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International Criminal Law

Using or Abusing Legality?

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To Janice and Hector.

Thank you

Table of Cases

Radhabinod Pal, *Dissentient Judgment of Justice Pal: International Military Tribunal for the Far East* (1953)

Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another [2012] eKLR

R. v Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42

R. v Horseferry Road Magistrate's Court, ex p Bennett (No3) [1995] 1 Cr App R 147, 149

R. v Dedan Kimathi S/o Wachiuri [1956] eKLR*Republic of Fiji v Prasad* (Unreported, Court of Appeal of Fiji, 1 March 2001, Civil Appeal No. ABU0078/2000S)

Ridgeway v The Queen (1994–1995) 185 CLR 19

S.S. Lotus (France v Turkey) (1927), Permanent Court of International Justice Publications, Series A, No. 9, at 18 (Sept. 7)

Southeast Mortg. Co. v Sinclair, 632 So. 2d 677(1994)

The State v Dosso [1958] 2 PSCR 180

The Legality of the Threat or Use of Nuclear Weapons, International Court of Justice (Advisory Opinion of 8 July 1996) General List no. 95

The Prosecutor v Jean-Paul Akayesu Case No. ICTR-96-4-T Decision of 2 September 1998 at para 521

The Prosecutor v Siméon Nchamihigo Case No. ICTR-2001-63-DP before Navanethem Pillay J. Decision of 8 May 2002 On the Defence Motion Seeking Release of yhe Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor

The Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva Case No. ICTR-98-41-T ICTR Judgment and Sentence of 18 December 2008

Uganda v Commissioner of Prisons, Ex parte Matovu [1966] EA 514

United States of America v Alstötter et al. (The Nuremberg Trials: 'The Justice Case') 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948) <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm#War%20Crimes%20and%20Crimes%20Against> at 6 August 2009

United States v Alvarez-Machain, 504 U.S. 655 (1992)

United States v Araki, Dissenting Opinion of Justice Pal, in 105 The Tokyo Major War Crimes Trial 36-7 (R. John Pritchard, ed.) (1998) at 37

US v Marion 404 US 307, 324 (1971) 61

USA v Von Leeb et al. (The German High Command Trial) Case No. 72 United States Military Tribunal, Nuremberg (1948) Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XII, London, HMSO, 1949

Velvel v Johnson 287 F. Supp. 846 (D. Kan. 1968)

Walton v Gardiner (1993) 117 CLR 378

Williams v Spautz (1991–1992) 171 CLR 509

Table of Legal Instruments

1215	Magna Carta 25 Edw. I, c. 29 (1297) (1215)
1814	United States Constitution
1899	*Hague Convention For the Pacific Settlement of International Disputes (Hague I)* (29 July 1899)
1907	*Hague Convention on the Opening of Hostilities* (Hague III); 18 October 1907
1907	*Pacific Settlement of International Disputes (Hague I)*; 18 October 1907
1919	*The Covenant of the League of Nations*
1928	'Kellogg–Briand Pact; 1928' *United States Statutes at Large*, vol. 46, part 2, 2343 Articles 1–3
1945	London Agreement of 8 August 1945 with the Charter Annexed, subsequent trials on Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55 (1946)
1945	*Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal*, London, 8 August 1945
1945	*Charter of the United Nations*
1946	*The Charter of the International Tribunal for the Far East*
1946	*Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal*, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946
1970	*Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* UNGA Resolution 2625 (XXV) (24October 1970)
1974	*Definition of Aggression,* United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974
1976	*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force 23 March 1976, Article 9 (1)
1978	*Declaration on the Preparation of Societies for Life in Peace,* UNGA/ Res/33/73 (15 December 1978)

1981	*African [Banjul] Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1520 UNTS 217, entered into force 21 October 1986
1982	*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 assented to 29 March 1982
1984	*Declaration of the Right of Peoples to Peace,* UNGA Res 39/11 (12 November 1984)
1993	United Nations Security Council Resolution 827(1993) with the Statute of the International Criminal Tribunal for the Former Yugoslavia Annexed
1994	*Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994)
1995	*International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence* Adopted on 29 June 1995 pursuant to Article 14 of the *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994).
1998	*Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3, art 83(2) (entered into force 1 July 2002).
2002	Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002, Statute of the Special Court Annexed

Preface

Law and violence have a deeply ambiguous relationship to each other. The law is supposedly the antithesis of violence and yet the law is at the same time the legitimation and institutionalization of some forms of violence. This collection of essays weaves disparate threads together organized around the core argument that criminalizing violence involves imposing a monopoly on the legitimate use of force. This inquiry seeks to construct and unpack a legal argument for a legal answer to a legal problem: namely, whether (and if so how) the law itself provides an answer to the question of whether law is a suitable medium or not to resolve the related issues of the prevention of violence, the illegal use of force and the criminality of aggression in international law. It looks at the law on the use *for* force (in saving and protecting life) rather than the use *of* force (in inflicting death, destruction and injury). The stakes raised in this inquiry reveal the law as a line that separates, as well as invests with meaning, the boundary dividing life and death. These lines of inquiry therefore have implications in both law and jurisprudence generally.

