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In 1946, the world witnessed the first-ever prosecutions of a state’s leaders for planning and executing a war of aggression. The idea of holding individuals accountable for the illegal use of force—the “supreme international crime”—was considered but ultimately rejected in the wake of the First World War.¹ A few decades later, however, following the even more destructive Second World War, the victorious powers succeeded in coming together in a court of law at Nuremberg to prosecute the leaders of Nazi Germany for waging an aggressive war against other states. Yet the Nuremberg trials were both the first and last time an international tribunal has adjudicated aggression. It took decades for the international community to take the steps necessary to institutionalize the prosecution of international crimes and to reconfirm the prohibition on aggression as a crime under international law.² Now, in 2017—seventy years after the Nuremberg prosecutions—the international community will gather to decide whether to activate the jurisdiction of the International Criminal Court (ICC) over the crime of aggression.³

Over seven decades, as the international community has debated how and whether to make the prosecution of aggression a practical reality, Benjamin Ferencz has worked tirelessly to ensure that the prevention and prosecution of aggressive war-making remain on the international agenda. As the Chief Prosecutor in the Einsatzgruppen case, Ferencz secured the convictions of twenty-two SS officers for the murders of over one million Jews, Roma, disabled persons, partisans, and others.⁴ Between 1947 and 1957, as the Director of the Jewish Restitution Successor Organization and through the United Restitution Organization, he helped Jewish victims recover lost property, and through the

¹ 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 427 (1948).
² It was not until 1974 that the UN General Assembly finally adopted a definition of “aggression.” From 1974, it took another twenty-four years for the international community to create a permanent international tribunal—the International Criminal Court—and even then, the States Parties put off the actions necessary to activate the Court’s jurisdiction over aggression. See Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).
Jewish Material Claims Against Germany, he helped negotiate the treaty between the Claims Conference, West Germany, and the State of Israel.\textsuperscript{5}

Motivated by the horrors of the Holocaust and the Second World War, throughout his long career, Ben Ferencz has continued to push for the international community to reconfirm its commitment to replacing the “rule of force with the rule of law.”\textsuperscript{6} He has done so by advocating strongly for the establishment of a permanent international criminal tribunal that would have jurisdiction over the same crimes he tried in Nuremberg\textsuperscript{7} and by insisting that the “supreme international crime” remain judiciable as an offense under international criminal law.\textsuperscript{8}

With his work in mind, and writing as the international community prepares to decide whether to activate the ICC jurisdiction over the crime of aggression, the authors in this symposium take stock both of what has been accomplished and of what remains to be done. This symposium is intended to build on the reflections of the scholars and practitioners of international law who came together in September 2015 at a meeting of international experts hosted by the Whitney R. Harris World Law Institute at the Washington University School of Law. This conference, “The Illegal Use of Force: Reconceptualizing the Laws of War,” served as both a source of inspiration and a starting point for many of the contributions in this symposium.\textsuperscript{9} Similar to the Harris Institute debate, this symposium reflects on broader issues of accountability for the illegal use of force under international law, with the goal of influencing broader scholarly efforts that continue to shape the debate on the scope, nature, and future of the criminalization of the illegal use of force.\textsuperscript{10}

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The adoption, first of the Rome Statute establishing the ICC, and then of the Kampala Amendments defining the crime of aggression under that statute, represents a significant achievement in international law. Between 1945 and 1947, international law experienced a brief period in which illegal war making was justiciable both as a state act and as a crime carrying individual liability. During the following seventy years, however, aggressive war was no longer justiciable as

\begin{itemize}
  \item \textsuperscript{5} Benjamin Ferencz & Telford Taylor, Less Than Slaves: Jewish Forced Labor and the Quest for Compensation (1979).
  \item \textsuperscript{6} Id.
  \item \textsuperscript{8} Benjamin B. Ferencz, Defining International Aggression: The Search for World Peace (1975); Benjamin B. Ferencz, Enforcing International Law: A Way To World Peace (1983).
\end{itemize}
a crime; it remained sanctionable only as a violation of the prohibition against the use of force for which individuals could not be held directly liable. It is for this reason that the 2010 Kampala amendments to the Rome Statute were a historic development. If activated in 2017, the amendments will make wars of aggressions and illegal war-making judiciable criminal offenses again, for the first time since Nuremberg. In her essay, Federica D’Alessandra analyzes the symbiotic and at times idiosyncratic normative history of aggression, from Nuremberg to Kampala. As Anthony Abato details in his essay, the hard-fought adoption of the Kampala Amendments in 2010 occurred in the face of strong opposition from the five permanent members of the UN Security Council, which have taken the view that aggression is a non-justiciable political question.

The inclusion of a defined crime of aggression in the Rome Statute sends a clear signal to state leaders that aggression is contrary to law and that it will be prosecuted as such. Ambassador Christian Wenaweser and Sina Alavi emphasize the rule of law benefits of the criminalization of aggression in their symposium essay, arguing that activating ICC jurisdiction over aggression “will allow the law to challenge the longstanding forces of power politics.” In addition, Donald Ferencz echoes this sentiment in his symposium essay, noting that the inclusion of aggression in the Rome Statute provides a concrete basis for prosecutions—“a litany of specific acts of aggression”—assuming the parties to the Rome Statute choose to activate the ICC’s jurisdiction over the crime in 2017. Finally, as William Schabas notes, the criminalization of unlawful war-making is a “corollary” of the human right to peace, which, Schabas argues, should be viewed as encompassing both the *jus ad bellum* and the *jus in bello*.

Despite the significant steps taken at Rome and Kampala, however, questions remain about how the prohibition on acts of aggression will be—and should be—applied. In their symposium essay, Dapo Akande and Antonios Tzanakopoulos raise important jurisdictional issues the ICC may face in applying article 8 bis of the Rome Statute, given the statutory requirement that the ICC make a determination of state responsibility as a prerequisite for finding an individual liable for aggression. Because the Court likely does not have jurisdictional authority to make the necessary determination of state responsibility for states that are not parties to the Rome Statute or have not ratified the Kampala Amendments, the ICC may not be able to exercise its jurisdiction effectively over acts of aggression committed by the nationals of such states. As another example, similar to this jurisdictional uncertainty, Marissa Brodney notes the lack of clarity concerning the nature of the victims of the crime of aggression as codified in the

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11 Federica D’Alessandra, *Accountability for Violations of the Prohibition against the Use of Force at a Normative Crossroads*.
13 Christian Wenaweser & Sina Alavi, *From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC’s Jurisdiction over the Crime of Aggression*.
14 Donald M. Ferencz, *Continued Debate over the Crime of Aggression: A Supreme International Irony*.
Rome Statute. Assuming the Court’s jurisdiction over the crime of aggression is activated later this year, the Court will still face many such challenges in determining how the law may be applied.

Questions of how the prohibition on aggression should be applied are equally as important. For example, practitioners and scholars of international law have long debated the scope of actors who should face liability for acts of aggression. Historically, international law has conceived of aggression as a leadership crime. Photos of top Nazi officials like Hermann Goering listening to the trial proceedings at Nuremberg seem to embody the very heart of the “supreme international crime.” The nature of the “leaders” affected, however, remains a topic of discussion, however. In his symposium essay, Volker Nerlich considers whether liability for acts of aggression lies only with principals—or whether liability might reach state officials who are complicit in the aggressive “political or military action” but do not mastermind it. Similarly, Juan Calderon-Meza also considers accessory liability for the crime of aggression and argues that once the jurisdiction over aggression is activated, the ICC could prosecute private individuals—particularly business leaders in the private military and security industry—who make a significant contribution to acts of aggression undertaken by heads of state. In situations in which it is politically impractical to prosecute the heads of state responsible for acts of aggression, the prosecution of private persons under an accessory theory could provide a way to ensure that some party is held accountable for these crimes. At the same time, reflecting on the legal standards that facilitated the prosecution of industrialists at Nuremberg, MacKennan Graziano and Lan Mei caution against raising the bar for holding the officers and directors of corporations accountable, which is even more important now that modern warfare frequently involves corporate individuals.

In contrast to the focus on accountability for individuals, which figures so prominently in debates on the crime of aggression, in another essay in the symposium, Frédéric Mégret argues that focusing on individual accountability for aggression may not always provide sufficient compensation for the injuries stemming from an act of aggression. Indeed, focusing on individual accountability for the leaders of States that engage in aggressive war-making may ignore other critical participants in the act of aggression and obscure the broader structural forces that foster such violence.

Finally, related to the question of which actors should be held liable for acts of aggression is problem of which acts should give rise to liability. In their symposium essay, Hector Olasolo and Lucia Carcano examine the extent to which

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17 Marissa R. Brodney, Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court.
18 Volker Nerlich, The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?.
19 Juan P. Calderon-Meza, Non-State Accessories Will Not Be Immune from Prosecution for Aggression.
20 MacKennan Graziano & Lan Mei, The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability.
the ICC plays—and should play—a role in preventing acts of aggression, not merely adjudicating completed acts.\textsuperscript{22}

In answering questions such as those posed by the authors in this symposium, it is imperative that the ICC—still a relatively young institution on the international stage—firmly ground any future decisions on the crime of aggression securely in law and in the way that law is understood by the international legal community. In his symposium essay, Judge Christopher Greenwood emphasizes this point, urging the ICC to become familiar with the jurisprudence of other international tribunals, such as the International Court of Justice, and to harmonize, as much as possible, its decisions with those of its fellow tribunals.\textsuperscript{23}

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The changing nature of warfare and geopolitics complicates these inquiries about the boundaries of the crime of aggression. In her essay, Leila Sadat notes that states’ response to the rise of global terrorism—particularly the movement toward a “perpetual war” paradigm among U.S. lawyers and academics—has challenged the basic framework of international law, in which peace is the default and war the exception.\textsuperscript{24} Similarly, in their essays, Judge Sanji Mmasenono Monageng and Ambassador David Scheffer each stress that the changing nature of modern warfare exposes gaps in the definition of aggression as codified in article 8 bis of the amended Rome Statute.\textsuperscript{25} The growing importance of non-state actors in armed conflicts and the emergence of cyber warfare, in particular, will require the definition of aggression to continue developing to fit the needs of a rapidly changing world. According to the perspective embodied in the essays by Judge Monageng and Ambassador Scheffer, aggression is an enduring, “core” international crime that simply requires periodic updates to fit the times.

Yet this view is not the only perspective on how the crime of aggression fits into the modern world. In contrast to the angle taken by Judge Monageng and Ambassador Scheffer, Cherif Bassiouni argues that the changing nature of warfare, in which the “classical form of aggression . . . is not likely to occur again,” should lead the international community to consider abandoning the project of criminalizing aggression.\textsuperscript{26} In his essay, he notes significant changes in the nature of armed conflict over the last few decades, including the emergence of autonomous weapons systems and cyber technology and the overall decline in conflicts that meet the definition of aggression. In his view, this development

\textsuperscript{22} Hector Olasolo & Lucia Carcano, The ICC Preventive Function in Respect of the Crime of Aggression in International Politics.

\textsuperscript{23} Christopher Greenwood, What the ICC Can Learn from the Jurisprudence of Other Tribunals.

\textsuperscript{24} Leila Nadya Sadat, Accountability for the Unlawful Use of Force: Putting Peacetime First.


\textsuperscript{26} M. Cherif Bassiouni, The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization.
should push international lawyers and academics to devote their efforts to creating the legal links between the use of new technologies and well-established international crimes like war crimes and crimes against humanity instead of continuing to focus on criminalizing aggression in its classical form.

Yet despite the challenges that changing conditions pose for the adjudication of aggression as a crime under international law, those very changes may make it more important than ever to ensure that parties are held accountable for violent international crimes generally, whether characterized as the crime of aggression, war crimes, crimes against humanity, or, indeed, something altogether new. As Ben Ferencz writes in his epilogue to this symposium, the very technologies that are “shrinking” the world “must gradually lead to the recognition that we are all inhabitants of one small planet and that we must share its resources so that all may live in peace and human dignity.” To promote this end, “[a]ccountability for the illegal use of force is an indispensable prerequisite.”

Rebecca F. Green
Federica D’Alessandra
Juan P. Calderon-Meza *

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27 Benjamin B. Ferencz, Epilogue: A Nuremberg Prosecutor’s Summation Regarding the Illegal Use of Armed Force.
28 Id.
* This introductory essay incorporates Juan’s personal views and does not reflect the views of any of the institutions with which he is affiliated.
Accountability for Violations of the Prohibition against the Use of Force at a Normative Crossroads

Federica D’Alessandra*

For a brief period of time, between 1945 and 1947, public international law outlawed, sanctioned, and made judiciable breaches of the prohibition against the use of force in international relations as both a state act and a crime warranting individual penal liability. Ever since the Nuremberg trials, however—and despite the 1946 UN General Assembly affirmation of the principles of Nuremberg, which, it has authoritatively been argued, conferred upon these principles the status of customary law¹—the articulation of the prohibition against the use of force was abandoned in the international criminal sphere and left to the United Nations system of enforcement and maintenance of international peace and security. The relatively recent history of the normative development of the prohibition itself and the controversies surrounding the justiciability of breaches of this prohibition as crimes under international law are but two indicators of the chronic unpopularity that has accompanied efforts to outlaw and sanction armed conflict throughout modern history. After years of lengthy negotiations, in 2017 the international legal community will have the opportunity to reconsider its commitment to the precedent it established in Nuremberg. This might, in fact, be the year that the law on the use of force and international criminal law converge again after seventy years of separation and idiosyncrasy.² With accountability for violations of the prohibition against the use of force at a crossroads, this

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¹ Attorney Gen. of the Gov’t of Isr. v. Eichmann, 36 I. L. R. 277 (Sup. Ct. 1962) (“[I]f there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law ‘since time immemorial,’ such doubt has been removed by two international documents”; citing G.A. Res. 95(I) and Res. 96). See also R v. Jones, [2006] UKHL 16 [12]–[18] (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 566 (5th ed., 1998) (“[W]hatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law.”)).

² In talking about “convergence” of the law on the use of force and international criminal law, the author refers strictly to the normative relationship between the two strands of public international law. The level of substantive overlap between the prohibition against war as articulated in the body of law regulating the use of force, and the prohibition against aggressive war as existing in international criminal law remains, in fact, a topic of lively scholarly debate. See, e.g., Dapo Akande & Antonios Tzanakopoulos, The International Court of Justice and the Concept of Aggression, in THE CRIME OF AGGRESSION: A COMMENTARY 214–29 (Claus Kreß & Stefan Barriga eds., 2017).
contribution is dedicated to its normative history, and to the possibility of a normative convergence in the near future.

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A brief period of overlap. The prohibition against the use of force has been recognized as the bedrock of public international law since the end of World War II. Although some have disagreed with this notion, the prohibition against the use of force is widely recognized a jus cogens norm of peremptory character, whose scope has been defined in multiple international legal instruments, including the founding document of the United Nations (UN), and in the jurisprudence of international tribunals. In 1945, article 2(4) of the United Nations Charter imposed an absolute prohibition against the use of force, requiring that all Member States “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 sole exceptions to this rule were made for instances of the use of force in individual or collective self-defense and for the use of force to combat threats to international peace and security under the executive power of the newly established UN Security Council. Rising from the ashes of the most devastating conflict in history, states had finally outlawed war as a legitimate means of conducting themselves in the international arena. That principle underpinned the new system of international law and relations that still governs us today.

After the end of World War II and amidst much controversy, violations of the prohibition against the use of force were also recognized as crimes under international law warranting the adjudication of individual criminal responsibility as “crimes against peace.” Under the law of the International Military Tribunals at Tokyo and Nuremberg, the “planning, preparation, initiation or waging of wars 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” was recognized as the “supreme international crime” that differed from other international crimes only in that “it

5 U.N. Charter art. 2 para. 4, art. 39, art. 42 & art. 51.
6 The first international legal instrument to impose a binding legal obligation to “renounce war as an instrument of national policy” was the Kellogg-Briand Pact of 1928. Although important as an early effort by states at self-restraining, the treaty was however a weak instrument that did not envision either sanctions for failing to abide or an enforcement mechanism, and as such, it has been highly criticized. See Kellogg-Briand Pact, Aug. 27, 1928, 6 U.S.T. 3516, 75 U.N.T.S. 287.
7 On the constitutive elements of “crimes against peace,” and the controversy surrounding the criminalization of breaches of the prohibition against the use of force, see Roger S. Clark, Nuremberg and the Crime Against Peace, 6 Wash. U. Global Stud. L. Rev. 527, 527 (2007).
contains within itself the accumulated evil of the whole.” 8 The criminalization of
the illegal use of force was hailed as a step forward for accountability and as a
“safeguard [of] the future peace and security of this war-stricken world.” 9
Nuremberg itself and the subsequent trials 10 have been defined as the most
successful “plea of humanity to law,” 11 and “one of the most significant tributes
that Power has ever paid to Reason.” 12

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Between idiosyncrasy and symbiosis: from Nuremberg to Kampala. Despite
the enthusiasm at the time, and notwithstanding the consistent best efforts of a
committed group of individuals, including the indefatigable Benjamin Ferencz,
criminal liability for violations of the prohibition against the use of force was
relegated to the status of a memory from the recent past for the next seventy
years. 13 In the 1950s, at the request of the General Assembly, the International
Law Commission (ILC) drafted two statutes for a permanent international court
that would have received jurisdiction over breaches of the prohibition against the
use of force, or “aggression,” as it had come to be known, but these were shelved
during the Cold War, which made the establishment of such court politically
unrealistic. 14 In 1974, the UN General Assembly adopted by consensus a
resolution defining the “crime of 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, as set out in this Definition.” Article 5(2) of the resolution clearly stated

8 Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82
U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19,
1946, 4 Bevans 20; 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL
MILITARY TRIBUNAL, NUREMBERG 427 (1948).
9 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL,
NURENBERG 93 (1947).
10 See Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against
Humanity, Control Council Law No. 10 (Dec. 20, 1945), 3 Official Gazette Control Council for
Germany 50–55 (1946).
11 Opening Statement of Benjamin B. Ferencz at Nurember, Proceedings, Sept. 29, 1947, 4
TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL
COUNCIL LAW NO. 10, NUERNBERG 30 (1950).
12 See Opening Statement of Robert H. Jackson, Proceedings, Nov. 21, 1945, 2 TRIAL OF THE
MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 99
(1947).
13 It should be noted that the tribunals have not received an overwhelmingly positive response,
however. Many have criticized the tribunals as constituting an imposition of “victor’s justice,” and
the prosecution of “crimes against peace” specifically has been criticized on grounds that it
violated the principle of “legality.” See generally ANTONIO A. CASSESE, GUIDO G. ACQUAVIVA,
MARY D. FAN & ALEX A. WHITING, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY
(2011); MAHMOUD CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2nd
14 See D. H. N. Johnson, The Draft Code of Offences against the Peace and Security of
that “a war of aggression is a crime against international peace,” and that “aggression gives rise to international responsibility.”

The definition built both on the Nuremberg and Tokyo Charters and on the language and scope of article 2(4) of the UN Charter. Interestingly, however, and contrary to the International Military Tribunal statutes, it avoided specifying whether the responsibility for this “crime” ought to lay with the individual; moreover, unlike the UN Charter, it did not recognize the “threat” of the use of force as aggression pursuant to its own definition. The resolution went into some detail, however, by fleshing out which breaches of the prohibition against the use of force did constitute “acts” of aggression (invasion, including occupation and annexation, bombardment, blockade, violation of status of forces agreements, the “sending” of armed groups, or any other form of armed attack by sea, air, or land, including the use of one’s territory to launch it), and by recognizing that “aggression is the most serious and dangerous form of the illegal use of force.”

