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A Gendered Analysis of Aggression and International Law

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Foreword

Now more than ever, the international community needs a universal definition for the crime of aggression and to understand this crime through a gendered lens. The following report forces us to think critically about ideas and norms of peace, violence, and aggression. Who gets to define these words, both colloquially and in international law? Why are States who maintain, for example, a system of gender apartheid not viewed as presenting a threat to or a breach of the peace? At what point will international law, and aggression, recognize the continuum of violence that women face in the everyday? How has the militarized hierarchy of the U.N. Security Council inhibited itself from taking substantive and transformative action to support international peace and security?

This is a project of the New Lines Institute that seeks to expand understandings of aggression and to move the conversation beyond the U.N. General Assembly and Rome Statute definitions, which privilege largely male military forces over civilian populations. As the first report of its kind, it builds on the past work of Louise Arimatsu and Christine Chinkin and takes us through the history of efforts to define aggression in international law while pulling apart the hypocrisy found in the differences in international responses to the various conflicts and acts of aggression in the 21st century. The report serves as a clarion call for policymakers and the international community at large to think and respond more critically to the increasing levels of violence erupting all around the world.

In all definitions of aggression found in international law, gender is absent in the same way as gender is also largely absent in discourse surrounding Ukraine, the Gaza Occupied Palestinian Territory, Yemen, Sudan, and elsewhere. The following report calls for international law to prioritize civilians over militarized forces in the ongoing quest for peace. We are at a turning point in history, with unprecedented levels of global conflict. The world needs unprecedented, creative, and sustainable solutions – solutions that will begin with a gender and intersectional analysis. As the authors conclude, preventing aggression is far easier than waging war.

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Introduction

This report elaborates on the prohibition of aggression in international law through a gender lens. That gender matters is increasingly recognized by policymakers and legal practitioners, yet dominant understandings and applications of gender tend to remain narrow in focus. The report seeks to pinpoint what is missed when narrow framings are adopted or when international law neglects gender, thereby missing opportunities to prevent aggression or respond appropriately to it.

Gender as a tool for analysis is concerned with understanding how societies are ordered and hierarchies produced among categories of people and activities that are symbolically associated with social constructions of masculinity and femininity. To adopt a gender perspective is to deconstruct and decode patterns of power – typically binary – that are normalized to perpetuate structural and systemic inequalities, oppression and discrimination. As a system of power, gender is both constituted by and integral to the manufacture of other vectors of power such as race, class, colonialism, militarism, nationalism, the political economy, and international law. Gender structures our world, our knowledge, and our views on violence, both inter-personal and inter-state. It shapes our ideas on what constitutes violence; how lawful violence is distinguished from unlawful violence; who is entitled to resort to violence; and the conditions thereof. Gender is thus core to our understanding of inter-state aggression under international law.

The following section briefly traces the dual-track evolution of aggression in international law as an international wrongful act of state and as an international crime. Such "duality of responsibility" is a "constant feature of international law."[1] State responsibility and individual criminal responsibility are distinct and exist concurrently so that a state "is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out."[2] Section 2 analyzes each of these through a gender lens and elaborates on how a gender perspective can inform prevention strategies. The discussion is elucidated through examples from international affairs. The final section considers, through a gender prism, the legal consequences of an act of aggression that flow for states that are directly implicated and for states not directly involved as a perpetrator or victim of violence but as members of the "international community" ("third states").

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment, 26 February 2007, ICJ Rep 2007, 43, para 173.

[2] Ibid citing International Law Commission (ILC), Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on article 58, para 3. Genocide and torture similarly incur dual responsibility.

1. Chronology of Aggression in International Law

Aggression under international law has evolved in a bifurcated, piecemeal fashion, through different legal regimes and instruments, causing a lack of clarity and cohesion.

International efforts to outlaw inter-state aggression date to the early 20th century[3] when, in the aftermath of World War I, member states of the League of Nations accepted the obligation "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[4] States also sought to hold Kaiser Wilhelm II individually accountable "for a supreme offence against international morality and the sanctity of treaties.'"[5] Although this endeavor ultimately proved fruitless and no trial ever took place, it marked the beginning of a normative trend to conceive aggressive war not only as a violation of the solidarity of the member states of the international community[6] and an internationally wrongful act of a state but also as an international crime.[7] The adoption of the 1928 Kellogg-Briand Pact that renounced war as an instrument of national policy gave added weight to the inter-state prohibition of aggression. This was further consolidated with the determination by the Sixth Conference of American States that a war of aggression constitutes "an international crime [of states] against the human species" and that accordingly "all aggression is considered illicit and as such is declared prohibited."[8]

Although the Kellogg-Briand Pact contained no penal sanction and did not criminalize aggression, it was pivotal in providing the legal touchstone upon which crimes against peace were for the first time prosecuted in the immediate post-World War II period. The International Military Tribunal (IMT) Charter for the trial of Nazi war criminals listed "crimes against peace" first in its identification of crimes over which it had jurisdiction. These were defined as the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances."[9] Aggression as a crime against peace thus incorporates pre-conflict (planning and preparation), commencing such a war (initiation) and acts pursuant to a "war of aggression." The crime against peace was a central focus of the Nuremberg Tribunal;[10] it was also included within the jurisdiction of the International Military Tribunal for the Far East,[11] but its status under then-existing international law was "desperately controversial."[12] The majority opinion accepted the concept of crimes against peace, but in a detailed legal and historical dissenting opinion, Judge Bernard Röling determined that "neither the lofty phrases used in resolutions, nor the ambiguous Pact of Paris outlawed war in the sense that waging an illegal war

[3] Peace movements were active especially in Europe and the United States well before the 20th century; Cynthia Cockburn, A*nti MILITARISM: Political and Gender Dynamics of Peace Movements* (Palgrave MacMillan, 2012); Louise Arimatsu and Christine Chinkin. *Gendered Peace through International Law* (Bloomsbury Publishing, 2024) chapter 4.

[4] Covenant of the League of Nations, 1919, art 10.

[5] Treaty of Peace with Germany (Treaty of Versailles) 28 June 1919, art 227. The lack of legal (and certainly criminal law) formulation is evident.

[6] Protocol for the Pacific Settlement of International Disputes, Geneva, 2 October 1924, preamble; provisions of the Protocol determined an aggressor state and consequences. The Protocol received insufficient ratifications to come into force. On Sept. 24, 1927, the League Assembly unanimously adopted a resolution prohibiting all "wars of aggression." Ian Brownlie, *International Law and the Use of Force by States* (OUP, 1963) ch V: Illegal War, Aggressive War, and Aggression: The Major Legal Developments of the Period 1920 to 1945.

[7] E.g., Draft Treaty of Mutual Assistance, 1923, art 1: "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." The Treaty was not accepted.

[8] Sixth International Conference of American States, Habana, Cuba, January 16 to February 20, 1928; US Foreign Relations, 1928 vol 1, 204 at https://history.state.gov/historicaldocuments/frus1928v01/pg_204,

[9] Charter of the International Military Tribunal, 8 August 1945, art 6 (a).

[10] The Nuremberg Tribunal declared the crime of initiating a war of aggression to be "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Nuremberg Trial Proceedings, Judgment, vol 22, 426, 30 September 1946.

[11] Charter of the International Military Tribunal for the Far East, 19 January 1946, art 5 (a) is in the same terms as the Nuremberg Charter except for the insertion of "declared or undeclared" before "war of aggression."

[12] Lord Hankey, 162 Hansard, 19 May 1949. For a detailed account Gary Bass, *Judgment at Tokyo World War II on Trial and the Making of Modern Asia* (Knopf Publishing, 2023).

did become criminal in the ordinary sense."[13] A "war of aggression" was not defined at either Nuremberg or Tokyo.

1.1 Aggression Under the United Nations Charter

The language of aggression is introduced into the U.N. Charter in articles 1 and 39. Article 1 (1) identifies the maintenance of "international peace and security" as the first purpose of the United Nations and to achieve that end spells out the need 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." Aggression is thus integral to the *jus ad bellum* – the international legal regime regulating recourse to force in international relations.[14]

As with the League of Nations Covenant, the Charter does not define aggression. This lacuna together with the different terms used in the Charter to denote inter-state violence, such as "use of force," "armed attack," and "breach of the peace" (similarly undefined), has led to contestation around definitions and legal consequences, including for third states. Article 2 (4) prohibits the "use of force" in international relations.[15] Although what conduct constitutes a 'use of force' remains unsettled,[16] what is not disputed is that an attack by the armed forces[17] of a state against another state constitutes a use of force prohibited by article 2 (4). The Charter recognizes that not every use of armed force by a state is unlawful. The two Charter exceptions to the prohibition are: individual or collective self-defense in response to an armed attack under article 51[18] and when the Security Council authorizes the use of military force pursuant to its primary responsibility for the maintenance of international peace and security.[19] The assumption of illegality of the use of force made by article 2 (4) of the Charter means that states resorting to military force usually assert the legality of their violent acts as coming within the exceptions to the prohibition. The use of armed force by a state outside these two exceptions is an unlawful use of force[20] and may constitute aggression as is the case of "armed attack" within the meaning of article 51.[21]

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[13] There were three dissenting judges: Röling (Netherlands), Judge Radhabinod Pal (India), and Judge Henri Bernard (France). the tribunal's president, William Webb (Australia), submitted a separate opinion.

[14] The *jus ad bellum* must be distinguished from the *jus in bello* (the legal regime governing conduct in warfare), as an international crime incurring individual responsibility for aggression is also associated with the latter, thereby blurring the two legal regimes.

[15] "All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The prohibition is a norm of customary international law.

[16] E.g., could the deliberate diversion of waters of an international river thereby depriving an inland state of the means of survival constitute a use of force? Not all forms of coercion or hostile acts of intervention constitute a use of force; the International Court of Justice held that merely funding irregular armed forces engaged in operations against another state did not reach the use of force threshold; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America). Merits, Judgment. 27 June 1986, ICJ. Rep 1986, 14, para 228.

[17] An act that qualifies as a "use of force" is not limited to those committed by the armed forces, provided the act is attributable to the state in accordance with the Articles on Responsibility of States for Internationally Wrongful Acts, UNGAR 56/83, 12 December 2001, annex, art 2 (a).

