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AGGRESSION IN LEGAL LIMBO: A GAP IN THE LAW THAT NEEDS CLOSING

DONALD M. FERENCZ*

At “The International Criminal Court at Ten” conference held at the Washington University School of Law in St. Louis, the first prize in the inaugural Benjamin Ferencz Essay Contest was awarded to Matthew Gillett and Manuel J. Ventura, co-authors of *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*.¹ The contest was funded by The Planethood Foundation, which my father, Ben Ferencz,² and I established in 1996. As discussed below, the International Criminal Court’s present inability to exercise its jurisdiction over the crime of aggression leaves a glaring gap in the enforcement of international law. The essay contest was intended to explore whether that gap might be narrowed using the Court’s existing jurisdiction over crimes against humanity.³

This Note will elaborate on the informal impromptu remarks that I offered during the contest awards program.⁴ After briefly addressing the current status of the crime of aggression, I will relate some of my own

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1. Published in this symposium.

2. Former Chief Prosecutor for the United States in the Einsatzgruppen case, a trial held as part of the Subsequent Proceedings at Nuremberg. For details of his writings, lectures, and life’s work toward criminalizing the illegal use of armed force, please see his personal website at www.benferencz.org.

3. The contest was administered under the auspices of the Whitney R. Harris World Law Institute, which elected to honor my father by way of associating his name with the contest. The Institute’s Director, Professor Leila N. Sadat, has recently been appointed a Special Advisor on Crimes Against Humanity to the Prosecutor of the International Criminal Court. For more information about the contest and the award winners, please see the contest website at <http://law.wustl.edu/harris/pages.aspx?id=9126>. As discussed below, significant efforts are already under way to help close the gap caused by a lack of current jurisdiction over the crime of aggression, by working to activate the Court’s jurisdiction over aggression as soon as possible—hopefully by 2017. The crimes against humanity track is simply another approach which, in the absence of aggression jurisdiction, may help deter those who would undertake actions resulting in crimes covered by the Rome Statute.

4. The comments that I made at the awards ceremony were somewhat personal and also touched on the behind-the-scenes father-son dynamics pertaining to the development of the argument that the illegal use of armed force may be prosecutable as a crime against humanity. My father wasn’t present at the time, so this is his chance to find out what I said about him behind his back. This Note is by no means intended as a comprehensive discussion, but rather as a very rudimentary sketch of only a few of the fundamental issues associated with the inquiry which was the subject of the contest itself. We are currently in discussions regarding further writing competitions to continue the exploration of this matter.

reaction to my father's conviction that something must be done—and done *now*—to hold accountable those who would undertake the illegal use of armed force, subjecting them, if possible, to prosecution for crimes against humanity. Finally, as an indicator of the early development of his own thinking on this subject, I include, as an Appendix, a short piece he wrote prior to the contest, which I believe readers of this Note may find of interest.⁵

I. BRIEF BACKGROUND ON EFFORTS TO CRIMINALIZE THE ILLEGAL USE OF FORCE

As I've observed elsewhere, the principle that the illegal use of armed force is a crime didn't originate at Nuremberg.⁶ In 1758, the Swiss jurist, Emmerich de Vattel wrote, in his *Law of Nations*, that whoever takes up arms without a lawful cause:

can absolutely have no right whatever: every act of hostility that he commits is an act of injustice. . . . He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his *crimes*. He is guilty of a *crime* against the enemy, whom he attacks, oppresses, and massacres without cause: he is guilty of a *crime* against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity,—against those of his subjects who are ruined or distressed by the war,—who lose their lives, their property, or their health, in consequence of it: *finally, he is guilty of a crime against mankind in general*, whose peace he disturbs, and to whom he sets a pernicious example.⁷

5. I do so at his request, but also because it's something I discussed at the program in St. Louis. Anyone from the New York City area (as I am) knows that such a coupling of two things for the price of one is sometimes referred to as a "twofer"—especially with respect to theatre tickets sold at Times Square. His piece, "A New Approach to Detering Illegal Wars," reproduced here, has not been reproduced elsewhere in print, but is available online at his website at <http://www.benferencz.org/index.php?id=4&article=106>.