These notions were, of course, picked up by the International Court of Justice (ICJ) in much of its reasoning and jurisprudence on the subject of the legality of the use (or threat of the use) of force, even though only a handful of cases have come before the ICJ on this issue throughout the years. Although the Court has “never found that a state has committed aggression,” nor has it “set out a definition of the concept of aggression” or “analyzed the concept in any detail,” nevertheless, “allegations of aggression have occasionally found their way before

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16 Id., art. 3 (“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”).
17 Id., preamble.
19 Examples of such cases are Nicaragua v. United States, the Oil Platforms Case, Cameron v. Nigeria, Democratic Republic of Congo v. Uganda, Yugoslavia v. United States, and two ICJ Advisory Opinions on the Construction of a Wall in the Occupied Palestinian Territory and on the Legality of the Threat or Use of Nuclear Weapons. For a discussion, see generally Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14 EUR. J. INT’L L. 867 (2003).
the ICJ."\textsuperscript{20} Even in cases in which aggression was not alleged \textit{as such}, the Court’s analysis of the legality of the use of force has helped “develop[] the law both in relation to the prohibition of the use of force, and in relation to the exceptions to that prohibition.”\textsuperscript{21}

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\textit{Towards normative convergence in Kampala.} The ICJ reasoning on what constitutes and does not constitute an act of aggression was duly taken into consideration during the Kampala negotiations and in the lead up to the negotiations during the \textit{travaux préparatoires} of the Working Group on Aggression.\textsuperscript{22} The drafters were sensitive to the debate surrounding the level of overlap between the substantive and constituent elements of the notion of the illegal use of force as it had developed with respect to state responsibility, as well as to the constituent elements of the penal offense as it was recognized in and subsequent to Nuremberg (including the 1974 definition of aggression). Because of the lack of systematic treatment of the concept of “aggression” by the ICJ, however, several positions existed in Kampala as to what should or should not be included in the definition. Article 8 \textit{bis} of the Rome Statute eventually came to distinguish between an \textit{act} of aggression and a \textit{crime} of aggression. For the purpose of the Rome Statute, a crime of aggression was defined as an “act of aggression, which by its \textit{character, gravity and scale}, constitutes a \textit{manifest} violation of the Charter of the United Nations.”\textsuperscript{23} An act of aggression, for the purposes of the Statute, is thus a constituent element of a crime of aggression and, coherently with the 1974 definition of aggression, is any of the following acts: invasion (including occupation and annexation), bombardment, blockade, violation of Status of Forces agreements, the “sending” of armed groups, or any other form of “armed attack” by sea, by air, or by land, including the use of one’s territory to launch it.\textsuperscript{24}

The “manifest” threshold for the criminal offense concerning the gravity, scale, and character of the violations (as cumulative elements) was intended to exclude “borderline cases” (as it would be the case, for example, with border skirmishes). It was also intended to exclude cases falling within a gray area both factually (when the act of state does not meet the required “gravity” or “scale,” such as in minimal boarder incursions), as well as legally (that is, debatable cases, where the act of state does not constitute a manifest violation of the Charter due to its “character”). This language is, of course, fruit of diplomatic compromise and has been harshly criticized,\textsuperscript{25} but it ought to be understood in light of the

\begin{itemize}
\item \textsuperscript{20} Akande & Tzanakopoulos, \textit{supra} note 2, at 215.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} See generally \textit{The Travaux Préparatoires of the Crime of Aggression} (Steffan Barriga & Claus Kreß, eds., 2012).
\item \textsuperscript{24} \textit{Id.} (emphasis added).
\end{itemize}
“different speeds” at which states mature and develop their own understanding of what the prohibition against the use of force in international law prescribes or proscribes, particularly with respect to exceptions to the prohibition. The controversy in Kampala over so-called “unilateral humanitarian interventions” is an emblematic example of this.

Humanitarian interventions (that is, non-UNSC sanctioned use of military force in the territory of a non-consenting state to halt or prevent war crimes, crimes against humanity, genocide, and ethnic cleansing) were discussed as possible exceptions falling under the latter category of non-manifest violations, and a memorandum of understanding to this extent was proposed by the United States to the Assembly in Kampala. Ultimately, however, the memorandum of understanding was not adopted because unilateral humanitarian interventions have not crystallized as exceptions to the prohibition against the use of force under international law.26 To the contrary, although the 2001 International Commission on Intervention and State Sovereignty’s Final Report theorized that a “responsibility to protect” civilians from atrocity crimes exists, both the 2004 High-Level Panel on Threats, Challenges and Change, and the Secretary-General’s own 2005 Report in Larger Freedoms concluded that under existing law, such responsibility can be exercised only under the authority of the Security Council.27

Of course, academic, policy, and ethical disagreement over humanitarian interventions continue to date.28 Other international law “doctrines” might be equally invoked in future debates over “gray areas” in the definition of acts of aggression concerning, for example, the “protection of nationals abroad” (most often taking shape in the form of “non-combatant evacuation operations,” or NEOs) and self-defense against non-state armed groups. Insofar as the crime of aggression is concerned, however, the manifest threshold introduced in the definition intentionally excludes all such instances of the use of force. It is exactly for this reason that those with a restrictive view on the use of force—including, notably Benjamin Ferencz—have argued that the definition agreed upon in Kampala did not go far enough if we consider deterrence from the illegal use of force the ultimate goal of criminalizing aggression in the first place. Alternative theories have been advanced, arguing that the illegal use of force may be prosecuted as a war crime in some circumstances (of disproportionate attack, for example)29 or as a crime against humanity in and of itself.30 Whether these

28 Koh, supra, 25.
theories will gain support among scholars and experts is yet to be seen. Early reactions to these ideas, however, do not seem to preclude the coexistence of such theories and the framework agreed upon at Kampala. The specific arguments, moreover, cannot be discounted as being without merit.

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In conclusion, the substantive aspects of the debate surrounding criminal accountability for the illegal use of force are not marginal. The legislative history of aggression from Nuremberg to the Kampala negotiations is illustrative of the symbiotic but idiosyncratic relationship that has characterized the various strands of public international law that deal with questions concerning the legitimacy and lawfulness of the use of force. From a normative perspective, the observance of how developments in the law on the use of force have influenced and may or may not influence again the definition of the crime of aggression, or may be conducive to an expansive interpretation of other judiciable offenses, is fascinating. And if normative developments demand that standing definitions of crimes or interpretations of these definitions be changed, surely the international community will have future opportunities to revisit the issue. Indeed, perhaps the international community will revisit the most appropriate penal characterization for the illegality of the use of force that results in the death of score of innocent civilians. At the current stage, however, the question is whether or not the international community will honor its original commitment to make the “supreme international crime” again a judiciable offense—or, as this essay ponders, whether 2017 will be the year that the law on the use of force and international criminal law converge again after seventy years of separation. Even if no convictions are obtained under the current definition of the crime of aggression, the symbolic power of completing the Nuremberg legacy—and the prospect of adding a further tool for deterring military adventurism, contributing to the maintenance of international peace and security in a manner compatible with the requirements of the UN Charter—seems a worthwhile endeavor, especially in a nuclear age.

31 The 2022 review conference could be one such moment to reconsider whether developments in the normative prohibition against the use of force have changed the internationally agreed definition of what constitutes a crime of aggression, and every year the Assembly of State Parties has the opportunity to reconsider amendments to the definition of other offenses.
On the Adjudication of the Illegal Use of Force at the ICC

Anthony Abato*

“I cannot stop. It’s a trauma,” said Benjamin Ferencz about working tirelessly at his advanced age.1 Two reporters sat with him in his Florida home and took notes. “I’m sure it’s the trauma of what I saw,” he said.2 What he personally “saw” was, on the one hand, extensive human suffering during his service in the military and as a criminal lawyer. But was there another, latent type of “trauma” that Ferencz endured? He continued:

In the First World War, 20 million people were killed, and we got the Covenant of the League of Nations. It was very weak. After World War II, and 50 million people were killed, they gave us the United Nations Charter. Very weak. Then perhaps after millions more, people will wake up and say: we have to build more institutions. One of the institutions we got is a court, the ICC. But it’s too weak because nations don’t give it the support it needs.3

All this came in response to the remark, “Now you are almost 90.”4 The frustration was on the tip of his tongue. In the years leading up to this interview, the five permanent members of the Security Council (P5) had taken a common position to undermine the States Parties’ support for the Court’s jurisdiction to select and adjudicate aggression cases. Outlawing aggression was—and still is—Ferencz’s life’s work. Perhaps the “trauma” that Ferencz suffered, wittingly or unwittingly, was in part from years of hearing the P5’s strained rhetoric.

Following the interview, at the Kampala Review Conference, the P5’s rhetoric grew into an agenda. The U.S. government delegation took the position that the determination of aggression requires a political assessment5 and that states must not entrust such decisions to a prosecutor and a group of judges.6 The proposed

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2 Id.
3 Id. at 35–36.
4 Id. at 35.
6 Id. at 266. See also ICC, Statement on Behalf of the United States of America, 15th Assembly of States Parties, The Hague, The Netherlands, Nov. 17, 2016, https://asp.icc-
amendments on aggression, according to the U.S. delegation, were inconsistent with the judicial nature of the Court. Meanwhile, the Russian delegation’s intention in Kampala was to avoid a “dubious, legally flawed situation where judges determine that an act of aggression has been committed.” Collectively, the P5 claim that they act out of altruism, in defense of the “integrity of the UN Charter.” They say the Court should exercise jurisdiction only after the Security Council has determined the existence of an act of aggression by one state against another.

This short essay will look critically at the P5’s theory of the non-justiciability of aggression. The nature of aggressive war requires thinking in the abstract—a smearing of the otherwise rigid division between international relations and criminal law. But this rendering of “aggression” does not preclude its adjudication. As preparations for the next review conference begin, advocates for the criminalization of aggressive war, such as Ferencz, will have the difficult task of steering state delegates towards the big picture.

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Despite the P5’s lobby, the result of the Kampala Conference allows the Court to determine whether there has been an act of aggression without relying on a decision by the Security Council. This clearly does not accord with the agenda of the P5. But the outcome of Kampala is justified. The importance of the

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7 Koh & Buchwald, supra note 5, at 266.
8 Gennady Kuzmin & Igor Panin, Russia, in THE CRIME OF AGGRESSION: A COMMENTARY 1264, 1266 (Claus Kreβ & Stefan Barriga eds., 2017).
9 See id. at 1267; Koh & Buchwald, supra note 5, at 262.
10 Zhou Lulu, China, in THE CRIME OF AGGRESSION: A COMMENTARY 1131, 1134 (Claus Kreβ & Stefan Barriga eds., 2017); Kuzmin, supra note 8, at 1265.
11 This is demonstrated by how the concept of a state act of aggression relates to the overall crime of aggression. Article 8 bis(1) creates a definition of the crime of aggression that depends on the existence of an act of aggression. Thus, under article 8 bis(1), an individual must have participated in a state act of aggression to attract liability. Article 8 bis(2) then provides an enumerative list of acts which shall qualify as state acts of aggression, which the Court must interpret “in accordance with United Nations General Assembly resolution 3314.” Amendments to the Rome Statute of the International Criminal Court art. 8 bis(2), June 11, 2010, A-38544 U.N.T.S. [hereinafter Amendments]. It follows that, with the aid of the elements of crimes and the seven understandings—which form part of the package of amendments—the Court will have the authority to determine whether the requisite state act of aggression has occurred pursuant to article 8 bis(1) and (2). The Court must also determine whether that state act of aggression under subparagraph (2) is a “manifest violation of the Charter of the United Nations” under subparagraph (1). Id. art. 8 bis(1).
12 France’s delegation announced it “cannot support this draft text as it disregards the relevant provisions of the Charter of the United Nations enshrined in Article 5 of the Rome Statute” (Edwige Belliard, France, in THE CRIME OF AGGRESSION: A COMMENTARY 1143, 1144 (Claus Kreβ & Stefan Barriga eds., 2017). China, Russia, and the US also expressed disagreement for this reason. Lulu, supra note 10, at 1134.
adjudication of aggression by a court of law has its roots firmly planted in history. At the Nuremberg Trials, Germany argued that its military discretion about whether the use of preventive force was necessary was essentially non-justiciable.\(^{13}\) The Tribunal disagreed. In an authoritative statement about the importance of the rule of law to aggression, the Tribunal held that “whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.”\(^{14}\)

In the age of the UN Charter, there is plenty of support for the contention that aggression can be determined by bodies other than the Security Council, despite article 24(1).\(^{15}\) The General Assembly has pronounced upon aggression on several occasions.\(^{16}\) Furthermore, Judge Schwebel provided a clarification of the Security Council’s role in the determination of aggression in his dissenting opinion in *Nicaragua v. United States* at the International Court of Justice.\(^{17}\) In finding that the determination of a state act of aggression is not the exclusive domain of the Security Council, Judge Schwebel reasoned:

[W]hile 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.\(^{18}\)

Judge Schwebel’s reasoning here was not contradicted by the majority. Moreover, his reasoning is sound, and it sheds light upon the two faces of aggression. Just as politics will sometimes be the catalyst for the determination that an unlawful war is a violation of the UN Charter, politics will also sometimes

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13 Of course, the United States did not advance this argument. At the time of Nuremberg, given the triumph of the allies and their occupation of Germany, the U.S. government was rather enthusiastic about putting the issue of “aggression” squarely before the court. *See, e.g.*, Roger S. Clark, *The Crime of Aggression*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 778 (Carsten Stahn ed., 2015). In the 1940s, the U.S. government adopted a policy position that aggressive war should be treated as criminal *per se*, which is rather ironic given its about-face regarding aggression in Rome and Kampala. *Gerhard Kemp, Individual Criminal Liability for the Crime of Aggression* 82 (2d ed. 2016).


15 U.N. Charter, article 24, para. 1 (stating: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.”).


17 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 259, ¶ 60 (June 27) (dissenting opinion of Judge Schwebel).*

18 *Id.*
stand in the way. In the latter case, the unlawful war is still “aggressive” under international law, and a court applying international law is not precluded from making such a finding. But the fact that aggression can be adjudicated is only the beginning of the analysis. Such a conclusion does not lead unavoidably to the courthouse steps. Although a court is competent to rule on an act of aggression, this does not mean that aggression should be adjudicated.

In classical international legal philosophy, there are two opposing views of how states should address the illegal use of force. Of these, Grotius’ view of international law might be considered idealistic, delineating between just and unjust wars with a view to punishing ill-intent. He noted that in making war, “a wrong may arise from the intent of the party,” such as “an eager desire for glory, or some advantage, whether private or public.” All acts that arise in an unjust war are unjust, as a sort of “internal” or moral injustice. Those who wrongfully cause unjust war should be answerable for “all those things . . . which ordinarily follow in war,” and even generals and soldiers who could have prevented the harm should be held accountable.

On the other hand, Vattel articulated a contrasting world view: Every nation has a right to defend itself and its interests and to use whatever force is necessary to achieve that purpose. Depending on their interests, whether well or poorly understood, sovereign states have authority to determine the just causes for war, under Vattel’s view. Applied to the adjudication of aggression at the ICC, this theory would cast trials before the Court as political “show trials,” and the Court itself would become what amounts to a political adversary. In that vein, Martti Koskenniemi argues that in the trial of an aggressor, “each party is a judge, and each a criminal.” According to this view, branding someone an aggressor at trial is simply the extension of the political campaign against that party following the war, thus falling into the trap of “victor’s justice.”

The P5 subscribe to this latter theory. The common refrain is that jurisdiction over aggression would “politicize the Court and the prosecutor, who would have to decide—one way or the other—whether to pursue the inevitable allegations that both sides would make in the event of armed conflict, charging that the other side had committed aggression.” However, this refrain is losing its audience.

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20 Id., at Book III, Ch. X, Sec III.
21 Id., at Book III, Ch. X, Sec. IV.
25 Koh & Buchwald, supra note 5, at 262.
The creation of the Court and the drafting of the Kampala amendments have tipped the scales in favor of Grotius’ view. In her plea to re-open the amendments, former U.S. diplomat Sarah Sewall, speaking at the Annual Meeting of the American Society of International Law, acknowledged that the aggression amendments are part of a “changing international security landscape.”27 Indeed, the world view favoring the enforcement of international law has taken hold of the dialogue surrounding aggression. Aside from the P5, state representatives and scholars are now largely of the view that the Security Council does not have a monopoly on determining the propriety of the use of force.

Why has this shift occurred? Perhaps the international community is now more accepting of the fact that law and politics are inextricably bound to one another. The short history of the Court shows that the crimes within its jurisdiction often have a political dimension.28 But this does not mean that international crimes are inherently political and should not be prosecuted. The intervention of the ad hoc tribunals in several very politically charged indictments of state leaders—Slobodan Milošević, Radovan Karadžić, and Charles Taylor—illustrates this point. Although the judicial process was seen initially as a threat to peaceful mediation, the prosecutions forged ahead, and the accused “increasingly came to be viewed as spoilers to the mediation process.”29 This created what Rastan calls a “convergence between international peace and security and the delivery of justice.”30

The famous aphorism from the English common law of judicial impartiality is that “not only must justice be done; it must also be seen to be done.”31 The same would seem to hold true regarding the very politically charged crime of aggression. The reality is that the decisions which inhere in the prosecution of aggression will inevitably possess a mystical blend of legal and political factors, and the appearance of justice may be just as important as an actual conviction. By the same token, the Security Council is not without its shortcomings in meting out justice in the wake of mass atrocities. Its resort to ad hoc tribunals can be taken as an admission of that fact. And particularly with respect to aggression, the Security Council has never made a determination that the use of force by any state

26 See Allott, supra note 23, at 14, 17 (observing, generally that “[a]t the beginning of the 21st century, at long last, two centuries late, there is reason to think that we are witnessing the first stages of a great metamorphosis of the international system” and that “the Vattelian mind-world is withering away under the impact of the new international social reality”). See also ANDREW CLAPHAM, BRIERLY’S LAW OF NATIONS 39 (7th ed., 2012) (lamenting that “the survival of Vattel’s influence into an age when the ‘principles of legal individualism’ are no longer adequate to international needs, if they ever were, has been a disaster for international law”).

27 In a more alarmist tone, Lulu makes the claim that the Kampala amendments may have a “serious impact on the international legal and political system and act as a destabilizing factor in the collective security system.” Lulu, supra note 10, at 1134.


30 Id.

31 R v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259 (Eng.).
constituted an “act of aggression.” Nor has it ever referred to, let alone given meaning to, General Assembly Resolution 3314 on the definition of aggression, issued in 1974. The defining question, then, is not “whether the Court is acting independently of politics and public perception,” but, rather, whether the risk that the wrong person may be convicted by a politically-motivated Court is greater than the risk that, left to the Security Council, no justice will be delivered at all.

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When asked during his interview whether international criminal law could deliver justice, Ferencz responded, “[i]n the end, you certainly don’t get perfect justice, it’s imperfect no matter what you do, but it’s better than no justice.” This should be the dominant rejoinder to the P5 at the next review conference. Despite the formal consensus in Kampala, the amendments themselves remain fragile—they require a majority vote for their activation—and there is still a considerable opportunity for the P5 to shape the outcome of the vote. But if the P5’s delegates arrive at the next review conference with a similar to-do list, it is crucial that the other delegates do not lose sight of their goal: ending illegal wars. The failure to activate the Court’s jurisdiction over aggression would be a potentially fatal blow to the campaign led so dutifully by Ferencz and others.

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35 VERRIJN STUART, supra note 1, at 44.
36 Amendments, supra note 11, arts. 15 bis(3), 15 ter(3).
37 The U.S. delegation, for example, took similar measures in Rome and Kampala. See MCDougALL, supra note 33, at 50–51.
From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC’s Jurisdiction over the Crime of Aggression

Christian Wenaweser* and Sina Alavi**

In his opening statement before the International Military Tribunal (IMT) in Nuremberg, Justice Robert Jackson, the Chief Prosecutor for the United States, recalled that common sense demanded that “the law’s condemnation of war reach deeper, and that the law condemn not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars—wars of aggression.” The IMT set a precedent by prosecuting those most responsible for committing the crime against peace—which we now call the “crime of aggression,” and which Justice Jackson argued was the “supreme international crime.” The decades following Nuremberg, however, did not live up to the expectations that the IMT had created for international justice. States fought for years to define an “act of aggression” before finally adopting UN General Assembly Resolution 3314 in 1974. The creation of ad hoc tribunals by the UN Security Council in the 1990s created renewed momentum for the international criminal justice project in general, but none of those courts were given jurisdiction over the crime of aggression.