The inquiry was prompted by a certain discrepancy (or development) in legal opinion regarding legally regulating violence that has arisen in the past 60 years or so. Justice Robert Jackson, speaking for the United States of America at the end of the first Nuremberg Trial in 1945, punctuates this period at one end. He said it was illegal and criminal for any 'nation to redress grievances or seek expansion by resort to aggressive war'. At the other end of the period is Mr Bill Richardson, again speaking for the United States, at the United Nations Conference on the establishment of the International Criminal Court in 1998. He said that acts not clearly criminalized under international law should be excluded from the definition of aggression and that it was therefore premature to attempt to define aggression in terms of individual criminal responsibility.

This project takes its cue from the arguments, exemplified by Bill Richardson's statement, against legally defining the crime of aggression. These arguments by default (either designed or accidental) favour instead political action such as in the United Nations Security Council against the International Criminal Court in framing matters of aggression and the use of force. The focus on the United States is in recognition of both its indispensable role and pivotal influence in developing international criminal law and its preponderant military force. This correlation of law-making power with preponderant force is no coincidence at all.

Although an adequate definition of aggression is itself not the core problem, issues resulting from the history of defining aggression arise once the chequered evolution of attempts at codification is examined. The focus is therefore on the

conceptual definability of a crime of aggression, which is a legal-theoretical matter, and not on the actual process of providing a definition, which is a matter decided by the political process that achieved the necessary consensus. It is therefore not so much an issue of the lack of law in defining aggression in international criminal law as it is one of assembling adequate political consensus to craft an objective legal standard sufficiently oblivious of military might.

The inquiry here tests whether the power to inflict death and injury is outside or inside the law. This project questions whether using the law to address political violence would legally entail an abuse of legality or not. Abuse of legality means capturing legal rules, principles and processes in ways that undermine the rule of law and human rights, but doing this in the name of upholding the rule of law or protecting human rights. This takeover or mimicry of law makes it difficult to discern between what is good faith application of legal principle and what is a travesty of it.

My intuition is that even in the absence of specific laws governing an ambiguous state of facts, there is always legality as an approach to unstructured situations. This legality (as a way of doing things) exists side-by-side with, and even without, specific laws. Laws are evidence of legality and not the other way round. Legality in that way justifies acts even in the absence of clearly enabling structures. Given this, the task I set out to do is to trace a line dividing politics and law that assigns the characterization of aggression to legality. The argument therefore contends that there is an emerging but contested global monopoly on the legitimate use of force. This monopoly is oriented towards future human security and global stability that are necessarily predicated upon legality as a stabilizer of future expectations.

In other words, when confronted with the threat or use of violence, the questions posed are recast to whether there is a distinction between just and unjust force and violence, who decides this, how, and with reference to what. Couched like this, the questions are more amenable to processing within the legal system from legislation to adjudication and enforcement, rather than by brute force, which would be the default mode of dispute resolution in the absence of peaceful dispute settlement. Most importantly, and this is the crux of the matter, even though brute force is brought to bear, this will in itself not change the law but only breach it.

Further, where it is claimed that such use of force in fact has changed the law, this violence is not just *contrary* to law but also *against* the law. That is, it is simultaneously a crime of aggression and an abuse of the legal process and undermines global order. This is violence against the notion of law itself, not only against its provisions but against the very order of normality that makes the law intelligible. This is demonstrably on the wrong side of the line separating self-defence from taking the law into one's own hands. Actors that claim the justification of law deserve, as it were, 'their day in court' to prove or have their claims disproven in an appropriate manner and forum.

Consequently, the argument is that law is the appropriate medium within which to discuss regulating violence in a globalized society. The thesis pursued is that 'peace', normatively speaking, does not require the absence of coercion but merely presupposes a monopoly on the legitimate use of force. This legitimacy

should be considered as a matter of and for pre-existing standards of greater or lesser detail (that is, legality). To orient the debate, this relates to considerations associated with consolidating the international community as a multifaceted pluralistic society. These considerations increasingly indicate legality as the means to approach the use of force from the local to the global level as it affects individuals, communities, States and humanity alike.