6. See, e.g., Donald M. Ferencz, *The Crime of Aggression: Some Personal Reflections on Kampala*, 23 LEIDEN J. INT'L L. 905–08 (2010), available at http://journals.cambridge.org/abstract_S0922156510000464...http://journals.cambridge.org/action/displayFulltext?type=1&fid=7926037&jid=LJL&volumeId=23&issueId=04&aid=7926035&fromPage=cupadmin&pdftype=6316268&repositor=y=authInst.

7. Emmerich de Vattel, *The Law of Nations of the Principles of Natural Law*, in FOUR BOOKS, at bk. 3, p. 489 (Joseph Chitty trans., 1833) (1758) (emphasis added), available at http://files.libertyfund.org/files/2245/Vattel_1379_Bk.pdf.

Almost 200 years later, in his opening statement before the International Military Tribunal at Nuremberg (“IMT”), the American Chief Prosecutor, Robert Jackson, echoed de Vattel in arguing that once an illegal war has been started, the killings that flow from it are crimes for which the instigators of the war should be held criminally accountable:

This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times—aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it *to set in motion evils which leave no home in the world untouched*.⁸

His British counterpart at the IMT, Sir Hartley Shawcross, in his closing statement, put it this way: “The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where the war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands.”⁹

Aggressive war-making was charged before the IMT as “crimes against peace”¹⁰ and was indelibly branded by the Court as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”¹¹

When the Rome Statute of the International Criminal Court was negotiated during the summer of 1998, the drafters included aggression as one of the four core crimes over which the Court would have

8. See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (Pub. Nuremberg, Germany 1947) (emphasis added), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf.

9. 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 458 (Pub. Nuremberg, Germany 1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf (with special thanks to Manuel J. Ventura and Matthew Gillett, who brought this quotation to my attention by citing it in their winning essay).

10. Article 6(a) of the Charter of the International Military Tribunal (IMT) covered “*CRIMES AGAINST PEACE*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.” See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (Pub. Nuremberg, Germany 1947), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

11. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (Pub. Nuremberg, Germany 1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf.

jurisdiction.¹² As a compromise, however, it was agreed in Rome that the Court would not be able to exercise its jurisdiction over aggression until a definition of the crime, as well as provisions delineating the manner in which the Court would be able to exercise its jurisdiction over aggression, were adopted within the Rome Statute.¹³ Such provisions were intended to be adopted at a Review Conference, which was to be convened seven years after the date on which the Rome Statute came into force.¹⁴

The Review Conference on the Rome Statute of the International Criminal Court was held in Kampala, Uganda in 2010. There, representatives of the Assembly of States Parties agreed by consensus to adopt amendments to the Rome Statute defining the crime of aggression and setting forth the conditions under which the Court may exercise its jurisdiction over the crime.¹⁵ However, the provisions granting the Court active jurisdiction over the crime—though adopted by consensus—require that, before they can become effective for anyone, they must be reapproved by the ASP (some time not before 2017), *and* be formally ratified by at least thirty States Parties.¹⁶ Even once so activated, the

12. Rome Statute of the International Criminal Court art. 5.1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

13. Article 5.2 of the Rome Statute of the International Criminal Court, prior to its being deleted by the amendments which were the subject of the Kampala resolution on aggression, stated that “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Rome Statute, *supra* note 12, art. 5.2.

14. Article 123 of the Rome Statute provides, in pertinent part: “1) Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.” *Id.* art. 123. The Statute came into force on July 1, 2002.

15. Rome Statute, *supra* note 12, arts. 8 *bis* (definitional provisions), 15 *bis* and 15 *ter* (jurisdictional provisions) (as amended).

16. See *id.* arts. 15 *bis* ¶¶ 2–3, 15 *ter* ¶¶ 2–3. For an excellent overview of the Kampala Review Conference and the crime of aggression, see Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT’L L. 517 (2011); see also Claus Kress & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179–1217 (2010), available at <http://jicj.oxfordjournals.org/content/8/5/1179.full.pdf+html>; Robert L. Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. L. F. 417 (2010), available at <http://www.derechos.org/nizkor/aggression/doc/kampala2.html>; Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49–104 (2011), available at <http://nyuglobalcitizen.files.wordpress.com/2011/04/aggression-kampala-article-final.pdf>; Drew Kostic, *Whose Crime is it Anyway? The International Criminal Court and the Crime of Aggression*, 22 DUKE J. COMP. & INT’L L. 109–41 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=djcl>; Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 9 J. INT’L CRIM.