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1 See Robert Jackson’s opening statement at the IMT. Proceedings, Nov. 21, 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 145 (1947).
2 Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 186 (1947) (“To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”).
3 Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974). Resolution 3314, adopted on December 14, 1974, 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.” In the definition, the term “State” “[i]s used without prejudice to questions of recognition or to whether a State is a member of the United Nations [and] [i]ncludes the concept of a ‘group of States’ where appropriate.”
Encouraged by the work of the ad hoc tribunals, in 1998, states succeeded in establishing the International Criminal Court (ICC), which was little more than a utopian dream just a few years earlier. Although the Rome Statute of the ICC included the crime of aggression within the Court’s competence from the beginning, it took nearly twenty more years before the ICC would actually be given the opportunity to exercise its jurisdiction over the crime.4

Seventy years after the IMT delivered its judgment, we can finally fulfill the promise of Nuremberg by criminalizing aggressive war-making. In December 2017, States Parties to the Rome Statute of the ICC have the historic opportunity to activate the Kampala amendments and thus to enable the ICC to exercise its jurisdiction over the crime of aggression. An affirmative activation decision will make aggression prosecutable before an international court for the first time since the Nuremberg trials. Consequently, ICC States Parties will not only remedy the current lack of individual criminal liability for committing the crime of aggression, but they will also complete the Rome Statute as originally drafted, helping to deter aggressive war-making and enforce a key provision of the Charter of the United Nations: the prohibition on the illegal use of force.5

In spite of the prohibition on the illegal use of force in the UN Charter and the definition of an act of aggression by the UN General Assembly in 1974, the collective mindset of the international community has continued to treat war-making as unfortunate and undesirable, rather than as illegal. At the 1998 Rome Conference, states had different views about whether to include the crime in the founding treaty of the ICC. Against strong opposition, in particular from Permanent Members of the UN Security Council, the crime of aggression was included within the jurisdiction of the Court by way of compromise, due in no small part to the tireless advocacy of Ben Ferencz.6 But, in the absence of a definition of the crime, the Court’s exercise of jurisdiction was put on hold. At the ICC Review Conference in Kampala in 2010, States Parties finally agreed both to a definition of the crime of aggression as well as to the conditions for exercise of jurisdiction.7 While the agreement by consensus in Kampala was regarded as remarkable and unexpected, it came again with a provision for delay: The exercise of the ICC’s jurisdiction over the crime of aggression was conditioned on achieving thirty ratifications of the Kampala amendments and a one-time

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5 Article 2(4) of the Charter of the United Nations (UN) prohibits the threat or use of force against the territorial integrity or political independence of any state. Two exceptions are made: First, individual or collective self-defense by states involving the use of force is authorized by article 51 of the Charter, and second, the use of force can be authorized by the UN Security Council as under Chapter VII of the UN Charter.

6 In 1947–1948, Ben Ferencz was chief prosecutor in Nuremberg for the Einsatzgruppen case, which involved twenty-two defendants who were charged with murdering over one million people. All defendants were convicted, and the press hailed it as the “biggest murder trial in history.” “The Biggest Murder Trial in History”, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007155 (last visited Mar. 15, 2017).

7 Rome Statute, supra note 4, arts. 8 bis, 15 bis, 15 ter.
activation decision, to be taken by ICC States Parties no earlier than January 1, 2017. In June 2016, the threshold of thirty ratifications was reached, allowing ICC States Parties to take the required activation decision in 2017.8

By activating the Court’s jurisdiction over the crime of aggression, ICC States Parties will make it possible to hold individuals in leadership positions accountable for the most serious forms of the illegal use of force—for the first time since Nuremberg in an international court, but also in national courts.9 Equally as important, activation will afford legal clarity to domestic discussions on the use of force, as the Kampala decision, for the first time in history, provides a consensually agreed upon definition of the crime of aggression codified in an international treaty. National decision-makers will be given a legal basis for deciding if prospective actions are in accordance with international law and will understand the possible consequences of their decisions, if they are not. The ability to investigate and hold to account those responsible for the most serious forms of the illegal use of force will constitute a significant achievement for the rule of law at the international level, as it will allow the law to challenge the longstanding forces of power politics. Empowering the ICC to prosecute crimes of aggression will also provide judicial protection to states against acts of aggression and thus deter the illegal use of force against them. This protection, however, is somewhat limited, as the compromise reached in Kampala established a far more restrictive jurisdictional regime for the crime of aggression when compared with the regime governing the other Rome Statute crimes.10

The task of completing the legacy of Nuremberg is long overdue. An affirmative activation decision taken by ICC States Parties at the sixteenth session of the Assembly of States Parties (ASP) in New York in December 2017 will strengthen the international rule of law by providing clarity on the legality of the use of force and realizing the full intent of Rome Statute as originally drafted. Activation will also help deter illegal uses of force in the future, as leaders will

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8 At the time of writing, thirty-two states have ratified the Kampala amendments on the crime of aggression.

9 States that choose to implement the Kampala definition into their domestic legislation will not only give full effect to the principle of complementarity contained in article 1 of the Rome Statute, but such domestic rules could also help deter the leaders of that country from committing aggression in the first place. It also remains to be seen whether states that have adopted implementing legislation will be able to exercise universal jurisdiction over the crime of aggression.

10 See Rome Statute, supra note 4, art. 15 bis. In the case of future state referrals or proprio motu investigations, particular conditions and procedures regarding the crime of aggression must be observed. First, acts of aggression that involve Non-States Parties to the Rome Statute—whether as victim or aggressor—are categorically excluded from the Court’s jurisdiction. Second, acts of aggression involving States Parties to the Rome Statute come within the Court’s jurisdiction under the following conditions: The amendments must have entered into force for at least one of the States Parties involved, whether as a victim or as an aggressor, because otherwise the Court would not be able to apply the amendments. And the aggressor State Party must not have made use of the possibility of opting out of the Court’s jurisdiction. Such an opt-out declaration must precede the presumed act of aggression itself. In the case of a future referral of a situation by the Security Council, the Court can investigate all four of the ICC’s core crimes, including the crime of aggression—consent is not required by the states involved.
have to consider the ICC’s jurisdiction over the crime of aggression when making relevant decisions, and it will afford states legal protection from illegal war-making. We have watched the curve of international justice span from Nuremberg in 1946 to New York in 2017. The time has finally come to criminalize the most serious forms of the illegal use of force and to make the Nuremberg legacy complete.
Continued Debate Over the Crime of Aggression: A Supreme International Irony

Donald M. Ferencz*

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.

Robert Jackson, 21 November 1945

With these words, the Chief of Counsel for the United States opened the case for the Prosecution at the International Military Tribunal at Nuremberg (IMT). The IMT’s ground-breaking judgment of October 1, 1946 held Nazi leaders personally to account for war crimes, crimes against humanity, and crimes against peace—and indelibly branded aggression as “the supreme international crime.”

Within days of the verdict, Robert Jackson reported to the President of the United States that “[n]o 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.” Yet, despite such ardent pronouncements, the IMT was a court of limited jurisdiction and, without broader global endorsement, its judgment might have fallen short of commanding universal recognition as binding law. For this reason, the United States advanced its consideration by the United Nations, where, on December 11, 1946, the General Assembly unanimously affirmed the principles of the Nuremberg Charter and judgment and directed that work begin on formulating these principles within an international criminal code. Such affirmation has been cited by both courts and commentators

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2 See 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948) (“To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”).
4 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/RES/1/95 (Dec. 11, 1946). For a detailed history, see Affirmation of the Principles of International Law Recognized by the Charter of the
as having stamped the judgment with the expected imprimatur of customary international law.\(^5\)

Notwithstanding the fact that it took the U.N. only seventy-one days to affirm aggression as a customary law offense, today, almost seventy-one years later, it remains a crime in legal limbo. Though the International Criminal Court (ICC) is technically vested with jurisdiction over the crime of aggression, it is, as yet, powerless to exercise such jurisdiction.\(^6\) But that may soon change.

In 2010, at an ICC Review Conference held in Kampala, Uganda, amendments to the Rome Statute were adopted by consensus which could allow the Court’s aggression jurisdiction to be activated as early as 2017.\(^7\) Ironically, those most responsible for having elevated the crime to its current status within customary international law are in no rush to see that happen.\(^8\)

At Nuremberg, it was the United States that pressed for including aggressive war-making as an indictable offense.\(^9\) The Charter defined “crimes against peace”

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\(^5\) See, e.g., Ian Brownlie, Principles of Public International Law 566 (5th ed., 1998) (‘[W]hatsoever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law.’). See also R v. Jones, [2006] UKHL 16 [12]–[18] (Eng.) (holding that the crime of aggression exists in customary international law, essentially unchanged since Nuremberg, and citing Brownlie); Attorney Gen. of the Gov’t of Isr. v. Eichmann, 36 I. L. R. 277 (Sup. Ct. 1962) (‘[I]f there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law ‘since time immemorial,’ such doubt has been removed by two international documents’; citing G.A. Res. 95(I) and Res. 96).

\(^6\) The Rome Statute of the International Criminal Court (hereinafter the “Rome Statute” or the “Statute”) provided that the Court (established in 2002) may not “exercise jurisdiction over the crime of aggression” until after “a provision is adopted . . . defining the crime and setting out the conditions under which the court may exercise such jurisdiction.” Rome Statute of the International Criminal Court art. 5, July 17, 1988, 2187 U.N.T.S. 90, (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

\(^7\) The Kampala amendments provide that activation of the Court’s aggression jurisdiction will occur after at least thirty States have ratified them and they have been re-approved by the ICC’s Assembly of States Parties (ASP) at some time after January 1, 2017. Rome Statute, supra note 6, arts. 8 bis, 15 bis, 15 ter. See also Jutta F. Bertram-Nothnagel, A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court, AFRICA LEGAL AID Q., http://www.africalegalaid.com/wp-content/uploads/2017/02/The_Provisions_on_the_Crime_of_Aggression_Adopted_at_the_Kampala_Review_Conference_for_the_Rome_Statute_of_the_International_Criminal_Court.pdf.


\(^9\) The Nuremberg Charter was appended to the London Agreement of 8 August 1945, signed by representatives of the United States, France, the U.K., and the Soviet Union. It is the foundational document authorizing the trial of Nazi criminals at Nuremberg. See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 10–18 (1947). For a detailed account of the paramount role of the United States in advancing crimes
as the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.”

It went on to specify that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

While customary law covers only wars of aggression, the Rome Statute criminalizes a litany of specific state acts of aggression involving uses of armed force which, as to their “character, gravity and scale constitute[] a manifest violation of the Charter of the United Nations.” Although the Statute, therefore, may appear to straddle a customary law divide between wars of aggression and mere acts of aggression, the “manifest violation” threshold may reasonably be expected to limit aggression prosecutions, other than for substantial breaches of the peace.

The acts specified in paragraph 2 of Article 8 bis of the Rome Statute are identical to those set forth in Article 3 of the Definition of Aggression adopted in General Assembly Resolution 3314 in 1974. As to the character of the prohibition of conduct proscribed by Article 3 of the 1974 definition (relating to “the sending” . . . of armed bands, groups, irregulars or mercenaries”), the International Court of Justice opined in 1986 that such prohibition “may be taken to reflect customary international law.” This characterization was made outside the scope of a criminal prosecution, but it is, nonetheless, of interest with respect to the question of whether the Rome Statute’s aggression provisions parallel those of customary international law. Yet it is a question which, in the end, may be relatively academic: Any prosecution before the ICC will necessarily rely primarily on the authority of the Rome Statute itself, rather than on principles of universal jurisdiction or of customary law.
In Kampala, the Assembly of States Parties resolved by consensus “to activate the Court’s jurisdiction over the crime of aggression as early as possible.”\textsuperscript{18} Now, in 2017, the parties are finally in a position to do so.\textsuperscript{19} Whether their stated resolve was based in rhetoric or in reality should soon be fairly obvious.

Evidence, it may also, “where appropriate,” consider secondary sources of law, including principles of both international and national laws.\textsuperscript{18} See International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res.6 (June 11, 2010).

\textsuperscript{19} Since thirty State Parties have already ratified the amendments, all that remains for their activation is their re-approval by the ASP. See Rome Statute, supra note 6.
The idea of an international criminal court was probably contemplated by dreamers in the eighteenth and nineteenth century, but it did not grow legs until the weeks following the armistice that ended the First World War. The forum for much of the debate was the Commission on Responsibilities, a body set up by the Preliminary Peace Conference in January 1919.1 At its second meeting, the Commission decided to establish three sub-commissions, each charged with developing recommendations on a piece of the problem. The first of them focused on fact-finding, while the other two addressed the legal issues.2 One sub-commission considered the responsibility for planning and launching the war, and the other examined violations of the laws and customs of war committed during the conflict.3

Thus, from the earliest days of international criminal justice, a distinction was made between the *jus ad bellum* and the *jus in bello*. Ultimately, the Commission on Responsibilities decided to focus criminal justice on the violations committed during the war rather than the responsibility for starting it.4 But the important decisions on the content of the peace treaty were taken not by the Commission but by the Council of Four, which convened in April 1919. The Council set aside much of the Commission report. It agreed to create an international tribunal to try the German Emperor for “a supreme offence against international morality and the sanctity of treaties.”5 The trial never took place, of course, because the Netherlands refused to surrender the Kaiser.

When international justice revived during the Second World War in forums like the London International Assembly, the United Nations War Crimes Commission, and the London Conference, the debates about the relationship between responsibility for starting a war of aggression and crimes committed within the conflict resumed. The judges of the International Military Tribunal

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2 Id. at 2–3.

3 Id.


5 Treaty of Peace between the Allied and Associate Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188.
addressed the issue by describing the category of crimes against peace as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” They presented a holistic view of international criminality for atrocities by which crimes against peace, war crimes, and crimes against humanity were joined in what amounted to a symbiosis.

That relationship was challenged, although only indirectly, during the 1990s, when the Security Council established ad hoc tribunals to respond to the conflicts in the former Yugoslavia and Rwanda. The statutes of those institutions were confined to the jus in bello. What the International Military Tribunal had called the “supreme international crime” was absent. This is partly explained by the understanding that the conflicts in both Yugoslavia and Rwanda were essentially non-international in nature. But the uncertainty about the status of the “supreme international crime” persisted during the drafting of the Rome Statute of the International Criminal Court (ICC). Eventually, the vision of the International Military Tribunal began to be restored with the adoption, at Kampala, of amendments to the Rome Statute on the crime of aggression. These entered into force in 2013 and are expected to become fully operational at the end of 2017.

Yet a tendency to marginalize the crime of aggression persists. For example, a press release issued by the ICC in February 2017 described the Court as “the first permanent international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community, namely: genocide, war crimes and crimes against humanity.” Of course, not only does article 5 of the Rome Statute include the crime of aggression as one of the four core crimes, but the amendments adopted at Kampala entered into force nearly four years ago. The oversight is a bit symptomatic.

Benjamin Ferencz, who has probably thought about these issues longer than anyone else on the planet, manifests in his writings and lectures an understanding of the bonds that join the crimes of the jus ad bellum to those of the jus in bello. He has developed a very creative approach by which aggressive war is positioned under the umbrella of crimes against humanity. It makes a neat and persuasive complement to the vision at Nuremberg, whereby crimes against humanity were hitched, as it were, to war crimes and crimes against peace. In that

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6 22 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 427 (1948).


10 Rome Statute, supra note 8, arts. 15 bis, 15 ter.


sense, it might be said that crimes against humanity have become the “supreme international crime.” Challenges to the link between the crime of aggression and the other atrocity crimes are explained, at least in part, by an insistence upon the distinction between the *jus ad bellum* and the *jus in bello* that comes from international humanitarian law. Without necessarily proclaiming total indifference on the lawfulness of the use of force, there is nevertheless an emphasis on conduct within the conflict and an affirmation of the essential equality of the parties, a consequence of ignoring the responsibility for the war itself.

What is a useful distinction in international humanitarian law seems to have spilled over into the international law of human rights. For example, at the Kampala Review Conference a position paper published by Human Rights Watch explained that the organization did not have much interest in the amendments on the crime of aggression because its focus was on the *jus in bello* rather than the *jus ad bellum*.13 Amnesty International did much the same, explaining that “peace” was not a part of its mandate, which was derived from the Universal Declaration of Human Rights, because that document does not deal with the lawfulness of the use of force.14

This is a very narrow interpretation of the scope of international human rights. The opening words of the Universal Declaration of Human Rights affirm that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”15 The concluding phrase confirms the relationship of three fundamental objectives.16 The sentence as a whole highlights the connection between freedom, justice, and peace and the protection of fundamental human rights.

After a period of some legal uncertainty as to whether or not human rights law applies during armed conflict, some having argued that it is displaced by the *lex specialis* of the law of armed conflict, it is now beyond serious dispute that human rights protections and obligations continue during wartime. According to the International Court of Justice, “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International

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13 Human Rights Watch, Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference (May 10, 2010), https://www.hrw.org/report/2010/05/10/making-kampala-count/advancing-global-fight-against-impunity-icc-review-conference (“We have not participated actively in negotiations on the crime of aggression. We believe that we are most effective as a human rights organization if we do not opine on issues of *jus ad bellum*, the lawfulness of waging war, and instead adopt . . . an approach of strict neutrality during armed conflicts.”).


16 Id.
Covenant on Civil and Political Rights.”\(^{17}\) Article 4 permits no derogation to the right to life.\(^{18}\) Moreover, the European Convention on Human Rights permits derogation from the right to life only for “lawful acts of war.”\(^{19}\) The rather limited *travaux préparatoires* of the Convention suggest that this phrase may well apply to the *jus ad bellum* as well as to the *jus in bello*.

It can be no more accurate to claim that the Universal Declaration of Human Rights is inapplicable in wartime than to say that the Charter of the United Nations, from which the Declaration is derived, does not operate during armed conflict. The importance of the right to life, sometimes described as the “supreme right,” enshrined in article 3 of the Universal Declaration of Human Rights and in all of the major treaties of general application, is at its most acute during armed conflict.\(^{20}\) The right to life manifests itself in specific norms of the law of armed conflict, such as the prohibition of attacks on non-combatants and on civilian objects.\(^{21}\)

Article 29(2) of the Declaration recalls that “[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”\(^{22}\) How can it be contended that the Universal Declaration is silent on the lawfulness of the use of force if the Declaration permits limitation of the right to life only when it is “determined by law”? Obviously, unlawful resort to force to settle an international dispute cannot be consistent with the requirement that it be “determined by law.”

The law of armed conflict takes its distance when the lawfulness of the use of force is concerned. It examines whether deprivation of life is arbitrary only from the perspective of the *jus in bello*. There is no reason for international human rights law to take the same path. Killing in an unlawful war is unlawful killing. It may escape the sanction of the law of armed conflict because of the internal logic of that system. But that rationale should not and cannot apply to international human rights law, where it is fitting to speak of a human right to peace.\(^{23}\)

\(^{17}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).


\(^{20}\) Universal Declaration of Human Rights, *supra* note 15, art. 3.


\(^{22}\) Universal Declaration of Human Rights, *supra* note 15, art. 29, para. 2.

criminalization of the unlawful use of force—the crime of aggression—is the corollary of this human right to peace.
The Crime of Aggression in the ICC and State Responsibility

Dapo Akande* & Antonios Tzanakopoulos**

In a contribution to the debate regarding the Kampala Amendments on the Crime of Aggression, we argued that the jurisprudence of the International Court of Justice (ICJ) on use of force questions can be relevant in interpreting the now-defined international crime that will fall within the jurisdiction of the International Criminal Court (ICC). This is in part because the crime of aggression, as defined in Kampala, requires the commission of an “act of aggression” that “by its character, gravity and scale constitutes a manifest violation of the United Nations Charter.” The fact, however, that the finding of a state’s responsibility for such a manifest breach is required for a conviction of the crime of aggression raises questions about the involvement of the ICC in making determinations of state responsibility.

The jurisdiction of the ICC extends only to the determination of the criminal responsibility of individuals. When those individuals are also officials or agents of states, questions may also be raised about the responsibility of the state to which the acts of the individual are attributable. Indeed, where an international crime within the jurisdiction of the ICC is committed by a state organ or person whose acts are otherwise attributable to the state, there will usually also be a case of state responsibility for breach of international law. This is because all the crimes within the jurisdiction of the ICC reflect the concept of “dual obligations.” That is to say, the prohibitions that underlie those “core crimes” are not addressed merely to individuals but are also related to the same (or substantially similar) obligations imposed on states. The prohibition on genocide is addressed both to individuals and to states; war crimes are serious violations of international humanitarian law, which is clearly binding on states; and crimes against humanity are derived essentially from human rights law.

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3 Id., art. 25(1).

Although a finding that a state organ has committed an international crime for which he or she bears individual criminal responsibility will usually imply that the state to which his or her acts are attributable has committed an internationally wrongful act that generates state responsibility, it will not usually be the role of the ICC to make such a finding of state responsibility. Even where the ICC has to make a finding that state organs had a policy of committing such crimes or developed a plan to do so, these findings would be not expressions or determinations of state responsibility but rather a statement of facts that would imply the responsibility of the state.

When it comes to the crime of aggression, however, the definition of the crime itself requires the ICC to make a determination of state responsibility as a prerequisite for the finding of individual responsibility for the commission of the crime. This means that we are not talking here about an implication—even a necessary implication—that emerges from the finding that a state organ has committed an act of genocide or a crime against humanity. We are actually talking about a direct determination of state responsibility as a prerequisite for the finding of individual criminal responsibility under international law. As Claus Kress has put it, “The crime of aggression . . . is . . . the only crime under international law that requires the commission of certain internationally wrongful conduct by a state.”

