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At the Crossroads of Law and Licence: Reflections on the Anomalous Origins of the Crime of Aggressive War[*]

Anatoly Levshin[**]

> – Yet when we came back, late, from the
> hyacinth garden,
> Your arms full, and your hair wet, I could not
> Speak, and my eyes failed, I was neither
> Living nor dead, and I knew nothing,
> Looking into the heart of light, the silence.
>
> T.S. Eliot, *The Waste Land*

13.1. Introduction

When was the crime of aggressive war born? The Judgment of Nuremberg famously described aggressive war as a *malum in se*:

> 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 from other war crimes in that it contains within itself the accumulated evil of whole.[1]

[*] I would like to thank Jennifer Welsh for encouraging me to grapple seriously with the question at the heart of this chapter. Although that question received only a nominal mention in my graduate thesis, on which I commenced work under her supportive guidance, I now appreciate its pivotal importance to any attempt, however rudimentary, to explain the origins of the crime of aggressive war.

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[1] Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 2011, p. 128.

However, to assert that the launching and prosecution of a war of aggression are essentially evil acts and that, therefore, they have always been criminal under international law, is to obscure the history of law with ahistorical normative valuations.[2] Stefan Glaser is guilty of this mistake when, in enquiring whether *jus ad bellum* had at all changed since the founding of the modern states system, he asserts: "We do not think so. In fact, from medieval canon lawyers, up to Grotius and Vattel, international law has strived to distinguish between cases where the use of force was legal and those where it was not".[3] However, the plain truth of the matter is that, as late as 1914, international law accorded sovereign states the licence to prosecute war in accordance with their national interests.[4] When, then, did the legal landscape of world politics change not simply from a permissive *jus ad bellum* to a *jus contra bellum* but to a *jus contra bellum* that recognised the launching of aggressive war as a criminal offence entailing individual accountability?

Two rival answers to this question permeate the scholarly literature: at the London Conference on Military Trials ('London Conference') in 1945 or at the Review Conference of the Rome Statute of the International Criminal Court ('Review Conference') in Kampala, 65 years later. In this chapter, I attempt to adjudicate between these competing views. This problem is more difficult than it may at first appear, however, for the opposition between these views conceals a troubling anomaly in the historical record. Both answers enjoy limited empirical corroboration,

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2 This confusion is equally evident in Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press, Cambridge, 2008 and Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 2000.

3 Stefan Glaser, "The Charter of the Nuremberg Tribunal and New Principles of International Law", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, p. 67.

4 An excellent illustration of this fact can be glimpsed from a relevant provision in the US War Department Field Manual that was approved by the US Chief of Staff on 25 April 1914. The manual unequivocally pronounces that "the law of nations allows every sovereign Government to make war upon another sovereign State", US War Department, Office of the Chief of Staff, *Rules of Land Warfare*, Government Printing Office, Washington, DC, 1914, p. 25. For a general overview of the evolution of *jus ad bellum* in the modern states system, see Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963; Dinstein, 2011, pp. 65–133, see *supra* note 1; Cornelis Pompe, *Aggressive War: an International Crime*, Martinus Nijhoff, The Hague, 1953; and Page Wilson, *Aggression, Crime and International Security: Moral, Political, and Legal Dimensions of International Relations*, Routledge, London, 2009.

but neither can satisfactorily account for those pieces of evidence upon which the other draws for primary support. Furthermore, because the two answers appear to be mutually exclusive, this fact of mixed empirical support also means that neither answer is true. How can this be? This anomaly has not yet received adequate attention in the scholarly literature, and it is the primary purpose of this chapter to explore it at length.

The chapter is divided into three core sections. The first section will outline the terms of the anomaly and examine the empirical evidence commonly adduced in support of the two rival positions. The second section will then propose one way of resolving the anomaly by showing that tracing the origins of the crime of aggressive war in a manner that is faithful to the seemingly incompatible aspects of the historical record requires us to move beyond our conventional assumptions about the development of international norms. I will argue that the crime of aggressive war was, indeed, born in 1945, but that it was not until 2010 that it finally became what, on these conventional assumptions, we could recognise as a fully realised norm. The third section will then explore, in a preliminary and suggestive manner, some of the possible causes responsible for putting the crime of aggressive war on such a heterodox path of development. It bears emphasis that causal explanation is not the primary goal of this chapter, and I will not seek to provide a definitive explanation of these unusual circumstances. My intention is merely to paint a brief historical sketch that may aid the reader in better grasping the anomaly and facilitate subsequent research on this question.

13.2. Conventional Views on the Origins of the Crime of Aggressive War

Two rival views on the origins of the crime of aggressive war prevail in the scholarly literature. The first view espouses what we may term the conventional narrative: namely, that the crime of aggressive war was born in the summer of 1945, and that the London Charter of the International Military Tribunal in Nuremberg ('London Charter') was the certificate of its birth. Yoram Dinstein articulates this view in his classic work *War, Aggression, and Self-Defence*: "the criminalisation of aggressive war in a treaty in force was attained only in the aftermath of World War II, upon the conclusion of the Charter of the International Military Tribunal

annexed to an Agreement done in London in 1945".[5] Cornelis Pompe similarly honours the Agreement as "the first international penal charter",[6] while Hans Kelsen concurs that "the rules created by this Treaty and applied by the Nuremberg tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war".[7] This is the prevalent view in the fields of international history, political science and international criminal law.[8] It also embodies the aspiration of those observers of the Nuremberg Trials who saw in them an opportunity to deliver international relations from the perils of ruinous interstate rivalries and atavistic militarism into the security of enlightened supranationalism.[9]

Opposed to this narrative, we find the revisionist view that the London Charter and the Nuremberg Trials were nothing more than aberrant measures designed by the victorious powers to punish their defeated foes – certainly not harbingers of transformative and reciprocally binding legal principles. As Kirsten Sellars puts it, "[t]he experiment with crimes against peace proved to be an historical anomaly, born of the peculiar circumstances of the closing phase of the Second World War".[10] Gerry Simpson strikes a similar chord: "crimes against peace are controversial precisely because the use of force in international relations *remains a sovereign prerogative* that sovereigns are understandably unwilling to entirely disavow".[11] On this view, it was not until the Review Conference in Kampala, nearly 65 years later, that the international

5 Dinstein, 2011, p. 126, see *supra* note 1.

6 Pompe, 1953, p. 192, see *supra* note 4.

7 Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", in Mettraux, 2008, p. 275, see *supra* note 3.

8 This was the view of Ian Brownlie, of course; Brownlie, 1963, pp. 188–94, see *supra* note 4. An early critique of this view can be found in Georg Schwarzenberger, "The Judgment of Nuremberg", reproduced in Mettraux, 2008, p. 178, see *supra* note 3.

