process of international criminalization is one which cannot be explained exclusively through power-based explanations.

The factor that proved to be the least useful in the preceding analysis was that of the interests of agents of criminalization, conceived here as their interests in maintaining a distinction between the categories of 'criminals' and 'non-criminals' in international society. As the creation of an international crime simultaneously establishes who can and cannot be deemed an 'international criminal' in international society, the analytical framework initially expected the agents involved in the criminalization process would be less likely to support ideas on the status and form of an international crime that would immediately implicate themselves within the category of an international criminal. What the historical analysis has shown, however, is that this consideration did not strongly feature within discussions and negotiations on status and form – and indeed, there was a complete absence of debate on this issue. Given its limited analytical explanatory value in this study, it may therefore prove useful to exclude this factor from a revised analytical framework, if it were to be refined for the purposes of future research on other international crimes.

Arguably, then, this suggests that states were aware – and that they also approved – that international criminalization would entail the creation of the new social category of an

international criminal in international society. A possible explanation for this centres on the normative appeal behind the notion of an international crime. In this regard, establishing genocide and aggression as international criminal acts in international society would allow for new judicial practices to come into play vis-à-vis the international criminals who commit them, namely, their prosecution and punishment under international law before national or international courts. International crimes and international criminals, then, represent two sides of the same coin: establishing the former necessarily involves accepting there will be actors in international society who will come to be embraced by the latter category. There was no need, therefore, to negotiate between competing ideas on the exact parameters of the notion of an international criminal – perhaps because this was a matter that would be judicially interpreted by national and international courts during the legal prosecution and punishment of an international crime after its initial establishment. Rather, as the empirical analysis in this study suggests, the greater imperative during the process of international criminalization centred on establishing the substance and content of the international crime itself.

CONCLUSION

This thesis has examined the phenomenon of international criminalization in international society. It began by presenting an initial framework for analysing how and why the process of international criminalization occurs. To this end, Chapter 1 introduced the following: the definition of international criminalization; the two-stage process of international criminalization; and the driving factors behind the process of international criminalization. Thereafter, this framework was employed to analyze the empirical cases of this study and here, particular focus was devoted to examining the first stage of the process of international criminalization, namely, the emergence of an international criminal norm.

Beginning with genocide, Chapter 2 analyzed how and why genocide was recognized as having the status of an international crime, while Chapter 3 demonstrated how and why genocide assumed the particular form that is now evident in its international legal definition. Chapters 4 and 5 focused respectively on aggression's status and form as an international crime, and showed how its process of international criminalization was similar to, but also differed from, that of genocide's. In Chapter 6, the thesis turned to a non-international crime – piracy – in order to ascertain whether the process of international criminalization occurred in piracy's case and relatedly, whether it amounts to an international crime. Chapter 7 provided an analytical summary of the thesis' key empirical findings, as well some reflections on the strengths and limitations of the initial framework.

To bring this thesis to a close, this final chapter recapitulates the core conceptual arguments this study has advanced; discusses the contribution this thesis makes to International Law (IL)

and International Relations (IR) scholarship; and finally, offers some suggestions on possible areas of further research on the topic of international criminalization.

INTERNATIONAL CRIMINALIZATION IN INTERNATIONAL SOCIETY

Five central arguments about international criminalization, which will be summarized below, have guided the conceptual underpinnings and the empirical study of this thesis. Firstly, the concept of international criminalization can help us better understand the following aspects about international crimes: why international crimes came to be established in contemporary international society; why international crimes are distinct from other types of crimes, such as domestic and transnational crimes; and finally, what distinguishes international crimes from other forms of internationally prohibited conduct, such as taboos or prohibitory norms. In this regard, this thesis has argued that in order to appreciate why international crimes, which have not always existed in international society, are now a firm feature of the contemporary international legal and political order, we require a deeper understanding of how and why particular acts were criminalized in international society. This, in turn, requires an understanding of the concept of international criminalization – and more specifically, how and why the process of international criminalization unfolds in international society.