Further, using legality would substitute the terrorist/freedom fighter paradox for a general objective legal standard instead of singular subjective self-interested stances. Therefore, in place of mutually exclusive self-justified violence by States, an all-inclusive framework of rules and exceptions would generally apply in discerning competing claims. In criminal law terms, possible exceptions, justifications, excuses or defences may include self-defence, humanitarian intervention, the responsibility to protect, measures undertaken to combat terrorism and the like.

To summarize, the project is organized by arguing against the objections opposing further legalization of the use of force and consequently proposing rendering inapplicable the relevant customary international law. These revolve around the propositions that law is either unable or unsuitable to resolving the role of force in international relations and that this is best left to the political sphere (effectively therefore in the realm of combat with no normative distinction between sides). However, implicit in the argument is that the usefulness or inability of the law is for the law to decide, not a literal trial by battle. This is because the legal system is itself best placed to judge on its own misuse or any abuse of legal process, which would essentially involve taking life (and liberty or property, which relate to quality of life) without due process of law; in other words, *violently*, which is precisely what is at stake.

The method used here analyses of the observation and description of the legal/illegal distinction when applied to force, violence or aggression. This distinction is drawn through an exclusion and inclusion mechanism that alternately protects life from and exposes it to force/violence. This process is underwritten by a functional, but not essential, distinction between force (which is sanctioned by law) and violence (which is outside or contrary to law according to law).

Specific to this process is criminalizing violence and institutionalizing force by withholding legitimacy from the latter and granting it to the former through a claimed monopoly on a legitimacy that is politically contestable but beyond legal reproach. The work addresses this process by highlighting the dialectic of inclusive exclusion and exclusive inclusion through the deconstructive parsing and examination of the language contained in critical phrases and terms that were arrived at, or departed from, through the political process.

I employ a critical theoretical methodology to interrogate the relationship between law and violence in the context of communal order and disorder. Critical theory makes it possible to analyse international society as a whole in terms of place and time but also values interdisciplinary perspectives to supplement the law, including politics and not ignoring economics. This is to make the implicit

deep structural debate explicit and, incidentally but more importantly, bring to light a method for discerning between competing teleological claims that pit law against politics and vice versa in defining violence and aggression.

In bringing to light this method for discerning between legal and political claims, I need an analytical and descriptive theory that purportedly considers different social perspectives simultaneously yet separately, while leaving each supreme in its domain. That is, what is required is a meta-narrative or paradigm that provides some measure of objectivity without solely relying on legal arguments to promote exclusively legal solutions for a social problem. For this purpose, sociological systems theory saves the argument from lifting itself up by its own bootstraps because it assigns certain characteristics to social systems, which are reducible in inner logic to binary coding both in political communication (friend/enemy) and legal communication (lawful/unlawful); all of which much simplifies the task of classification.

I contribute a prescriptive and normative perspective on the back of this descriptive systems theory. This is accomplished through utilizing the descriptiveness in assigning a truth/untruth value to competing teleological arguments. These arguments dispute between what is and what is not customary international law, in terms of what use the law is in the context of violence.

The methodology brings together (in an overall framework of a shared relation to 'life') Niklas Luhmann's description of humans as divided into mind and body (or in his terms, 'psychic' and 'organic systems'), as well as Michel Foucault's 'biopolitics' and Giorgio Agamben's conjunction of *Zoë* or 'bare life' and *Bios* or 'social life' in the human, as all describing an identical phenomenon. This phenomenon is the contemporary centrality of 'life and death' in social control as means and end, tool and material. This phenomenon may be named 'biolegality', meaning law oriented to life as its referent and justification and therefore legitimacy. Elements of Niklas Luhmann's sociological systems theory inform the research paradigm within which I work. It focuses on communication and assigns humans a decentred role as part of society's environment, comprising of the mind and body as separate systems unified in the human. Further, because Niklas Luhmann regarded the law as society's immune system, he explicitly inflected it within a biological register. The layered method chosen reflects that the social debate sought to be untangled and unpacked is convoluted with political arguments dressed up as legal ones and with legal arguments disparaged as political ones.

Consequently, critical theory is the genre within which I write, with a systems theoretical sensibility. Luhmann, Foucault and Agamben provide for both theoretical conceptualization and empirical practice in their identification of social processes linked to or mimicking life processes, thereby demonstrating that life is itself conceptually both the subject and object manipulated in the process. I scrutinize not the human actors as such but their communicative acts. Communication and language are the core concerns and the specific subject and focus of my work.