Court's aggression jurisdiction may still be significantly limited: unless the Security Council refers a situation, all States Parties can opt out of the Court's jurisdiction over the crime, and aggression jurisdiction will not apply to the nationals of non-States Parties or with respect to acts committed on their territory.¹⁷

Although a global campaign is underway to encourage ratifications of the Kampala amendments at the earliest possible date,¹⁸ at least for the time being, as far as enforcement by the ICC is concerned, aggression remains a crime without a court. Notwithstanding the vision of the architects of Nuremberg that the waging of illegal war would henceforth be known to all as a punishable international crime, the crime of aggression simply cannot currently be prosecuted, as such, at the international level.¹⁹

The obvious current gap in enforcement is the catalyst for thinking about the illegal use of armed force in perhaps a new way and in a new light—the light of “the common sense of mankind” which, as Jackson put

JUST. (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883351; Dapo Akande, *What Exactly was Agreed in Kampala on the Crime of Aggression?*, EUR. J. INT'L L. BLOG (June 21, 2010), available at <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>. For a discussion of the Kampala process and amendments written by a member of the U.S. observer delegation, see Beth van Schaack, *Negotiating at the Interface of Power & Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 506, 522 (2011), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=beth_van_schaack.

17. Regarding State referrals and *proprio motu* jurisdiction, Article 15 *bis* (5) provides that: “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.” Rome Statute, *supra* note 12, art. 15 *bis* (5). Note the opt-out provision of Article 15 *bis*, which governs *proprio motu* and State referrals, is absent from the provisions of Article 15 *ter*, governing referrals by the Council. Compare *id.* art. 15 *bis* with *id.* art. 15 *ter*. With respect to the exemption for non-States Parties, see *id.* art. 15 *bis* ¶ 5.

18. The Mission of Liechtenstein, with the support of The Global Institute for the Prevention of Aggression (a project of The Planethood Foundation), has developed a website at www.crimeofaggression.info to share information regarding the work that various organizations and institutions are doing in this regard and to provide information regarding the status of ratifications of the Kampala amendments. It is expected that the website, which is currently “live” but also still under construction, will also present a matrix setting forth information regarding domestic implementation of aggression, as well as other core crimes of the Rome Statute, at the level of national criminal codes around the world.

19. *But see* Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 28M, May 15, 2012 (setting forth provisions on criminalizing aggression for the States of the African Union), available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>. It should also be noted that a number of States include the crime of aggression within their domestic criminal codes and can, therefore, prosecute perpetrators of the crime in their own courts. For a discussion of the question of prosecution in national courts and references to jurisdictions that criminalize aggression domestically, see Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357 (2012).

it at Nuremberg,²⁰ *demands* that we hold accountable those who *set in motion* the evils which leave so many victims in their wake.

II. WHY FOCUS THE ESSAY COMPETITION ON CRIMES AGAINST HUMANITY?

The idea of sponsoring an essay contest, exploring whether, and how, a case may be made that the illegal use of armed force might be prosecuted as a crime against humanity, originated with my father. In the absence of current ICC jurisdiction over aggression, he is intent on refocusing the legal community's thinking regarding deterring the illegal use of armed force. Since Kampala, he has sounded a clarion call, of sorts: that, at least while aggression remains in legal limbo, those initiating the illegal use of armed force should not be immune from potential prosecution for crimes against humanity, over which the Court *does* have current jurisdiction.²¹

Standing at the lectern in Courtroom 600 at Nuremberg in September of 1947, a much younger Ben Ferencz opened the prosecution's case against the Einsatzgruppen defendants with what he referred to as "a plea of humanity to law."²² The plea continues today. It is a plea—and a reminder—that those who defy the legal precedents set at Nuremberg do so at their peril. Since Nuremberg—and especially since the Rome Statute of the International Criminal Court came into force—no one can plead ignorance of the fact that the prohibition of crimes against humanity is enforceable at law,²³ regardless of the current status of enforcement of the crime of aggression.