This required link between state and individual responsibility with respect to the crime of aggression suggests that the crime of aggression is different from the other “international crimes.” For one thing, it may be argued that the project of international criminal justice is about establishing that “crimes against international law are committed by men and not by abstract entities,” with the emphasis and the focus being laid on the responsibility of the wrongdoing individual and that of the state being secondary. However, with aggression, the focus on the state persists in that the court has first to pronounce on state responsibility, and only after it has done that can it proceed to determining individual guilt or innocence.

Furthermore, the required link between state and individual responsibility leads to a number of practical questions for the ICC, which we are merely highlighting in this brief contribution, along with some provisional responses to get the debate going. The first question is whether a state whose leader(s) are being prosecuted for the crime of aggression can possibly intervene in ICC proceedings in order to argue that no manifest breach of the UN Charter has occurred in the particular instance. The second, related, question is whether the ICC actually has the competence to make an incidental, as it were, finding of state responsibility in the context of determining the existence of individual criminal responsibility under international law. Any court operating on a

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5 See Rome Statute, supra note 2, arts. 7(2)(a), 8(1) (requiring, respectively, the Court to make findings as to (1) whether an attack directed against a civilian population is “pursuant to or in furtherance of a State or organizational policy to commit such attacks” and (2) whether war crimes were committed as “part of a plan or policy or as part of a large-scale commission of such crimes”).


7 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 223 (1947).

8 See Sarah Williams, Aggression, Affected States, and a Right to Participate: A Response to Koh and Buchwald, 109 AJIL Unbound 246, 246 (2016).
limited jurisdictional basis has to determine the extent to which it can make the incidental findings that are required in order to answer the main legal question falling within its jurisdiction. The ICJ has faced such questions in Lockerbie,\textsuperscript{9} for example, and the issue has also been raised before other courts and tribunals, such as those operating under the dispute settlement system of the UN Convention on the Law of the Sea.\textsuperscript{10} However, the issue that arises with respect to the crime of aggression is whether we are dealing, essentially, with a Monetary Gold issue—that is, a situation in which the incidental determination required for the Court to exercise its jurisdiction is such as to make the claim non-admissible.\textsuperscript{11} The problem is not that the ICC has to make an incidental determination. The issue is that it has to make a determination of the responsibility of a state which is not before the Court.

The appropriateness, under the Monetary Gold principle, of the ICC making determinations as to whether states have committed violations of the UN Charter, depends essentially on whether the states in question have consented to the Court’s engaging in this exercise. Under the ordinary jurisdictional regime of the ICC, acts committed by any individual on the territory of a state party will be subject to the jurisdiction of the ICC, whether that individual is a national of any party to the ICC statute or a national of a non-party.\textsuperscript{12} Consent by the state of nationality is not a requirement for jurisdiction.\textsuperscript{13} However, the possibility that the Court might determine whether an act of aggression has been committed by a non-consenting state is lessened by the fact that the Kampala amendments on aggression provide that, where the jurisdiction of the Court is triggered by a state referral or by the prosecutor proprio motu, the Court shall not exercise its jurisdiction over the crime of aggression when committed by the national of or on the territory of a state that is not party to the Rome Statute of the ICC.\textsuperscript{14} Thus, under this provision, findings of state responsibility for acts of aggression may not be made by the ICC against states that have not given their consent to ICC jurisdiction.

\textsuperscript{9} Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, 1998 I.C.J. 115 (Feb. 27).

\textsuperscript{10} See, e.g., Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award; South China Sea Arbitration (Philippines v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015). In these cases (and others) one can argue that the question of incidental jurisdiction emerges because of the tendency of states (and their lawyers) to try to “shoehorn” particular disputes into narrow compulsory clauses (since these are the only jurisdictional bases that they can find) and thus to bring the relevant cases before not-obviously-competent courts and tribunals. See also Antonios Tzanakopoulos, Resolving Disputes over the South China Sea under the Dispute Settlement System of the UN Convention on the Law of the Sea, in THE SOUTH CHINA SEA DISPUTES AND INTERNATIONAL LAW (forthcoming 2017), https://ssrn.com/abstract=2772659.


\textsuperscript{12} Rome Statute, supra note 2, art. 12(2)(a).

\textsuperscript{13} See Dapo Akande, Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limitations, 1 J. INT’L CRIM. JUST. 618 (2003).

\textsuperscript{14} Rome Statute, supra note 2, art. 15 bis(5).
However, the question of ICC findings of state responsibility against potentially non-consenting states arises in two other cases. First, there is no such exclusion in cases where the jurisdiction of the Court is triggered by a Security Council referral.\(^{15}\) Second, the Court’s jurisdiction remains unclear with regard to acts of aggression committed by a party to the Rome Statute that has neither ratified (or accepted) the Kampala aggression amendments nor opted out of them.\(^{16}\) In both of these cases, a determination of state responsibility by the ICC could breach the *Monetary Gold* principle.\(^{17}\) Although it might be argued (as has been done elsewhere)\(^{18}\) that the first scenario relating to Security Council referrals would not be problematic, the second scenario would likely offend against the *Monetary Gold* principle, especially in light of the provisions of the Rome Statute dealing with amendments.\(^{19}\)

The fact that the ICC will have to determine questions of state responsibility in making determinations about individual criminal responsibility for the crime of aggression thus has implications for how we might think about the as yet unclear jurisdiction of the Court over the crime. It ought also to have implications for some of the procedures that the Court should adopt if and when it actually has a case dealing with the crime of aggression.

\(^{15}\) See *id.*, art. 15 ter.


\(^{17}\) See Akande, *Prosecuting Aggression*, supra note 11.

\(^{18}\) *Id.*

\(^{19}\) In particular, see Rome Statute, *supra* note 2, art. 121(5) (second sentence noting, “In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory”).
Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court

Marissa R. Brodney*

Which entities will legally qualify as “victims” of the crime of aggression at the International Criminal Court (ICC)? Because the Rome Statute accords victims the right to participate in proceedings1 and affords victims the possibility of obtaining reparation,2 identifying victim constituencies of crimes within the Court’s jurisdiction is foundational to adjudicating crimes under the Rome Statute. However, in contrast to other crimes under the ICC’s jurisdiction, individuals have generally not been recognized as victims of the crime of aggression under international law.3 It remains unclear how the Rome Statute

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1 Article 68(3) of the Rome Statute provides that, “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.” Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

2 Article 75 of the Rome Statute empowers the Court to authorize reparation for victims of crimes within the Court’s jurisdiction, including restitution, compensation, and rehabilitation. Id., art. 75. REDRESS defines “reparation” as “the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained.” REDRESS Trust, Reparation: A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law 8 (2003), http://www.redress.org/downloads/reparation/SourceBook.pdf. See also Marissa R. Brodney, Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates, 2016 J. OXFORD CENT. SOCIO-LEGAL STUD., https://joxcsls.com/2016/11/01/implementing-international-criminal-court-ordered-collective-reparations-unpacking-present-debates/ (providing an overview of reparation as a transitional justice mechanism within the International Criminal Court’s procedural architecture, and explaining: “[T]he ICC Rules of Procedure and Evidence outline procedures governing victim applications and Court motions for reparations (rules 94 and 95); publication of reparation proceedings (rule 96); assessment of reparations (rule 97); and the role of the Trust Fund (rule 98). Together, the Rome Statute and ICC Rules of Procedure and Evidence provide a general framework guiding the authorization of reparations.”).

3 See Erin Pobjie, Victims of the Crime of Aggression, in THE CRIME OF AGGRESSION: A COMMENTARY 816 (Claus Kreß & Stefan Barriga, eds., 2017) (“Unlike the other crimes within the Court’s jurisdiction—genocide, crimes against humanity and war crimes—individuals have never
system’s definition of “victim” applies to article 8 bis—as well as whether and to what extent the ICC’s understanding of “victim” accords with conceptualizations of victimization underpinning the framing and incorporation of aggression as a crime under international criminal law. This piece aims to introduce readers to questions that various scholars have raised with respect to the interaction between victim identity and aggression as a crime. For in-depth discussion of legal questions surrounding recognition of individuals as victims of the crime of aggression under the Rome Statute and an argument for their recognition as such, see Erin Pobjie, *Victims of the Crime of Aggression*, in The Crime of Aggression: A Commentary.5

In describing an act of aggression as “a manifest violation of the Charter of the United Nations,”6 article 8 bis invokes article 2(4) of the United Nations Charter—a provision that calls upon member states to refrain “from the threat or use of force against the territorial integrity or political independence of any state.”7 That the Rome Statute also codifies aggression as a leadership crime augments a state-centric understanding of aggression generally under the Rome Statute: To be held responsible for the crime of aggression, a person must be “in a position effectively to exercise control over or to direct the political or military action of a State.”8 The crime of aggression’s state-centric nature, however, may lead to “complicated questions of accountability and means of reparation”9 within the Rome Statute system.

While states figure prominently in the framing of article 8 bis, this emphasis on states does not necessarily comport with the Rome Statute system’s definition of “victim.” Rule 85(a) of the ICC Rules of Procedure and Evidence defines victims as *natural persons* who suffered harm resulting from a crime within the

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4 “For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Rome Statute, supra note 1, art. 8 bis(1).

5 Pobjie, supra note 3.

6 Rome Statute, supra note 1, art 8 bis.

7 U.N. Charter art. 2, para. 4 (emphasis added).

8 Rome Statute, supra note 1, art 8 bis(1) (emphasis added).

jurisdiction of the Court. Accordingly, will individuals qualify as victims of aggression under Rule 85(a)? Alternatively, as Pobjie suggests, might states qualify as victims of aggression at the ICC under an expansive interpretation of “institution” under Rule 85(b), which enables certain institutions serving a humanitarian function to attain victim status? Should the ICC amend the Rules to account expressly for states as new victim constituencies with respect to the crime of aggression, or should states remain excised from the ICC’s victim participation and reparation frameworks? Drafters of the crime of aggression did not consider “whether the victim provisions [of the Rome Statute] would apply to the crime of aggression or the impact of the proposed aggression amendments on the victim provisions in the Statute and Rules of Procedure and Evidence.” Prospects for adapting the ICC’s victim participation and reparation mandates to the prosecution of aggression remain under-explored.

At Nuremberg, where aggression was prosecuted as a crime against peace, victims could be conceptualized as at once both local and global in scope. Aggressive war ruptured a global order—even as specific countries may have suffered more acutely, and even as individual victims mounted. In contrast to the ICC, the International Military Tribunal at Nuremberg did not allow for victim participation or reparation in the trial process. As a result, the Nuremberg Tribunal did not need to conceptualize crimes in relation to victim constituencies in ways that the ICC must. Arguably, the power and promise of prosecuting crimes against peace derived from the expansive victimization associated with aggression. Contained within aggression was the “accumulated evil of the whole” of aggressive war—aggressive war harmed humanity writ large.

The ICC’s victim participation and reparation mandates preclude the Court from accepting the notion of a global victim. By incorporating victim participation and reparation within its framework for prosecuting international crimes, the Rome Statute invites—in fact demands—a focus on who may legally be considered a victim of the grave crimes within the Court’s jurisdiction. Mark McDougall, for example, maintains that, “States are . . . excluded from the definition of ‘victims’ under Rule 85 of the Rules of Procedure and Evidence states. “Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.” ICC Rules of Procedure and Evidence, Rule 85(b), https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf. For a detailed analysis of the argument that states may conceivably qualify as victims under 85(b), see Pobjie, supra note 3, at 847–52.

Findlay and Ralph Henham have argued that it “has become essential for the legitimacy of [International Criminal Justice] that a victim constituency be centrally recognized,”yet possibilities for defining that victim constituency for the crime of aggression under the Rome Statute remain uncertain.

ICC recognition of individuals as victims of the crime of aggression would be a conceptual and legal innovation under international law. International law historically has recognized states, not individuals, as the victims of aggression. Discussions of aggression as a violation of international law have long been replete with references to victims of aggression as “victim states” or “attacked states.” These references persist, even as there may be an increasing focus on the humanitarian consequences of aggressive force on a state’s population.

Victim status at the ICC could permit individuals to obtain reparation for aggression under the Rome Statute, in an era when, as Friedrich Rosenfeld has noted, “an individual right to reparation for violations of the [j]us ad bellum is still widely rejected among scholars.” The United Nations Compensation Commission (UNCC) and Eritrea-Ethiopia Claims Commission (EECC) both enabled individuals to receive compensation in relation to violations of the jus ad bellum. However, only governments and international organizations were permitted to submit claims to the UNCC, and the EECC made awards only to states. Compensation, furthermore, is a concept distinct from, even if related to,

16 An understanding adopted at Kampala attempted to bound the impact of the Rome Statute’s aggression amendments on international law beyond the Rome Statute: “It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6, Annex III, Understanding No. 4 (June 11, 2010). Nevertheless, Sean Murphy argues that, “Adoption of the definitions on ‘act’ and ‘crime’ of aggression may have collateral implications outside the criminal context, especially on rules relating to the jus ad bellum.” Sean D. Murphy, The Crime of Aggression at the ICC 38 (Geo. Wash. U. Law Sch. Pub. Law and Legal Theory Paper No. 2012-50; Legal Stud. Research Paper No. 2012-50, 2012).
17 See Pobjie, supra note 3, at 816.
19 Id. at 1404.
21 “Jus ad bellum refers to the conditions under which States may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it (self-defence and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients of jus ad bellum.” Int’l Comm. of the Red Cross, What Are Jus ad Bellum and Jus in Bello? (Jan. 22, 2015), https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0.
23 See Ari Dybnis, Was the Eritrea–Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict, 33 LOY. L.A.
the broader concept of “reparation,” which has yet to be awarded to individual victims of aggression on the world stage.

If the ICC were to recognize states as victims of the crime of aggression, under either an expansive interpretation of Rule 85(b) or by amending the Rules, a situation could plausibly arise in which in which a convicted person might be held liable for repairing harm to a victim state; this would be a profound development—if not inversion—of international law as we know it. The Court’s evolving jurisprudence on reparation, furthermore, makes clear that the ICC will hold a convicted person monetarily liable for Court-ordered reparation even when a reparation judgment is funded by external sources, such as those provided by the Trust Fund for Victims. In part owing to a recognition that victim status

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24 Compensation may comprise one of various modalities of reparation. Reparation is generally understood to require some communication of social meaning to victims, often anchored in an acknowledgement of responsibility for causing harm. Communication of social meaning is part of what transforms compensation into reparation following crimes associated with oppression or conflict. See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (codifying a right to remedy and reparation and elaborating upon various modalities of reparation for victims of cross violations of human rights law and serious violations of international humanitarian law); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 110 (1998) (“Social and religious meanings rather than economic values lie at the heart of reparations.”). Separately, states incur an obligation under international law to provide reparation when one state’s breach of international law injures another state. See, e.g., Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, The Concept of Legalization, 54 INT’L ORG. 401, 409 (2000) (“When breach leads to injury, legal responsibility entails an obligation to make reparation, preferably through restitution. If this is not possible, the alternative in the event of material harm is a monetary indemnity; in the event of psychological harm, ‘satisfaction’ in the form of an apology.”).

25 See Pobjie, supra note 3, at 847–52.

26 “[I]t might be suggested that special provisions may be needed, if only to enable the Court to function effectively in relation to aggression prosecutions. . . . [An] alternative [regarding victim participation] would be to establish a mechanism to allow the victim State to speak on behalf of the individual victims of the crime—perhaps through the modification of the existing mechanism in Rule 103 . . . [Regarding reparation] there may be a need to develop specific principles that recognise the special nature of the crime . . . .” McDougall, supra note 12, at 300–01.

27 Literature on investor-state arbitration has grappled with questions related to claims and counter-claims involving individuals and states, discussing individuals’ ability to sue states alongside states’ inability to sue individuals under international law. See, e.g., Alexander Orakhelashvili, The Position of the Individual in International Law, 31 CAL. W. INT’L L. J. 241, 261 (2001) (“International law, owing to its inter-state structure (however conservative it may look) cannot offer an equal remedy to the State. The State cannot sue the private corporation under international law.”).

28 The Trust Fund For Victims is an entity established by article 79 of the Rome Statute, which provides: “(1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims; (2) The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund; (3) The Trust Fund shall be
could allow a state to apply for reparations against a convicted person,commentators have argued that the Court should decline to recognize states as victims.

States resisted anchoring the Court’s reparations mandate in principles of state responsibility at the time of the Rome Statute’s drafting. This resistance may indicate a more general aversion to anchoring the Rome Statute’s reparative justice framework in an expressly geopolitical frame.

Consistent with the notion that the ICC should enforce distance between individual and state-level liability and associated harm, Carsten Stahn suggests not only that “[e]xtending victim participation to state representatives in the context of aggression would give the reparations regime a completely new direction,” but also that doing so “would introduce a surrogate forum for interstate reparation through criminal proceedings before the ICC”—which might “ultimately run against the purpose and mandate of the court.”

managed according to criteria to be determined by the Assembly of States Parties.” Rome Statute, supra note 1, art. 79. In 2015, the ICC Appeals Chamber clarified that making a reparations order “through” the Trust Fund “does not exonerate the convicted person from liability.” Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals against the ‘Decision Establishing the Principles and Procedure to Be Applied to Reparations’ of 7 August 2012, ¶ 5 (Appeals Chamber, Mar. 3, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02631.PDF. See also Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Ordonnance de Réparation en Vertu de l’Article 75 du Statut, ¶¶ 326–30 (Mar. 24, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (setting the amount of Katanga’s liability for reparations at USD 1,000,000, even while declaring Katanga indigent for the purpose of reparations as of the date of the Trial Chamber’s reparations order; instructing the Registry to continue to monitor Katanga’s financial situation; and, at the same time, inviting the Trust Fund to consider using its resources to implement reparations for victims given Katanga’s indigence) [hereinafter Katanga Reparations Order].

Pobjie, supra note 3, at 850.

See, e.g., Pobjie, supra note 3, at 852 (“As the recognition of legal persons as victims under rule 85(b) is discretionary…the Court should exercise its discretion to decline to recognise states as ‘organizations or institutions’ meeting the definition of victim.”).

“A significant number of delegations were not prepared to accept the notion of State responsibility to, or in respect of, victims. However, this refusal does not diminish any responsibilities assumed by States under other treaties and will not—self evidently—prevent the Court from making its attitude known through its judgments in respect of State complicity in a crime.” Christopher Muttukumaru, Reparations to Victims, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 267 (Roy S. Lee, ed., 1999).

At the same time, however, Friedrich Rosenfeld notes, “There is substantial overlap between the forms of reparation, which can be awarded according to Article 75 ICC Statute and those that are envisaged by the ILC Draft Articles on State Responsibility.” Rosenfeld, supra note 20, at 257. Additionally, as Trial Chamber II recently noted in its order for reparations in the Katanga case, ICC-issued reparations judgments do not absolve states of their responsibility to grant reparations to victims under other treaties or national legislation. Katanga Reparations Order, supra note 28, ¶ 323, https://www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (“[L]es réparations accordées par une ordonnance n’exonèrent pas les États parties de la responsabilité d’octroyer des réparations à des victimes en vertu d’autres traités ou de leur législation nationale.”).

Enabling state representatives to claim victim status could also risk coopting mechanisms designed to serve a reparative or restorative function for individuals. Recognizing a dissonance between state-centric conceptualizations of aggression and person-centric victim provisions of the Rome Statute, Carrie McDougall has questioned “whether restorative or reparative justice is a good fit with the crime of aggression” at all. Separately if relatedly, an act of aggression causing catastrophic harm to large numbers of individual victims could pose logistical challenges for the Court’s already fragile victim participation regime, augmenting existing and perhaps introducing new barriers to realizing victims’ procedural rights.

The ICC’s need to identify and work with certain victim constituencies to the exclusion of others may result in a conceptual narrowing of aggression, which Benjamin Ferencz has described capacious as “the breeding ground for the most atrocious crimes against humanity.” Alternatively, victim-centric provisions of the Rome Statute may afford new opportunities to frame and redress victimization associated with aggression, by accounting for and remedying harm to individuals in new ways. Conceptual, procedural, and normative challenges will infuse the Court’s efforts to square its jurisdiction over aggression with existing victim provisions of the Rome Statute and Rules of Procedure and Evidence.

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34 “A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.” ICC Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, Nov. 10, 2009, para. 3, http://reliefweb.int/sites/reliefweb.int/files/resources/58901C8BE39F9B4749257673001BFFBB-ICC-ASP-8-45-ENG.pdf.

35 McDougall, supra note 12, at 300.

36 The victim participation application process has been described as “burdensome on the chambers, the parties, and the Registry, had created significant backlogs of applications, and appeared not to be effective for victims.” Mariana Pena, Victim Participation Decision in the Ntaganda Case: How Does the System Compare to Previous Experiences?, Int’l Just. Monitor (Feb. 17, 2015), https://www.ijmonitor.org/2015/02/victim-participation-decision-in-the-ntaganda-case-how-does-the-system-compare-to-previous-experiences/.