[18] Most states take the view that not all uses of force constitute an "armed attack" within the meaning of article 51. The ICJ has distinguished between the "most grave" forms of the use of force, namely "armed attacks" and other uses of force; *Nicaragua*, above note 16, para 191, *Oil Platforms* (Islamic Republic of Iran v United States of America), Judgment, 6 November 2003, ICJ Rep 2003, 161, paras 51 and 64. The U.S. is the only state that has expressly maintained that there is no normative gap between a use of force and armed attack that gives rise to the right of self-defense; U.S. Department of Defense Manual, para 16.3.3.1.

[19] U.N. Charter, 1945, arts 24, 39 and chapter VII.

[20] States claim other exceptions to the prohibition of the use of force, notably humanitarian intervention; the rescue of nationals abroad; and, in the context of the invasion of Iraq in 2003, response to possession of weapons of mass destruction. Heads of state through the UNGA have rejected such claims asserting that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security." UNGAR 60/1, 2005 World Summit Outcome, 24 October 2005, para 79.

[21] The idea that aggression is the most serious form of an unlawful use of force emerged over time. Early exchanges among states indicate that an "armed attack" within the meaning of article 51 constituted aggression but mere "frontier incidents" did not; https://history.state.gov/historicaldocuments/frus1945v01/d224. Likewise, the Pact of the League of Arab States signed in 1945 equated aggression with an armed attack. U.N. Treaty Series. vol 70, 248, 254.

The second reference to aggression in the U.N. Charter is in article 39, which empowers the Security Council to authorize the use of force "to maintain or restore international peace and security." Such authorization rests on the prior determination of "the existence of any threat to the peace, breach of the peace, or act of aggression."[22] As with aggression, neither "threat to the peace" nor "breach of the peace" are defined leaving maximum discretion to the Council. Two observations are merited. First, the SC has in general avoided determining which leg of article 39 it is acting under when mandating the use of force. Nevertheless, it has favored a state-centric framing that maintains a separation between internal and external or domestic and international actions,[23] in accordance with the principles of non-intervention and sovereignty. The consequence is that the idea of "peace" (whether it is a threat to or breach of) is limited to a restrictive and negative conception, namely the prevention of inter-state war, with gendered consequences. For example, states that maintain a system of gender apartheid[24] are not viewed as presenting a threat to or breach of the peace as long as rights violations and violence are directed internally. Second, in practice the militarized hierarchy established by the creation of five permanent members with the power of veto over decisions on non-procedural matters has inhibited the Council from determining that a particular state action constitutes aggression (or a threat to or breach of the peace). This failure by the Council means that states and their allies denote forcible action by other state(s) as either contrary to U.N. Charter article 2 (4) or as legal self-defense under article 51 depending on their political standpoint.[25] In rare instances, the SC has determined there to have been aggression as with the violence against front-line states committed by the racist regimes in Southern Rhodesia and South Africa,[26] reflecting the political abhorrence of those regimes in the 1970s and 80s. However, on those occasions the Council did not authorize force. Since 1990, the Council has only once determined there to have been aggressive acts but did not authorize the use of force.[27] It has been other bodies, notably the General Assembly (GA), International Law Commission (ILC), and International Court of Justice (ICJ) that have developed the concept of aggression and the consequences that flow from its commission.

[22] According to the records of the San Francisco Conference, it was decided "to leave to the Council the entire decision, and also the entire responsibility for the decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression;" (United Nations Conference on International Organization, vol. Il, 17.

[23] E.g., Poland's efforts in April 1946 to urge for SC action against the "activities of the Franco regime in Spain" was resisted by states as a matter falling within Spain's domestic jurisdiction. A Sub-Committee established by the Council concluded in June 1946 that "no breach of the peace had yet occurred. No act of aggression had been proved. No threat to the peace had been established" although it was a situation likely to endanger the maintenance of peace and security; "The Spanish Question," 1946-1947 Yearbook of the United Nations, 345-351. A narrow understanding of "threats to the peace" is not shared by other bodies; Report of the U.N. Secretary General, "In larger freedom: towards development, security and human rights for all;" A/59/2005, para 78.

[24] Gender apartheid is yet to be defined under international law; see Karima Bennoune, "The International Obligation to Counter Gender Apartheid in Afghanistan" 54 Columbia Human Rights Law Review [2022] 1.

[25] E.g., notwithstanding Iran's plea that the SC "vehemently condemn" Israel's unlawful armed attack on its consulate in Damascus on 1 April 2024, the Council failed to do so; S/PV.9593, 02/04/2024. Iran subsequently justified its own resort to force as self-defense. For further discussion see Christine Gray, *International Law and the Use of Force* (OUP, 4th ed 2018) 21-8.

[26] "From 1973 to 1990, the Security Council adopted thirty-four resolutions in which it made express reference to the concept of 'act of aggression.'" These were primarily against apartheid South Africa and "the illegal regime in Southern Rhodesia;" two concerned Israel, one Iraq, and three did not identify the aggressor. Nicolaos Strapatsas, "The Practice of the Security Council Regarding the Concept of Aggression," in Claus Kress and Stefan Barriga, *The Crime of Aggression: A Commentary* (CUP, 2016) 178.

[27] UNSCR 667, 16 September 1990 considers actions by Iraq against diplomatic persons and premises in Kuwait to constitute "aggressive acts." The Council had not made a similar determination with respect to the invasion and occupation of Kuwait in August 1990.

1.2 The GA, ILC, ICJ and Aggression

Draft Code against Peace and Security of Mankind

The GA, in furtherance of its obligations with respect to the progressive development of international law,[28] affirmed the Nuremberg principles – including individual criminal responsibility for international offences – and directed the Committee on the Progressive Development of International Law and its Codification to work on the subject.[29] The matter was subsequently taken up by the ILC following its creation in 1947.[30] The ILC's 1954 Draft Code of Offences included as a crime under international law "[a]ny act of aggression, including the employment by the authorities of a State of armed force against another State," unless it came within the Charter exceptions to the prohibition of the use of force. It also included a threat of aggression.[31] Cold war realities prevented the adoption of the Draft Code as submitted to the GA. Following the end of the Cold War, the ILC returned to its work on the subject, and its 1996 Draft Code[32] asserted individual responsibility for the crime of aggression as set out in article 16,[33] "without prejudice to any question of the responsibility of States under international law."

General Assembly Definition of Aggression

Separately, the failure to define aggression led the GA in 1952 to set up a Special Committee to study the various forms of aggression; the relationship between aggression and the maintenance of international peace and security; the problems caused by its definition within a framework of international criminal jurisdiction; and the effect of a definition on the exercise of jurisdiction of U.N. bodies.[34] Cold War politics impeded progress on this enterprise, and the Committee was superseded by further Special Committees,[35] the last of which completed its work in 1974 when the GA adopted, by consensus, resolution 3314 annexed to which was the proposed "Definition of Aggression" (DoA).[36]

The DoA builds on international legal norms governing inter-state relations. It is grounded in the U.N. Charter and on the understanding of aggression set forth in the 1965 Declaration on Non-Intervention that "armed intervention is synonymous with aggression"[37] and the 1970 Declaration on Friendly Relations,[38] which recognized acts of aggression to be "incompatible with the notion of friendly relations between states."[39] The Friendly Relations Declaration reiterates that a "war of aggression constitutes a crime against the peace, for which there is responsibility under international law" and that states "have the duty to refrain from propaganda for wars of aggression."[40] The General Assembly considered that aggression should be defined because of

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28 U.N. Charter, 1945, art 13.
29 UNGAR 95 (I), 11 December 1946.
30 UNGAR 174(II), 21 November 1947.
31 ILC, Draft Code of Offences against the Peace and Security of Mankind, art 2 (1) and 2 (2).
32 Adopted by the International Law Commission at its forty-eighth session, in 1996, 2 YBILC, 1996, Part Two.
33 Ibid., art 16: "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."
34 UNGAR 688 (VII) 20 December 1952.
35 UNGAR 895 (IX) 4 December 1954; UNGAR 1181 (XII) 29 November 1957; UNGAR 2330 (XXII) 18 December 1967.
36 UNGAR 3314 (XXIX) 14 December 1974, Definition of Aggression.
37 UNGAR 2131 (XX), 21 December 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.
38 On interpretation and application of the Definition, see Annex 1, Report of the Special Committee on the Question of Defining Aggression, 11 March – 12 April 1974, General Assembly Official Records, A/9619.
39 Frédéric Mégret, "What is the Specific Evil of Aggression?" SSRN, 28 March 2012, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546732.
40 UNGAR 2625, 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

the "conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences"[41] and recommended its definition as guidance to the Security Council.

The preamble to the DoA notes that aggression is "the most serious and dangerous form of the illegal use of force." The idea that not all unlawful uses of force constitute aggression is further affirmed by article 2, which effectively discounts as aggression unlawful uses of force that are not of "sufficient gravity." In article 1 it defines aggression as "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." This expansive wording conceives of aggression as an act that fundamentally undercuts multiple values that are core to the international system, including (i) state sovereignty; (ii) international peace; and (iii) [humanity] and human rights.[42]

The definition sets out a non-exhaustive list of acts that constitute aggression and which give rise to international state responsibility. Although its primary concern is not with individual criminal responsibility, in article 5 (2) the DoA recognizes a "war of aggression" as a crime against international peace. It makes clear that there can be no political, economic, military,[43] or other justification for aggression; in other words, motive is irrelevant. No territorial acquisition or special advantage from aggression shall be recognized as lawful.[44] A threat of the use of armed force is not encompassed in the definition (as it is in article 2 (4) of the Charter and the 1954 ILC Draft Code); it follows that a breach of the prohibition is contingent on the act of aggression taking place. Its temporal extent is not determinative as a single (first) use of armed force, bombardment, invasion or military occupation (however temporary) can all constitute an act of aggression.