Secondly, the process of international criminalization consists of two distinct stages. In the first stage, an international criminal norm develops in international society and thereafter, this norm is translated into an international legal proscription. In conceiving international criminalization as a two-stage process, this thesis recognizes that the process of international criminalization does not only include the moment when an international crime is initially established. Apart from this initial act of international criminalization, it also embraces what can be termed ongoing practices of international criminalization, which concerns the prosecution and

punishment of international crimes following their establishment. Here, what assumes particular importance is the judicial interpretation of international crimes on the part of judges, prosecutors and lawyers across different cases of prosecution. However, these ongoing practices of international criminalization have been excluded from the analysis undertaken here in order to provide an in-depth examination of the initial act of criminalization, namely, a historical analysis of how, when and why particular international crimes came to be established in international society.

Thirdly, the first stage of international criminalization – the emergence of an international criminal norm – represents the social dimension of the initial act of criminalization. Like ordinary international norms, an international criminal norm embodies shared understandings, ideas and values that take hold in international society at a particular point in time. However, unlike ordinary international norms, it specifically embodies shared understandings that a particular act should not simply be prohibited in international society but rather, that it should be stigmatized as an international criminal wrong. In addition, an international criminal norm differs from ordinary international norms in the way they are established. Before an international criminal norm emerges, international agreement on two particular issues are required: firstly, on the status of an act that is a candidate of international criminalization and secondly, on the form it ought to assume as an international crime.

Fourthly, international legal proscription – the second stage of international criminalization – represents the legal aspect of the process. In this phase, the international criminal norm is given formal legal existence under international law. This can occur in one of two ways: either through international legal codification, which involves the adoption of an international treaty; or, through the development of international customary law. As this second stage sees the

international social consensus obtained during the first stage acquiring the legal quality of bindingness under international law, this thesis has also argued that it constitutes the more procedural step within the overall process of international criminalization. This is not to say, however, that this step is without importance. Without international legal proscription, the international social consensus acquired in the preceding stage would not be given formal legal expression under international law. This, in turn, would mean the international criminal norm would not be able to formally exist as an international crime under international law and in addition, that its legal enforcement through international criminal prosecution would not be possible.

Finally, the process of international criminalization is driven, firstly, by the existence of a pivotal event or a critical juncture within international society. This provokes a normative reassessment of existing norms, ideas and values within international society on the part of the agents of international criminalization, who, in turn, advance different ideas on the status and form of an act that is subject to the criminalization process. During the political contestation that ensues over the legitimacy, validity and acceptability of these different ideas, some ideas will prevail, while others will be rejected. Three main factors will determine which ideas come to be accepted by the agents of criminalization: the degree of compatibility between these ideas and already-existing norms; the status of the agents, namely, their power and influence; and finally, the interests of the agents in maintaining a distinction between the criminals and non-criminals of international society.

CONTRIBUTION TO INTERNATIONAL RELATIONS AND INTERNATIONAL LAW SCHOLARSHIP

This thesis has sought to demonstrate that a positivist approach to international criminalization, which characterizes existing accounts of the concept within IL scholarship, provides a

particularly narrow understanding of how and why the process of international criminalization unfolds in international society. Although IR scholars have not directly engaged with the concept of international criminalization to date, the discipline of IR nevertheless offers, this thesis has argued, the intellectual resources to better capture the complexities of the phenomenon, as well as to refine existing understandings of the concept. In the discussion that follows below, the principal insights that a historically-informed constructivist IR approach to international criminalization, which has been developed in this thesis, offers to contemporary IR/IL scholarship will be outlined.

The nature of the process of international criminalization

Although IL accounts valuably highlight how international legal codification features within the process of international criminalization and that it operates to formally codify the existence of an international crime within positive international law, it mistakenly sees the entire process as centring exclusively on this step. In order to demonstrate how the process of international criminalization embraces more than just international legal codification, this thesis has argued that it additionally involves the development of an international norm. In making this argument, the thesis has drawn on constructivist IR ideas on international norms, which constructivist IR scholars conceive as shared understandings of appropriate behaviour in world politics that international actors are perceived as having to observe. Building upon these constructivist insights, this thesis has suggested that the process of international criminalization brings into play shared understandings about international criminality. These shared understandings particularly concern collective ideas about what constitutes a crime at the international level and why, and relatedly, who constitutes the outlaws and law abiders within international society.