Notwithstanding the very positive aspects of what was achieved at Kampala and the efforts that are currently underway to fulfill its promise of early activation of ICC jurisdiction over aggression, the delay in

20. *See supra* note 6.

21. *See* Rome Statute, *supra* note 12, art. 7.

22. Opening statement in the Einsatzgruppen trial is available online at <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/einsatzopenpros.html>. Video of portions of the statement are available online at http://resources.ushmm.org/film/display/detail.php?file_num=623.

23. As Justice Robert H. Jackson put it in his report to President Harry S. Truman dated 7 October 1947, "No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction." Rep. from Just. Robert H. Jackson, to Pres. Harry S. Truman, International Conference on Military Trials (Oct. 7, 1947), available at <http://avalon.law.yale.edu/imt/jack63.asp> (see point number 2 of Jackson's summary to Truman). After enumerating 6 points, Jackson went on to say that "The four nations through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart. *These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them.*" *Id.* (Emphasis added).

activating such jurisdiction is hard to reconcile with the Rome Statute's preambulatory language, which cites a determination to end impunity for such crimes. After all, does it make any sense, in logic or in law, that we can end impunity by accepting the proposition that one can start a perfectly *illegal* war, but as long as people are killed according to the so-called "laws and customs of war," no one can be prosecuted for committing a crime?²⁴ Sir Hartley Shawcross certainly didn't think so,²⁵ and neither, I suspect, do most of the rest of us—certainly not, at least, those who believe, as did Justice Robert Jackson, that the IMT established a legal precedent, binding on all nations, including those which sat in judgment at Nuremberg.²⁶

The Nuremberg precedents, the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and other similar courts, as well as the establishment of the International Criminal Court, reflect a developing global determination to end impunity for "the most serious crimes of concern to the international community."²⁷ Perpetrators should recognize that we live not only in an age of crimes against humanity, but also an age of humanity against crimes.²⁸ The world in which perpetrators of

24. A discussion of the possibility of making a case for inclusion of the illegal use of armed force as potentially falling within "war crimes" was not the subject of the essay contest, nor is it within the scope of this Note. I mention it as a rhetorical question simply to emphasize the logical absurdity of the current situation of impunity for instigators of the illegal use of armed force.

25. See *supra* note 7.

26. Toward the end of his opening statement, Jackson said:

Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible.

But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, *including those which sit here now in judgment.*

See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 153–54 (Pub. Nuremberg, Germany 1947) (emphasis added), available at http://www.loc.gov/frd/Military_Law/pdf/NT_Vol-II.pdf. Clearly, for Jackson, Nuremberg stood for the proposition that law was not simply to apply to weak nations, but also to nations which are strong enough to undertake the illegal use of armed force believing that they can get away with it.

27. Rome Statute, *supra* note 12, pmb1.

28. Although Crimes Against Humanity is clearly delineated within the core crimes of the ICC, see *id.* art. 7, and thus well-established within the panoply of globally recognized crimes, a current effort is underway to universalize the crime by way of a Convention on Crimes Against Humanity so that, regardless of whether states are members of the ASP or not, they can commit to proscribing crimes against humanity within their own legal systems. See WHITNEY R. HARRIS WORLD LAW INST., *The Crimes Against Humanity Initiative*, <http://crimesagainsthumanity.wustl.edu/> (last visited Aug. 22, 2013). As per Article 2.1 of the Convention, the States Parties to the Convention will undertake "to

internationally recognized crimes can, quite literally, get away with murder is shrinking.²⁹ The global community is not only watching,³⁰ but it is awakening to the fact that state sovereignty is not inviolate, and that the system of merely *international* norms is giving way, in certain respects, to a system of *global* norms and practices, where both state and non-state actors alike will be held accountable for gross violations of universally recognized standards of conduct.³¹

In the end, using crimes against humanity as a tool in the arsenal against illegal uses of armed force isn't about *minding* the gap in international law—it's about *closing* it.

prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes." *Id.*

29. In a quote that I believe preceded the establishment of the ICC, it was said that: "A person stands a better chance of being tried and judged for killing one human being than for killing 100,000." José Ayala Lasso, former United Nations High Commissioner for Human Rights (1994–1997), INT'L CRIM. CT. (1999), *available at* <http://untreaty.un.org/cod/icc/general/overview.htm>. This Note is dedicated to the proposition that such a quotation, while it may have been true in the past, will not be true today or from now on.