Obligations Owed Erga Omnes

Prior to the adoption of GA resolution 3314, the ICJ had indicated in the *Barcelona Traction case* a further aspect of the importance of the prohibition of aggression within the international normative order.[45] Charged with interpreting the law, the Court had drawn a distinction between "the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection," noting that "the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." Among the examples given by the ICJ of such obligations in contemporary international law was "outlawing of acts of aggression."[46]

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41 DoA, preamble; on feminist activism for disarmament see Louise Arimatsu, "Transformative Disarmament: Crafting a Roadmap for Peace," (2021) 97 *International Law Studies* 833.
42 Mégret, above note 39.
43 This emphasizes the difference between the *jus ad bellum* and *jus in bello* (IHL), where military necessity is accepted as a justification for actions that would otherwise be illegal.
44 DoA, art 5 (3); see also the Declaration on Friendly Relations, above note 40.
45 In 2006 the then highest Court in the U.K., the House of Lords, held that the crime of aggression existed in customary public international law; *R v Jones* [2006] UKHL 16.
46 *Barcelona Traction Light and Power Company, Limited* (Belgium v Spain), Judgment, 5 February 1970, ICJ Rep 1970, 3, paras 33-4.

ILC Articles on State Responsibility and Jus Cogens

Over the many decades of its work on principles of state responsibility for the commission of an international wrongful act, the ILC struggled with a further delineation between "ordinary" (delictual) international wrongful acts and more serious acts, international crimes of state of which aggression was a prime example. Much of the rationale for the concept of a crime of state reverted to the idea of international solidarity, that such grave wrongs impact the international community as a whole. One difficulty was determining the appropriate response to a crime of state, for "it is unthinkable that States could have believed that such a breach unhesitatingly qualified as a 'crime,' would entail only the consequences which normally followed from internationally wrongful acts that were much less serious, namely the right of the injured party to require the offender to make reparation for the damage sustained."[47] There was ultimately no article on crimes of state in the Articles on State Responsibility as adopted by the GA in 2001. However, building on the work on *jus cogens* through the ILC's mandate on the law of treaties[48] and the ICJ's assertion of obligations owed *erga omnes* in *Barcelona Traction*, there is provision for "a serious breach by a State of an obligation arising under a peremptory norm of general international law."[49] Since a peremptory norm impacts on the international community as a whole, there are consequences for third states; they must cooperate to bring to an end through lawful means any serious breach and must not "recognize as lawful a situation created by a serious breach … nor render aid or assistance in maintaining that situation."[50]

Two decades later, the ILC further elaborated on the nature and legal consequences of *jus cogens*. In its Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*),[51] it provided a non-exhaustive list of norms that it had previously identified as having acquired this status.[52] First in its list is the prohibition of aggression (not "act of aggression" nor "war of aggression," but simply "aggression"). Among other *jus cogens* norms is the right of self-determination. The prohibition of the use of force is not included in the list, although it is often cited as the paradigmatic example of a *jus cogens* norm and has been accepted as such by the ICJ [53] and ILC.[54] In terms of consequences of serious breach, the ILC reiterated states' obligations as set out in the Articles on State Responsibility: cooperation in putting an end to the serious breach and non-recognition.[55] Within international organizations, "the obligation to cooperate imposes a duty on the members of that international organization to act with a view to the organization exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (*jus cogens*)"[56] In elaborating on state obligations, the ILC has clarified a further legal distinction: aggression is an illegal use of force and violation of an obligation *erga omnes* but its commission can constitute

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47 Fifth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (continued), A/CN.4/291 and Add.1 & 2 and Corr.1, 1976, para 145 and fn 230.

48 Vienna Convention on the Law of Treaties, 1969, arts 53, 64.

49 Articles on State Responsibility, above note 17, art 40. A breach is serious if it "involves a gross or systematic failure by the responsible State to fulfil the obligation."

50 Ibid. art 41.

51 Adopted by the ILC, 73rd session, 2022; 2 YBILC 2022, Part Two.

52 Ibid, Conclusion 23, Non-exhaustive list, Annex.

53 In the *Nicaragua* case, the ICJ "without explicitly endorsing the idea of *jus cogens*, stated that both States and the Commission viewed the prohibition of the use of force as *jus cogens*." First report on *jus cogens*, by Mr. Dire Tladi, Special Rapporteur, ILC 68th session, 2016, A/CN.4/693.

54 Commentary to draft Article 50 of the Draft Articles on the Law of Treaties, 1966 YBILC, vol. II, part II, 247, A/6309/Rev.1.

55 ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, U.N. Doc. A/77/10, 2022, Conclusion 19.

56 Ibid, 75-76.

either a "non-serious" or "serious" breach if it involves "a gross or systematic failure by the responsible State to fulfil that obligation."[57]

1.3 Aggression and the ICC

In the 1990s, aggression was not included as a crime, giving rise to individual responsibility within the jurisdiction of the ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR). It was included in the Rome Statute of the International Criminal Court (ICC) as a crime within the jurisdiction of the ICC subject to a definition to be subsequently agreed by the States Parties. This was achieved at the Review Conference in Kampala in 2010, where the Resolution on the Crime of Aggression was adopted by consensus.[58] "For the first time in history a legally binding document was adopted which defined the two key aspects of the crime of aggression, namely, the individual and state conduct."[59] The Rome Statute made individual criminal responsibility for aggression contingent on a breach by a state of the *jus ad bellum* by requiring the Court to determine that the state has committed aggression before adjudicating on individual criminal responsibility.[60] This contrasts with other serious violations of international criminal law that are perpetrated by individuals, albeit often acting as part of a collective but not necessarily through a state apparatus. The structure of the crime of aggression within the Rome Statute presents a threat to the gendered state precisely because it requires attention to state responsibility in contradistinction to violations of other international crimes, which direct our gaze to individual actors whom the state is responsible for punishing.

The Rome Statute defines the crime of aggression as 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,[61] of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[62] The introduction of the qualifier "manifest" reinforces that only the most serious uses of force will be subject to prosecution.[63] The leadership requirement protects the "common" soldier from prosecution for aggression[64] and by definition recognizes only state actors (or those whose acts are attributable to the state) as falling within the ICC's jurisdiction. The Rome Statute clarifies that an "act of aggression" within this definition 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."[65] The list of acts that constitute such an act of aggression follows the GA's definition. Investigation of the crime of aggression requires the prosecutor to "ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned."[66] If the SC has done so, the prosecutor may

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57 Ibid, Conclusion 19 (1)(3). The ICJ has expressed the same idea using the terms "most grave" and "less grave;" *Nicaragua*, above note 16, para 191; *Oil Platforms*, above note 18, para 64.

58 Resolution RC/Res.6, 11 June 2010.

59 Nicolaos Strapatsas, "The Practice of the Security Council Regarding the Concept of Aggression," in Claus Kress and Stefan Barriga, *The Crime of Aggression: A Commentary* (CUP, 2016) 178.

60 The state may also be held responsible where such crimes are attributable to it under the concept of duality of responsibility; see above note 1. States are not precluded from finding individual criminal responsibility for aggression in domestic law without necessarily touching on state responsibility.

61 Rome Statute of the ICC, 1998, art 25 (3) *bis* repeats this requirement: "In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State."

62 Rome Statute of the ICC, art 8 *bis*, para 1.

63 Beth Van Schaack, "The Aggression Amendments: Points of Consensus and Dissension" (2011) 105 Proceedings of the Annual Meeting (American Society of International Law) 154.

64 The perpetrator of a crime against peace must be "in a position to shape or influence the policy that brings about [a crime against peace's] initiation or its continuance after initiation, either by furthering, or by hindering or preventing it." *High Command case,* Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, October 1946 – April 1949, vol XI, 488.

65 Rome Statute of the ICC, art 8 *bis*, para 2.

66 Rome Statute of the ICC, art 15 *bis,* para 6.

proceed with the investigation in respect of a crime of aggression, but if there has been no such determination, the Pre-Trial Division of the Court must first authorize the investigation. Since the SC has made no determination of aggression since 1990, this second procedure is likely to come into play in the case of any prosecutorial investigation into an alleged crime of aggression.

Aggression in Contemporary International Law

As this brief account of the evolution of aggression as an international wrongful act and as an international crime shows, there remain uncertainties and ambiguities. Despite definition of the crime of aggression and provision for its prosecution by the ICC at Kampala in 2010, in 2017 it was described as "hanging by a thread in the firmament of international offences."[67] By 2024, the position had changed, at least rhetorically, and aggression is taking a place in the center of international legal discourse with the GA's assertion of aggression by the Russian Federation in Ukraine[68] and advocacy for a Special Tribunal to prosecute aggression in Ukraine. Likewise, aggression featured in the written and oral submissions to the ICJ in the Advisory Opinion on the Occupied Palestine Territory as an internationally wrongful act by Israel[69] that gives rise to international criminal responsibility.[70]

Aggression has been described as "conduct performed under circumstances that results in consequences."[71] Gender is relevant to all three: conduct, circumstances and consequences. In all definitions of aggression under international law, however, gender is absent as it largely is in discourse around armed violence in Ukraine, the Occupied Palestinian Territory, and elsewhere (for instance, Yemen and Sudan) except in the limited context of conflict-related sexual violence, primarily construed as committed against women and girls. The consequence is that all forms of violence and in particular inter-state violence are assumed to be gender neutral. The following section revisits aggression in international law through a gender lens, with a focus on the conflicts in Ukraine and the Occupied Palestinian Territory, and elaborates on how a gender perspective can inform our understanding of aggression, its consequences, and prevention strategies.

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67 Frédéric Mégret, "What is the Specific Evil of Aggression?" In Claus Kress and Stefan Barriga, *The Crime of Aggression: A Commentary* (CUP, 2016) 1398.

68 UNGAR E-S/11/1, 18 March 2022, Aggression against Ukraine: para 2. "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter."

69 Pleadings have ranged from maintaining that an occupation is unlawful per se when it is imposed as a consequence of aggression and/or that de facto/de jure annexation is an act of aggression. E,g, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Request for Advisory Opinion) by the UNGA in Resolution 77/247 of 30 December 2022, 25 October 2023, Written Statement of Palestine, para 2.39; Written Statement of Belize, 25 July 2023, paras 32-34 and 44; Written Statement of Bolivia paras 11-18; Written Statement of The Gambia, para 1.18-1.19; Written Statement of South Africa, para 137 citing report of Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/77/356, 21 September 2022.