It has also suggested that the criminalization process generates an altogether unique type of international norm, namely, an international criminal norm. In this thesis, an international criminal norm refers to shared understandings that an act, because it is so reprehensible, not only needs to be proscribed but additionally denounced as an international criminal act. More specifically, an international criminal norm expresses shared understandings that, firstly, an act deserves the status of an international crime and secondly, that it ought to assume a particular form as an international crime. Importantly, these shared understandings take hold in international society before international legal codification occurs. This has therefore allowed this thesis to demonstrate that an additional stage within the process of international criminalization, which existing IL accounts do not currently capture, concerns the development of an international criminal norm.

Given the emphasis it attaches to international codification, the positivist view primarily conceives of international criminalization as amounting to a legal process that centres on the adoption of an international treaty on an international crime. In contrast, a constructivist IR approach, which emphasizes the socially constructed nature of international relations, would suggest that international criminalization also amounts to a social process. Guided by constructivist ideas on social construction, this thesis has argued that the first stage of international criminalization – the emergence of an international criminal norm – constitutes a social process for three central reasons. Firstly, the international criminal norm that arises embodies an international social consensus that an act deserves to be recognized as an international crime and furthermore, that it should assume a particular form as an international crime. Secondly, this international social consensus arises through international diplomatic negotiations between social actors, who constitute the social participants of the process of international criminalization. During initial discussions on the issues of status and form,

diplomatic negotiations take place between non-state actors – and in particular, international legal experts – and state actors. However, formal and final decisions on status and form are eventually made by the latter, namely, diplomats and legal experts representing states. It is these particular actors, therefore, who constitute the principal social actors within the overall process of international criminalization. Thirdly, international negotiations amongst these social actors occur within international social spaces. In this regard, international legal experts and state diplomats convene within international diplomatic spaces that are affiliated to the United Nations (UN). This includes the General Assembly (GA) of the UN, the Sixth Committee of the GA, the International Law Commission, and special *ad hoc* international committees established under the auspices of the UN.

Evidence of international criminalization

As the positivist view sees international criminalization as a legal phenomenon, it turns principally to positive international law for legal evidence that international criminalization has occurred. In IL accounts, this legal evidence centres on international treaties and in this regard, the moment when an international treaty has been legally adopted is treated as the sole and definitive marker of the process of international criminalization. As this thesis acknowledges that international treaties have a role within the process of international criminalization, it similarly sees the moment when an international treaty has been concluded as a significant marker within the overall process. However, the conclusion of an international treaty is treated here as evidence that the second stage of international criminalization has occurred. More specifically, it constitutes evidence of international legal proscription. Accordingly, this thesis has also suggested that a number of additional moments, which precede the formal adoption of an international treaty and which constitute evidence of an international criminal norm having emerged, constitute further markers of the overall process of international criminalization. As

the analysis of genocide and aggression have shown, these additional markers include the moments when international agreement on status and form were obtained.

To demonstrate what these additional moments are and how they can be discerned, this thesis has been broadly guided by a historically-informed constructivist approach. This has required turning to, and examining, the historical sources that make up the archival record of its two chosen international crimes, including the following: official resolutions of organs of international organizations; official records of meetings held by organs or committees of international organizations; and *the travaux préparatoires* of international treaties. By closely analysing this archival record, this thesis has identified historical evidence of the moments when international agreement on status and form were obtained. As the empirical chapters of this thesis have shown, this historical evidence centres on formal international declarations or pronouncements issued by states on the twin issues of status and form. More specifically, it has included the following moments: when formal decisions on genocide's and aggression's status as international crimes were made by the GA through the issuing of international resolutions; when official decisions of the GA's Sixth Committee were adopted through formal votes during international negotiations on genocide's international legal definition; when formal decisions on the definition of political aggression were made through the issuing of an international declaration by the GA; and when official decisions of the Special Working Group on the Crime of Aggression were adopted through a formal vote during international negotiations on the definition of criminal aggression.

On their own, these international declarations and pronouncements do not possess binding legal force, principally because they are not one of the recognized sources of international law. Positivist accounts, therefore, have tended to downplay their significance as markers of the

process of international criminalization and instead, have attached greater significance to international treaties, as they constitute a binding source of international law. By contrast, this thesis has elevated the importance of these international declarations and pronouncements, which were adopted prior to the formal conclusion of an international treaty. In this thesis, they specifically represent historical evidence of the moments when international agreement on status and form were obtained and as such, need to be appreciated as additional markers of the process of international criminalization.