30. A notable, albeit somewhat informal, example of the public interest in such matters is the fact that, as of the writing of this article, at least 96,537,495 have viewed at least some portion of the *Kony 2012* video posted online by Invisible Children as part of their campaign to help bring Joseph Kony, an alleged perpetrator of atrocities in and around Uganda, to justice before the ICC. *See Kony 2012*, YOUTUBE, <http://www.youtube.com/watch?v=Y4MnpzG5Sqc> (last visited July 31, 2013). Lest anyone think that the author is out of touch with "what's really happening" on YouTube, please allow me to assure you that I'm aware that there are other posted videos which have significantly higher viewer figures—for example, Psy's *Gangnam Style*, at a rather remarkable figure of 1.3 billion views as of this writing (Ricky Gervais, eat your heart out). *See Gangnam Style*, YOUTUBE, <http://www.youtube.com/watch?v=9bZkp7q19f0> (last visited July 31, 2013). All I can say is, "This is one scary planet we live on!" As a more formal matter, with respect to the ICC itself, it should be noted that the Coalition for the International Criminal Court is comprised of 2,500 civil society organizations operating in 150 different countries. *See About the Coalition*, COALITION FOR THE ICC, <http://www.iccnw.org/?mod=coalition> (last visited July 31, 2013). There are currently 121 Member States of the Assembly of States Parties of the ICC, with a combined population of over 2 billion people. *See The States Parties to the Rome Statute*, ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited July 31, 2013) (relevant self-developed population chart is on file with the author). Hopefully, these numbers will amount to something in the quest for global justice.

31. *See, e.g., Global Administrative Law Changes the International Legal Order*, CTR. ON LAW AND GLOBALIZATION, http://clg.portalxm.com/library/keytext.cfm?keytext_id=123 (last visited July 31, 2013) ("Because global regulation is less and less defined in terms of agreements among states, the nature of the international legal order is changing."). The Center was established in 2007 by the University of Illinois College of Law and the American Bar Foundation. *See Center on Law and Globalization: A new resource for global leaders*, UNIV. OF ILL. COLL. OF LAW (Oct. 27, 2008), <http://www.law.illinois.edu/news/article/1045>.

III. THE EVOLUTION OF MY OWN REACTION

When my father first suggested that the Court, absent current jurisdiction over aggression, might still prosecute the illegal use of armed force as a crime against humanity, I wasn't particularly convinced of the proposition, and I told him so. I noted that in order to qualify as a crime against humanity, whatever harms were inflicted would need to strictly track the language of Article 7 of the Rome Statute—that they would need to be “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” and be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”³²

Yet, as I looked at the language of Article 30 of the Rome Statute, which provides that a person has intent where, “In relation to a consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of events* (emphasis added),” my opinion began to change.³³ My initial reservations gave way to the belief that if one can show that the decision to illegally use armed force led to deaths that would reasonably occur “in the ordinary course of events,” that a crimes against humanity charge could perhaps be sustained. Of course, assessing liability for a particular consequence should hinge on proving a direct chain of sufficiently linked and purposeful causal events, with the

32. Article 7.2(a) of the Statute, which provides that “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute, *supra* note 12, art. 7.2(a). For an interesting and informative discussion of whether the “State or organizational policy” language of Article 7.2(a) actually means what it says, see William Schabas, *State Policy as an Element of International Crimes*, 98 Nw. J. CRIM. L. & CRIMINOLOGY 953–82 (2008), available at <http://www.law.northwestern.edu/journals/jclc/symposium/Schabas.pdf>.