This study distinguishes force from violence by initially uniting them in the value-neutral concept of coercion. It subsequently distinguishes them as force being coercion used for social ends (for example, law enforcement or self-defence), while violence is coercion for anti-social ends (here the crime of aggression is portrayed as threatening collective security and peaceful change). With reference to human society writ large, social/anti-social is congruent with friend/enemy in the political sphere and lawful/unlawful in the legal system. The resolution therefore to the current debate is more legalization that deeper embeds the use of force in society for social ends and either blackens or whitens the current grey areas that are still rhetorically insisted upon as a matter for politics. This is especially relevant in highly politicized contexts, such as war or revolution and the transition through to peace and justice.

The project therefore observes the manipulation, apportionment and direction of life and death processes in society by tracing an overarching but contingent trajectory of an expanding and consolidating line that draws and dissolves boundaries within it. This is theory building that looks upon law and violence as a self-referential bundling in which the terms opposed only make sensible meaning in relation to each other. At its simplest, law is not violent and violence is not lawful. This thesis will propose some amelioration in the actual application of law through debating its effects on individuals and communities.

Chapter 1 inquires into the responsibility to protect civilians from political violence. The chapter inquires into the expansion of the rule of law in international law as it relates to the use of force. The consequential but regrettable necessity of a forcible response to real or threatened mass atrocities underscores this fundamental undesirability of violence versus its inevitability. The compromise reached is that force, although inevitable, should only be used sparingly. Chapter 2 is a theoretical and empirical investigation into whatever causal link there may be between international criminal trials and preventing political violence through exemplary prosecutions. Specifically how do representative trials of persons accused of having the greatest responsibility for the most serious crimes of concern to the international community as a whole, supposedly bind recurrent violence? The argument pursued is that by using an accused as an example, a court engages in an indirect and uncertain substitution of personal rights for social harmony and order. Chapter 3 argues that in international law the Hobbesian social contract intended to prevent violence works in exactly the same way as a Faustian pact. That is to say, even when it is effective whatever it achieves could still have been realized without it. But once utilized there is no objective proof of its contingency likewise just as before it is resorted to there is no proof of its necessity. Essentially it creates its own reality poised as it is between necessity and contingency.

Chapter 4 expounds on the linkages between the crime of aggression and the abuse of legal process. It explores how the doctrine of the abuse of legality relates to aggression from local to global contexts. This chapter argues that society politicises violence when it is indistinguishable from force by dividing it into a binary pairing of social/anti-social. Society permits, if not encourages, the former

(as law enforcement) and abhors the latter (as law-transgressing violence). This is how force is developed conceptually through legal tools by being accorded social recognition. What is therefore value-neutral in a mythical state of nature becomes decried in society (partially) and exalted (partially), dependent on whether society characterizes it as social or anti-social. Chapter 5 describes a legal methodology for determining matters of aggression. It argues that society overall has separated law from politics by imposing rules on utilizing force, thereby separating power from authority: that is, mere ability from legitimacy. Therefore, in pondering the applicability of legality (the effect of rules) versus the inapplicability of legality (the freeing up from rules), judges look to the society's general will as constructed via the prism of legal text.

Chapter 6 discusses aggression in the context of international criminal justice as opposed to other possible alternatives. The argument pursued is that, viewed through the prism of law, the debate on prosecuting criminal aggression at the International Criminal Court, while explicitly referring to criminality, implicitly refers to an international legal order. This order promotes obeying the force of law rather than the law of force. Chapter 7 examines biolegality or the 'law of life itself'. This chapter argues that the law not only regulates both the states of life and death but also defines the boundary between them. The law does this by assigning rights and duties between the living to create different forms of and entitlements to life. This 'vital' process of the law profoundly influences social relations and can be abused with deadly consequences. Chapter 7 discusses the deficiencies of law when facing overwhelming violence. The chapter explains that extreme violence shows up certain inadequacies in law that go beyond mere systemic lack (of law and order resources) to conceptual befuddlement (given a monopoly on violence, when is might not right?). Nevertheless, the argument is that there is a meaningful and consequential distinction between a *monopoly* on the legitimate use of force and a *legitimate* monopoly on the use of force.

Chapter 8 addresses the illegal use of the legal system. The argument is that globally, society functions optimally when social systems, such as the legal system, have overall control of their processes, especially in terms of being independent of unmediated political intervention. With law specifically in mind, the chapter reconstructs the notion of abuse of legality as expressing the teleology of law according to the law and therefore as the principal juridical weapon against political machination in discerning between law creating and law destroying violence.

Chapter 9 examines the law on aggression up to immediately after the Second World War and as reflected by debate around the setting up of the International Criminal Court. The argument is that, in discussing the legality or illegality of the use of force in its normative manifestation, there is a universal yet inarticulate major premise posited, which at its simplest says 'there is a right to peace'. This right to peace and concomitant duty to keep the peace inheres in the nation state but also, as the chapter argues, in individuals through the operation of international human rights instruments and customary international law. Peace at its most basic