As these international declarations and pronouncements embody an international social consensus that takes hold during the first stage of international criminalization, this thesis additionally sees social actors as having a much more critical role within the process of international criminalization than existing positivist accounts currently acknowledge. In this regard, the social actors that this thesis sees as crucial participants within the process of international criminalization are international legal actors. This has included individual international jurists such as Raphael Lemkin and Vespasian Pella, as well as official diplomats and legal experts representing states within the UN and the International Criminal Court (ICC). As the empirical chapters of this study have demonstrated, before international legal codification takes place, these social actors convene within international social spaces in order to debate, discuss and negotiate contending ideas about status and form. If we are to fully appreciate the process of international criminalization, then these diplomatic negotiations need to be understood as a critical part of the process that eventually culminates in an international crime being established. Evidence for the process of international criminalization does not, therefore, simply centre on formal legal evidence, as positivist accounts suggest. Rather, it also includes historical evidence of international declarations and pronouncements on status and form, which embody the international social consensus that principally develops amongst state

diplomats and legal experts. The important implication here, then, is that an international crime will not come to be established under international law unless there is prior international agreement between these social actors about the two questions of status and form.

International criminalization as a historically-contingent phenomenon

By treating the above-mentioned historical sources as additional markers of the process of international criminalization, the historical analysis undertaken in this thesis has been able to offer two additional insights, which existing positivist accounts do not sufficiently illuminate, about the broader role of history within the overall process. Firstly, a historical approach valuably demonstrates how international consensus on status and form does not arise instantaneously but rather, develops historically. As the empirical chapters of this thesis highlighted, formal decisions on status and form were made, in the case of genocide, across four years, and across six decades in aggression's case. Crucially, this centralizes how international criminalization is a process that stretches across a period of time. This is particularly significant in aggression's case, as the structure of the international order did not remain constant throughout the six decades. Rather, the process of aggression's international criminalization occurred across three different international orders, namely, the post-war, the Cold War and the post-Cold War international orders.

Secondly, a historical approach also centralizes how and why international consensus on status and form takes root within a particular historical context. As this thesis has shown, a political shock was responsible for driving the process of criminalization into motion for the two international crimes under study. Without a major historical event that raises normative concerns within international society, social actors would not be presented with a historical opportunity to assess the adequacy of existing norms, ideas and practices to deal with matters

of international criminality – and indeed, to propose international criminalization as a solution in instances where these existing norms and practices are perceived as being inappropriate. Here, it is important to stress that IL accounts do broadly acknowledge the significance of major historical events in the historical development of international crimes (Cassese 2005; Cassese and Gaeta 2013; Cryer 2008; Gaeta 2009; Werle and Jessberger 2014; Yarnold 1994). What these accounts do not then go on to show, however, is how and why historically-contingent factors flowing from these historical events specifically matter during the actual process of international criminalization.

Through its historical analysis of the criminalization of genocide and aggression, this thesis has demonstrated how international agreement on status and form have developed in relation to historically-contingent views about the adequacy or inadequacy of norms that existed within international society at that particular point in time. Of the different ideas that were proposed on status, those that eventually prevailed and became embodied within an international social consensus were those that departed from existing norms. In this regard, genocide and aggression were both recognized as deserving the status of an international crime because existing norms were perceived as being deficient. On the one hand, a new international crime of genocide would remedy the perceived limitations of an already-existing international crime, crimes against humanity. Meanwhile, recognizing aggression as an international crime would rectify what many states considered to be its primary shortcoming, namely, that it amounted to an *ad hoc* legal charge that was too closely linked to the controversial circumstances surrounding the Nuremberg Trials, as well as the specific context of the Second World War. Recognizing both acts as international crimes was viewed, therefore, as necessary departures from existing norms that were perceived as being unsatisfactory at that particular point.