70 Ibid., Written Statement of Belize, 25 July 2023, para 89.

71 Nikola Hajdin, "The *Actus Reus* of the Crime of Aggression," 34 *Leiden JIL* (2021) 489, 504.

2. Gendering Aggression in International Law: The Cases of Russia and Israel

The current use of armed force by Russia and Israel are illustrative of how aggression may be understood as gendered. In the latter case, there are several lines of legal reasoning whereby the use of force by Israel against Palestine can constitute aggression.[72] First, the force used to impose and maintain the occupation of Palestine derives from an unlawful use of force by Israel in 1967.[73] Second, the annexation of territory by Israel is an unlawful use of force qualifying as aggression.[74] Third, the denial of the Palestinians' right to self-determination, a peremptory norm of international law, effected through an illegal occupation constitutes aggression.[75] Fourth, the imposition and maintenance of the unlawful blockade on Gaza since 2009 qualifies as an act of aggression by Israel.[76]

Gender analysis is not straightforward, as the language of gender is often deliberately resorted to by parties to conflict for competing purposes, for instance as propaganda to garner support while belittling and humiliating other parties or to legitimate a use of force that might otherwise be viewed as aggression. Striking are the commonalities between parties to conflict in their use of gender and gendered imagery to bolster their legitimacy, to appear strong and resolute – attributes coded masculine – and in avoiding actions that could be construed as feminine, commonalities that complicate the issue and the value of assigning blame.[77] Despite the GA definition of aggression (repeated in the Rome Statute), states' labelling of a use of violence as the international wrongful act/crime of aggression is politically, not legally, determined.[78]

2.1 Circumstances

It is self-evident that no act of violence, whether committed by a state or non-state actor, can be prevented without understanding the context within which it has materialized. As early as 1946, Judge Pal at the IMTFE highlighted that aggression is contextual; he considered that Japanese violence across Asia could not be assessed outside the context of European colonial violence. While rightly condemning the atrocities committed by Hamas and other armed groups on 7 October 2023, U.N. Secretary-General António Guterres also reminded his audience that the violence did not occur in a vacuum, presumably referring to the long history of Israeli

[72] DoA, art 1 expressly notes that the definition of "State" is used "without prejudice to the questions of recognition or to whether a State is a member of the United Nations." As the occupying state, Israel is precluded, as a matter of law, from pleading self-defense with respect to actions emanating from the occupied territory.

[73] On the different and opposing contemporaneous positions taken by states and the conflicting views expressed by international law scholars since, see John B. Quigley, "The Six Day War – 1967" in Tom Ruys and Oliver Corten (eds) *The Use of Force in International Law: A Case-Based Approach* (OUP, 2018) 131-142.

[74] DoA, art 3 (a) states that "any annexation by the use of force of the territory of another State or part thereof" qualifies as an act of aggression. See *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, AO, 2024 ICJ Rep, 19 July 2024 where the Court reiterates that acquisition of territory through force is illegal.

[75] Special rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, OHCHR Press Conference, 16 September 2024 https://webtv.un.org/en/asset/k1m/k1mk1uaclx.

[76] DoA, art 3 (c) and the findings of various international bodies including the International Committee of the Red Cross as documented in the *Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 27 September 2010, section II.

[77] Hilary Charlesworth, "Women and gender in the invasion of Gaza," in Raimond Gaita, *Gaza: law, morality and politics* (UWA Publishing, 2010) 127, on Operation Cast Lead in 2008-9.

[78] E.g., compare the statement by the representative of Syria in the GA debate in the 11th Emergency session following the Russian invasion of Ukraine on 24 February 2022 that "the draft [resolution] clearly represents a prejudiced attitude based on political propaganda fuelled by political pressure and is a tool of pressure and political blackmail." And that of the United States: "To all who dedicate themselves to the noble mission of this Organization, today we call on Russia to stop its unprovoked, unjustified and unconscionable war and to respect the sovereignty and territorial integrity of Ukraine." A/ES-11/PV.5, 2 March 2022. UNGAR ES-11/1, 2 March 2022 was adopted by 141 votes in favor, 5 against, and 35 abstentions. States that voted in favor did not explain their understanding of aggression. Cf., "while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression - or, as more often is the case, fail to arrive at a determination of aggression - for political rather than legal reasons." *Nicaragua*, above note 16, Judge Schwebel, diss. op., para 60.

displacement of Palestinians and military occupation of Palestinian territories. But histories alone cannot fully explain any violence without recognizing the structures of power that produce and are shaped by those histories. Gender is one such axis of power that intersects with race, nationalism, class, militarism and other vectors of power. The GA itemization of acts of aggression is not exhaustive,[79] and each case must "be considered in the light of all the circumstances of each particular case."[80] So doing promotes thinking about aggression contextually, as "a form of subjugation and oppression of a population"[81] not as a particular military operation but rather to be analyzed taking into account a pattern of activity that might last many years.

Preconditions to Aggression

An act of aggression does not materialize in a political-social void but is typically the manifestation of a gendered, militarized nationalism cultivated and internalized by the aggressor state. Aggression is dependent on the normalization of militarism within the social/political fabric of the aggressor state, including the framing of political decision-making. Gender systems are core to militarism and help to establish militarized structures and institutions, public and private; to shape identities to naturalize relationships founded on gendered hierarchies; to embed militarism in political, economic, social and cultural discourse and affairs; and to rationalize the irrational,[82] namely, collective violence including the unlawful use of force that amounts to aggression.

As with all state recourse to armed force, aggression is a collective enterprise involving a collaborative (and often indistinguishable) relationship between the executive branch (with or without the support of its legislative branch) and senior members of the state's armed forces. Gender norms, identities and attributes such as strength, independence, decisiveness – all coded masculine – not only serve to bond those who occupy senior positions within both the executive and military but also help to shape and weave together values, objectives, and the appropriate means to achieve those objectives, including through violence and a willingness to act outside of existing law if deemed necessary.[83] The logic of militarized nationalism is reliant on the construction of the "other" as an enemy who poses a direct threat, thus necessitating resources to be diverted to military expenditure to counter the threat. Such narratives rely on the gendered state as the male "protector," together with the production of militarized masculinities and femininities[84] that concurrently sustain nationalist projects and militarization, including through military service.[85]

Gender has always been integral to aggression. After all, the charges of "crimes against peace," thereby criminalizing aggressive war, were forged in the context of the toxic militarized masculinity exhibited by axis powers in World War II. These too extolled the strength (masculinity) of the totalitarian state against the weakness (femininity) of the liberal democracies: for instance "Japanese extremists celebrated the Axis pact as a rejection of individualism, liberalism and

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79 UNGAR 3314, art 4.
80 Ibid, preamble.
81 Mégret, above note 39.
82 Carol Cohn, "'Sex and Death in the Rational World of Defense Intellectuals," 12 *Signs* (1987) 687.
83 A logic that is capable of silencing existing law and of founding new law.
84 By equating military service with feminist empowerment or even glamour, the purpose of the use of force can be erased including where it amounts to aggression; https://nuhahassan.medium.com/the-romanticisation-of-israel-defense-forces-female-soldiers-e058cf36537a. Cf., President Alexander Lukashenko's address to the Belarusian people and the National Assembly, 31 March 2023: "Everyone who calls himself a man should at least learn to hold a weapon to be able to defend everything they care about."
85 See material cited on "gendered nationalism" by Bram De Smet and Ihntaek Hwant, "Nationalism, masculinities, and bodies," in Tarja Väyrynen, Swati Parashar, Élise Féron, Catia Cecilia Confortini (eds) *Routledge Handbook of Feminist Peace Research* (2021).

democracy, alien ideas imposed upon Asians by Western democratic powers in favor of a virile Japanese totalitarianism."[86] Russian President Vladimir Putin is emblematic of a "strong man" asserting authoritarian rule.[87] His toxic masculinity is evident in his speeches where women are barely mentioned except as needing protection (LGBTQI+ persons are even less frequently mentioned),[88] and in his favoring of displays of highly feminine supporters of his war. His hegemonic masculinity and authoritarianism intersect with and reinforce racism, homophobia, and transphobia, factors also apparent in the aggressive policies of the Axis powers in World War II. Paradoxically, although he is far from being alone, Putin has become a hostage to his own toxic gendered narratives.[89]

The dominance of gendered framings that intersect with other axes of discrimination such as race is not the exclusive preserve of belligerent states but cuts across all states. This translates into the only too apparent double standards exhibited by the West in condemning Russian aggression in Ukraine but tolerating, and even supporting,[90] Israel's gendered violence in the Occupied Palestinian Territory. The readiness to accept "progressive, democratic Israel" in contrast to "primitive, barbaric Hamas," and hence all Palestinians, is bolstered by assumptions about the position of women in the two societies: Women's inferior status under Islam and the curtailment of women's rights through such practices as veiling and killings in the name of (male) honor can be contrasted with Israeli women's participation in public spaces such as the Israeli Defense Forces (IDF).[91] Such depiction obscures the reality and complexities of Palestinian women's lives, including their active resistance to the occupation and that of Israeli women who also experience discrimination, sexual and domestic violence, and harassment in different spheres of life, including within the IDF.[92]

Gendered Justifications for Aggression

Aggression disrupts the post-1945 multilateral legal order and, on occasion, involves the disavowal of even longer-established international legal norms.[93] Aggressor states typically justify their resort to forceful action through expansive interpretation of the law, through claiming a further exception to the prohibition of the use of force, or that acting outside the parameters of existing law is both necessary and legitimate given the exceptional and/or unique circumstances confronted. Exceptionalist narratives are used to support the inadequacy or non-applicability of existing law, thereby undermining the international rule of law. Gendered norms play an integral part in the construction of each of these claims to justify resort to armed force.