9 Eugene C. Gerhart, *America's Advocate: Robert H. Jackson*, Bobbs-Merrill Company, New York, 1958, pp. 307–31, 455–68; Robert H. Jackson, "Nuremberg in Retrospect: Legal Answer to International Lawlessness", reproduced in Mettraux, 2008, pp. 354-71, see *supra* note 3; and Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War*, Harper and Brothers, New York, 1948, pp. 584–91.

10 Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, New York, 2013, p. 259.

11 Gerry J. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 152 (emphasis added).

community transformed the launching of aggressive war from a merely unlawful act into a criminal act. As William A. Schabas, writing in 2005, put it, "it should seem obvious enough that ongoing work aimed at plugging the hole in the Rome Statute is to a large extent an exercise in the progressive development of international law, rather than in its codification, one of *lex feranda* rather than *lex lata*".[12] In recent years, the revisionist view has gained considerable attention in the study of international criminal law but has yet to percolate into related fields.

For the purposes of this chapter, the disagreement between these two points of view is far less interesting for its scholastic value than for an anomalous discrepancy in the historical record which it reveals. The conventional and revisionist narratives are formulated as incompatible alternatives and, therefore, must draw on incompatible pieces of evidence for empirical confirmation. The difficulty is that, on this particular matter, the historical record appears to point in two contradictory directions at once. Both narratives enjoy limited empirical corroboration, but neither can plausibly account for those pieces of evidence upon which the rival narrative draws for support. While the historical record corroborates the conventional narrative by allowing us to identify the London Charter as the instrument of criminalisation with reasonable confidence, it also undercuts that narrative by failing to reveal any meaningful antecedents or repercussions of criminalisation in that earlier historical period. However, if we accept this absence of observable implications as evidence against the conventional narrative and choose, instead, to trace the criminalisation to the Review Conference in Kampala, our position is similarly weakened by the existence of positive evidence which points to the summer of 1945 as the date of criminalisation. In the end, neither the conventional nor the revisionist narrative affords us an adequate grasp of the totality of the relevant portions of the historical record. Furthermore, because the two narratives claim exclusive validity and, therefore, cannot be true simultaneously, this fact of mixed empirical support necessarily means that neither narrative is true on its own terms. This is what we may call, for ease of reference, the paradox of the origins of the crime of aggressive war or, more simply still, the radical paradox.

[12] William A. Schabas, "Origins of the Criminalization of Aggression: How Crimes Against Peace Became the 'Supreme International Crime'", in Mauro Politi and Giuseppe Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate, Aldershot, 2004, p. 19.

Let us flesh out the terms of this paradox in greater length. Consider, first, the evidence in favour of the revisionist narrative. If we suppose, *ad arguendo*, that the London Charter was the instrument of criminalisation, then we should expect to find significant changes in the rhetoric and conduct of states consistent with that transformation in that historical period. Indeed, even slight changes in norms regulating recourse to war can produce reverberations reaching far beyond the domain of war. This is because, in relations among states, as among individuals bereft of effectual governance, the brooding possibility of war remains an ineradicable legacy of their anarchic condition.[13] For Joseph de Maistre, it was an axiom of history that "war is, in a certain sense, the habitual state of mankind, which is to say that human blood must flow without interruption somewhere or other on the globe, and that for every nation, peace is only a respite".[14] While the macabre implications of de Maistre's view can be disputed, his emphasis on the ubiquity of war remains, regrettably, beyond reproach. It is precisely due to this ubiquity that norms governing recourse to war as an instrument of political power are commonly thought to exert profound influence on the broad contours of the entire institutional edifice of the international society.[15] In any case, the criminalisation of aggressive war can hardly be dismissed as a minor transformation. Whether it occurred in 1945 or 2010, it not only reaffirmed that states no longer enjoyed an unlimited exercise of the right of war, that ultimate and jealously guarded prerogative of sovereign

[13] The classic statement of this point can be found in Thomas Hobbes, *Leviathan*, Cambridge University Press, Cambridge, 1991, pp. 86–90. Noel Malcolm's insightful *Aspects of Hobbes*, Clarendon Press, Oxford, 2004 offers a balanced interpretation of that passage. More recent restatements of Hobbes's original formulation can be found in Hans J. Morgenthau, *Scientific Man vs. Power Politics*, University of Chicago Press, Chicago, 1946, pp. 191–201 and Kenneth N. Waltz, *Theory of International Politics*, Waveland Press, Long Grove, IL, 2010, pp. 88–128.

[14] Joseph de Maistre, *Considerations on France*, Cambridge University Press, Cambridge, 1995, p. 23.

[15] Carl Schmitt operationalised this point in terms of the relationship between the underlying structure of the global *nomos* and the institution of war in that *nomos*; Carl Schmitt, *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europaeum, Telos Press Publishing, New York, 2006, especially pp. 140–68 and 259–80. This is also a central theme in his later work *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, Telos Press Publishing, New York, 2007. For a statement of this point unburdened by strong metaphysical assumptions, consider instead Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Palgrave Macmillan, London, 2002, pp. 178–93.

power, but, further, exposed rulers to the possibility of criminal punishment for violations of this prohibition.[16] However, searching for observable implications of such criminalisation on the assumption that it occurred in 1945 yields few meaningful findings. Three points merit notice in this regard.

First, the extraordinary selectivity displayed by the victorious powers in drafting the arraignment article, tailoring it to the wrongs of their defeated foes and, thus, exculpating their own inequities by the mere fact of its definitional narrowness, was already a telling indication that no meaningful effort would be undertaken subsequently to transform this legal innovation into a general rule of conduct.[17] It must not be forgotten that the San Francisco Conference on International Organisation, which concluded shortly before the signing of the London Charter, considered and quietly discarded the possibility of treating the launching of aggressive war as a criminal rather than merely an unlawful act.[18] In the course of negotiations in London, Robert Jackson, head of the US delegation, expended considerable effort to prove, against the opposition of his Soviet counterpart, General I.T. Nikitchenko, that the criminality of aggressive war ought to be construed as a general principle of conduct. He justly observed:

> I should think that our 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 conduct, it should bind us all, and if not, we should not invoke it at this trial. It sounds very partial to me, and I think we would get great criticism from it.[19]

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[16] For a general discussion of the concept of criminalisation, see Nicola Lacey and Lucia Zedner, "Legal Constructions of Crime", in Mike Maguire, Rod Morgan and Robert Reiner (eds.), *The Oxford Handbook of Criminology*, Oxford University Press, Oxford, 2007, or Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology*, J.B. Lippincott Company, Chicago, 1955, pp. 8–13.

[17] For example, Simpson argues that "the conspiracy charges were one way in which this was done. The crime of aggression was reworked into a norm applicable to a state captured by a vicious cabal of conspirators intent on regional or global domination", Simpson, 2007, p. 149, see *supra* note 11.

[18] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948, pp. 185–87.