In contrast, the ideas on genocide's and aggression's form that met the greatest level of support and acceptance were those that were perceived as being most compatible with existing norms. In genocide's case, cultural genocide was excluded from its form because the protection of cultural groups was perceived as being more compatible with the already-existing norm of minority protection within international human rights. In addition, political genocide was excluded from genocide's form because the existing norm of state sovereignty would be least disrupted if the political groups were excluded as a protected group under genocide's definition. Turning to aggression, the definition of 'political aggression' was informed by the perceived need to ensure compatibility with two existing norms contained in the UN Charter: the prohibition against the use of force in international relations (Article 2(4)) and the responsibility of the Security Council to determine the existence of acts of aggression (Article 39). Meanwhile, the definition of 'criminal aggression' was driven by the desire to ensure compatibility with the formulation of 'crimes against peace' in the Nuremberg Charter, as well as the definition of political aggression contained in Resolution 3314 of 14 December 1974.

Taken together, the historical development of international consensus on status and form centralizes how contextual factors present at a particular point in time within international society matter for the process of international criminalization. Apart from a major historical event, such as the Second World War, these historical factors includes the following: firstly, already-existing norms within international society and secondly, views about the adequacy or inadequacy of these norms that arise at a particular point in time. All of this goes some way towards demonstrating how the process of international criminalization is a historically-contingent phenomena. Put differently, there is nothing historically inevitable about international criminalization. Rather, its occurrence and unfolding proceeds in relation to, and

is influenced by, a historically-specific normative context that arises within international society at a given point in time.

International crimes as social constructs

The legalism that characterizes positivist accounts of international criminalization also extends to their view of international crimes themselves. From the perspective of IL scholars, international crimes come into existence by being formally recognized as such in an international treaty. They are, in other words, legal constructs that are formally created through, and because of, international law. Unlike other legal constructs, international crimes are unique because they generate special legal consequences under international law. Under the principle of individual criminal accountability, individuals can be held legally responsible under international law for committing international crimes. In this regard, the perpetrators of international crimes can be prosecuted and punished in terms of international criminal law by national courts or the ICC. While it acknowledges the close connection international crimes have with international law necessarily means they are legal constructs, this thesis has argued the positivist view does not sufficiently capture how international crimes also constitute social constructs.

International crimes need to be additionally appreciated as social constructs for three principal reasons. Firstly, they express shared understandings, which take hold within international society at a particular point in time, that a particular act has been socially stigmatized and delegitimized as a higher-order transgression, namely, an international criminal act. Secondly, these shared understandings develop historically from a diplomatic process of negotiation that takes place within an international social setting amongst diplomats and legal experts representing states within multilateral organizations. Thirdly, during these international

negotiations, an international social consensus develops amongst these social actors on the reasons why a particular act deserves the special status of an international crime, as well as what form it should assume as an international crime. All of this serves to show that like the process of international criminalization itself, there is nothing inevitable about international crimes. Rather, particular acts are criminalized in international society because they are actively shaped, crafted and constructed by the social actors involved in their process of international criminalization on the basis of collective views on what constitutes a crime in international society and why.

FURTHER RESEARCH ON INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINALIZATION

The analytical framework developed in this thesis offers three main avenues for future empirical research. Firstly, it can be used to explore the historical process by which the two other international crimes – war crimes and crimes against humanity – were established as international crimes in international society. This would provide a complete comparative study of the international criminalization of all four international crimes that exist under current international law. In doing so, it would enable a systematic comparison of the similarities between these four instances of international criminalization, as well as encourage greater analytical reflection on the principal differences that distinguish these four cases.

Secondly, the analytical framework that guided this study can also help us better understand why other transnational crimes, such as human trafficking, drug trafficking or terrorism, never achieved universal recognition as international crimes. As with piracy, the analysis would be directed at understanding how and why these transnational crimes did not undergo the process of international criminalization. Importantly, research into the historical development of other

transnational crimes presents the opportunity to explore, in more theoretical terms, how the criminalization of transnational crimes differs from that of international crimes.

A final area of empirical research lies with future or emerging international crimes. In this regard, the two-stage process of international criminalization can be applied to acts that are currently the subject of international condemnation or prohibition but have not yet been internationally criminalized. Examples here might include international terrorism or torture. Employing the analytical framework to such acts offers a fruitful way to analyze whether new international crimes are in the process of developing in contemporary international society and relatedly, what would be required for the process of international criminalization to be fully completed in these cases.

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