In both Ukraine and Palestine, gendered tropes saturate depictions and justifications of the respective positions of the protagonists in conflict. For instance, from at least 2010 Russia has asserted its determination to uphold what it terms "traditional family values,"[94] rejecting gender

[86] Gary Bass, *Judgment at Tokyo*, above note 12, 393.
[87] Robert Kagan, "The strongmen strike back," Policy brief, Brookings (March 2019).
[88] Petr Kratochvil and Mila O'Sullivan, "A war like no other: Russia's invasion of Ukraine as a war on gender order," 32 *European Security* (2023) 347.
[89] Louise Arimatsu and Christine Chinkin, "War, Law and Patriarchy," LSE blogs, 5 April 2022; https://blogs.lse.ac.uk/wps/2022/04/05/war-law-and-patriarchy/
[90] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (Nicaragua v Germany) ICJ, Application for provisional measures, 1 March 2024 and Verbatim record 8 April 2024.
[91] The CEDAW Committee expressed its concern that despite women's representation in the IDF sexual violence there has increased; CEDAW Committee, Concluding Observations on the 6th periodic report of Israel, CEDAW/C/ISR/CO/6, 17 November 2017.
[92] CEDAW Committee, Concluding Observations on the 6th periodic report of Israel, CEDAW/C/ISR/CO/6, 17 November 2017.
[93] E.g. Israel's armed attack on Iran's consulate in Damascus on 1 April 2024 breached the Vienna Convention on Diplomatic Relations, 1961 on the inviolability of diplomatic personnel and premises of the mission, as well as customary international law. Both Israel's attack on the consulate and the use of force by Iran in response, may "constitute the international crime of aggression by civilian and military leaders responsible;" https://www.ohchr.org/en/press-releases/2024/04/israel-and-iran-must-de-escalate-conflict-protect-human-rights-warn-un
[94] In the same way as male perpetrators of domestic violence seek to sustain the patriarchal family unit.

equality, gender diversity, and homosexuality. Its war against Ukraine is the manifestation of this objective being "explicitly fought for the so-called traditional values, the meaning of gender, sexuality, womanhood and manhood, and the 'natural' place for women." In these ways, the war "is not only implicitly gendered, but gender becomes a central point of explicit contestation."[95] Russia's claim to be providing "an alternative to the decaying morals of the west" is a recurring rhetoric to justify its use of force, and Ukraine "is seen as the key litmus test for the success of the Russian project of alternative modernity."[96] In this regard Russia seeks to destabilize cohesion and unity throughout Europe by exploiting "gender fault lines through hybrid warfare."[97]

Gender has been resorted to by Putin as a further justification of the aggression in Ukraine by depicting women in Eastern Ukraine as victims in need of protection by Russia.[98] This has precedent in the similar presentation by the U.S. of women in Afghanistan in 2001 as needing rescuing from the Taliban.[99] By presenting Afghan women as "helpless victims of Taliban oppression," the U.S. and its coalition partners were able to "cast themselves as heroic masculine warriors" without regard to how this reinforced the image of Afghan women as "mere symbols of helplessness … in a position of absolute inferiority and dependency."[100] The expediency and cynicism of this stance was exposed by the failure of the U.S. to take account of the dangers facing Afghan women and LGBTQI+ persons when it withdrew its forces in 2021, facilitating the Taliban to regain power.

Israel has highlighted the sexual violence committed during the 7 October attacks to bolster support for and delegitimize criticism of its goal of eliminating Hamas.[101] While we condemn all gender-based violence, these examples demonstrate the instrumentalization and weaponization of gender, most notably women's rights, to justify state violence, to legitimate military action that always translates into violence against other women while disregarding the interests and histories of those they are purporting to protect. Israeli commentators have used gender imagery instrumentally especially to an American audience to project the state as both tough and unyielding – that is, as "manly" – and as the historic victims (coded female) of unrelenting aggression and thus the worthy recipients of ongoing support through military and diplomatic means:

> "[American Jews] also need the 'Israeli hero' as a social and emotional compensation in a society in which the Jew is not usually perceived as embodying the characteristics of the tough manly fighter. Thus the Israeli provides the American Jew with a double contradictory image – the virile superman, and the potential Holocaust victim – both of whose components are far from reality." [102]

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95 Petr Kratochvil and Mila O'Sullivan, "A war like no other" above note 88.

96 Ibid.

97 NCGM Thematic Analysis, "The use of Gender Perspective in the Conflict in Ukraine," 2023-01-09.

98 E.g., "The President of the Russian Federation stated, inter alia, that this decision [to formally recognize the Donetsk People's Republic and the Luhansk People's Republic as independent states] was taken in light of continuing attacks against the Donbas communities and '[t]he killing of civilians, the blockade, the abuse of people, including children, women and the elderly.'" *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 states intervening), Preliminary Objections, 2 February 2024, ICJ Rep 2024, para 30.

99 Simon Chesterman, "Humanitarian Intervention and Afghanistan," in Jennifer Welsh, *Humanitarian Intervention and International Relations* (OUP, 2003) 163.

100 Thomas Gregory, *Rescuing the Women of Afghanistan: Gender, Agency and the Politics of Intelligibility*, PhD thesis, University of Manchester, 2012.

101 Such criticism directed at feminists accuses them of double standards: "I say to the women's rights organizations, you've heard of the rape of Israeli women, horrible atrocities, sexual mutilation – where the hell are you?" Netanyahu, cited Azadeh Moaveni, "What They Did to Our Women," 46 (9) *London Review of Books*, 9 May 2024.

102 Boaz Evron, cited Pankaj Mishra, "The Shoah after Gaza," 46 (6) *London Review of Books*, 21 March 2024, 5.

This encapsulates Israel's response to the 7 October 2023 attacks: the continued vulnerability of a targeted victim and imperative of a virile, unwavering response. The unprecedented level of violence in Gaza – and increasingly across the West Bank, East Jerusalem, and the region – is a deeply gendered act by Israel to reassert its masculinity and militarized dominance, dented by its failure to protect its population on 7 October 2023. By refusing to visit Washington following the U.S. abstention in the SC that allowed the adoption of resolution 2728,[103] Netanyahu likely believes that he is appearing strong: "A 'senior source' … asserted, 'The confrontation with the United States doesn't weaken Israel; it conveys strength. The world, and especially our enemies, see that Israel knows how to stand up to all pressure, even at the cost of confrontation with our greatest friend.'"[104]

2.2 Aggressive Conduct Through a Gender Lens

The Definition of Aggression article 3, which provides a non-exhaustive list of acts of aggression (repeated in the Rome Statute article 8 *bis*), privileges spectacular manifestations of violence, as shown by its use of terms such as "invasion," "attack," "bombardment," "use of any weapons," and "armed bands, groups, irregulars or mercenaries … [to] carry out act of armed force." The consequence of registering aggression primarily, if not exclusively, through this prism is that in the absence of spectacular violence, aggression may not be identified as such. A gender analysis underscores the need for an understanding of aggression as grounded in the lived experiences of violence and not limited to the spectacular and of how such violence extends beyond the first use of force. A gender perspective enables us to recognize aggression by directing attention to power and of how coercive "power over" – the essence of aggression – manifests rather than being diverted by international law's fixation on spectacular violence and on territory.[105]

Spectacular v Lived Violence

Acts of aggression are always gendered gestures that seek to impose and/or cement a hierarchical relationship of domination and subjugation over the "enemy"/"other" by means of armed violence. Although international law introduces a threshold over which such violence must cross before it is recognized to constitute aggression, this does not mean that the forceful conduct of the aggressor state must continue to maintain that threshold of violence. In other words, aggression should be understood as a continuing act for so long as the aggressor state is able to maintain a dominant position over the "enemy" by virtue of its ability to deploy armed violence, at the level of an armed attack, at its time of choosing. This feature of aggression is particularly pertinent to military occupation.

The GA definition of aggression includes "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."[106] The DoA treats occupation as presumptively unlawful when it results from a violation of the *jus ad bellum* and an act of aggression unless authorized by the SC.[107] Yet

[103] UNSCR 2728, 25 March 2024.
[104] Times of Israel, op ed David Horovitz, 25 March 2024.
[105] Christine Chinkin, "From the Spectacular to the Everyday: international Law, Violence and the Agenda for Women, Peace and Security," British Academy 2021.
[106] The DoA, preamble recalls that "that the territory of a State shall not be violated by being the object, even temporarily, of military occupation."
[107] A lawful use of force in self-defense can mutate into an unlawful use of force – and an act of aggression – when the conditions of necessity and/or proportionality are no longer satisfied. This also applies to situations where the territorial state withdraws its consent to the presence of foreign troops as expressly set forth in DoA, art 3 (e); *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) 19 December 2005, ICJ Rep 2005, paras 51-52 and 345. Force is no longer lawful when the SC mandate authorizing

in neither Ukraine nor the Occupied Palestinian Territory have the actions of Russia or Israel respectively been determined to constitute aggression by the SC.[108] The GA did deplore "in the strongest terms the aggression by the Russian Federation"[109] in response to the invasion on 24 February 2022 and the all-out war that followed but did not do so in 2014 when Russia annexed Crimea[110] and occupied parts of Eastern Ukraine. Subsequent resolutions have condemned the human rights abuses committed in the occupied areas that, by default, distract attention away from the *ad bellum* framework.[111] By remaining attentive to how armed violence instils and maintains relationships of gendered power over an occupied population, a gender perspective avoids international law's propensity to compartmentalize. It thereby enables us to recognize as aggression de facto occupation whilst also registering the gendered dynamics of occupation that violate both international human rights and humanitarian law.[112]

A useful analogy might be drawn between the ongoing gendered violence, intimidation and abuse against those of non-Russian ethnicity living under Russian control maintained through exercise of military power and long-term domestic violence.[113] In both scenarios, the oppressor controls all aspects of the lives of those they dominate including their movement, contacts spending, and even what they can eat; isolates them from allies/friends; dehumanizes them; and rejects all opportunities for a consensual or inclusive future. The gendered hierarchical relationship of power is maintained through the perpetrator's impunity and ability – actualized or not – to inflict significant arbitrary violence.

The analogy also applies in the case of Israel's relentless exercise of militarized power over Palestinians in the Occupied Palestinian Territory since 1967. Aggression manifests in gendered form with gendered consequences at checkpoints, through the permit system, settler constructions, evictions, night-time raids into homes, detention, including ill-treatment in detention, the control of movement, living arrangements, and security of Palestinians with immediate material and long-lasting psychological effects on women and their children.[114] Israeli laws have separated families and communities. The violence of prolonged occupation has on a number of occasions erupted into extreme or spectacular violence (at which point awakening international attention), as has been the case following the Hamas attacks on 7 October 2023. The violence inflicted by Israel in response has been condemned by the GA,[115] although not as aggression, and has been justified by Israel's long-term allies as founded on the right to self-defense.[116] This latter claim has been made to sound reasonable by the focus on the 2005 "disengagement" of Israel from Gaza and dominance of international humanitarian law as the applicable legal regime rather than the *jus ad bellum*. This stance obfuscates the fact that it is the ability of the oppressor to inflict arbitrary violence when it chooses that is core to occupation as

force expires or where the behavior of SC mandated force exceeds the terms of the authorization, as was arguably the case in Libya in 2011; Micah Zenko, "The Big Lie about Libya," *Foreign Policy*, 22 March 2016.