[19] Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: A Documentary Record of*

It is a subtle irony that the final formulation of the arraignment clause, in its restrictive application to the European Axis Powers, as well as the rejection of the principle of the criminality of aggressive war at San Francisco altogether obscured this admonition, reaffirming, instead, that in world politics, "the standard of justice depends on the equality of power to compel".[20]

Second, war did not wither away in the wake of 1945, and state leaders have since shown little fear of criminal prosecution in commencing wars of aggression; nor, for that matter, have their enemies proved alacritous to threaten them with such prosecution.[21] The new norm remained very much confined to the margins of practical politics in the wake of the Second World War, exercising no measurable influence over the conduct of states and, until the end of the Cold War, subsisting largely in the writings of jurists and historians. As Jonathan Bush notes, "throughout the period, the potential applicability of the criminal law to interstate aggression plainly had no relevance in the outside world".[22] To be sure, civil activists undertook several attempts to hold political leaders accountable by drawing on the discourse of crimes against peace, of which the Russell-Sartre Tribunal on the intervention of the United States in the Vietnamese civil war is, perhaps, the most notable.[23] However, such attempts at discursive entrapment[24] proved few in number and, ultimately, ineffectual in their cumulative effect on the conduct of high

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, Division of Publications, US Department of State, Washington, DC, 1949, p. 336.

20 Thucydides, *History of the Peloponnesian War*, Penguin, New York, 1972, p. 402.

21 Jonathan A. Bush, "The Supreme Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War", in *Columbia Law Review*, 2002, vol. 102, no. 8, pp. 2387–95, especially p. 2392; Simpson, 2007, pp. 144–47, see *supra* note 11.

22 Bush, 2002, p. 2392, see *supra* note 21.

23 *Ibid*., p. 2393.

24 For a general discussion of the concept of "discursive entrapment", see Bull, 2002, pp. 43–44, *supra* note 15; Andrew Hurrell, "Norms and Ethics in International Relations", in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations*, Sage, London, 2002, p. 145; Marc Lynch, "Lie to Me: Sanctions on Iraq, Moral Argument and the International Politics of Hypocrisy", in Richard M. Price (ed.), *Moral Limit and Possibility in World Politics*, Cambridge University Press, Cambridge, 2008, pp. 169–76.

politics. In the capitals of the great powers, the scathing attitude to the very suggestion that their prerogative to wield the sword in defence of vital national interests could, even in principle, be subject to supranational oversight, was succinctly articulated by the US Secretary of State Dean Acheson: "law simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty".[25] It is difficult to imagine a more truculent rebuke of the very concept of *jus contra bellum*.

Third, the criminalisation was preceded by a startling absence of domestic and international negotiations regarding the political desirability and costs of creating the new norm. Instead, the topic remained firmly within the purview of legal committees and conferences organised by the victorious powers to settle the narrow question of war crimes.[26] It is difficult to explain how such a radical norm could have developed without, at the very least, due calculations of its expected utility by the great powers. To be sure, norms can develop in the absence of deliberate planning, but it strains credulity to suppose that powerful states would have proved willing to relinquish their supreme prerogative to the haphazard whim of custom and unintended consequences. It is far more reasonable to conclude that the victorious powers admitted the criminality of aggressive war for the sole purpose of punishing defeated enemy leaders and officials but did not earnestly contemplate extending its applicability more broadly. The cumulative effect of these three observations is uncompromising. Supposing that aggressive war was criminalised in 1945 leads us to the seemingly inexorable conclusion that what was, arguably, one of the greatest transformative moments in the history of the modern states system appeared to have left few immediate impressions on the dynamics of that system.

The striking lack of observable implications of the criminalisation in that historical period certainly lends support to the revisionist narrative and may even incline us to the conclusion that aggressive war did not become a crime until 2010. This conclusion, though tempting, would be

[25] Elliott L. Meyrowitz, "What Does Law Have to Do with Nuclear Weapons?", in *Michigan State University-DCL Journal of International Law*, 2000, vol. 9, no. 1, p. 305.

[26] Sellars, 2013, pp. 47–112, see *supra* note 10; Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, especially pp. 201–29; Bradley F. Smith, *The Road to Nuremberg*, André Deutsch, London, 1981.

injudiciously precipitate, since considerable positive evidence exists confirming the London Charter as the instrument of criminalisation. To begin with, it was the London Charter that introduced the concept of crimes against peace into the lexicon of international law – not the Paris Peace Treaty of 1919, the Kellogg-Briand Pact of 1928, or the Kampala Amendment. Furthermore, the London Charter *is* widely acknowledged as the instrument of criminalisation in international practice. For example, we find this genetic attribution in Resolutions 95 and 177 of the General Assembly of the United Nations as well as in the national statutes and military codes of some of the great powers.[27] For example, the US Department of Defense revised its Field Manual on land warfare in 1956 to acknowledge the criminality of aggressive war.[28] Ian Brownlie argues that such widespread adherence indicates acceptance of "the Nuremberg Charter as a source of general international law".[29]

Perhaps the most convincing piece of evidence confirming the London Charter as the instrument of criminalisation can be found in longitudinal changes in patterns of public discourse. Before 1945, proposals to criminalise aggressive war were widely viewed as quixotic and impractical. The justificatory burden lay with proponents of criminalisation, and it was incumbent upon *them* to demonstrate the unacceptability of a permissive *jus ad bellum*. Consider, for example, the protracted exchange that took place between US Secretary of State Robert Lansing and Ferdinand Larnaude, the French jurist, both delegates to the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('the Commission'), over the course of the plenary sessions in the spring of 1919. Larnaude, adamant to punish the ex-Kaiser Wilhelm II for initiating the First World War, insisted that "the premeditated, carefully prepared commencement of hostilities" be

[27] For a general overview of these instruments, see Brownlie, 1963, pp. 188–94, *supra* note 4; Dinstein, 2011, pp. 129–30, *supra* note 1. For examples of bureaucratic enmeshment and legal internalisation of the criminality of aggressive war in national rules and laws, see Brownlie, 1963, pp. 187–88, *supra* note 4.

[28] Provision 498 of the Manual, under the heading "Crimes under International Law", reads: "Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace […]", US Department of the Army, *FM 27-10, Department of the Army Field Manual: The Law of Land Warfare*, Department of the Army, Washington, DC, 1956, p. 178.

[29] Brownlie, 1963, p. 191, see *supra* note 4.

recognised by the Commission as an international crime.[30] Lansing objected, remarking that while states had "no moral right" to wage "a wanton war",[31] existing law admitted *compétence de guerre* as an unrestricted sovereign prerogative: "*the essence of sovereignty* [is] *the absence of responsibility*".[32] When Larnaude contended that "the legality of a premeditated war should not be admitted",[33] Lansing sternly rebuked him, making liberal use of the established legal axiom:

> The Commission should not stagger at *the truth*. A new doctrine advocated by a very few men should not be permitted to change *the standing rule of the world* […] [A] war of aggression ought to be declared to be a crime against international law but this had never been done and the paragraph should therefore stand as drafted.[34]

Larnaude eventually conceded that "the right of going to war was admitted",[35] but insisted that the article of arraignment be preserved to "emphasise the new sensibility of mankind" regarding the moral unacceptability of aggressive wars.[36] Lansing summarily dismissed his appeal: "the Commission should not let public opinion enter the question at all".[37] Established presumptions are difficult to overturn, and it is remarkable how easily Lansing was able to extinguish the force of Larnaude's proposal by exposing its inconsistency with accepted legal premises.[38]

This discursive situation remained almost unchanged until the final years of the Second World War. When, in 1944, the British Attorney General, Sir Donald Somervell, reasoned that the launching of aggressive war "is not a war crime or a crime in any legal sense", he was merely

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30 FO 608/245, Document 3, p. 153, National Archives, UK ('TNA').