33. Rome Statute, *supra* note 12, art. 30 (see, in particular, (2)(b)). Article 30 provides:

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Id.

requisite level of intent clearly established.³⁴ Among the factors critical to any such analysis is the question of how ICC judges would interpret the phrase “in the ordinary course of events.” There is certainly nothing “ordinary” about innocent people being killed, but conflict after conflict has shown that such deaths occur on a regular, ongoing, and repeated basis. It will be for the judges to decide whether such regularity rises to a level of predictability or certainty giving rise to criminal culpability.

While looking into the “ordinary course of events” issue, I chanced upon something quite unexpected: a series of speeches by the well known World War II U.S. military commander, General Douglas MacArthur, in which he unequivocally declared that in today’s world civilian populations are the *primary* target in war.³⁵ As an aside, it may surprise many to know how much MacArthur said about the necessity of abandoning a war ethic in favor of the rule of law; I was so surprised, myself, that I take the liberty of offering a number of his quotes in the note below.³⁶

The effort to assure as many ratifications as possible of the Kampala amendments on aggression, as quickly as possible, is underway and must proceed as expeditiously as possible. It is hoped that such efforts will bear fruit and that the promise of Kampala—that the Court will be able to exercise its jurisdiction over the crime of aggression at the earliest possible date—will be fulfilled by no later than 2017, and that the current gap as to

34. In this regard, I would avoid limiting the characterization of the illegal use of armed force resulting in large-scale civilian deaths simply to “other inhumane acts.” Although it may very well be one, this particular subcategory of crime may require the narrowest possible construction by the Court due to its generally less specific nature as a residual or catchall and, therefore, a less clearly defined category of crime. My concern is that “other inhumane acts” may, therefore, be somewhat restrictive and perhaps more difficult to prove than, for example, “murder.”

35. EDWARD T. IMPARATO, *GENERAL MACARTHUR SPEECHES AND REPORTS 1908–1964*, at 233, 235, 238, 247 (2000).

36. *See, e.g., id.* at 142 (“I therefore recommend Japan’s proposal for the renunciation of war to the thoughtful consideration of all the peoples of the world. It points the way . . .”), 175 (“I am a 100% disbeliever in war.” He went on to say, with respect to war, that “I believe that the entire effort of modern society should be concentrated on an endeavour to outlaw it.”), 182 (“You cannot control war; you can only abolish it. Those who shrug this off as idealistic are the real enemies of peace—the real warmongers. Those who lack the enterprise, vision, and courage to try a new approach when none others have succeeded fail completely the simple test of leadership.”), 185 (Speaking of the United Nations, he said, “But the great moral purpose which animated its formation—the abolition of war from the face of the earth—will always live and a way must be found to achieve that purpose.”), 215 (“Our ideal must be eventually the abolition of war.”), 224 (“You will say at once that although the abolition of war has been the dream of man for centuries every proposition to that end has been promptly discarded as impossible and fantastic. Every cynic, every pessimist . . . has always disclaimed it feasibility. But that was before the science of the past decade made mass destruction a reality.”), 237 (“The great question is, can global war now be outlawed from the world? If so, it would mark the greatest advance in civilization since the Sermon on the Mount.”).

the Court's jurisdiction over acts of aggression will, at last, be closed to the greatest extent possible.

In the meantime, the more I cite Jackson, Shawcross, and MacArthur, and the more I think about the *inevitability* of significant civilian deaths once illegal uses of armed force are unleashed, the more persuaded I am that the utter illegality of the killing warrants judicial scrutiny of those who set it in motion: humanity against crimes against humanity. As my father likes to put it: "Law. Not war."³⁷

Does humanity deserve less?