[108] SC discussions on Russia's involvement in Ukraine in 2014 centered on consent, with some states remaining undecided "whether an active act of aggression" was being committed on Ukrainian territory; S/PV.6125, 3 March 2014.

[109] UNGAR ES-11/1, 2 March 2022, "Aggression against Ukraine," OP 2.

[110] UNGAR 68/262, 27 March 2014, Territorial Integrity of Ukraine.

[111] Eg UNGAR 71/205, 19 December 2016.

[112] Fionnuala D. Ni Aolain, "The Gender of Occupation," *45 (2) Yale Journal of International Law* (2020) *338.*

[113] It is telling that Russia decriminalized domestic violence in 2017.

[114] "Palestinian Women under Prolonged Israeli Occupation: the Gendered Impact of Occupation Violence," Joint Submission to the UPR Working Group, 29th session, January 2018.

[115] UNGAR ES-10/21, 27 October 2023: "condemning all acts of violence aimed at Palestinian and Israeli civilians."

[116] As an occupying power Israel cannot claim self-defense within the meaning of U.N. Charter, art 51, for its use of force in occupied territory.

aggression.[117] The lived reality of the everyday gendered violence (whether in occupation or within familial settings) is a reminder of the hierarchical relationship of power.

The level of violence in Gaza (2023-2024) is such that the heightened settler violence in the West Bank that is instigated, fueled, and co-perpetrated by the Israeli authorities largely goes unnoticed, save momentarily when the violence is spectacular, making the parallels with domestic forms of coercive control even more striking.[118] The daily lived violence across the Occupied Palestinian Territory is not recognized as aggression despite its origin and basis in military occupation. As a settler colony, Israel depends on and deploys strategies of domination that are deeply structured by the gendered relations of power typical of colonial (patriarchal) societies: "to make Palestinian life intolerable and unsustainable and resistance accordingly unviable."[119] Occupation, like colonialism, reflects the nexus between public and private violence in national systems, the latter tolerated as upholding the patriarchal structures of power. Similarly, the occupying power largely enjoys the continued benefits of de jure and de facto membership within the international community, a status denied to Palestine by the U.S., Israel, and their allies,[120] redolent of patriarchal state histories that have resisted women's de jure and de facto equality with men.

When after enduring years of coercive control the victim retaliates with violence, provoking greater violence from the abuser, the latter may similarly claim to be acting in self-defense. It has been only recently, for instance in the U.K., that the male-dominated justice system has allowed an appeal to reduce a conviction for murder to one of manslaughter where the victim of long-term abuse has exercised her autonomy and killed her tormentor.[121] Coercive control has now been legislatively recognized as a form of abuse.[122]

The GA and Rome Statute definition of aggression asserts attack on the armed forces of another state, not attack on its civilian population. This privileges the largely male military forces over the civilian population where women are largely located while reinforcing militarism and assumptions of military activities as necessary for national security. A gendered understanding of aggression would explicitly include attacks on a civilian population; it would further encompass acts where it is foreseeable that armed violence would have a disproportionate impact on a civilian population.

[117] Human Rights in Palestine and Other Occupied Arab Territories, Report of the U.N. Fact-Finding Mission on the Gaza Conflict ("Goldstone report") A/HRC/12/48, 25 September 2009.

[118] In February 2024, the U.K. announced sanctions on four Israeli settlers following the "unprecedented levels of violence by extremist settlers in the West Bank over the past year," FCDO press release, 12 February 2024. Although a welcome response, sanctions on individual settlers diverts attention from state responsibility. The U.S., France, Australia, Canada, and Japan have also imposed similar, limited sanctions on individual settlers, although each has resisted sanctioning Israeli officials notwithstanding the fact that the settlers are acting in support of government policy.

[119] David Lloyd, "It is our belief that Palestine is a feminist issue." 4 feminists@law (2014).

[120] See SC debate on Palestine's application for admission as a member state to the U.N. at S/PV.9609 and draft resolution S/2024/312, which was vetoed by the US, 18 April 2024.

[121] Justice for Women, the case of Sally Challen at https://www.justiceforwomen.org.uk/sally-challen-appeal.

[122] Serious Crime Act, 2015 (U.K.), section 76 provides for the offence of controlling or coercive behavior, where the perpetrator and the victim are personally connected. There is a personal connection between the occupier and occupied peoples.

The Gendered Effects of Aggression

Aggression creates conditions in which socially constructed discriminatory divisions, primarily nationality, are heightened. This makes more likely the commission of serious international crimes along those same axes. Atrocity crimes manifest in different forms of violence perpetrated against different categories of people along pre-existing vectors of oppression and discrimination, including those of gender, race, and class. The value of gender analysis is that it illuminates how gender shapes identities, norms, activities, and belief systems and intersects with other axes to place different groups at greater risk to certain forms of violence, especially in wartime. As an analytic tool, it provides important insights into why and in what ways mass atrocities take place.[123] For example, the gendered assumption that males of a fighting age are weapon-bearers and thus pose a threat often makes all men and boys more vulnerable to being targeted and killed, as witnessed in Srebrenica in 1995. Men and boys are also more likely to be detained and tortured,[124] as is the case in the Occupied Palestinian Territory[125] and Ukraine.[126] The targeting of men and boys has cascading gendered effects on women and girls, making the latter vulnerable to different forms of gendered violence in conflict, such as forced marriage and trafficking.

Women are largely invisible in the conduct of the war – both as decision-makers and fighters – which has a particularly gendered impact. Despite claims for their protection women and children – assumed to be non-combatants - are rendered victims through death, injury and forced displacement.[127] Targeting of civilian structures also has gendered implications, including those associated with women's caring functions, for instance medical and educational establishments. Statistics from Gaza indicate the significant impact of aggression on reproductive rights, maternal and infant health and that Israeli attacks have resulted in a 300 percent increase in miscarriages with the ensuing toll on psychological and physical health and community well-being.[128] Despite the repeated evidence of the impact of war in Gaza on women and children there has been no concerted attempt to protect or rescue them from Israeli aggression but only demands for a cease-fire and humanitarian aid.[129]

The widespread incidence of sexual and gender-based violence against civilians as a tactic and strategy of war to humiliate and terrorize the civilian population is another aspect of gendered aggression, and only too prevalent in Ukraine.[130] Sexual violence is used against men and boys in Ukraine and the Occupied Palestinian Territory to humiliate and feminize them, to destroy their social position as protectors of their territory and their families and thus their masculinity. Public stripping and forcibly lining them up reduces their humanity.

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[123] By atrocity crimes, we refer to genocide, crimes against humanity, and war crimes.

[124] See Independent International Commission of Inquiry on the Syrian Arab Republic: "'I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic," U.N. Index: A/HRC/37/CRP.3, 8 March 2018 for a detailed analysis of this process.

[125] Since 7 October 2023 greater numbers of Palestinian women have been arbitrarily detained in Israeli custody with reports of multiple forms of sexual assault; OHCHR, 'Israel/oPt: U.N. experts appalled by reported human rights violations against Palestinian women and girls', 19 February 2024 at https://www.ohchr.org/en/press-releases/2024/02/israelopt-un-experts-appalled-reported-human-rights-violations-against

[126] OHCHR, Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine, 27 June 2023.

[127] 'The very principles of the [CEDAW] Convention protecting women and girls are challenged when mothers in the Gaza Strip have been put in a situation of burying at least 7,729 children in the past four months, and 5,500 women don't know if they will be able to deliver their children safely within next month' Statement, CEDAW Committee, 16 February 2024.

[128] Maria Santillan, 'Beyond the Battlefield: How gender-based violence in the Israel-Gaza conflict is a reproductive rights crisis', 8 March 2024; on the disproportionate impact of the violence in Gaza on women and children see, OHCHR, 'Onslaught of violence against women and children in Gaza unacceptable: U.N. experts', 6 May 2024.

[129] '[T]he failure to mobilize shame for targeting violations that make meaningless the protection of women giving birth in destroyed hospitals and clinics; … and to accept miscarriage as an inevitable outcome that follows from targeting decisions in high-density civilian areas (and thus part of the calculation of civilian harm) coldly indicates that protection for maternity is a low-to zero priority for States currently engaged in hostilities.' Fionnuala D. Ní Aoláin, 'A Zone of Silence: Obstetric Violence in Gaza and Beyond', *Just Security,* 21 February 2024.

[130] U.N. Women and Care, *Rapid Gender Analysis of Ukraine*, 4 May 2022; also see https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/ by Melanie O'Brien.

Although policy makers and shapers are beginning to appreciate the need for adopting a gender lens to craft adequate responses to mass atrocities – from healthcare and rehabilitation to economic and social support and justice mechanisms – there is still inadequate attention paid to gender in developing law and policy to prevent such crimes from being perpetrated.

Aggression is not limited to overtly violent acts. Images that make the conflict appear like a game are demonstrations of the power that underpin aggression for instance Israeli soldiers deployed in Gaza cheering around destroyed buildings and laughing as they rummage through, fondle, wear and display underwear belonging to Palestinian women who have been displaced from their homes, disappeared, maimed or killed. In a quote from the reporting of the 2008 Operation Cast Lead military violence in Gaza:

> 'It feels like hunting season has begun … sometimes it reminds me of a PlayStation game. You hear cheers in the war room after you see on the screens that the missile hit a target as if it were a soccer game'[131]

The analogy reminds us that for many people hunting is aggression involving excessive violence against unarmed animals, cruelty, and humiliation. The call to treat Palestinians as animals is no accident.[132]

Aggressive words and communications are used strategically, both before physical recourse to aggression and subsequently. Different narratives and images of both women nationals and those of the enemy state are projected and exploited for national purposes – women as victims, as mothers, as breeders of the next generation, as fighters, as combatants, as community leaders, as protectors of the national heritage, and others. Gender stereotypes accordingly flourish throughout war. Russian propaganda about the war against Ukraine, for instance, engages gender-based rhetoric and imagery, with Russia describing Ukraine and its leading male figures as prostitutes[133] or as aggressors transgressing gender norms.[134] Such aggressive communications may serve to create popular support at home for the use of force, as well as to humiliate and belittle civilians in the targeted state, thereby creating a climate conducive to conflict-related sexual violence. Propaganda serves as incitement to individual aggressive acts within the context of the state acts of aggression. Incitement to aggression is not directly criminalized under international law,[135] although human rights law prohibits "advocacy of national, racial or religious hatred that constitutes incitement to … violence."[136] War propaganda is also prohibited.[137] But the linkage between the use of gendered imagery as war propaganda and thus incitement to aggression is not drawn.