31 *Ibid*., p. 189.

32 *Ibid*., p. 191 (emphasis added).

33 *Ibid*., p. 250.

34 *Ibid.* (emphasis added).

35 *Ibid.*

36 *Ibid*., p. 239.

37 *Ibid.*

38 For a formal treatment of this point, see Neta C. Crawford, "*Homo Politicus* and Argument (Nearly) All the Way Down: Persuasion in Politics", in *Perspectives on Politics*, 2009, vol. 7, no. 1, pp. 118–19; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge, 1995, pp. 34–43.

expressing what was still, even at that late date, a common and uncontroversial view.[39] That view found an eloquent formulation in *War Criminals: Their Prosecution and Punishment*, a popular contemporaneous work composed by the Harvard criminologist Sheldon Glueck. Glueck expressly rejected the possibility of treating the launching of the war as a criminal act. The enumeration of penal charges proposed in the book, he noted,

> is not intended to include the "crime" of flagrantly violating solemn treaty obligations or conducting a war of aggression […] [T]o prosecute Axis leaders for the crime of having initiated an unjust war, or having violated the "sanctity of treaties", would only drag a red herring across the trail and confuse the much clearer principle of liability for atrocities committed during the conduct of a war, be it a just or an unjust one.[40]

Even as late as 1944, Glueck's position accorded well with those of most other scholars and practitioners.

However, the justificatory burden shifted entirely onto the opponents of criminalisation in the wake of the London negotiations. As Bush puts it,

> It is notable how many mouths gave lip-service to the Nuremberg charge of aggressive war. Outside of Germany and Japan, the only public opposition to the criminality of aggressive war seemed to come from lawyers working for the clemency of convicted Germans […] Everywhere else, there was only automatic endorsement of "Nuremberg" in general and the criminality of aggressive war in particular.[41]

The case of Glueck is particularly instructive in this regard. Having explicitly rejected the criminality of aggressive war in *War Criminals*, Glueck then reached the opposite conclusion in *The Nuremberg Trial and Aggressive War*, published only two years later:

> [D]uring the present century a widespread custom has developed among civilized States to enter into agreements expressive of their solemn conviction that unjustified war is

[39] Kochavi, 1998, p. 100, see *supra* note 26.

[40] Sheldon Glueck, *War Criminals: Their Prosecution and Punishment*, Alfred A. Knopf, New York, 1944, pp. 37–38.

[41] Bush, 2002, p. 2389, see *supra* note 21.

> so dangerous a threat to the survival of mankind and mankind's law that it must be branded and treated as criminal.[42]

Although the change in Glueck's position was, at least in part, an artefact of the work that he performed for the US prosecutorial team at Nuremberg, it was, nevertheless, representative of a broader and equally rapid transformation in public discourse. Jackson, in his reflections on the political impact of the Trials, neatly captured the magnitude of that change: "[no] one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law – law with a sanction".[43] If the revisionist narrative were correct, we would not expect such an immense and rapid change in patterns of public discourse to coincide so neatly with the signing of the London Charter. After all, a mere manifest of victors' justice can hardly be expected to accomplish such a transformation.

When was the crime of aggressive war born then? Considerable evidence exists to support both the conventional and revisionist narratives, entangling extant attempts to date the crime's origins into the radical paradox. This is a crucial point which has not yet received adequate attention in the scholarly literature. Researchers investigating the criminalisation have proven content to overlook the anomalous inconsistencies in the historical record and provide evidence corroborating only their preferred narrative. It may even appear tempting to dismiss the radical paradox as a conceptual problem produced by absence of adequate empirical evidence rather than a genuine historical anomaly. Could we not resolve the paradox by procuring more data in support of one or the other narrative? I do not believe that we could, and it bears emphasis that this suggestion fundamentally misunderstands the character of our present difficulties. Even if it proves possible to accumulate a preponderance of evidence in support of one narrative as against the other, such an imbalance would not in the slightest diminish the strength of the paradox as long as some evidence remains to support the weaker narrative. Because the conventional and revisionist narratives are formulated in exclusive terms, neither can be accounted true so long

[42] Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, Alfred A. Knopf, New York, 1946, p. 26.

[43] Kelsen, 2008, p. 274, see *supra* note 7.

as there remain anomalous facts in the historical record that cannot plausibly be subsumed within its chronological ambit.

The radical paradox results from this surprising fact that the historical record favours both the conventional and revisionist narrative, a fact that common sense stubbornly demurs to accept on grounds of their logical incompatibility. Common sense does not brook the possibility that the crime of aggressive war could have emerged multiple times in one century, unless we further suppose that the two births were separated by a temporary death – a possibility expressly contradicted by the evidence for the conventional narrative. Common sense demands singularity of origin. Unfortunately, history has not proven obliging in meeting this demand. It points us in two contradictory directions at once, directing our gaze first to London and then to Kampala, and, thus, frustrates our attempts to pinpoint the origins of the crime of aggressive war to a single temporal location. Confronted by the obduracy of empirical evidence, however, we are justified in enquiring whether it is not our common sense that is at fault on this point. After all, historical anomalies are not objective givens but merely discrepancies between empirical evidence and established theoretical expectations.

In the following section, I propose to outline a tentative solution to the radical paradox by framing it as a theoretical problem and demonstrating how unspoken theoretical assumptions undergirding the conventional and revisionist narratives are directly responsible for its production. We will begin by establishing the more general point that it is insensible to consider the emergence and evolution of norms in an abstract manner detached from prior theoretical considerations.