The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?

Volker Nerlich*

The crime of aggression is a “leadership crime.” Not anyone who participates in a war of aggression—for instance, as a member of an aggressor’s army—is to be held criminally responsible. Rather, in keeping with the precedents of Nuremberg and Tokyo, liability attaches only to those high up in the chain of command.1 Nevertheless, the exact reach of the criminalization has remained largely unclear in post-World War II jurisprudence. The International Military Tribunal in Nuremberg (IMT) convicted twelve of the twenty-two high-level Nazi officials accused of crimes against peace or conspiracy to commit crimes against peace.2 In the subsequent proceedings before American military tribunals in Nuremberg, crimes against peace and conspiracy to commit crimes against peace were charged in four cases,3 resulting, however, in only five convictions, all in the Ministries Case.4 According to Henry T. King, who, like Benjamin Ferencz, was one of the prosecutors in the Nuremberg follow-up trials, “the IMT judgment left open the question of how involved in the policy of aggression an individual would have to be in order to be convicted.”5

The definition of the crime of aggression in article 8 bis of the Rome Statute seeks to resolve this question by requiring that the perpetrator be “in a position effectively to exercise control over or to direct the political or military action of a State.”6 This is a high threshold: The person planning, preparing, initiating, or

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3 The Farben Case, the Krupp Case, the High Command Case, and the Ministries Case.

4 Namely, von Weizsaecker, Keppler, Woermann, Lammers, and Koerner. See Judgment, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 323–435 (1952). The convictions against von Weizsaecker and Woermann for aggression, however, were later set aside by the Tribunal on motions of error.


executing the acts made criminal under article 8 bis must presumably hold a high-ranking position in the aggressor state. What is required is “control” or the ability to “direct” the state’s action. This suggests that only a small number of government leaders, perhaps only the head of state or government or the minister of defense or foreign affairs, could ever be held guilty of the crime of aggression.\(^7\)

Article 25(3) of the Rome Statute establishes a detailed and differentiated system of modes of liability, which distinguishes between principal perpetrators—who, either alone, together with, or through others commit a crime,\(^8\)—and accomplices—who are involved in instigating, ordering, aiding and abetting, or otherwise contributing to the commission of a crime by one or more principal perpetrators.\(^9\) It is noteworthy that the definition of principal liability in the International Criminal Court’s jurisprudence uses language that resembles the characterization, in article 8 bis(1), of the potential persons criminally responsible for a crime of aggression: According to the case law,\(^10\) a principal is someone who has control over the crime, in the sense of possessing the ability to frustrate its commission. In contrast, all forms of accomplice liability require a lesser form of control over the crime.

During the negotiations on the crime of aggression, there was a debate as to whether article 25’s differentiated participation regime should be made applicable to the crime of aggression or whether the incriminated conduct should be set out comprehensively and conclusively in article 8 bis.\(^11\) The former solution was eventually adopted. Article 25(3) bis provides the link between the crime of aggression and the modes of liability in article 25(3) of the Rome Statute.\(^12\) The provision clarifies that article 25(3) applies to the crime of aggression as well, albeit, “only to persons in a position effectively to exercise control over or to direct the political or military action of a State,”\(^13\) thus copying the language of article 8 bis(1). In light of this formulation, it has been argued that the effect of article 25(3) bis and the adoption of a differentiated approach is “virtually nil”—essentially all those participating in a crime of aggression would be principal

\(^7\) Note, however, that the Elements of Crimes for the crime of aggression clarify in a footnote that “[w]ith respect to an act of aggression, more than one person may be in a position that meets these criteria.” Amendments to the Rome Statute of the International Criminal Court, Annex II, 21 n.1, June 11, 2010, A-38544 U.N.T.S.

\(^8\) Rome Statute, supra note 6, art. 25(3)(a).

\(^9\) Id., art. 25(3)(b)–(d).

\(^10\) See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, ¶¶ 458–69 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF.


\(^12\) Rome Statute, supra note 6, art. 25(3) bis.

\(^13\) Id.
perpetrators. At first sight, this would appear to be a reasonable expectation, given the definition of principal perpetration in the case law of the ICC and the limitations that have been adopted on the persons potentially responsible for the crime of aggression.

However, such an understanding would lead to a surprising and arguably unreasonable result. While article 25(3) bis makes the whole range of modes of responsibility in article 25(3) applicable to the crime of aggression, the formulation of the provision would, in effect, negate the applicability of large parts of article 25(3). On this reading, rather than allowing for the application of all sub-sections of article 25(3) to the crime of aggression, article 25(3) bis would actually limit applicability to article 25(3)(a)—perpetration as a principal.

Perhaps a closer look at the interplay between article 25(3) bis and article 25(3) is needed. First, the level of control that is required has to be assessed. Is control only “effective” if it is complete—unified in one man or woman at the helm of a state? Such an understanding of “effective control” would essentially limit the crime of aggression to dictators holding absolute power in a state. This cannot have been intended. Indeed, arguably none of the accused in Nuremberg held such a high level of control over the war-making of Nazi Germany. In addition, political systems based on separation of powers and “checks and balances” would automatically be excluded, as none of the political leaders would, in fact, hold effective control. Thus, control in terms of article 8 bis and article 25(3) bis must be considered to be effective even if it is not complete, as long as the person in question has the power to shape political and military decision-making. Such an understanding would also align with the post-World War II case law, particularly the Nuremberg follow-up trials, in which the tribunals adopted a “shape or influence” standard.

Further, it is noteworthy that, according to the plain language of article 8 bis(1) and article 25(3) bis, the object of control or direction is not the act of aggression itself, but the “political or military action” of a state. Arguably, this must be determined independently of the question of who was at the center of the decision-making with respect to the specific act of aggression giving rise to criminal responsibility. While there must certainly be some link to the exercise of military force—for example, it would be difficult to justify control over the cultural policy of a state as sufficient to make the person a potential perpetrator or accomplice to a crime of aggression—the group of people controlling or directing the “political or military action” of a state may be larger than the group that actually made the decision to go to war.

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14 See Kai Ambos, 2 TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 206–208 (2014); see also Clark, supra note 11, at 582 (“[O]ne suspects that most of the real-life cases can be fitted within article 25(3)(a).”).

15 See Kevin Jon Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, 18 EUR. J. INT’L L. 477, 480–88 (2007). On the other hand, there were concerns during the negotiations that the “shape or influence” formula “would open the doors too far, especially in relation to democracies where a very large circle of persons could be said to ‘shape or influence’ the State’s action.” See Barriga, supra note 11, at 22.
If such an approach is accepted, it is conceivable that control over the “political or military action” and the control over the commission of the crime of aggression do not fully align. In a given situation, a government minister may have control over the political action of a state—including in matters of war and peace—but may be involved only indirectly in planning, preparing, initiating, or executing the act of aggression. She may thus be found to have been an accomplice rather than a principal perpetrator of the crime of aggression. The same may apply to high-ranking officials within the military.

Based on such an understanding of article 8 bis and article 25(3) bis, not only those who were at the center of a decision to wage aggressive war could be held accountable, but also those who, while not at the sidelines, were somewhat removed from the decision-making process, as long as they were sufficiently high up in the hierarchy to be able to shape the policy of the aggressor state in that regard. In turn, and depending on the facts of the case, this would allow for the application of different modes of liability to all those who were in a position of control; some might be considered principal perpetrators, while others might be mere accomplices, who, for example, aided and abetted the execution of an act of aggression. Thus, while the crime of aggression is a leadership crime, it is not necessarily a crime only of principals.
Non-State Accessories Will Not Be Immune from Prosecution for Aggression

Juan P. Calderon-Meza*

The prosecution of non-state actors accused of aggression was possible in the Nuremberg Trials under the special prosecutorial counsel of Benjamin Ferencz.¹ The Prosecution in the *Krupp Case* accused defendants who “held high positions in the political, financial, industrial, and economic life of Germany and committed crimes against peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups, including Krupp, connected with the commission of crimes against peace.”² As the international community considers activation of the International Criminal Court’s (ICC or Court) jurisdiction over the crime of aggression, it is worth recalling that non-state actors who contribute to atrocity crimes, such as some private military and security companies (PMSCs), should also be brought to justice.

While the crime of aggression’s leadership clause may result in liability for only a narrow scope of principals, such as heads of state, it should not limit the scope of liability for accessories. Indeed, article 8 bis(1) of the Rome Statute provides for an umbrella definition of the crime of aggression where the *actus reus* of the principals is restricted to “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.”³ This limitation was also added to article 25(3) of the Rome statute.⁴ This provision, however, does not specifically mention whether the accessories have to be state actors.

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¹ *Proceedings, United States v. Alfried Krupp et al.,* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 5 (1950) (noting Benjamin Ferencz as Special Prosecution Counsel) [hereinafter Krupp Case Proceedings]. See also id. at 1185–87 (Benjamin Ferencz’s cross examination of a Krupp officer).

² *Id.* at 10.


⁴ Rome Statute, *supra* note 3, art. 25(3) bis (“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.”).
What does the silence of articles 8 bis and 15(3) bis with respect to accessories mean? In light of article 21(a) of the Rome Statute, once the Court has subject-matter jurisdiction over the crime of aggression, the law to be applied to cases addressing this crime would primarily be the “[Rome] Statute, Elements of Crimes and its Rules of Procedure and Evidence.” In the alternative, relevant treaties, principles, and rules of international law, in the first place, as well as consistent principles of domestic law, in the second place, would apply as “subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where [the Trial Chamber] identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules.”

The silence of the Kampala amendments must thus be systematically read in harmony with other provisions in the Rome Statute, the Elements of the Crimes and the Rules of Procedure and Evidence. In cases where the ICC judges have found lacunas, other provisions of the Rome Statute have served as the basis for concluding that “silence on a particular procedural issue does not necessarily imply that it is forbidden.” Although procedural, these cases offer a basis for reading this substantial silence in the definition of the crime of aggression. This article purports for a reading in tune with the core principle of complementarity as well as the plethora of modes of liability under article 25(3)(c) and 25(3)(d) of the Rome Statute.

This reading of the crime of aggression is in keeping with the core principle of complementarity enshrined in the Rome Statute and its framework. Crimes should be prosecuted and tried domestically, and the Court should complement these domestic efforts only when the domestic systems are unable or unwilling to bring

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5 See Rome Statute, supra note 3, art. 21(a).
8 In Prosecutor v. Uhuru Muigai Kenyatta et al., Trial Chamber V was seized with the interesting issue of whether witnesses may be prepared by the calling party before trial. While the Chamber found no specific provision applicable to this matter, that silence was not construed as a prohibition. The Chamber relied on article 64 of the Rome Statute and other international tribunals’ jurisprudence to say that its discretion is ample in relation to silent procedural issues. See id., ¶¶ 31, 33 (“Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims. . . . [T]he fact that the ad hoc tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions.”). See also Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ICC Trial Chamber III, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial ¶ 10 (Trial Chamber III, Nov. 24, 2010, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01-05-01-08-1039.
In other words, domestic courts should be able to try accessories to the crime of aggression, and only when this is not politically possible could the ICC try the individuals who would otherwise enjoy immunity, whether they are state actors, under theories of direct and indirect liability, or non-state actors under a theory of accessory liability, including individuals in the private military and security industry, as well as other corporate actors who often facilitate Rome Statute crimes.

Otherwise, what would complementarity mean for the crime of aggression? One could already anticipate political obstacles to be faced by domestic prosecutors trying to investigate foreign heads of state. Authoritative commentary on the Kampala amendments supports domestic criminalization of foreigners who may be liable for aggression but at the same time foresees political obstacles:

> Depending on the jurisdictional regime chosen by the implementing State, its domestic laws may criminalize aggression by foreign leaders, in particular when the act of aggression was committed against the prosecuting State (which could assert its own territorial jurisdiction). The implementing State should however bear in mind that the leadership clause of the crime of aggression will result in very low number of potential suspects, and that certain immunities may apply . . . Such an assertion of jurisdiction over foreign nationals could therefore turn out to be difficult to implement in a concrete case. States which limit jurisdiction solely to their own nationals may well avoid significant cross-border political and legal complexities related to prosecutions of foreign nationals.\(^9\)

The immunity of incumbent heads of state may, indeed, be invoked as a principle under international law.\(^11\) States Parties of the Rome Statute, on the

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9 See Rome Statute, supra note 3, arts. 1, 17.


11 See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3, ¶ 70 (“[G]iven the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.”); id., ¶ 71 (“[T]he Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.”); id., ¶ 75 (“The Court has already concluded . . . that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the
other hand, have already waived this immunity.\textsuperscript{12} As noted by the Court, however, “when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State party, the question of personal immunities might validly arise.”\textsuperscript{13} Although the Court may seek cooperation from non-state parties to waive the immunity of their heads of state,\textsuperscript{14} this article considers an additional solution for difficult cases, such as aggression, where the liability of non-state parties might make the immunity waiver politically unrealistic.

This is not the case, however, for private individuals who are accessories to the crime of aggression. In difficult cases where aggression is likely to be committed by heads of powerful states that are not parties to the Rome Statute, the Court has an alternative. It could prosecute accessories who do not hold any state immunity for acts of aggression perpetrated within the territorial and temporal jurisdiction of the Court. In other words, the Court could adjudicate the liability of private individuals who acted as accessories.

Often, foreign private individuals lead corporations with the aim of facilitating or making significant contributions to the work of state actors who perpetrate atrocity crimes, including crimes of aggression. Take the case of PMSCs. “Such entrepreneurs have played a role in wars past and present, from ancient times to the conflicts of our day. But historians apparently considered them no more than

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  \item \textsuperscript{12} See Rome Statute, supra note 3, art. 27. See, e.g., Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 66 (June 18, 2013), https://www.icc-cpi.int/pages/record.aspx?uri=1605793 (noting that there is a “contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law.”);
  \item \textsuperscript{13} Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶ 25 (Apr. 9, 2014), https://www.icc-cpi.int/pages/record.aspx?uri=1759849 (“[I]t is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. Such personal immunities are ensured under international law for the purpose of the effective performance of the functions of sitting Heads of States.”).
  \item \textsuperscript{14} Article 98 of the Rome Statute recognizes the State Parties’ international obligations not to surrender a head of state to the Court, in which case it will try to obtain cooperation of the third or surrender state. See Rome Statute, supra note 3, art. 98(1); Prosecutor v. Omar Hassan Ahmad Al Bashir, supra note 12, ¶ 27. (“It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter’s Head of State.”).
\end{itemize}
an ancillary aspect of military affairs, their status and significance warranting no particular scrutiny.”

Yair Klein’s leading role in Colombia’s armed conflict is a lamentable example of leading private individuals absconding from domestic justice. Klein is an Israeli national who retired the military and founded the PMSC Spearhead. He was convicted in absentia by a Colombian court for “instruction in and teaching of military and terrorist tactics, techniques and methods, committed with mercenaries and accomplices.” Klein personally gave Colombian villagers mercenary training in the midst of Colombian armed conflict. As recently noted by authoritative reporters, Colombian mercenaries have been hired by Global Enterprises, another PMSC, to fight for the United Arab Emirates in Yemen’s ongoing war.

Domestic judicial systems, however, have been unable to bring Klein to justice. The European Court of Human Rights refused to extradite Klein to Colombia on the basis “that the evidence before it demonstrates that problems still persist in Colombia in connection with the ill-treatment of detainees.”

It is time to reflect on the teachings from Nuremberg. The Nuremberg Tribunal was empowered to prosecute “[a]ny person without regard to nationality or the capacity in which he acted . . . deemed to have committed a crime . . . [against peace], if he . . . (b) was an accessory to the commission of any such

15 FED. DEPT. OF FOREIGN AFF. OF SWITZERLAND (FDFA) AND INT’L COMM. OF THE RED CROSS (ICRC), THE MONTEUX DOCUMENT: ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT 5 (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (“The presence of private military and security companies (PMSCs) in armed conflicts has traditionally drawn scant attention. In some ways this is surprising; as such, reliance on private entrepreneurs during war is nothing new.”).


20 Klein v. Russia, supra note 17, ¶ 53.

21 See, e.g., Who Is Israel’s Yair Klein and What Was He Doing in Colombia and Sierra Leone?, DEMOCRACY NOW (June 1, 2000), https://www.democracynow.org/2000/6/1/who_is_israels_yair_klein_and.

22 Mercenario Condenado, supra note 18.
crime or ordered or abetted the same.” 23 Crimes against peace, indeed, included “wars of aggression in violation of international laws and treaties.” 24

In the Krupp Case, the prosecution charged industrialists with crimes against peace as well as with conspiracy to commit crimes against peace. 25 While the evidence did not support the liability of the defendants for these counts beyond a reasonable doubt, the panel did “not hold that industrialists as such, could not under any circumstances be found guilty upon such charges.” 26 In a concurring opinion, one of the judges explained:

To establish the requisite participation there must be not merely nominal, but substantial participation in and responsibility for activities vital to building up the power of a country to wage war. To establish the requisite criminal intent, it seems necessary to show knowledge that the military power would be used in a manner which, in the words of the Kellogg-Briand Pact, includes war as an "instrument of policy.” 27

Once the crime of aggression is activated, article 25(3) of the Rome Statute allows prosecution of private accessories who made a significant contribution. The Pre-Trial Chamber has found “the level of contribution under article 25(3)(d) of the Statute cannot be as high as . . . an essential contribution.” 28 As the Chamber noted, “a person must make a significant contribution to the crimes committed or attempted.” 29

As we reflect now on the Court’s jurisdiction over the crime of aggression, 29 we should pause to revisit lessons from the past. Adopted just after the Second World War, the Universal Declaration of Human Rights imposes duties on “every individual and every organ of society . . . to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance.” 31 Genocide, the crime of crimes, was collectively outlawed by the

24 Id., art. II(1)(a).
25 Krupp Case Proceedings, supra note 1, at 391.
26 Id. at 393. See also id. at 400.
27 Id. at 455–56 (brackets in original).
28 Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (Pre-Trial Chamber I, Dec. 16, 2011) (finding “that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise”); id., ¶ 279 (noting that it “has already found that the level of contribution under article 25(3)(d) of the Statute cannot be as high as . . . an essential contribution”).
29 Id., ¶ 285.
international community, which agreed that “[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

Today there is an “emerging international consensus” on the corporate role played with regards to human rights, and a number of treaties have recognized and outlawed the role of non-state actors in wars. With regard to the crime of aggression, experts who have reflected on the teachings from Nuremberg say:

In line with the dicta in 

Krupp, the door is left ajar—albeit in limited circumstances—for principal or accessorial liability of non-state actors, including business leaders and, therefore, business corporations.

It is time to recall these teachings when jurisdiction over the crime of aggression is activated. In the words of a Master, whom we honor today, “never give up, never give up, never give up!”

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The Crime of Aggression under the Rome Statute and Implications for Corporate Accountability

MacKennan Graziano* and Lan Mei**

The former prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, observed in 2003 that “investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted.”¹

Despite the acknowledged role of corporations in atrocity crimes, since 2003, and indeed since the Nuremberg trials in the mid-20th century, no corporate actors have been prosecuted for their roles in atrocity crimes.² The 2010 amendments to the Rome Statute, defining the crime of aggression, do nothing to change this reality. If anything, they have made it more difficult to prosecute corporate actors by treating the newly defined crime of aggression as a “special case when it comes to the criminal responsibility of transnational business corporations.”³

As defined in the Rome Statute amendments, criminal liability for direct and indirect perpetration of the crime of aggression appears to be limited to those individuals who exercise control over a state. This limitation on criminal liability is an indication of the overriding concern states have about protecting their sovereignty from interference by other states. However, if the Rome Statute is to be a legal regime whose purpose is primarily to protect victims from atrocious crimes, liability should be extended to all those who participate in fueling conflict,

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¹ Press Release, International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-0D2C271A9A63/277502/16_july__english.pdf (noting that atrocities taking place within the Democratic Republic of the Congo appear to be linked to money laundering by various corporations through international banking organizations).
² Although the ICC has yet to prosecute any corporate actors for playing a role in atrocity crimes, the ICC has taken steps to improve its ability to conduct financial investigations. For example, in October 2015, the ICC hosted a workshop on financial investigations, particularly, on tracing, seizing, freezing, and forfeiting the financial assets of a suspect. Press Release, International Criminal Court, ICC Hosts Workshop on Cooperation and Financial Investigations (Oct. 28, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1161.
not just those actors in leadership positions.

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_The crime of aggression._ Renowned scholar Benjamin Ferencz observed that “[t]he most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. . . . Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.”