Ukraine too has turned to gendered tropes to support its defense against Russian aggression: "If there is a feminist way to wage war, Ukraine wants everyone to know that this is how it is fighting its battle against Russia."[138] But the picture is complex; male fighters are exhorted to protect the country; "[p]rotecting the family and community is associated with being 'a good man,' and men who do not want to fight are often mocked and shamed for it." But this entails restrictions on

[131] From an article in Ha'aretz cited Hilary Charlesworth, above note 77.
[132] Yoav Gallant, Defence Minister of Israel, "We are fighting human animals;" *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel) Order of 26 January 2024, ICJ Rep 2024, para 52.
[133] Egle E. Murauskaite, "Russian Women in the Face of War against Ukraine," Foreign Policy Research Institute, 26 March 2024.
[134] NCGM Thematic Analysis, above note 97.
[135] As is incitement to genocide; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, arti III (c); Rome Statute of the ICC, art 25 (3) (e).
[136] International Covenant on Civil and Political Rights, 16 December 1966, art 20 (2).
[137] Ibid.
[138] NCGM Thematic Analysis, above note 97.

men's movement, as neither they nor trans women are allowed to leave the country. Women have long been accepted in the Ukrainian military but only more recently in combat positions. Ukrainian servicewomen "still face barriers to their work – from scepticism about their abilities, obstacles to promotion, to difficulties with basic yet vital matters such as proper uniforms and body armour. Women in the military are also at risk of sexual violence." In the midst of war, the Ukrainian government has adopted a new National Action Plan on Women, Peace and Security that includes as a priority addressing the situation of women in defense and security sectors.[139] Gender is used strategically by Ukraine intelligence, for instance through dating apps, to locate Russian troops, gather intelligence, and spread counter-narratives about the invasion.[140] Motherhood is exploited by Ukrainians phoning the "mothers of Russian soldiers, asking them to come to Ukraine and pick up their sons."[141] President Volodymyr Zelensky too has resorted to this gendered trope by exhorting Russian mothers to "check where your son is. And if you have the slightest suspicion that your son could be sent to war against Ukraine, act immediately to prevent him being killed or captured."[142] He has also made a different type of appeal to Russian mothers, urging them to break the silence in Russia about the war crimes and atrocities committed by their sons: "I want every mother of every Russian soldier to see the bodies of the dead."[143]

[139] Christine Chinkin and Oksana Potapova, "WOMEN, PEACE AND SECURITY National Action Plans in the U.K. and Ukraine" Policy Brief, Conflict & Civicness Research Group, 15 March 2023.
[140] NCGM Thematic Analysis, above note 97.
[141] Ibid.
[142] Ukraine President's Appeal To Russian Mothers: "Check Where Your Son Is," 12 March 2022 at https://www.ndtv.com/world-news/ukraines-volodymyr-zelensky-appeal-to-russian-mothers-check-where-your-son-is-2818645.
[143] Address by the President of Ukraine, 3 April 2022 at https://www.president.gov.ua/en/news/chas-zrobiti-vse-shob-voyenni-zlochini-rosijskih-vijskovih-s-74053.

3. Consequences

3.1 Aggressor State Obligations

Aggression constitutes a serious breach of international law and as such incurs obligations for the aggressor state. In violation of article 2 (4) of the U.N. Charter, aggressor states have an obligation to cease their wrongful conduct and to give assurances and guarantees of non-repetition.[144] The obligation is a continuing one for as long as the aggression continues and requires the aggressor state to bring an immediate, full, and permanent end to its act of aggression. Territory occupied as a result of the aggression must be reversed, and the *status quo ex ante* that existed before the aggression must be restored. The second core obligation that stems from the breach is the obligation to make full reparation.[145] The Human Rights Committee has asserted that "States parties engaged in acts of aggression … resulting in deprivation of life, violate ipso facto article 6 of the Covenant"[146] and must accordingly make reparation to the victims' families. Such reparation must strive to be transformative rather than simply punitive in nature and thereby address the root causes of aggression, including the gender systems that helped to normalize nationalism and militarism thereby fostering the toxic environment within which aggression became a rational pursuit.

3.2 Third State Obligations

Aggression always gives rise to third state obligations because every serious breach of a peremptory norm of general international law does so whether the norm is codified or not.[147] In the case of aggression, third state obligations include a positive duty to cooperate to bring to an end the act of aggression through lawful means; not to recognize any situation resulting from the aggression; and not to render aid or assistance in maintaining the act of aggression.[148] States seek to fulfil their responsibilities through such actions as adopting resolutions condemning unlawful uses of force, by calling for an end to such violence, including through peaceful dispute resolution, urging compliance with international law, establishing independent fact-finding bodies and asserting the obligation to allow for humanitarian access to areas in need. States have also utilized existing international judicial mechanisms such as the ICJ[149] and ICC[150] to attempt to bring about an end to the aggression. While the decisions of the ICJ bind only the states parties to the particular case, rulings by the Court with respect to states' obligations under treaty or customary international law alert all states to their legal obligations which they are expected to

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[144] Articles on the Responsibility of States, above note 17, art 30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ rep 2004, 136, para 150: "The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law."

[145] Articles on the Responsibility of States, above note 17, art 31.

[146] General Comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 70.

[147] Articles on the Responsibility of States, above note 17, arts 40 and 41. The ICJ has explained that some third state obligations do not derive only from treaty obligations but from general principles of law to which the particular treaty gives expression such as the obligation "to respect and to ensure respect" for the Geneva Conventions; *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory* (Nicaragua v Germany), Order of 30 April 2024, ICJ Rep. 2024, para 23;. The ICJ has previously declared these principles to be "intransgressible principles of customary international law;" *Legality of the Threat or Use of Nuclear Weapon*s, Advisory Opinion, 8 July 1996, 1CJ Rep 1996, 226, para 79.

[148] Articles on the Responsibility of States, above note 17, art 41 (2); this provision reflects a rule of customary international law and thus binding on all states.

[149] Eg.,Democratic Republic of Congo v Uganda, above note 107; *Legal Consequences of the Construction of a Wall ,* above note 144*; Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, AO, 19 July 2024 ICJ Rep 2024; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening), Provisional Measures, Order of 16 March 2022, ICJ Rep 2022, 211; Preliminary Objections, 2 February 2024, ICJ Rep 2024.

[150] ICC referral of the Situation in the State of Palestine, South Africa, Bangladesh, Bolivia, Comoros, Djibouti, 17 November 2023. Although aggression is not listed, the referral is grounded in "all matters related to the Israeli settlement regime" and "the unlawful appropriation and destruction of properties, including land, houses and buildings, as well as natural resources" thereby capturing in the language of international criminal responsibility and the wrongful act of the state, namely aggression as articulated in DoA, art 3 (a).

uphold.[151] Human rights bodies and special procedures of the U.N. Human Rights Council also urge states to cooperate in bringing an end to the violence.

Third states are under a legal duty not to recognize the acquisition or annexation of territory through the use of force,[152] an all-too-common objective of inter-state aggression as exemplified by Iraq in 1990,[153] Russia since 2014 and Israel since 1967. [154] Annexation by force amounts to an act of aggression in and of itself as is an occupation which is revealed to be "an intentionally acquisitive, segregationist and repressive regime" entailing an unlawful use of force.[155] The obligation not[156] to recognize the annexation of territory means that third states should abstain from any act that entrenches the authority of the aggressor state in the annexed territory. Such acts include, inter alia, entering into treaty relations with the aggressor state that has the effect of legitimizing the annexation;[157] establishing diplomatic missions within annexed territory;[158] or entering into economic and other relationships that perpetuate and consolidate the annexation.[159] In addition to the duty not to recognize the taking of territory by force, states have a duty not to render aid or assistance to an aggressor state that contributes to enabling, furthering or maintaining the act of aggression.[160] A state that allows its territory to be used by an aggressor state against another is itself committing an act of aggression, as for instance Belarus, in aiding and assisting in Russian aggression.[161] Further, the provision of weapons to an aggressor state that enables its commission of aggression or to maintain an unlawful situation resulting from aggression would amount to a violation of international law.[162] Under common article 1, state parties to the Geneva Conventions have an obligation to ensure that parties to an armed conflict (irrespective of whether the party is deemed to be the aggressor) comply with their international humanitarian law obligations. They must also act to bring before their courts persons alleged to have committed grave breaches.[163] State parties to the Rome Statute are required to cooperate

[151] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (Nicaragua v Germany) Order of 30 April 2024, paras 23 – 24.

[152] Declaration on Friendly Relations, above note 40; this prohibition applies independently of the lawfulness of the use of force.

[153] UNSCR 662, 9 August 1990, decided that the annexation of Kuwait by Iraq "under any form and whatever pretext has no legal validity, and is considered null and void."

[154] UNGAR 42/22, 18 November 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, para 10; Declaration on Friendly Relations, above note 40; UNSCR 2234, 23 December 2016 reaffirms that the establishment of settlements by Israel in the OPT "has no legal validity and constitutes a flagrant violation under international law," underlining the duty of non-recognition of acquisition of territory by force; UNGAR 77/126, 12 December 2022 calls on all states, "consistent with their obligations under international law and the relevant resolutions, not to recognize, and not render aid or assistance in maintaining, the situation created by measures that are illegal under international law, including those aimed at advancing annexation in the [OPT];" UNGAR ES-11/4, 12 October 2022, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, "Calls upon all States, international organizations and United Nations specialized agencies not to recognize any alteration by the Russian Federation of the status of any or all of the Donetsk, Kherson, Luhansk or Zaporizhzhia regions of Ukraine, and to refrain from any action or dealing that might be interpreted as recognizing any such altered status;" S/PV.9138, 27 September 2022, statements by SC member states refusing to recognize the outcome of the "referendums" in the Donetsk, Luhansk, Kherson, and Zaporizhzhya regions in September 2022 as de facto annexation by the Russian Federation.