13.3. A Critical Analysis of Conventional Views and Theoretical Considerations

Tracing a norm's origins, development, acceptance or decay is an empirical exercise guided by the steady hand of theory.[44] For it is theory which delineates the ceaseless stream of political behaviour into these conceptual categories in the first place, specifying, for example, exactly when a norm can be said to have emerged, how a norm evolves, or what it

[44] This point is made indirectly in Adam R.C. Humphreys, "The Heuristic Application of Explanatory Theories in International Relations", in *European Journal of International Relations*, 2010, vol. 17, no. 2, pp. 259–65.

means for a norm to develop until it reaches the point of acceptance.[45] Consider, for example, the question of evolution. Drawing on the burgeoning literature on international norms, we can expect the evolutionary trajectory of most norms to follow one of two well-trodden paths.[46] Some are products of human design – they are sculpted by visionary entrepreneurs in response to the exigencies of social need or opportunities for personal advantage and, with the sustained assistance of powerful groups, they gradually penetrate and become assimilated into the very fabric of international conduct.[47] Others are products of human action undertaken in the service of custom rather than deliberate foresight. These latter norms evolve "more casually and more imperfectly", to borrow David Hume's incisive formulation,[48] as chance contributes its even share to their constitution.[49] Now, the notions at the heart of these complimentary heuristics – norm entrepreneurs, penetration and assimilation, and unintended consequences – are essentially theoretical categories. They empower us to venture beyond our immediate sensory environment to experience and apprehend a political universe rich in

[45] Kratochwil, 1995, pp. 25–8, see *supra* note 30; John Gerard Ruggie, *Constructing the World Polity: Essays on International Institutionalization*, Routledge, London, 1998, pp. 85–101; John R. Searle, *The Construction of Social Reality*, Penguin, New York, 1995.

[46] For a general discussion of norm development, see James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*, Free Press, New York, 1989; Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, Cambridge University Press, Cambridge, 2008.

[47] For the classic statement of this view, Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", in *International Organization*, 1998, vol. 52, no. 4, pp. 887–917. Illustrative applications of this view can be found in Martha Finnemore, *National Interests in International Society*, Cornell University Press, Ithaca, NY, 1996, pp. 34–127. The point on assimilation is absent from Finnemore's positivist formulation of the model, but it is required by the thesis of 'mutual constitution', which widely accepted by other constructivist scholars. For an informed discussion of this thesis, see Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations*, Routledge, London, 1989.

[48] David Hume, *Essays, Moral, Political and Literary*, Liberty Fund, Indianapolis, 1985, p. 39.

[49] This view prevails especially in the tradition of enlightened conservatism, of which Hume, de Maistre and Edmund Burke are admirable exponents who require no introduction. A succinct statement of this view can be found in Friedrich Hayek, *Studies in Philosophy, Politics and Economics*, University of Chicago Press, Chicago, 1967, pp. 96–105.

intangibles, but they also limit us in our engagement with that universe to particular, often quite narrow, domains.[50]

The choice of theoretical framework for the analysis of a particular empirical problem ought to be governed by the pragmatic considerations of suitability and utility.[51] After all, theories that either tortuously twist evidence to make elementary sense of it, or purchase little explanatory power at the price of exorbitant simplifications, can hardly be considered appropriate. Instead, scholars should strive to attain a reflective equilibrium between the explanatory possibilities afforded by available evidence, on the one hand, and the explanatory focus of their chosen theoretical framework, on the other.[52] This point commands crucial importance, since even ostensibly purely descriptive statements about the evolution of international norms are laden with unspoken theoretical assumptions. Unconscious attachment to such assumptions, perhaps owing to unreflective deference to academic convention, can contribute to perilous distortions of the historical record whenever the pragmatic criteria of suitability and utility are violated.

Returning to the case of the criminalisation of aggressive war, it is precisely such attachment to what we may term the assumptions of non-monotonicity and bivalence that entangles extant accounts of the crime's origins into the radical paradox.[53] On the non-monotonic view, states are

[50] Norwood R. Hanson, *Patterns of Discovery: An Inquiry into the Conceptual Foundations of Science*, Cambridge University Press, Cambridge, 1961, pp. 271–84; Searle, 1995, pp. 1–58, see *supra* note 45.

[51] Norwood R. Hanson, *Perception and Discovery: An Introduction to Scientific Inquiry*, Freeman, Cooper and Co., San Francisco, 1970, p. 64.

[52] I borrow the concept of 'reflective equilibrium' from John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, MA, 1971, p. 20.

[53] These assumptions are implicit in mainstream models of norm development, such as Beth A. Simmons's functionalist theory of commitment, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, Cambridge, 2009, pp. 64–80; Margaret E. Keck and Kathryn Sikkink's theory of transnational advocacy networks *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, Ithaca, NY, 1998, pp. 10–16; Wayne Sandholtz's model of norm cycles, "Dynamics of International Norm Change: Rules Against Wartime Plunder", in *European Journal of International Relations*, 2008, vol. 14, no. 1, pp. 101–12; or Alexander Wendt's thesis of international cultures, *Social Theory of International Politics*, Cambridge University Press, Cambridge, 1999, pp. 246–368. Richard M. Price's work on the chemical weapons taboo affords one notable exception to this trend, *The Chemical Weapons Taboo*, Cornell University Press, Ithaca, NY, 1997, especially p. 8.

assumed to be consistent in their normative commitments and, furthermore, they are assumed to maintain that consistency by summarily repudiating older norms clashing with their new commitments. Bivalence encourages scholars to think of the development of norms in terms of crisp thresholds of acceptance. On this second assumption, the existence of a norm at any given point in time is conceptualised as an elementary binary category – it is either accepted by the relevant political community or it is not. In effect, bivalence assumes that the development of a norm can be conceptualised as a unidimensional process in which a gestating norm must first accumulate sufficient support before it can reach a specified threshold and, thus, become an accepted norm.[54] The combination of non-monotonicity and bivalence restricts the range of admissible trajectories of a norm's development to cosmetic variations on the familiar scenario of rival norms succeeding each other in gradual temporal succession, of which at most one is recognised as accepted by the community at any one point in time. This scenario may well afford an appropriate heuristic for the study of some historical questions, but it is not uniformly applicable.[55]

[54] Bivalence is implicit in the Austinian view of law as command, a view that, to borrow the critique that John Stuart Mill targeted against historicism, "arrives at the annihilation of all moral distinctions except *success* and *not success*", Maurice Mandelbaum, *History, Man, and Reason: A Study in Nineteenth-Century Thought*, Johns Hopkins University Press, Baltimore, 1971, p. 137.

[55] I borrow this taxonomy from the study of formal logic, in which the term 'bivalence' denotes the metaphysical assumption that atomic propositions and well-formed formulae admit of two exclusive Boolean states, truth and falsehood. Bivalence is the cornerstone of classical logical systems, and its prevalence in the study of human reasoning is partly a reflection of its undeniable utility for the investigation of certain common empirical problems. However, reification of this assumption to the status of a metaphysical certainty can hamper our ability to reason about vague conceptual boundaries or dynamic systems that change in gradual increments. This point runs exactly parallel to our present discussion, and it may aid the reader in grasping the direction of my argument. The sorites paradox offers a useful example of an intuitively flawed syllogism whose invalidity is obscured by bivalence. For a general consideration of the paradox, see Merrie Bergmann, *An Introduction to Many-Valued and Fuzzy Logic: Semantics, Algebras, and Derivation Systems*, Cambridge University Press, Cambridge, 2008, pp. 1–7. Consider a finite heap of grains. Suppose that we remove one grain from the heap and observe that the heap is not appreciably diminished by this reduction. It is valid to conclude that a heap of grains is no less a heap for the loss of a single grain. However, this conclusion is no longer sustainable if we choose to iterate it recursively for as many times as there are grains in the heap, yielding the patently false conclusion that a heap is no less a heap for the loss of its final grain. As John Nolt puts it, "early in the sequence of inferences these premises lead to