The international community finally adopted article 8 _bis_ to amend the Rome Statute to criminalize acts of aggression in 2010, thanks in large part to the efforts of Ferencz. This is an important step forward to criminalizing and preventing war. But more needs to be done to ensure full accountability for the crime of aggression and other instances of illegal use of force.

Article 8 _bis_ of 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, of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations.”

The crime of aggression, as defined by article 8 _bis_, must be committed by a person in a position to direct or control the actions of the state or military. Article 25(3) _bis_ additionally seems to extend this actor limitation to accessory modes of liability, providing that “[i]n 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.”

In essence, the crime of aggression as defined in the Rome Statute is a crime committed against the sovereignty of a state. But in today’s world, war cannot be simplified to fighting between states. Non-state actors, including non-state armed groups and corporations, are increasingly entangled in armed conflicts around the

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8 See, e.g., Nerlich, _supra_ note 2, at 906.
9 Rome Statute, _supra_ note 7, art. 25(3) _bis_ (emphasis added). Although the language is not explicit, “the provisions of this article” appears to reference article 25 as a whole, and particularly article 25(3). This appears to be the case from the naming of this new provision as article 25(3) _bis_, but also from the travaux préparatoires to the amended Rome Statute. See Marie Aronsson-Storrier, _Article 25(3) bis_, Commentary on the Law of the International Criminal Court, CASE MATRIX NETWORK (June 30, 2016), https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/#c3063 (observing that “[t]he purpose of this paragraph [25(3) _bis_] is to clarify that the leadership requirement, discussed under Article 8 _bis_(1), applies also when making assessments under _Article 25(3)._”.)
In light of the complexity of contemporary warfare and the involvement of non-state actors in armed conflicts, the limited nature of liability for the crime of aggression is regrettably inadequate.11

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The Extraordinary Nature of Article 25(3) bis. Article 25(3) bis, on its face, limits the individual responsibility for crimes of aggression in an extraordinary way, excluding the possibility of accessory liability except for those individuals who are in a position “effectively to exercise control or to direct” state and military action.12 This language seems to evoke the “effective control” standard from the international law of state responsibility, which requires a state either to have issued directions to or to have enforced the specific operations of an armed group or another state in order to be held liable for the actions of that other state.13 The “effective control” standard is a high one and makes a finding of state responsibility an exceedingly difficult task. Interpreting article 25(3) bis analogously would make it extremely difficult to prosecute non-state and non-military officials for acting as accessories to the crime of aggression, because it would be difficult to find that such non-officials were in a position to issue directions to state organs or to the military, or to enforce the carrying out of operations.

An interpretation of article 25(3) bis in such a stringent way would thus run counter to the drafting history of the Rome Statute amendments and the legacy of the Nuremberg trials and would weaken other provisions within the Rome Statute itself. The drafting history of the Rome Statute suggests that the drafters did not

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12 See, e.g., Nerlich, supra note 2, at 906.

want to exclude entirely liability for non-officials. While amendments related to the crime of aggression were being drafted, “[t]he view was also expressed that the language of this provision was sufficiently broad to include persons . . . who are not formally part of the relevant government, such as industrialists.”

Similarly, the Nuremberg tribunals explicitly contemplated the possibility that non-government officials, including industrialists, could be liable for the crime of aggression. One Nuremberg judge in Krupp et al. stated there were two essential elements to establishing criminal liability for aggression: “[T]here must be not merely nominal, but substantial participation in and responsibility for activities vital to building up the power of a country to wage war. To establish the requisite criminal intent, it seems necessary to show knowledge.”

Like the Nuremberg tribunals, article 25(3)(d)(ii) requires an actus reus of significant contribution\(^{16}\) and a mens rea of knowledge for accessory liability.\(^{17}\) Article 25(3) \(\text{bis}\), however, requires, in addition to the mens rea and actus reus, that the individual be in a position effectively to exercise control over or to direct the state’s political and military actions.\(^{18}\) This additional requirement, that the suspect be a member of a particular class of individuals, guts the power of article 25(3) to hold all responsible accessories liable for the crimes of aggression to which they contribute.

Normally, under article 25(3)(d) an individual is liable for any Rome Statute crime if she “contributes to the commission or attempted commission of such a

\(^{14}\) Nerlich, supra note 2, at 908.

\(^{15}\) Special Concurring Opinion of Judge Wilkins on the Dismissal of Charges of Aggressive War, the Krupp Case, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 455–56 (1950). See also the Farben Case, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 1113 (1952) (noting that “participation in the rearmament of Germany was not a crime . . . unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war”) (emphasis added).


\(^{17}\) Rome Statute, supra note 7, art. 25(3)(d)(ii).

\(^{18}\) The standard set by article 25(3) \(\text{bis}\) has been justified by some scholars, who observe that lower-ranking officials also cannot be prosecuted for crimes of aggression because they cannot effectuate a waging of aggressive war against another state. See SERGEY SAYAPIN, THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW 253, 284–87 (2014). But this is not any different from other crimes under the Rome Statute. Those who make the ultimate decision to carry out the crime can still be criminally liable, even if they could not have effectuated the crime on their own. For example, the OTP charged Joshua Arap Sang with contributing to crimes against humanity in Kenya by merely, “(i) placing his show Lee Nee Eme at the disposal of the organisation; (ii) advertising the organisation's meetings; (iii) fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and (iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.” Prosecutor v. William Samoei Ruto and Joseph Arap Sang, Alleged Crimes (non-exhaustive list), Int’l Crim. Crt., https://www.icc-cpi.int/kenya/rutosang/pages/alleged-crimes.aspx.

The crime of aggression is no different. Individuals other than high-ranking State officials can be liable for contributing to the actions of officials who make the actual decision to wage aggressive war.
crime” and the contribution is both “intentional” and either “made with the aim of furthering the criminal activity or criminal purpose of the group . . . or made in the knowledge of the intention of the group to commit the crime.” Nuremberg precedent is analogous to this form of accessory liability.

With respect to other crimes, the ICC has already explained how contribution liability for corporate actors would work in practice:

“A well intentioned arms dealer may decide to sell arms to State C instead of warring States A and B, since the arms dealer knows that both States A and B are committing war crimes. However, if State C is merely funneling all of the arms to State A unbeknownst to the arms dealer, then the arms dealer may meet all of the elements for 25(3)(d) liability for uncontroversial non-criminal conduct in the absence of some requirement that he at least be aware that his contribution is going to, in this example, State A.”

The ICC’s analysis of contribution liability for corporate actors does not depend on the underlying crime. In fact, the analysis would not change if State A, in this example, were committing crimes against humanity or genocide instead of war crimes. Neither does the analysis need to change if State A were committing the crime of aggression. Article 25(3) bis does change this analysis, though, by requiring that the arms dealer be in a position effectively to control or direct State A’s government or military actions. In most situations, this arms dealer would very likely not be in such a position.

It is unnecessary to limit the modes of liability for the crime of aggression to those who have power to control or direct state action. The Protocol on the Statute of the African Court of Justice and Human Rights, although not yet in force, provides a good example—it limits the direct perpetration of the crime of aggression to those who direct or control the military or political action of a state, while allowing for general modes of liability, including contribution liability, for

19 Rome Statute, supra note 7, art. 25(3)(d) (emphasis added).
20 Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, n. 681 (Pre-Trial Chamber I, Dec. 16, 2011), https://www.icc-cpi.int/pages/record.aspx?uri=1286409. The International Criminal Tribunal for Rwanda similarly acknowledged the role that corporate actors such as weapons manufacturers can have in contributing to genocide. “The ICTR trial chamber explicitly linked weapons to genocide, by stating that one may be complicit in genocide ‘by procuring means, such as weapons, instruments or any other means, use to commit genocide, with the accomplice knowing that such means would be used for such purpose.’ Thus a person who knowingly provides weapons to a group that he or she was aware was carrying out a genocidal campaign could in principle be tried as an accomplice to acts of genocide.” Lisa Misol, Weapons and War Crimes: The Complicity of Arms Suppliers 9, HUMAN RIGHTS WATCH (citing Prosecutor v. Akayseu, Case No. ICTR-96-4-T, Judgment, ¶¶533–37 (Sept. 2, 1998)).
“any of the crimes.” These general modes of liability are not limited to those in leadership positions. Additionally, the African Court paid particular attention to the issue of corporate accountability, giving itself jurisdiction over all “legal persons.”

Using the article 25(3)(d) standard for individual liability for aggression would not suddenly put all corporate actors at risk for liability. The level of liability has its own internal standards protecting defendants from unnecessary and unreasonable criminal prosecution, namely, proving the requisite mens rea of knowledge of the intent to commit the crime and a sufficiently “significant contribution” to the crime.

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The crime of aggression should not be a “special case” in which accessory modes of liability otherwise available under article 25 are inapplicable.

The purposes of the Rome Statute include ensuring “that the most serious crimes of concern to the international community as a whole [do] not go unpunished” and “put[t]ing an end to impunity for the perpetrators of these crimes and thus [contributing] to the prevention of such crimes.” If the Rome Statute aims to do more than simply protect the sovereignty of states, then the crime of aggression must also be defined to implicate more than just those individuals in positions to control or direct state or military action.

The evolution of modern combat has seen non-state actors and corporations becoming increasingly involved in armed conflict. Without addressing the role that private actors can have in aggression, a vast accountability gap will continue to exist. The exception to accessory liability in article 25(3) bis is thus

22 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 14 adding arts. 28M & 28N (June 27, 2014), https://au.int/en/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [hereinafter African Court of Justice Statute Protocol Amendments]. The Protocol 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 or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”


24 Rome Statute, supra note 7, preamble.

25 A statute is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331.
unsatisfactory. The bar for liability for corporate actors is already set high. It should not be made even higher.
State Responsibility for Aggression: 
A Human Rights Approach

Frédéric Mégret*

The insertion of aggression in the Rome Statute has created hopes that it might one day be prosecuted.¹ Nonetheless, the chances of anyone being prosecuted by the ICC for aggression seem rather dim at present given how unlikely it is that states who might commit aggression will recognize the Court’s jurisdiction over it, and the inevitable difficulties of prosecuting senior leaders.

More importantly, even if aggression is prosecuted, it is hard not to see how the focus on individual criminal responsibility is even more problematic when it comes to aggression than it is with other crimes. Individual responsibility has a place within international law and is often associated with a level of targeted deterrence, as well as satisfying some of victims’ needs to locate responsibility within particular individuals. Indeed, there may be room for strategic prosecution aimed at hyper-responsible individuals, those who have had a larger-than-life role in the launching of wars of aggression.

Nonetheless, the role of individual responsibility ought to remain a marginal one in relation to reckoning with broader issues of collective responsibility. It is not only that individual responsibility for aggression is dependent on a finding that the state engaged in aggression; it is that aggression is behavior that is also attributable to the state and should be seen as such.² It may be that some wars are launched primarily by individuals, but many have significant—even massive—popular support and/or are launched by democratically elected leaders. Because of the emphasis on aggression as a “leadership crime,” the degree to which the population and the military may willingly have embraced aggression risks being hidden from sight, possibly allowing both simply to “blame their leaders.”³

In addition, there is arguably a deeper problem than aggression itself understood as the first, unprovoked use of violence against another state—namely, the very existence of war as a possibility in international law. Aggression is a key component of war, but it is not its defining structural feature. That structural basis is more likely to be found in the unique military buildups and territorial exclusivism that the nation state makes possible, combined with the

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² Rome Statute, supra note 1, art. 8 bis.

particular anarchy of the international system. Aggression, moreover, will often only occur against the background of significant injustices, unresolved territorial disputes, power imbalances and politics, colonial legacies, support of despotic regimes, militarism, the arms trade, etc. We should be mindful, in fact, that oftentimes both states will be happy to go to war with each other, and that the “technically” self-defending state may welcome the opportunity to fight. The criminalization of individuals committing aggression, in short, can blind us to the structural dimensions of aggression.\(^4\) It is hardly a comprehensive answer to the problem of war and peace, even if it may be part of the solution to first uses of force as a particular trigger of war.

How, then, might one think about complementing and improving on individual criminal responsibility for aggression? State responsibility is a fundamental pillar of international law. State responsibility for aggression is an attractive option, especially in cases where there may be something arbitrary about focusing on a small coterie of individuals. For example, state responsibility seems to have a better ability to tackle the problem of reparations. As it stands, the ICC reparations regime focuses on the responsibility of the convicted and some indeterminate source of external funding channeled by the Victims Trust Fund.\(^5\) But although an individual may be entirely responsible for a crime, he cannot, in most cases, be responsible for the totality of the harm caused. That is particularly the case with a collective crime, such as aggression. Even if it is justifiable for individuals to bear full criminal responsibility for aggression, it does not follow that they should shoulder the totality of the blame for the harm—and at any rate, they could not compensate for it in the way that a state might.\(^6\)

Thinking of responsibility for aggression as state responsibility may also help deal with the broader consequences of aggression by allowing us to develop what might be described as a human rights approach to aggression.\(^7\) Under a regime that punishes individuals for aggression, it is not always clear what the actual gravity of having launched an unprovoked war is. In international criminal law, aggression is a fairly “flat” accusation: An act of aggression that leads to a world war, causing many deaths, or an act of aggression that ends in a minor conflict, with few deaths, may be understood politically and morally as being separated by orders of magnitude. Legally, however, these two acts will be treated the same as constituting aggression. This may be because aggression is traditionally, first and foremost, conceived of as a crime against another state, irrespective of its consequences for human beings.\(^8\) As a result, individuals who commit aggression

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\(^6\) Id. at 149–50.

\(^7\) Some of the themes discussed here have been explored in more detail in Frédéric Mégret, *What is the Specific Evil of Aggression?*, in *The Crime of Aggression: A Commentary* (Claus Kreß & Stefan Barriga eds., 2017).

\(^8\) Mégret, *supra* note 7.
typically are not understood as being conceivably responsible for at least four things that seem crucial to our understanding of the gravity of aggression.

First, because of the distinction between the *jus ad bellum* and the *jus in bello*, war crimes committed in war are not per se attributable to the individuals who engaged in aggression. Some individual “aggressors” might, of course, be liable under a separate heading as commanders or instigators of war crimes, but the act of engaging in aggression is a distinct offense and is separate from its consequences. This is so even though, per hypothesis, the war crimes would never have been committed had aggression not occurred, triggering the chain of events that led to the conditions under which the war crimes occurred.

Second, those responsible for aggression are not criminally responsible for the deaths of enemy combatants who are lawfully killed and the other side’s civilians who are killed collaterally in ways that conform to the laws of war. This is because under the *jus in bello*, which applies to both parties, including the aggressing side, such deaths are considered to be legal. This is true irrespective of the fact that, were it not for the initial act of aggression and the resulting operation of the laws of war, it almost certainly would have been unlawful to kill these individuals from a default human rights perspective.

Third, individuals who commit aggression are emphatically not responsible for any loss of life caused by the acts of the state exercising self-defense. Individuals clearly do not exercise responsibility or control over soldiers on the other side that could, under ordinary principles of criminal law, be imputable to them. This is true even though the defending state would never have had to kill combatants or non-combatants collaterally (those of the aggression state), and perhaps never have committed war crimes, had it not been “forced” to respond to an aggression in the first place.

Fourth, those involved in aggression are typically not guilty for the loss of life of their own troops. As individuals, they do not owe particular human rights obligations to such individuals. Again, this is true even though none of those troops would have died had the aggressing state not engaged in aggression in the first place.

One might argue, therefore, that individual responsibility for aggression is either very indeterminate about what is being punished, or reflects a quite limited view of the actions for which individuals are being punished when found guilty of

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10 I say typically, because attempts have been made in the UK to at least sue the British state for failures to protect the right to life as a result of having insufficiently sought advice before sending British troops to Iraq. See House of Lords, Judgments - R (on the application of Gentle (FC) and another (FC)) (Appellants) v. the Prime Minister and others (Respondents), [2008] UKHL 20. After the Chilcot inquiry’s findings that the 2003 invasion of Iraq was illegal, there have also been suggestions that this could be changing and that former Prime Minister Tony Blair could be sued essentially for engaging in an act of aggression. Caroline Mortimer, *Tony Blair Could Be Sued for “Every Penny” by Families of Soldiers Killed in Iraq*, *THE INDEPENDENT* (July 8, 2016), http://www.independent.co.uk/news/uk/politics/chilcot-tony-blair-iraq-war-soldiers-families-sue-every-penny-prosecution-a7126386.html (last visited Mar 16, 2017).
aggression. Looking at the problem from the point of view of state responsibility and of human rights might allow us, by contrast, to contemplate more readily the overarching gravity of aggression. State responsibility for aggression is a moral responsibility, one could argue, for the totality of the consequences that flow from aggression. These consequences would include, at the very least, war crimes committed by a state’s own troops, regardless of whether the state actually condoned them. The question of whether the aggressing state bears any responsibility for the war crimes committed by the other side is more complex, and there may be strategic reasons to deny that possibility, in addition to the fact that the defending state acts as a sort of novus causus interveniens. Nonetheless, if responsibility for war crimes committed by the other state is not seen as the exclusive responsibility of that state or its agents, then on the basis of a “would never have been committed in the first place” criterion, one might say that the aggressing state bears at least some responsibility for the war crimes committed by others.

As to the killing of enemy combatants and, collaterally, enemy civilians, it is lawful only because of and under the peculiar logic of the laws of war. Even if the laws of war grant individuals a privilege of belligerency in such cases, the aggressing state should arguably be held liable for wrongfully creating the conditions under which that privilege of belligerency becomes effective. Of course, positive international human rights law is typically understood to defer to the lex specialis of the laws of war following the ICJ’s Advisory Opinion when it comes to the conduct of hostilities. One can wonder, however, what might be the deeper rationale for this position from a human rights point of view. Why should the aggressor be rewarded through its own wrongdoing by a quasi-immunity for killing? From a human rights angle, the state has unlawfully, to use Jens Ohlin’s felicitous phrase, “bootstrapped” itself into a position where it can claim the benefit of the laws of war’s “license to kill.”

Finally, a human rights approach to aggression would focus on the extent to which the aggressing state violates the rights of persons within its own jurisdiction whom it endangers by entering a war that no human rights consideration can justify. The persons affected would include the state’s own civilians, even when killed by enemy fire that the aggressing state has “brought upon itself” without any just cause. Moreover, these persons arguably would also include the state’s own combatants, whose lives and integrity the state is expending in ways that cannot be shown, under human rights principles and contrary to the situation of the defending state, to be justified under some democratic imperative.

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11 Mégret, supra note 7.
13 Ohlin, supra note 9.
The ICC Preventive Function with Respect to the Crime of Aggression and International Politics

Hector Olaśolo* & Lucia Carcano**

In most national systems, criminal liability arises when a person agrees to commit an ordinary crime, participates in the design of a criminal plan, or contributes to establishing the conditions necessary for its execution. The extension of the scope of criminal law at the national level to criminalize preparatory acts for ordinary crimes, regardless of whether the crime is subsequently completed or even initiated, has been used, to an important extent, to confront situations in which a group of persons engages in criminal conduct to achieve economic (e.g., trafficking of human beings, drugs, and weapons, or money laundering) or political (e.g., terrorism) goals. The question that then arises is why preparatory acts for the international crimes that come under the jurisdiction of international criminal tribunals and hybrid tribunals are not criminalized in international criminal law, for the most part. In addition to constituting the most egregious attack on the core values of international society, such acts are of a unique magnitude, have a collective nature, and take place in an organizational context.

The interpretation of the definition of the crime of aggression adopted in 2010 at the Kampala Review Conference brings up this very same question.¹ According to article 8 bis(1) of the Rome Statute of the International Criminal Court (ICC), the crime of aggression consists of the “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of


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Paragraph 2 of this provision completes the definition by further elaborating on what must be understood by an “act of aggression”: “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.” It then includes a list of acts, “which regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.”

For an external observer, the ordinary meaning of this definition leaves no room for doubt concerning the criminalization of the preparatory acts (e.g. planning) for a state’s act of aggression against another state, regardless of whether the act of aggression is ultimately completed or even initiated through a “substantial step.” This interpretation is further supported by the purpose of the Rome Statute and the functions entrusted to the ICC Prosecutor to achieve it. In this regard, it is important to highlight that acts of aggression are not unavoidable and often are not unforeseen. They usually take extensive planning and preparation by the highest political and military ranks of the aggressing state, as they require collective effort and organization within the state. Furthermore, the international community usually has substantial information about impending acts of aggression, which, regrettably, is ignored or minimized by high-level national and international decision makers with competing political agendas.