37. See the lead page of his website, *supra* note 2.

APPENDIX

A New Approach to Deterring Illegal Wars

by
Benjamin B. Ferencz

What Really Happened at Kampala

It should be recalled that after millions of innocent people had been killed in World War II, everyone prayed for a more peaceful future. In the name of “WE THE PEOPLES,” the primary goal of the United Nations Charter signed on June 25, 1945 was “to save succeeding generations from the scourge of war.” Pursuant to an Agreement in London on August 8, the four occupying Powers established an International Military Tribunal (“IMT”) in Nuremberg to try leading perpetrators of Nazi crimes. The court was composed of prominent jurists from the US, USSR, UK, and France. In his moving opening statement on November 21, Chief Prosecutor Robert M. Jackson, on leave from the US Supreme Court, warned that if law was to serve a useful purpose, “it must condemn aggression by any other nations including those who sit here now in judgment.” On October 1, 1946, the IMT handed down its detailed decision. “To initiate a war of aggression,” said the learned judges, was “the supreme international crime.” It was hoped that malevolent leaders might be deterred from launching future illegal wars. Yet, it soon became apparent that many powerful nations, including the four that sat in judgment, were not prepared to give up their perceived sovereign right to go to war whenever their leaders felt it was in their national interest. The promise of Nuremberg remains unfulfilled.

After decades of wrangling by UN committees, it was finally agreed, at a conference in Rome in 1998, that an International Criminal Court (“ICC”) would be created to try key persons for genocide, war crimes, crimes against humanity, and aggression. However, the court could not exercise its jurisdiction over “the supreme international crime” until amendments were adopted defining that offense, consistent with the UN Charter. The five permanent Security Council members were not prepared to yield any of their responsibilities or privileges. Arguing that the crime had not been defined seemed a plausible justification for inaction. Committees resumed debates. A dozen years later, how to deter aggression still remained unresolved. As mandated in Rome, the issue came to a head at a Review Conference in Kampala, Uganda in June 2010. Since the definition had been debated for more than half-a-century, the Delegates in

Kampala were able to agree on a new formulation built on an earlier General Assembly consensus in 1974. No longer could the canard again be raised that aggression had not been defined.

Lawyers are very skilful in finding ambiguities in texts they do not wish to accept. The Rome Treaty seemed clear in Article 121 that amendments would only bind those states that agreed to be bound. Requests for further reassurances or clarification would always seem reasonable. Not content to rely on ICC judges to determine the meaning of the terminology, Kampala delegates submitted various alternatives. Unable to reach accord, they finally did what they had done in Rome in 1998; they postponed the issue again. By way of compromise, a few more hurdles were added and it was agreed that the question whether the ICC could exercise its jurisdiction over aggression should again be postponed for reconsideration at some unspecified future date; no sooner than 2017. Many arguments against activating ICC jurisdiction over the crime of aggression seemed designed to disguise the sad truth that some powerful states still preferred war to law.

A New Approach

Criminologists will generally agree that one of the most effective ways to deter crime is to let perpetrators know in advance that they will be held to account in a court of law. To assure them that they will not be brought to trial is more likely to encourage than to deter the conduct you are trying to prevent. As we have seen, the world community still remains divided about requiring aggressors to face the bar of international justice. Persons in high authority who knowingly and intentionally launch the horrors of illegal war should not be allowed to remain immune from prosecution. After more than 60 years of unsuccessful effort, a new approach is necessary.

1. ICC should punish illegal armed force as crimes against humanity

As long as the ICC cannot try the crime of aggression, other ways must be sought to end the impunity. The illegal use of force almost invariably results in actions that should qualify as crimes against humanity. Whether armed force is legal or illegal is essentially governed by the UN Charter that binds all nations. Article 2(4) calls upon all Members to refrain from the threat or use of force inconsistent with the purposes of the UN. Article 51 recognizes the inherent right of self-

defense against an armed attack. Chapter VII allows the Security Council to authorize armed force when the Council considers it necessary to maintain or restore peace. In short, if the use of armed force was not in self-defense or authorized by the Security Council, it is illegal. Genuine humanitarian interventions may mitigate the punishment and all circumstances, and prosecutors and judges must take moral justifications into account. But no person or nation should be allowed to take the law into their own hands.

What the crime is called should not be decisive. The international tribunals at Nuremberg, for example, referred to aggression as “CRIMES AGAINST PEACE.” The term “war” appears only once in the UN Charter, which speaks about “armed force.” “Genocide” is the first crime listed in the ICC Statute, although it could easily have been subsumed and included under “crimes against humanity.” If aggression had not been relegated to special committees, armed force prohibitions could also easily have found a place on the list of crimes against humanity. The fundamental right to life is heralded in all human rights conventions. What matters more than the title of the crime is the substance. Keep in mind that the basic goal is to deter the unlawful use of armed force that kills or maims countless innocent men, women, and children. Deterring war should not depend on nomenclature.