Non-monotonicity excludes the possibility of what may be viewed as politically haphazard or schizophrenic behaviour in which a state, or, possibly, a group of states, upholds two or more seemingly inconsistent norms at the same time. For example, a state may simultaneously commit itself to inconsistent norms if its leadership finds it possible to assign different functions to those norms and, in thus insulating their mutually contradictory effects, extinguish much of the tension between them. Alternatively, an inconsistent normative posture may be the product of two or more national bureaucracies devising conflicting solutions for organising co-operation with foreign partners. Bivalence excludes the possibility that a norm can be realised only partially, that it may enjoy some, but not all, of the effects commonly associated with inveterate norms, and that, therefore, its progress cannot be assessed on a unidimensional scale with a crisp cut-off. For example, a norm may be favoured by vocal national constituencies that, although not sufficiently powerful to ensure its acceptance at the national level, can at least restrain their government from committing itself to the opposite normative principle. Or a norm may be entrenched in the bureaucratic procedures and legal codes of the very same states that refuse to endorse it publicly in international fora.[56] These examples are not intended to exhaust the range of complexity created by rejection of non-monotonicity and bivalence. They are meant only to convey the point that some meaningful historical scenarios are not captured, and, indeed, are distorted, by theoretical frameworks that rely on these assumptions.

conclusions that are either wholly true or approximately true. But as they are used to draw conclusion after conclusion, the conclusions become less and less true so that by the end of the sequence we arrive at a conclusion that is wholly false" (*Logics*, Wadsworth Publishing, Belmont, 1997, p. 421). In a certain sense, the paradox itself is entirely the product of a prior commitment to bivalence, which stipulates that every proposition is as true or false as any other and, so, occludes the possibility that consecutive applications of *modus ponens* can preserve truth only partially. Therefore, one way of solving the sorites paradox is to reject bivalence and allow for suitable gradations of truth. This strategy, implemented in infinite-valued logics, reconciles our intuitions and formal results by specifying that each recursive application of a sorites syllogism should diminish the truth of its conclusion by a corresponding margin. This solution is instructive as it reminds us that some conceptual problems are products not of objective givens but, rather, of the theoretical frameworks through which we perceive those givens.

[56] Andrew Hurrell denotes these possibilities 'bureaucratic enmeshment' and 'legal internalization', respectively, and they can be taken as evidence of a norm's acceptance in a given political society. Hurrell, 2002, pp. 145–46, see *supra* note 24.

In the case of the criminalisation of aggressive war, it is precisely non-monotonicity and bivalence that stymie our efforts to date the crime's origins by generating misleading theoretical expectations which are unwarranted by the empirical parameters of this particular historical problem. Upon relinquishing these assumptions, it is possible to acknowledge that, in a certain important sense, the crime *was* created in 1945. Witness its enmeshment in the bureaucratic procedures and legal codes of some states and the United Nations during the first decade of the Cold War, or the remarkable fact that almost no national political leader has openly contested the criminality of aggressive war since the Nuremberg Trials.[57] At the same time, however, it cannot be denied that the San Francisco Conference on International Organisation expressly refused to incorporate the principle of the criminality of aggressive war into the Charter of the United Nations and, instead, reaffirmed the weaker norm of the prohibition of aggressive war as the organising principle of the post-war world order. That fateful decision strongly shaped the subsequent impression that the doctrine of the criminality of aggressive war, enshrined in the Nuremberg Principles yet bereft of meaningful foundation in customary law, was, at best, an optional adjunct to the far more minimalist system of *jus contra bellum* developed in the Charter of the United Nations. It was only 65 years later that most states finally mustered the political will to commit themselves to the construction of a supranational infrastructure that, at last, institutionalised the formerly nebulous rule of criminality in a concrete political setting and on a reciprocal basis.

This is clearly a complex historical narrative that does not fit the conventional mould of non-monotonicity and bivalence. However, the proper conclusion to be drawn from this lack of fit is not that the crime of aggressive war was not born in 1945 but, rather, that our theoretical assumptions are inadequate for comprehending the unusual circumstances of its birth in their entirety. This conclusion effectively dissipates the historical anomaly at the heart of the radical paradox. By illuminating a developmental trajectory passing between the Scylla of non-monotonicity and the Charybdis of bivalence, it emancipates us from the imperative to consider the conventional and revisionist narratives as mutually exclusive possibilities. We are left at liberty to acknowledge that the crime of

[57] The exceptions are enumerated in Brownlie, 1963, p. 193, see *supra* note 4.

aggressive war was, indeed, born in 1945 and became a fully realised norm within the next decade, at least along the dimensions of bureaucratic and legal enmeshment. After all, it was the London Charter that introduced the criminality of aggressive war into the lexicon of international practice and established the precedent for subsequent engagements with the concept of crimes against peace. That first experiment was certainly imperfect, and we cannot overlook the pivotal role played by the realpolitik ingredients of cynicism, hypocrisy and egotism in making it possible. Nevertheless, it bears emphasis that such imperfections do not detract from the authenticity of the legal transformation ushered in by the London Charter. Of course, the new criminal rule had to await Kampala to become what, on a strictly non-monotonic and bivalent view, we may recognise as a fully realised norm. But this means only that, until that time, the crime of aggressive war endured a twilight existence. For those 65 years, it was, in the words of T.S. Elliot, "neither living nor dead" [58] – a victim of the political convenience of the victorious powers whose collusion in London effectively condemned it to straddle the line between political oblivion and fully fledged acceptance for decades.

13.4. In Defence of the Heterodox Developmental Trajectory of the Crime of Aggressive War

Throughout our discussion in the previous section, we have assumed that the heterodox developmental trajectory of the crime of aggressive war was, in part, the result of the political compromises reached in London. In this section, I should like to suggest some preliminary reasons in defence of this assumption. It may be objected that it would be more plausible to consider it an unintended consequence of contradictory bureaucratic choices made by the Allied Powers in the course of the Second World War. In the United States, for example, the tasks of punishing war criminals and designing the post-war international order were assigned to the Department of Defense and the Department of State, respectively. Working within this bifurcation, norm entrepreneurs favouring the criminalisation of aggressive war, such as, most notably, William C. Chanler, John J. McCloy, Edward Bernays, Henry Stimson and Robert

[58] This particular line is taken from the first part of T.S. Eliot, "The Waste Land", in *Selected Poems*, Faber and Faber, London, 2002, p. 42.