The ICC’s mandate has a dual nature. On one hand, the ICC aims to end impunity for international crimes both to uphold international criminal law and reinforce the core societal values it protects and to send the message to the world’s leadership that those who engage in crimes within its jurisdiction will not get away with them. On the other hand, the ICC has a preventive function involving timely intervention in situations where there are tangible indicia of future crimes falling within the ICC’s jurisdiction, or where such crimes are already taking place. This second function is discharged primarily by the ICC Prosecutor through her preliminary examinations, which cover a broad range of situations.

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3 Id., art. 8 bis(2).
7 Id.
8 Héctor Olásolo, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention, in ESSAYS ON INTERNATIONAL CRIMINAL JUSTICE 1, 3 (Héctor Olásolo ed., 2011).
Although the ICC Prosecutor cannot rely on coercive measures during her preliminary examinations and not all forms of States Party cooperation are available, the potential of preliminary examinations to incentivize national authorities should not be underestimated. Indeed, using diplomatic and media channels to bring the world’s attention to the plans of a state’s most senior leaders to execute acts of aggression—and highlighting the possibility that these leaders could escape ICC prosecution, should they abandon their plans and take the necessary preventive measures—has the potential to be a powerful tool. Moreover, from the perspective of ensuring a timely reaction to credible threats of aggression, the Rome Statute appears to offer unprecedented opportunities. While other international bodies, such as the UN Security Council and the UN General Assembly, usually engage in long negotiations before deciding to intervene in a situation, the ICC Prosecutor has greater flexibility and does not depend on interested stakeholders to open a preliminary examination.

Furthermore, article 15 bis of the Rome Statute does not prevent the ICC Prosecutor from discharging her preventive function regarding the execution of acts of aggression. Under this provision, the Prosecutor can proceed with an investigation after concluding her preliminary examination only when the United Nations Security Council has made a determination that an act of aggression has taken place or with the authorization of the Pre-Trial Division, when two conditions are met: (i) the Security Council has not made a determination within six months of the ICC Prosecutor’s notification to the UN Secretary General of her conclusion that there is a reasonable basis to proceed; and (ii) the Security Council has not requested that the ICC Prosecutor refrain from opening an investigation under article 16 of the Rome Statute. The application of this provision, however, comes only at the end of the ICC Prosecutor’s preliminary examination. Therefore, it has no impact on the way in which the ICC Prosecutor may conduct her preliminary examination to discharge her mandate to prevent the execution of acts of aggression through timely intervention in situations where there are tangible indicia of their planning and preparation.

But, if an interpretation “in good faith in accordance with the ordinary meaning to be given to the terms” of article 8 bis and the fundamental purpose of the ICC support the criminalization of preparatory acts, why is there so much opposition to this interpretation among scholars and practitioners?

For some, it is a question of positive law. The interpretation outlined above is contrary to the ICC Elements of Crimes, which require the actual commission of the act of aggression for criminal liability to arise for either the executed or the preparatory acts. The ICC Elements of Crimes, however, cannot amend the

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9 Upon the initiation of an investigation, the ICC Prosecutor can use coercive measures, as well as all forms of State Party cooperation provided for in Article 93 of the Rome Statute. See Rome Statute, supra note 2, arts. 54, 57, 93.
10 See Rome Statute, supra note 2, arts. 13–15.
11 See Rome Statute, supra note 2, art. 15 bis.
13 See CRYER, supra note 6, at 329; CARVAJAL CORREDOR ILICH FELIPE, EL CRIMEN DE AGRESIÓN EN DERECHO PENAL INTERNACIONAL: RESPONSABILIDAD DEL INDIVIDUO POR ACTO DE
content of the definition of the crimes provided for in the Rome Statute, as the elements must always “be consistent with . . . [the] Statute” and their role is limited to assisting the ICC in the Statute’s interpretation and application.\textsuperscript{14}

For others, it is a question of the general theory of criminal law because the interpretation outlined above runs contrary to the “harm principle,”\textsuperscript{15} as it leads to the criminalization of preparatory acts without “the actual causation of harm or the actual violation of a protected (legal) interest in order to justify the intervention of the criminal law without violating the principle of culpability.”\textsuperscript{16}

Yet one cannot assert that such preparatory acts do not affect a protected legal interest of the states concerned and international society at large when there are tangible indicia of the planning and preparation of an act of aggression by the most senior state officials. Moreover, if the planning of an illegal sale of weapons by a group of persons acting in a concerted manner is considered to fulfill the harm principle in many examples of domestic legislation, how is it possible that the planning of an act of aggression against another state by a state’s highest political and military ranks cannot fulfill this principle?

Finally, for many, it is a question of international politics. The most powerful military power in the international community (the United States) not only is unbound and unaffected by the definition of the crime of aggression in the Rome Statute, but it has also tried consistently to avoid any definition of this crime.\textsuperscript{17} Other major world and regional military powers, both with nuclear weapons capabilities (such as China, India, Israel, North Korea, Pakistan, and Russia) and without such capabilities (such as Egypt, Indonesia, Iran, Saudi Arabia, and Turkey), also are not bound or affected by the definition of crime of aggression in the Rome Statute.

Furthermore, the only two nuclear powers and permanent members of the UN Security Council that are States Parties to the Rome Statute (the United Kingdom and France) want a myriad of safeguards to make sure that the ICC does not interfere with the UN Security Council’s power to decide when there is a threat to peace, a breach of the peace, or an act of aggression and to take any necessary diplomatic, economic, or military coercive measures to maintain and restore international peace and security.\textsuperscript{18} Other important actors in the international community, like Japan, have also called into question the legality of the final agreement reached in Kampala by the States’ Parties,\textsuperscript{19} even though article 15 \textit{bis}...
ensures (i) that in the absence of a UN Security Council referral, the Kampala amendments apply only to acts of aggression committed by States Parties that have not lodged a declaration with the ICC Registrar declaring that they do not accept the ICC jurisdiction over the crime of aggression and (ii) that the ICC shall not exercise its jurisdiction over the crime of aggression when the acts are committed by nationals or in the territory of non-party states.20

In light of this opposition, one wonders whether there will ever come a time when the main state actors in international society will be prepared to have their use of armed force against third states reviewed by an international tribunal for the purpose of adjudicating the criminal liability of their most senior political and military leaders. Needless to say, only when such time comes will the ICC Prosecutor be in a position to carry out her preliminary examinations effectively, fulfilling her mandate to prevent the execution of acts of aggression by the main military powers of the world against third states through timely intervention in situations where there are tangible indicia of their planning and preparation.

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20 See Rome Statute, supra note 2, art. 15 bis.
What the ICC Can Learn from the Jurisprudence of Other Tribunals

Christopher Greenwood *

That the International Criminal Court (ICC) can, and should, learn from the jurisprudence of other international courts and tribunals is surely beyond doubt. Of course, international law knows no system of precedent comparable to that which exists in common law systems, 1 so the ICC is not bound by its own previous decisions, let alone those of other courts and tribunals. Nevertheless, as Judge Shahabuddeen has pointed out, consistency is an important attribute of law and justice, and the need to ensure consistency compels international courts to pay close attention to their own previous judgments. 2 Moreover, while there was once a tendency for some international judges to assume that their separate and distinct mandates meant that they were not obliged to pay much attention to the jurisprudence of other courts and tribunals, there is an increasing awareness that international law is a single legal system, not a series of isolated islands, and that attention to the pronouncements of other judicial bodies is both necessary and valuable. 3

That has certainly been true for the ICC in its early years, when the quality of its reasoning and the legitimacy of its judgments have been enhanced by its ability and willingness to draw upon the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, as well as that of other international courts. It might be thought, however, that the position is different in the case of the crime of aggression. Aggression was not included in the crimes over which the ad hoc tribunals were given jurisdiction and, although much effort went into producing a definition of aggression, 4 there is very little practice of any kind in applying that definition. 5

The most directly relevant jurisprudence, therefore, is that of the International Military Tribunals at Nuremberg and Tokyo, which were the first to rule upon the notion of “crimes against the peace.” That part of the judgments from these Tribunals is the most heavily criticized and most open to the charge of victors’ justice. In contrast to the comparatively well-established law on war crimes, judgments on crimes against peace were based

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2 MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 31 (2007).

3 See Christopher Greenwood, Unity and Diversity in International Law, in A FAREWELL TO FRAGMENTATION 37 (Mads Endenas & Eirik Bjoerge eds., 2015).


on the premise that the prohibition on states engaging in wars of aggression—
itself a very recent development—entailed the criminal liability of those
individuals who directed the affairs of the state and were therefore able to take
the decision to embark upon aggression.\(^6\) If that deduction was controversial at
the time, however, it is far less so today, when there is much wider acceptance
of the principle that “crimes against international law are committed by men,
not by abstract entities, and only by punishing individuals who commit such
crimes can the provisions of international law be enforced.”\(^7\)

The Nuremberg and Tokyo International Military Tribunals’
judgments, however, say comparatively little about the scope of aggression in
international law (although the Nuremberg Tribunal’s reasoning in rejecting
the plea of anticipatory self-defence advanced by some defendants certainly
merits further study). Of greater relevance in this respect are some of the later
decisions by United States Military Tribunals in the Control Council Law No.
10 trials, which were also held at Nuremberg. Although the Tribunals were not
international in the sense of having judges and prosecutors from a variety of
states, their mandate was international as they came from a law adopted by the
four Allied Powers occupying Germany. Two of the resulting judgments are
particularly interesting.

In *United States v. von Leeb* (the *High Command Case*),\(^8\) the Tribunal
explored whether individuals might incur responsibility for crimes against the
peace. It rejected the prosecution’s arguments that members of the German
General Staff should be convicted of crimes against the peace. The Tribunal
wrote that “it is not a person’s rank or status, but his power to shape or
influence the policy of his State, which is the relevant issue for determining
his criminality under the charge of Crimes against Peace.”\(^9\) The Tribunal
required not only knowledge that the war being planned was one of
aggression, but also that the person possessing that knowledge was “in a
position to shape or influence the policy that brings about its initiation or its
continuance.”\(^10\) In light of the requirement in article 8\(^\text{bis}(1)\) of the Rome
Statute of the International Criminal Court that the crime of aggression be
committed by “a person in a position effectively to exercise control over or to
direct the political or military action of a State,”\(^11\) the *von Leeb* judgment is
clearly relevant to the work of the ICC.

Also of interest is the judgment in *United States v. List* (the *Hostages
Case*).\(^12\) The Tribunal in that case rejected a prosecution argument that,
because the German invasion of Yugoslavia and Greece had been an unlawful
act of aggression, it necessarily followed that the actions taken pursuant to that
invasion were war crimes. International law, the Tribunal held, does not
differentiate between a lawful and an unlawful belligerent occupation in

\(^6\) See *Judgments and Sentences, 1 Trial of the Major War Criminals Before the

\(^7\) Id. at 223.

\(^8\) The German High Command Trial, 12 *Law Reports of Trials of War Criminals*

\(^9\) Id. at 69.

\(^10\) Id.

\(^11\) Rome Statute of the International Criminal Court art. 8\(^\text{bis}(1)\), July 17, 1998, 2187

\(^12\) The Hostages Trial, 8 *Law Reports of Trials of War Criminals* 34 (U.N. War
determining the occupying state’s powers, and the legality of its soldiers’ actions, under the laws of war (or, as we would say now, international humanitarian law). Since the ICC has jurisdiction over war crimes, as well as its yet-to-be-realized jurisdiction over aggression, the distinction drawn in List between legality under the *jus ad bellum* and legality under the *jus in bello*—a distinction which has been reaffirmed on numerous occasions—is also of clear relevance to its work.

Yet it would be a mistake to imagine that the ICC can learn only from the jurisprudence of courts and tribunals that have had to pronounce upon the crime of aggression or its forerunners. International law is a single legal system and the judgments of other courts or tribunals on more general matters are sources from which the ICC can and should draw. These obviously include the judgments of the ICTY and ICTR and other ad hoc courts and tribunals on the principles of international criminal justice, including the liability of secondary parties, admissibility and reliability of evidence, and the concept of due process. But it also goes beyond these examples. The judgments of the International Court of Justice in the *Corfu Channel*, *Nicaragua*, *Oil Platforms*, and *Armed Activities on the Territory of the Congo*, although concerned with state responsibility rather than individual criminal liability, constitute a significant body of jurisprudence on the legality of recourse to force and thus have an important bearing on defining the uses of force that amount to aggression. In addition, the Court’s judgments and advisory opinions on matters of general international law, such as the interpretation and application of treaties and the law of state responsibility, are likely to be significant for the ICC.

It is difficult to think of a subject on which the ICC’s decisions will be more important or far-reaching in their implications than aggression. It is essential, therefore, that, if the ICC is called upon to exercise jurisdiction with respect to a charge of aggression, its judgment be consistent with, and grounded in, the way in which prior tribunals have developed relevant international law. A deep understanding of all the relevant jurisprudence of other international courts and tribunals will be necessary if that objective is to be met.

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13 Id. at 59.
19 See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).
Accountability for the Unlawful Use of Force: Putting Peacetime First

Leila Nadya Sadat*

Writing on the unlawful use of force in a symposium honoring former Nuremberg Prosecutor Benjamin B. Ferencz is daunting. Ben has devoted a lifetime to the subject and has alternately inspired and harangued the international community on the question of war and its evils. His views have been expressed in a multitude of writings, from essays and articles to books, radio, and television interviews. His has been a voice of sanity, of moral clarity, in a world where being clever and powerful is often valued more highly than being wise. It has been my privilege to have known Ben for more than two decades, and to carry forward, in some small way, his vision of a world at peace under the rule of law.

In this brief essay, I would like to make a few points about the relationship between peace and war as a legal matter and challenge the notion that peace is no longer the natural state of human affairs, at least insofar as international law is concerned. I write from an admittedly U.S. perspective, which seems apt given that the Nuremberg trials were, to some extent, an American “show,” in terms of material support and participation. Additionally, a major challenge to the Nuremberg legacy emanates from the U.S. government as well as U.S. academics. This fight for the soul of the Nuremberg legacy—and perhaps the future of the world—is thus, in large part, an intra-country debate with a potentially profound global impact.

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Under international law, peace is defined in the negative—as the absence of war. So when international lawyers discuss a peacetime paradigm, they are not reflecting on an emotional or blissful state of inner well-being, or even on positive relations between neighbors, but on the legal paradigm governing national and international relations in the absence of armed conflict. The two concepts are

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1 Leila Nadya Sadat, The Nuremberg Trial, Seventy Years Later, 15 WASH. U. GLOBAL STUD. L. REV. 575, 579 n. 23 (2016) (citing ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS 233 (2005)).
related: peace (in the international law sense) leads to stability, which in turn may permit individuals to experience “life, liberty and the pursuit of happiness” or even “[a] state of public tranquility; freedom from civil disturbance or hostility.” It is thus unsurprising that the traditional approach of public international law—even during an era in which war was considered lawful—has treated peace as the rule, with special legal regimes governing armed conflict as the exception. This is evidenced in treatises like Lassa Oppenheim’s, which divided the world of international law in two: Peace (volume I) and War and Neutrality (volume II), and in the requirement that there be an “armed conflict,” for international humanitarian law to apply.

Crimes against peace were one of the three charges leveled against the Nazis at Nuremberg. This charge was defined as the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances . . . .” Although there had initially been fierce internal debate in the United States as to whether the Nazis should be tried for aggressive war, ultimately the U.S. prosecutorial team, led by Supreme Court Justice Robert H. Jackson, vigorously pursued the Nazis for crimes against peace, arguing that the aggressive war itself was “the crime which comprehends all lesser crimes . . . .” The International Military Tribunal agreed, famously opining that aggression “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” That pronouncement was enshrined in article 2(4) of the U.N. Charter, not as a matter of criminal law, but as a fundamental—indeed, peremptory—norm of international law binding on all states.

Yet defining aggression either as a matter of state or individual responsibility—and ensuring its prohibition—has turned out to be difficult. The ambivalence that plagued the drafting of the Nuremberg Charter continued to bedevil international efforts to definitively prohibit the unlawful use of force. The International Law Commission, charged with developing a draft code of crimes,
struggled for fifty years with the task, only to include the crime of aggression, without definition, in its 1996 Draft Code.\(^1\) The General Assembly fared somewhat better; in 1974, it adopted Resolution 3314, which includes both a general definition of aggression and a list of prohibited acts.\(^2\) The International Court of Justice has occasionally been seized of disputes involving allegations of unlawful uses of force, and there have also been arbitral disputes, fact-finding commissions, human rights adjudications, and even some national legislation (and case law) defining and adjudicating situations involving the unlawful use of force. Many of these are the subject of chapters in the forthcoming volume, *Seeking Accountability for the Unlawful Use of Force*.\(^3\) In spite of the progress made to date, however, enforcing the notion that prohibitions on the unlawful use of force represent *binding legal norms* rather than *political objectives* or even *wishful thinking* has been a constant struggle of the modern era, the Nuremberg trial and judgment notwithstanding.

A case in point, as chronicled by others in this symposium, was the struggle to include the crime of aggression in the Statute of the International Criminal Court (ICC). Aggression was not included in the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, and the fight over its inclusion in the ICC Statute threatened to derail the Rome Conference.\(^4\) Through the perseverance of many, including Ben, and in spite of the fierce opposition of the United States (as well as other nations),\(^5\) the ICC Assembly of States Parties adopted amendments to the Rome Statute in Kampala on the crime of aggression that are likely to be “activated” later this year when the Assembly meets in December. These amendments represent an important step forward in achieving accountability for the unlawful use of force, as they define the crime of aggression and give the ICC jurisdiction over it in limited circumstances. Yet because states can opt out of them if they wish, and certain “understandings” were adopted in Kampala that constrain the applicability and enforcement of the aggression amendments, their inclusion in the ICC Statute came with costs as well as benefits.\(^6\)

A second example has been the assault on the Nuremberg legacy by states responding to acts of international terrorism.\(^7\) Prominent U.S. scholars writing about the so-called “war on terror” have recently suggested the need to eliminate

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15 Id.
16 Sadat, *supra* note 1, at 587–90.
the peacetime paradigm in favor of a state of “perpetual war,” on the grounds that this realist approach will lead to greater protections for human rights or a more sensible balance between human rights and the demands of national security. Under this view, the U.S. government can use military force, even in peacetime and outside a theater of war, if a state in which the United States suspects terror activity is deemed “unable or unwilling” to address the threat under a broad understanding of the right to self-defense under article 51 of the
U.N. Charter. This has led to the use of drones and targeted killing in the fight against Al-Qaeda, ISIL and other groups, even in highly contested and controverted cases, which may violate *jus ad bellum* and *jus in bello* rules as well as international human rights law. Although the slide towards loose understandings of *jus ad bellum* (and *jus in bello* constraints on American power began in earnest following the September 11 attacks, it continued during the Obama administration, albeit with more self-restraint, and it appears likely to worsen under the forty-fifth president, who is apparently seeking to reject Obama-era constraints and “open the throttle on using military force,” according to recent reports.

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19 *Id.* Brooks refers to the “war on terror” in her writings, a phrase that was coined by the Bush administration but subsequently abandoned by it, and that was also not favored by the Obama Administration, which preferred the moniker “countering violent extremism.” *See, e.g.*, President Barack Obama, Remarks at the Leaders’ Summit on Countering ISIL and Violent Extremism at the United Nations Headquarters (Sept. 29, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/29/remarks-president-obama-leaders-summit-countering-isil-and-violent.


This notion of a “boundary-less battlefield” could push the laws of war and the prohibition on the use of force to the breaking point, making everyone, everywhere, liable to be killed as “collateral damage.” It works harm to the fundamental importance of peace as the presumptive framework for international relations and the existence of the emerging “human right to peace.” Echoing Ben’s experience of World War II and the judgment of the International Military Tribunal at Nuremberg, Steven Ratner recently argued that the first pillar of an ethical standard of global justice is whether a norm promotes the advancement of peace. He writes:

War has unparalleled catastrophic consequences for overall human welfare. More than any other activity over which humans have control, war undermines the possibility of people to live decent lives. As an initial matter, its death toll is staggering . . . .

War also creates an atmosphere of havoc, fear, irrationality, and aggressive human behavior that facilitates the commission of horrible acts against individuals . . . actions that many governments and their opponents would not commit in peacetime.

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In this short essay I have tried to make the case for reinforcing rather than abandoning the Nuremberg legacy and the U.N. Charter in which it is enshrined. This requires states to “put peacetime first,” rather than viewing the world through the lens of military force and its projection. The creators of the post-war world understood that to prevent the next war, the world needed rules, institutions, and enforcement. Let us hope that the seeds that were planted by Ben and his compatriots in the ashes of that war continue to bear fruit. As Ben himself has stated:

Nuremberg taught me that creating a world of tolerance and compassion would be a long and arduous task. And I also learned that if we did not devote ourselves to developing effective world law, the same cruel mentality that made the Holocaust possible might one day destroy the entire human race.