[155] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 21 September 2022, A/77/356, paras. 71-72.

[156] Eg., János Allenbach-Ammann, "Western Sahara: EU Court annuls trade and fishery deals with Morocco," 29 September 2021. Western Sahara has been occupied by Morocco since 1975; see *Western Sahara*, Advisory Opinion, 16 October 1975, 1CJ Rep 1975, 12.

[157] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, 56, para 122.

[158] Eg., the Trump administration's decision to move the U.S. embassy to Jerusalem prompted huge global outcry; UNSCR 1060, 18 December 2017 (supported by 14 states) was vetoed by the US; S/PV.8139.

[159] Eg., the Fisheries Agreement between the EU and Morocco depends on stocks offshore Western Sahara; it has been subject to much litigation within the EU including a decision in 2018 by the EU Court of Justice declaring it illegal. Various attempts have been made by the parties to affirm the legality of the agreement and a final decision is expected in 2024; Western Sahara Resource Watch. "Report: EU-Morocco fisheries depends on illegal occupation," 8 March 2024.

[160] Articles on the Responsibility of States, above note 17, art 16 concerns aiding and assisting in the commission of an internationally wrongful act, such as aggression; art 40 addresses situations arising from the serious breach of a peremptory norm, that is "after the fact" conduct.

[161] DoA, art 3 (f); UNGAR ES-11/1, 2 March 2022, Aggression against Ukraine, para 10: "Deplores the involvement of Belarus in this unlawful use of force against Ukraine, and calls upon it to abide by its international obligations."

[162] Although the Arms Trade Treaty, 2013 does not prohibit export of arms to states that act in violation of U.N. Charter art 2 (4), or for that matter engage in aggression, since aggression constitutes a serious violation of international law, the provision of weapons by a third state would nonetheless amount to aiding and abetting the aggressor state.

[163] Eg., Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art 146.

fully with the Court[164] and to comply with requests made by Court, such as those relating to the arrest and transfer of individuals to the Court's jurisdiction in respect of any listed offence, including the crime of aggression.

Third states should also ensure that gender is fully integrated into the design and delivery of post-conflict "peace" agreements as set out in the Security Council's agenda for Women, Peace and Security.[165] This also encompasses reparations to secure gender justice and that reparations are devised to be transformative[166] by dismantling the gendered, raced, classed structures of power that contributed to the conditions that gave rise to the aggression.[167]

Third state obligations also include obligations arising from membership in international organizations such as the U.N., although the latter have their own separate and distinct obligations as elaborated pursuant to the ILC Draft articles on the responsibility of international organizations.[168] Article 42 details the obligations of international organizations in the event of a serious breach of an obligation, including aggression, by states. Paralleling the obligations of third states, international organizations must cooperate to bring to an end through lawful means any serious breach[169] and not recognize as lawful a situation created by a serious breach nor render aid or assistance in maintaining that situation.

[164] Rome Statute of the ICC, art 86.
[165] Eg UNSCR 1325, para 8 calling upon all states "when negotiating and implementing peace agreements, to adopt a gender perspective."
[166] On "transformative" reparations see Special Rapporteur on Violence against Women, Reparations for women subjected to violence, A/HRC/14/22, 23 April 2010; Ruth Rubio-Marin (ed), *The Gender of Reparations* (CUP, 2009).
[167] Louise Arimatsu and Christine Chinkin, *Gendered Peace through International Law* (Bloomsbury Publishing 2024), ch 18, Transformative Reparations and Gendered Peace.
[168] Draft articles on the responsibility of international organizations, 2 YBILC , 2011, Part Two.
[169] *Legal Consequences of the Construction of a Wall*, above note 144, para. 159. *Legal Consequences Arising from the Policies and Practices of Israel*, above note 149,para 280.

4. Conclusions: Preventing Aggression

Preventing aggression is not as complex or challenging as states would have us believe. Paradoxically, it is the preparation for war and the waging of war that are far more demanding and resource intensive since they require the creation and coordination of militarized structures and institutions (public and private) and the normalization of militarism in political, economic, social, and cultural affairs. Gender systems knit these processes together and have been used, throughout history, by those holding political and military power to: naturalize the preparation for war; justify the resort to armed force (offensive and defensive, lawful and unlawful); and the waging of war. Militarization is normalized throughout societal structures and cultures through many largely unchallenged assumptions: that the state is best placed to both define and protect against threats; that armed force is the ultimate resolver of inter-state disagreement; that resort to collective violence is a rational pursuit; that hierarchical relations are necessary to effective action; that a state without a military force is both naïve and irresponsible (feminine); that the possession and use of weapons are necessary to guaranteeing security and peace; that in war those who are feminine need armed protection; and that any man who refuses to engage in armed violent action is a traitor and jeopardizing his own status as a manly man.[170] Gender norms are thus embedded in and help to consolidate these features that together constitute the militarized world we inhabit.

The consequence is that rather than commit to non-violence, states and more specifically ruling elites across all social sectors – political, military, law enforcement, commercial, industrial, mainstream media, and even universities – have repeatedly resorted to the threat and use of armed force as an appropriate and effective means by which to resolve inter-state differences and domestic dissent that calls for non-violence. Within and between states, militarism and the use of armed force has been internalized and is structural; the separation between the military and law enforcement branches has been eroded. The appeal of the securitized state and the war machine far exceeds any real interest in investing in the peace machine; ruling elites fear and abhor peace activism. As bell hooks observes, patriarchal methods of organizing nations, "especially the insistence on violence as a means of social control, has actually led to the slaughter of millions of people on the planet."[171]

Dismantling the gender systems that rationalize violence will not prevent aggression. But preventing aggression cannot succeed without dismantling the gendered norms and belief systems that have been internalized, normalized, and sustain other systems of power such as race, militarism, and nationalism that enable states to rationalize violence and war. Common to both aggression and mass atrocities are supremacist ideologies and belief systems that subjugate and make reasonable the killing of other socially constructed groups based typically on their nationality, race, and ethnicity. Such ideologies cannot be eradicated through recourse to force; the existence of standing armies have done little to deter an aggressor or prevent mass atrocities but rather have provided the material means by which aggressor states are able to actualize their stated ambitions.

[170] Cynthia Enloe, "Understanding Militarism, Militarization, and the Linkages with Globalization using a Feminist Curiosity" in *Gender and Militarism: Analyzing the Links to Strategize for Peace* (Women's Peacemakers Program, 2014).
[171] bell hooks "Understanding patriarchy" in *The Will to Change: Men, Masculinity and Love* 2004.

In closing, we reflect on the assertion by states that aggression is "the most serious and dangerous form of the illegal use of force"[172] to caution against the inherent underlying assumptions. That acts of aggression are regarded as a particularly pernicious form of unlawful use of force reinforces the binary distinction between lawful and unlawful uses of force, thereby legitimating lawful uses of force to erase the harm, suffering, and destruction of warfare that always adversely and disproportionately impacts certain categories of persons defined by their identity, including gender. Moreover, that the resort to armed force is lawful in some circumstances helps to rationalize the very act of collective violence and to normalize the creation and maintenance of armed forces, making the design, production, accumulation, and use of weapons a logical pursuit.[173] The distinction between lawful and unlawful armed force helps to reinforce the establishment of armed forces and that such forces are necessary to the protection of their national security interests and the maintenance of international peace and security.[174] The dominance of this logic diverts attention from the fact that a state with no armed forces or the requisite control over armed groups that can mount a military operation with effects that are comparable to the armed forces of a state cannot by definition fall foul of aggression. As elaborated, gender norms are core to rationalizing the need for armed forces (the gendered state as masculinized protector) comprising primarily young men (who must be trained to kill and destroy to be effective protectors but also to be wounded and even die) and equipped with the necessary weaponry to do so (reinforcing the age-old link between masculinity, weapons and citizenship). Gender norms likewise prop up the idea that the resort to armed force is a rational pursuit in maintaining peace and security, understood as national security.

International law does little to disrupt any of these assumptions. The U.N. Charter may, on the one hand, prohibit the use of force, but it concurrently adopts and consolidates a militarized logic that paradoxically provides the basis for aggression rather than commit unconditionally to non-violence to resolve disputes. [175] And rather than address the root causes of disputes that are frequently founded on inequalities, oppression and injustice, states maintain and often fuel inter- and intra-state inequalities. For instance, instead of reducing military expenditure and availability of weapons so as "to permit the possible allocation of additional funds for social and economic development, in particular for the advancement of women,"[176] states spend an inordinate proportion of their resources investing in the preparation for the eventuality of war as verified by the Stockholm International Peace Research Institute Military Expenditure Database.

For the patriarchal state, the expenditure on arms, which signifies its capacity to threaten or use force, is core to its identity, coded male. Illegality aside, aggression is the ultimate embodiment of masculinized authority and a violent gesture that seeks to emasculate by demonstrating the failure on the part of the victim state – also coded male – to protect its citizens.[177]

[172] DoA, preamble; Resolution RC/Res.6, annex, Kampala, 2010, Understanding Six.
[173] Binary logic also frames the field of weaponry distinguishing between lawful and unlawful weapons thereby legitimating the former.
[174] The U.N. system is based on the assumption of national security as encapsulated by the prohibition of the use of force against the "territorial integrity and political independence" of states.
[175] U.N. Charter, 1945, art 2 (3) and chapter 6 require member states to "settle their international disputes by peaceful means."
[176] Beijing Platform for Action, Report on the Fourth World Conference on Women, Beijing 1995, para 143.
[177] Iran's armed response to Israel's attack on its Damascus consulate in April 2024 and the desire on the part of Israel to respond to it with force are both demonstrative of the militarized gendered rationale that serves to escalate the violence between states.

Biographies

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