Jackson, were able to establish the principle of the criminality as a cornerstone of the American war crimes programme.[59] The Department of State adopted a different normative approach. Initial plans for the reconstruction of the international order after the war were proposed by the Informal Political Agenda Group, which consisted of Cordell Hull, then Secretary of State, Leo Pasvolsky, Isaiah Bowman, Sumner Welles, Norman Davis and Morton Taylor, in December, 1943. Hull, weary of the refusal of the Senate to ratify the Covenant of the League of Nations because it appeared to threaten its ability to exercise its constitutional prerogatives, was careful to maintain a minimalist position on the illegality of aggressive war. Predictably, the Informal Political Agenda Group did not consider the question of the criminality of aggressive war, nor was it added to the Department of State's programme at a later date.[60] Could we not conclude that this bureaucratic bifurcation is a sufficient explanation for the inconsistent posture assumed by the United States in promoting the criminalisation of aggressive war in London while quietly discarding that very same principle in San Francisco?

The logic of bureaucratic bifurcation certainly provides a partial explanation for the unusual circumstances of the birth of the crime of aggressive war, but we must keep in mind that those circumstances were also the direct consequence of strategic collusion by the victorious powers, especially the Soviet Union and the United States. After all, the conduct of negotiations in London was closely supervised by the highest executive authorities of the Allied Powers, and the question of whether the launching of aggressive war could be treated as an international crime was one of the most significant and enduring points of contention between the delegations.[61] The political significance of this question was simply too great – few remained blind to the fact that the outcome of the negotiations was bound to send shockwaves reaching far beyond the

[59] Some of the most excellent sources on this topic are Bush, 2002, see *supra* note 22; Kochavi, 1998, see *supra* note 26; Smith, 1981, see *supra* note 26. See also Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2000, pp. 149–81.

[60] Ruth B. Russell, *A History of The United Nations Charter: The Role of the United States, 1940–1945*, Brookings Institution, Washington, DC, 1958, especially pp. 220–24.

[61] The question of the legal status of aggressive war was a central topic of discussion for at least seven of the 15 sessions for which transcripts are provided in Jackson's report (Documents XIII, XXII, XXXVII, XLII, XLIV, XLVII, and LI in Jackson, 1949, see *supra* note 19).

narrow issue of war crimes – for those leaders opposed to the criminalisation of aggressive war to blindly consign the outcome of the negotiations to the rhetorical skill of their representatives. As we shall see in a moment, this was especially true of Joseph Stalin, who personally monitored the negotiations and issued direct orders to Nikitchenko to reject any proposed formulation of the legal charges which could be construed as an endorsement of the criminality of aggressive war in general terms.

Indeed, throughout the negotiations, the Soviet delegation insisted on restricting the scope of the proposed charge to attempts at "aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties".[62] This insistence faced vigorous opposition from Jackson, who, as we have already seen, refused to treat the criminality of aggressive war as anything other than a reciprocally binding principle enjoying general applicability: "If certain acts in violation of treatise 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 ourselves".[63] But that is precisely what the Soviets opposed. They saw the London Conference as a vehicle for institutionalising a set of legal principles on the basis of which enemy leaders could be indicted, not as a forum for laying the normative foundations of the post-war international order.[64]

Bureaucratic bifurcation alone was not sufficient to allay the worry of the Soviet leadership that the London Conference would not be used to criminalise the launching of aggressive war through the back door. This point is lucidly conveyed in a confidential telegram sent by Vyacheslav Molotov, the Minister for Foreign Affairs of the Soviet Union, to Stalin on July 25, 1945. Broaching the matter of Jackson's position on the legal status of aggressive war, Molotov noted:

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62 As stated in "Redraft of Definitions of 'Crimes', Submitted by Soviet Delegation, July 23, 1945", reproduced as Document XLIII in Jackson, 1949, p. 327, see *supra* note 19.

63 *Ibid*., p. 330.

64 For a general review of the Soviet position, see Sidney S. Alderman, "Negotiating on War Crimes Prosecutions, 1945", in Raymond Dennett and Joseph E. Johnson (eds.), *Negotiating with the Russians*, World Peace Foundation, New York, 1951, pp. 49–98 and George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial*, Martinus Nijhoff, The Hague, 1996.

> We believe that these unduly vague formulations make it possible to proscribe as international crimes military operations conducted in self-defence against aggression. As we know, in the course of the last war, our and Anglo-American troops invaded Germany, but that act cannot, from any reasonable point of view, be described as an international crime. *We believe that it would be possible to accept these formulations only on the condition that they are amended to specify expressly that they apply only to instances of fascist aggression*.[65]

That same day, Stalin received another confidential telegram on this matter from Andrey Vyshinsky, former Procurator General of the Soviet Union. Vyshinsky reported that, with respect to Jackson's insistence on treating the launching of aggressive war as an international crime, "we have given our delegation express orders to reject" his general formulations. Stalin's approval of Vyshinsky's order is recorded in the margins of the telegram, in pencil.[66]

It would be erroneous to conclude that this reluctance to endorse the criminality of aggressive war in general terms was driven solely by the cynical egotism of a totalitarian dictator who was himself responsible for authorising the Soviet invasions of Finland, Estonia, Latvia and Poland in 1939. In 1945 the sheer novelty and far-reaching implications of the criminalisation project, both in terms of implied sovereignty and uncertainty costs, meant that few policymakers, whether in the Soviet Union or elsewhere, were willing to consider it earnestly, even under the narrow rubric of war crimes. In this regard, it bears iteration that the intellectual ancestry of proposals to criminalise the launching of aggressive war is quite brief and sparse, dating merely to the first decades of the twentieth century.[67] After all, in the years before the First World War, international law did not restrict states in their ability to exercise the right of war, and this licentious permissibility left an indelible imprint on the institutional imaginations of contemporary thinkers and

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[65] Cited in Natalya Lebedeva, *SSSR i Nurnbergskiy Process: Neizvestnye i Maloizvestnye Stranitsy Istorii*, Mezhdunarodnyi Fond "Demokratiya", Moscow, 2012, p. 211 (emphasis added, my translation).

[66] *Ibid*., p. 210.

[67] Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, London, 2013, pp. 9–26, 79–97; Pompe, 1953, pp. 116–75, see *supra* note 4; Sellars, 2013, pp. 1–46, see *supra* note 10.

policymakers.[68] The criminalisation of aggressive war had only been attempted once before, in 1919, and, at that, in such a haphazard manner that the stillborn endeavour left the criminalisation project largely discredited as a hopelessly quixotic design.[69] A few telling examples drawn from the foreign policy circles in Britain and the United States may help to illustrate the point.