To be sure, the ICC cannot convict anyone of crimes against humanity without proof of “a widespread and systematic attack directed against any civilian population, with knowledge of the attack.” Modern warfare makes mass killing of innocents unavoidable. One cannot persuasively argue that, where large-scale civilian casualties were foreseen and inevitable, there has been no crime because innocent victims were not the primary target. Surely, illegal force deserves as much condemnation as “murder,” “severe deprivation of fundamental rights,” or similar atrocities listed in the ICC Statute. The illegal use of massive force should be punishable under the existing category of “Other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health.” The Prosecutor would have to prove beyond doubt that the accused held a position of high authority, played a key role, and intended the foreseeable consequences. In contrast to charges of aggression, the Security Council has no prior role to play concerning crimes against humanity.

2. National courts should criminalize the illegal use of armed force.

The new Kampala consensus definition of aggression, after many decades of consideration, spells out the parameters of what constitutes an illegal use of force. New domestic legislation can simply specify that the crime of aggression, as defined by consensus at the ICC Review Conference in Kampala in 2010, shall be punishable when committed on their territory or by their nationals. Nothing more is needed than such incorporation by reference. At the same time, charges can also be brought under the heading of crimes against humanity.

New domestic criminal statutes can also formulate their own texts, such as: “Persons in position of high authority responsible for the illegal use of armed force in violation of the UN Charter, knowing that such action will unavoidably and inevitably kill large numbers of innocent civilians, shall be subject to prosecution for crimes against humanity.”

Despots will be put on notice. Even a limited deterrent effect would surely be worthwhile.

3. Bilateral and Regional coalitions should join in criminalizing illegal war.

The Supreme Allied Commander in World War II, Dwight D. Eisenhower, when he was President of the United States, warned: “In a very real sense the world no longer has a choice between force and law. If civilization is to survive it must choose the rule of law.” Many nations, led by Japan and Germany, that had suffered the agonies of war, began to move in that direction in their post-war constitutions. Now, more needs to be done to move from promise to reality. The French Schuman Plan for economic cooperation with Germany, its war-time enemy, led to the formation of the European Union that has become a major bulwark for world peace. Uniformity of criminal legislation is, of course, preferable and is a growing reality in many other areas of international cooperation. Short-sighted and misguided reasons of policy, politics, or legal philosophy should not obscure the fact that unilateralism no longer has a place in the modern world. Diplomats should not hide behind the slogan: “The time is not yet ripe.” The time is ripe right now!

What do we do now?1. Ratify

According to the Kampala agreement, before the ICC can exercise jurisdiction over the crime of aggression, 30 States Parties must ratify or accept the amendments. Since the compromises were reached by consensus after much travail, it is not unreasonable to anticipate that the hurdle will be overcome. Failure to do so would mark Kampala as an exercise in futility or duplicity. Obtaining the necessary 30 acceptances must therefore be the first priority of those who really care about deterring war.

2. New Help and New Means

Experience suggests that relying in old methods is not likely to produce quick results. Man's capacity to destroy life on earth increases incrementally, and the race between civilization and disaster will need some faster runners. Fortunately, new means and methods are on the horizon and must be mobilized to protect humanity. Global communication networks can reach out to people everywhere and help them to understand that a more peaceful and humane world is indispensable. For the safety of the brave young people who serve in the military, a "peace ethic" must replace the prevailing glorification of military might. It is not merely a matter of life and death, but of economic survival that affects everyone.

The advent of new and miraculous means of instant communication offers a worldwide educational network never previously conceived. Perhaps the dissemination of truth will prove a more useful weapon than the costly and destructive instruments of war. International laws, courts, and a system of effective enforcement are still in their earliest stages of evolution. A matrix of countless social and organizational changes is needed. Every effort must be made to mobilize the younger generations to support the rule of law as their best safeguard. The international criminal court was a great historical achievement designed to encourage peaceful, rather than violent, resolution of conflicts. Those who hold the destinies of "WE THE PEOPLES" in their power must also be made to recognize, through the deterrent power of criminal prosecution, that law is always better than war.

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