In 1944, in response to an enquiry by Sir Cecil Hurst, the British delegate to the United Nations War Crimes Commission ('UNWCC'), regarding whether the launching of aggressive war constituted an international crime, Frank Roberts of the Foreign Office wrote that the Allied Powers, in issuing the Moscow Declaration of 1943,

> had in mind the conduct of the arch-criminals in conducting and directing the war, and as these criminals will include those who planned and launched the war, *it would seem unnecessary* to enlarge the conception of "war crimes" in a way which at any rate *involves the probability of political and legal controversy.*[70]

Upon learning of Hurst's enquiry, Sir William Malkin, Roberts' superior, dismissed the whole matter as "a frightful waste of time" and a mere "outburst of dialectics".[71] On 18 August 1944 Sir Arnold McNair, in a memorandum for consideration by the UNWCC, similarly noted that "however desirable it may be *de lege feranda* to take steps which will enable Governments in future to punish the procuring [*sic*] of aggressive war as a criminal act – I do not consider that *de lege lata* a judge would hold that the effect of the [Kellogg-Briand] Pact was to make it a criminal act".[72] An identical conclusion was reached by the Office of the Judge

[68] In addition to the above sources and those enumerated in footnote 4, see Dinstein, 2011, pp. 75–81, *supra* note 1; Quincy Wright, "Changes in the Conception of War", in *American Journal of International Law*, 1924, vol. 18, no. 4, pp. 755–67.

[69] The definitive statement on this subject is James F. Willis, *Prologue to Nuremberg: Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Publishing, Westport, CT, 1982. For a more concise treatment, see Bass, 2000, pp. 58–105, *supra* note 59; M. Cherif Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System", in *Denver Journal of International Law and Policy*, 2002, vol. 30, no. 3, pp. 244–91; Sellars, 2013, pp. 1–11, *supra* note 10.

[70] Document C15349, LCO 2/2976 (emphasis added) (TNA).

[71] Document C15349, FO 371/39007 (TNA).

[72] Document C43, p. 4, TS 26/69 (TNA).

Advocate General of the United States in a draft paper entitled "Is the Preparation and Launching of the Present War a War Crime?", published on 18 December 1944.[73] In sum, even as late as 1945, the institutional imaginations of most policymakers in the Allied states remained too heavily constrained by the operational presumptions of the permissive *jus ad bellum* which had existed before 1914, for them to contemplate, quite apart from prior strategic misgivings, that an international, or even supranational, criminal jurisdiction over matters of war and peace was at all possible.[74]

Returning to the negotiations in London, we can now assess the role that strategic co-ordination by the victorious powers played in putting the principle of the criminality of aggressive war on such a heterodox trajectory of development. Recall that the Soviet delegation did not oppose – indeed, it expressly endorsed – treating aggressive war as an international crime within the rubric of war crimes. It was Jackson's attempt to extend the new criminal rule beyond the confines of this rubric and transform it into a universal rule that occasioned the incessant objections of the Soviet delegation. The final formulation of the charges that we find in Article 6 of the London Charter clearly reflects the concerns and preferences of the Soviet delegation. Although it is not clear what prompted Jackson to acquiesce in such a compromise after days of obdurate disagreement, it is surely telling that his acquiescence followed immediately in the wake of Stalin's and President Harry Truman's negotiations in Potsdam, which concluded on 2 August 1945. Available records of their discussions contain only brief mentions of the London

[73] The paper is reproduced as Document 26 in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945*, Hoover Institution Press, Stanford, 1981, pp. 78–84.

[74] To be sure, the interwar period did witness a blossoming of theoretical contributions to the criminalisation project. Vespasian Pella, Robert Phillimore, Édouard Descamps, Nicolas Politis, Henri Donnedieu de Vabres, Megalos Caloyanni and Hugh Bellot were among the most distinguished jurists of the interwar period who developed the theoretical groundwork for the criminalisation project (although I know of no monograph treatment of these thinkers or of their contributions to the criminalisation project). A useful summary can be found in Grzebyk, 2013, pp. 82–85, see *supra* note 67. Curiously, Phillimore, Politis, de Vabres, Caloyanni and Bellot did not make any proposals to the League of Nations bearing on criminal law. Pella only consulted the League on the subjects of money laundering and harmonisation of domestic penal codes. It is reasonable to speculate that this lack of practical engagement contributed to the hesitancy of Allied policymakers in dealing with proposals for the criminalisation of aggressive war.

Conference.[75] However, in light of the fact that Stalin personally monitored the negotiations in London, it is not implausible to suppose that Truman offered him assurances that Jackson's position did not reflect a tacit commitment on the part of the United States to establishing the criminality of aggressive war as a general and reciprocally binding rule of conduct. It is possible that the two leaders agreed to endorse this new principle within the narrow rubric of war crimes on the supposition that doing so would not constitute a general endorsement of it, fully aware that the San Francisco Conference on International Organization had already rejected it.

13.5. Conclusion

We began this chapter by enquiring into the temporal origins of the crime of aggressive war and surveying two prevalent responses to this question. These responses, which we have termed the conventional and revisionist narratives of the crime's origins, are often formulated as incompatible alternatives. Throughout the chapter, my primary purpose has been to problematise this dichotomisation, to show that both narratives can contribute to our understanding of the crime's origins, and to expose the perils of formulating them in such starkly exclusive terms. The historical record provides limited empirical corroboration for both narratives. Thus, rigid attachment to the exclusivist view that only one of them can be true necessarily implies that neither is true. This is the essence of what we have termed the radical paradox, which, as I have sought to demonstrate, is not an immanent artefact of the historical record but, rather, of an incongruity between that record, on the one hand, and the assumptions of non-monotonicity and bivalence undergirding the exclusivist view of the two narratives, on the other. Rejecting these assumptions empowers us to strike a theoretical compromise that can faithfully accommodate what previously appeared to be glaring anomalies in the historical record. The consequent realisation that the crime of aggressive war was, indeed, born in 1945, but that it was not until 2010 that it finally became what, on these assumptions, we could recognise as a fully realised norm, effectively dissipates the radical paradox.

[75] A transcript of their discussion on war crimes can be found in *Foreign Relations of the United States, Diplomatic Papers: The Conference of Berlin (The Potsdam Conference) 1945*, vol. 2, US Government Printing Office, Washington, DC, 1960, pp. 525–57.

I would like to conclude this chapter with a word of encouragement to scholars who, whatever their field of study, find themselves saddled with theoretical conventions and inveterate assumptions that, in their opinion, distort reality more than they illuminate it. Theory is a servant of scientific enquiry, not its master. It is incumbent upon us to be bold and inventive in tailoring it to the circumstances of our problems and, in so doing, to resist the pressures of submitting to convention out of blind deference. In this chapter, I have defended the historical feasibility of a view of normative development that allows for schizophrenic normative commitments and multiple dimensions of acceptance, a view that contradicts mainstream models of normative development but is entirely warranted by the unusual parameters of my empirical problem. If this chapter succeeds in raising awareness of the explanatory potential afforded by pragmatism in the study of international norms as well as more broadly, it will have accomplished its purpose.

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Historical Origins of International Criminal Law: Volume 1

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further consolidate this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 1 comprises contributions by prominent international lawyers and researchers including Judge LIU Daqun, Professor David Cohen, Geoffrey Robertson QC, Professor Paulus Mevis and Professor Jan Reijntjes.

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