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25 Id.
26 See, e.g., DOUGLAS ROCHE, THE HUMAN RIGHT TO PEACE (2003); Anwarul K. Chowdhury, Human Right to Peace: The Core of the Culture of Peace, in CONTRIBUCIONES REGIONALES PARA UNA DECLARACION UNIVERSAL DEL DERECHO HUMANO A LA PAZ 125 (Carlos Villán Duran & Carmelo Faleh Perez eds., 2010).
27 RATNER, supra note 2.
28 Id. at 67.
The Crime of Aggression: Following the Needs of a Changing World?

Sanji Mmasenono Monageng*

No rational person today argues that the world is flat, that people should be slaves because of the color of their skin, that colonialism is a good thing, or that women should have no legal rights. We need new thinking and new legal institutions to enforce basic human rights.¹

Benjamin Ferencz, Ninety-Fifth Annual Meeting of the American Society of International Law

Benjamin Ferencz used these words when he addressed the Ninety-Fifth Annual Meeting of the American Society of International Law in 2001. With the Kampala compromise, the world took a step toward this “new thinking” as a definition of the crime of aggression was adopted for the first time.² The definition was meant to complement and complete the International Criminal Court’s (ICC) jurisdiction over the core international crimes: genocide, crimes against humanity, war crimes, and finally, the crime of aggression.

When establishing the Nuremberg Charter after World War II (WWII), the London Conference chose, for the first time in history, to criminalize acts of aggression, meaning that individuals were tried and prosecuted for such acts in the Nuremberg Tribunal.³ At the time of the proceedings in Nuremberg, there was “no agreed definition of what was meant by aggression,” and its criminalization thus led to extensive controversy.⁴ According to article 6 of the Tribunal’s Charter, the Tribunal held the power to try persons acting in the

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³ Charter of the International Military Tribunal art. 6, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.
interests of states. Article II of Control Council Law No. 10, which supplemented the Charter, stated that acts of aggression were acts directed against other states.\(^5\) Since almost every case of aggression results in the commission of other international crimes,\(^6\) the Tribunal considered the crime of aggression “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”\(^7\) In 1946, the United Nations (UN) General Assembly (GA) affirmed the legal principles laid down in the Nuremburg Charter and the judgment. It was held that these should serve as the basis for the codification of international law.\(^8\)

WWII was a “total war”: It involved national mobilization, and warfare was focused on battles fought with costly, mass-produced firepower, tanks, and airplanes.\(^9\) Today, armed conflicts often look very different. According to Mary Kaldor, armed conflict today encompasses many types of violence of a political nature, including organized crime and large-scale human rights violations, and the distinction between them is blurry. Often, it is not possible to distinguish between private and public, state and non-state, and formal and informal.\(^10\) These armed conflicts are not fought solely by regular armies but also include, for example, warlords and criminal gangs with highly decentralized structures. Another difference between today’s wars and traditional armed conflict is the nature of warfare. It is influenced by guerrilla tactics and counter-insurgency and yet is distinct from both. In traditional armed conflict, territory is captured through battle. When the parties use guerrilla tactics, on the other hand, they avoid battle and capture territory through political control by winning “hearts and minds,” while in the new mode of armed conflict, parties seize control through destabilization and terror. This means they use mass killings, forced resettlement, and different types of intimidating techniques. The violence is directed mostly at the civilian population. Indeed, many acts that are prohibited under the laws of armed conflict are “essential component[s] of the strategies of the new mode of warfare.”\(^11\)

It was stated at the Nuremberg trial that “[the prohibition of aggression] is not static, but by continual adaptation follows the needs of a changing world.”\(^12\) As explained, warfare has undergone great changes since WWII, so ultimately, to follow the directions of the judges at the Nuremberg trial, the prohibition of aggression, including its definition, should have developed


\(^7\) Judgment, 1 Trial of the Major War Criminals Before the International Military Tribunal 186 (1947).


\(^10\) Id. at 1–2.

\(^11\) Id. at 9.

\(^12\) The Law of the Charter, 22 Trial of the Major War Criminals Before the International Military Tribunal 464 (1948).
acquiring. The first agreement on a definition of aggression after the International Military Tribunals of WWII was not reached until 1974, when the General Assembly adopted Resolution 3314.\textsuperscript{13} It took another thirty-six years before the global community could agree on a definition of aggression that was actually meant to be used for criminal prosecution. The definition agreed on at the Kampala Conference is based on pre-existing, decades old sources: the 1974 definition and article 2(4) of the UN Charter.\textsuperscript{14} This definition recognizes only a person acting on behalf of a state as the perpetrator and only another state as the victim.\textsuperscript{15} It is argued that the purpose of including the crime of aggression within the ICC’s jurisdiction is “to prevent the suffering caused by armed conflict by deterring state actors from using aggressive force.”\textsuperscript{16} This aspect of the definition of aggression is based on the view, adopted at the Nuremberg Tribunal, that the act of aggression is a high-level crime that “contains within itself the accumulated evil of the whole”—in other words, that it is the “supreme international crime.”\textsuperscript{17} This is supported by the fact that several experts refer to the crime of aggression as the “supreme international crime” or the “crime of crimes.”\textsuperscript{18}

The concept of armed conflict that underlies the Kampala compromise, however, is arguably too narrow to capture “new armed conflict.” Noah Weisbord has argued that if the definition is not amended, then as a last resort, the definition in the Rome Statute can be interpreted so as to include non-state actors. He acknowledges, however, that his suggested interpretation still requires some state-like characteristics and that it fails to encompass all types of groups acting aggressively.\textsuperscript{19} As Weisbord emphasizes, the definition of the crime of aggression ultimately has not developed at the same pace as aggression itself.

At the same time, with respect to the other core crimes, the law has developed significantly since Nuremberg. Genocide has been recognized as a separate international crime;\textsuperscript{20} crimes against humanity do not require a link with an armed conflict;\textsuperscript{21} and the concept of war crimes has been extended to violations of humanitarian law in non-international armed conflicts.\textsuperscript{22} These


\textsuperscript{15} Id.


\textsuperscript{17} Id. at 6–7.


\textsuperscript{19} Weisbord, supra note 18, at 27–30.


\textsuperscript{21} Rome Statute, supra note 14, art. 7.

\textsuperscript{22} Id., art. 8(2)(c–f).
are all concepts, however, that are not included within the current definition of the crime of aggression. While the objective of stopping the other core crimes from being committed by prosecuting aggressive actions is logical, for this to become a reality, the definition of the crime of aggression must keep up with the definitions of the other international crimes. One might wonder whether the Assembly of State Parties (ASP) heard Ferencz’s call for new thinking or whether the ASP focused, instead, on his statement almost thirty years earlier that “[t]he most important thing about defining aggression is to define it.”23 For the global community to carry on the Nuremberg legacy—for the crime of aggression to remain the “supreme international crime” over the other international crimes—it will probably be necessary to develop the notion of the crime of aggression further.

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The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute

David Scheffer*

I have known Benjamin Ferencz personally since the 1990s when I was Senior Counsel to the U.S. Permanent Representative to the United Nations, Dr. Madeleine Albright, and then U.S. Ambassador at Large for War Crimes Issues heading the U.S. delegation to the United Nations talks that resulted in the Rome Statute of the International Criminal Court (ICC). Throughout that decade, including to the end of the Bill Clinton Administration, and then for years leading up to the Kampala Review Conference of 2010, which I attended as a law professor, he remained a fierce presence prepared at any moment to stare down skeptics of his cause.

Ferencz was a constant source of both inspiration and respectful criticism as he relentlessly sought to influence American policy on the crime of aggression and the ICC. When I signed the Rome Statute on behalf of the United States on December 31, 2000, Ferencz was very much on my mind as one of the most instrumental voices on the illegality of aggression and the imperative need for international justice. He changed the world at Nuremberg, and he certainly influenced the creation of the Rome Statute. The American people owe Ferencz their heartfelt gratitude for a selfless life dedicated to upholding the most humane and noble values of the United States and of international law.

With the same spirit that Ferencz always demonstrates in his quest to rid the world of aggression, I believe that the definition of the crime of aggression (which includes defining an “act of aggression”) contained in article 8 bis of the Rome Statute suffers from several shortcomings that ignore the modern realities of warfare. In this essay, I briefly set forth those defects.

Non-state actors. War during the twenty-first century often will not be fought conventionally between nations. Non-state actors like the Islamic State of Iraq and Syria (ISIS), Al Qaeda, Boko Haram, the Lord’s Resistance Army, and al-Shabab,
to name only a few past and present, will dominate the theaters of conflict and hostilities. Unfortunately, because it is grounded in General Assembly Resolution 3314 (XXIX) of December 14, 1974, article 8 bis(2) of the Rome Statute, defining “act of aggression,” is already exceptionally antiquated. The definition is relevant only for the actions of states (including “armed bands, groups, irregulars or mercenaries” sent by or acting on behalf of a state).

Article 8 bis(1) defines the “crime of aggression” in terms of what a person does in holding a “position effectively to exercise control over or to direct the political or military action of a State.” There is no opportunity for the ICC to prosecute an individual for aggression when he acts in a leadership capacity to guide a non-state entity. The ICC Prosecutor thus is disarmed in connection with vast exercises of aggressive warfare waged by non-state entities across national boundaries. Internal aggression, which is a favorite tactic of ISIS and other non-state actors determined (sometimes successfully) to seize territory within a state, also escapes the article 8 bis definition.

Cyber warfare. The many manifestations of cyber warfare have become a common staple of international affairs and yet the entire concept is absent from the article 8 bis definition. This is unsurprising given the fact that cyber warfare did not exist in 1974 when the General Assembly defined acts of inter-state aggression. But its absence from article 8 bis is a glaring omission in modern times and will cripple the ICC in how it will investigate aggression that may consist solely or largely of cyber warfare tactics.

Cyber warfare refers, at least by one definition, to “the actions by a nation-state or international organization to attack and attempt to damage another nation’s computers or information networks through, for example, computer viruses or denial-of-service attacks.” The description of cyber warfare, however, continues to evolve and, in my view, certainly involves actions by non-state actors such as ISIS, other terrorist organizations, and even corporate interests that might one day engage in such actions to disrupt part of a nation’s infrastructure in a manner that imperils the national security or democratic integrity of that country.

For example, if a state or a non-state entity were to use cyber warfare to seriously undermine the democratic processes of a target state and perhaps significantly influence the outcome of elections, that action should not be immune from ICC investigation as an act of aggression. The same could be said of cyber

6 Rome Statute, supra note 1, art. 8 bis(2)(g).
8 Rand Corporation, supra note 7.
9 The prospect of Russian cyber warfare to influence the 2016 presidential elections in the United States is a prominent recent example. See, e.g., Eric Lipton, David E. Sanger & Scott Shane, The Perfect Weapon: How Russian Cyberpower Invaded the U.S., N.Y. TIMES (Dec. 13,
attacks that shut down a nation’s power grid or disable vital communications or transportation networks. All of this is currently the subject of intense speculation, protective measures, and action by governments. One must recognize, however, that the United States and its allies reportedly use cyber attacks to defend against major threats, such as nuclear ones, from such adversaries as North Korea and Iran.\(^\text{10}\) The distinction between waging cyber aggression and engaging in cyber self-defense measures would rest upon the “character, gravity, and scale” that “constitutes a manifest violation of the Charter of the United Nations.”\(^\text{11}\) This would surely be a complex calculation for the ICC to adjudicate, but to ignore it would be to miss the elephant in the room.

Responsibility to Protect. A parallel development in the years leading to the Kampala Review Conference, where the crime of aggression was defined for purposes of the Rome Statute, was the responsibility to protect principle (R2P),\(^\text{12}\) endorsed by the UN General Assembly in 2005 and of the same legal authority as General Assembly Resolution 3314 of 1974. R2P has not been implemented as originally envisaged, with the war and humanitarian catastrophe in Syria being Exhibit A. The concern has long festered that an enforceable crime of aggression in the Rome Statute could undermine any chance for R2P to take firm hold among nations to prevent or end the commission of atrocity crimes. Policy-makers and military commanders likely would hesitate to intervene across borders to confront genocide, crimes against humanity (including ethnic cleansing), and war crimes imperiling a civilian population because of fear that the charge of aggression, involving individual criminal liability, would be levied against them if they act under R2P even with Security Council approval. Such approval may be


\(^{11}\) Rome Statute, *supra* note 1, art. 8 bis(1).


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interpreted as not endorsing some of the military actions a nation’s armed forces might take to end the atrocity crimes and protect civilians, particularly for the long term.

Article 8 bis does not explicitly accommodate R2P as an exception to aggression, although one might interpret article 8 bis to exclude R2P from any “manifest violation of the Charter of the United Nations” because of R2P’s requirement for Security Council approval for any military intervention. While that may suffice as a matter of strict legal interpretation, diplomats in capitals and at the United Nations may not see it that way as a practical matter. Their instinct will be to forego R2P because of the risk of an aggression charge, regardless of its likelihood of success at the ICC.

Each of these three shortcomings could be overcome easily with minor amendments to article 8 bis of the Rome Statute.13 The ICC Assembly of States Parties should be encouraged to discuss such a prospect soon. The one certainty is that crimes of aggression will not abate and R2P will not be fully realized until there is a realistic recognition of these particular acts in the Rome Statute.

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The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization

M. Cherif Bassiouni*

The term aggression first appeared in official international legal literature in connection with the definition of “crimes against peace” in article 6(a) of the Charter of the International Military Tribunal (IMT), followed by article 5(a) of the Statute for the International Military Tribunal for the Far East (IMTFE), and in article II(a) of Control Council Law No. 10 (CCL No. 10). But there was no legal precedent for such an international crime, even though much effort was made to link “crimes against peace” as it appeared in the IMT, IMTFE and CCL No. 10 to the Kellogg-Briand Pact of 1928, which does not, contrary to its plain terms, criminalize aggression or renounce “war as an instrument of national policy.” Between 1928 and 1945 nothing occurred to criminalize aggression or any state action by which war was an instrument of national policy. It was therefore an unjustifiable legal argument for IMT, IMTFE, and CCL No. 10 to take for granted that aggression or “crimes against peace” were indeed internationally criminalized. Certainly, if nothing else, such an extrapolation violates the principles of legality that are part of general principles of international law.

This author, as well as many of his contemporaries, joined this effort to criminalize aggression, though always raising doubts about the international community would meet this hopeful expectation.

The United Nations undertook a codification effort following World War II, as a fulfillment of the Nuremberg Principles and a continuation of international accountability and international criminal justice. That effort, which started with the Draft Code of Offenses Against the Peace and Security of Mankind in 1947, faced obstacles as of 1948 with the onset of the Cold War.

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1 Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.
Disagreement between states leading the two opposing blocs spilled into this legal effort. The *realpoliticians* of the time were able to separate the definition of aggression from other crimes, placing it into a committee of government-appointed representatives that took its sweet time (twenty-six years) to reach a definition of aggression. Even at that time, however, rather than adopting a convention, the UN General Assembly adopted a resolution on the definition by consensus in 1974.\(^6\) In the opinion of this writer, this does not make the definition of aggression, contained in that resolution, an international crime. Most significantly, neither the General Assembly nor the Security Council ever relied on that definition, notwithstanding the number of conflicts and issues regarding war and peace that they have had to deal with over these many years. Aggression thus remained in a legal and political limbo. Then came the International Criminal Court, and again a definition for aggression could not be reached either during the General Assembly’s four years of preparatory work or at a later diplomatic conference. It took twelve years for diplomatic initiatives, and the dedicated efforts of a few working behind the scenes, to develop a text with which that major states could agree. That text was included in the 2010 Kampala Review Conference work plan.\(^7\) The text was adopted as an amendment to article eight of the Rome Statute, but it would only be binding upon those States Parties that have specifically adhered to and elected to be bound by it. This left a considerable number of States Parties out of the scheme altogether. The thirty states required for the amendment to enter into force have since been reached (which includes Palestine).

With some poetic license, I can say that aggression has been a crime in the minds of many for such a long time that they have come to take it for granted, as if it were a legal reality. Unfortunately it was not, and there does not seem to be much of a reason to continue that illusion.

There are two powerful reasons why aggression should finally be abandoned. The first is that, over the last thirty years, the number of conflicts between states that could fall within the definition of aggression have become few and far between. States that use their armed forces outside their territory always find some legal basis under international law to justify their foreign presence. This was the case with the United States in its invasion of Iraq in 2003\(^8\) and its intervention in Afghanistan as of 2001.\(^9\) It was the case with respect to Russia in Ukraine,\(^10\) though that was more blatantly in violation of international law and had much less legal justification. Russia’s direct military involvement in Syria


\(^7\) International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).


advances this trend one step beyond anything international law could find permissible, but it is more about its consequences, namely the crimes against humanity and war crimes committed by its troops against civilians in the country.

There are no other known cases of one state invading another or using force against another, except for the cases cited above and the United States’ use of drones and autonomous weapons systems (AWS). If we consider the use of cyber technology by one state against another, and its harmful effects, then that includes a number of states such as the United States, Russia, North Korea, China and possibly other states.

The second reason is that the classical form of aggression, or any of its variations, is not likely to occur again in this age of globalization. Now AWS and cyber technology can be used as a way for states to accomplish goals for which they historically had to resort to the type of aggression witnessed in World War One and World War Two to achieve. It is, therefore, not aggression as we knew it that should be pursued by those in the international community who want to advance international accountability and international criminal justice. They should, instead, focus on these new forms of violence and the more traditional, and well-established, crimes, e.g., war crimes and crimes against humanity. We therefore need to develop a new legal concept for linking these two crimes and uses of AWS and cyber technology so as to increase the international criminal responsibility of those engaging in violence. This is especially important for the policymakers and technical operators of these new devices. This is our new challenge.
Epilogue: A Nuremberg Prosecutor’s Summation Regarding the Illegal Use of Armed Force

Benjamin B. Ferencz*

It was the hope of the Nuremberg Tribunals that the rule of law might serve to deter future wars and prevent crimes against humanity. As a member of the US Armed Forces, fresh out of Harvard Law School, I entered several Nazi concentration camps as they were being liberated. My assignment was to gather evidence of the incredible atrocities committed during the Hitler regime. The horrors I personally witnessed led to an unshakable determination to try to prevent such abominations in the future.

When the war was over, I returned to Germany to assist in subsequent Nuremberg proceedings. I became Chief Prosecutor in what was referred to as “the biggest murder trial in human history,” the prosecution of twenty-two Einsatzgruppen officers. All twenty-two high-ranking defendants—many with doctoral degrees—were convicted of deliberately slaughtering over a million men, women, and children. They were killed because they did not share the race, religion, or ideology of their executioners. I appealed for a new rule of law that would prevent future genocides and protect the human rights of all people everywhere, regardless of race or creed. It was my first case. I was 27 years old.

The most significant outcome of the Nuremberg Trials was the affirmation that aggressive war, which had previously been hailed as a sovereign right, was punishable as the supreme international crime. In 1946, the first General Assembly of the United Nations appointed committees to formulate a code of international crimes, including the crime of aggression, and to lay the foundation for an International Criminal Court to try leading offenders. Yet reaching agreement on the definition of aggression became a major obstacle.

A consensus definition, replete with loopholes and exculpations, was reached in 1974. Major powers were not prepared to have any outside body restrain their perceived sovereign right to use force. The 1974 definition was brushed aside as non-binding. After countless sessions of hundreds of lawyers and delegates, a

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new consensus definition was finally reached in Kampala in 2010. In order to reach agreement, it was stipulated that the offense could not be actionable before 2017 at the earliest, and only after a number of ratifications and other hurdles had been overcome. Whether and when the major powers will be willing to accept accountability for the illegal use of force remains in legal limbo. The persistent obstacles over the last seventy years are more political than legal.

Some national leaders seem more concerned with protecting their power than their people. Fanatic followers seek to guard their religion, territory, or economy by every means. The original UN Charter peace plan requiring disarmament, an international military force, and an unbiased Security Council, was never given a chance. Those who were victors in war returned to being adversaries in peace. The rule of law was placed back into the ice bucket of the cold war. Since there was no independent judiciary capable of enforcing its decisions, militants willing to kill and die for their particular cause continued to rely on force by every available means. The voice of Nuremberg was not heard.

Nuremberg posited that crime is committed by individuals and that law must apply equally to everyone—including those who sit in judgment. If law is designed to protect large and varied constituencies, it must be interpreted broadly rather than narrowly. If punishing the crime of aggression remains blocked by overblown legal obstacles, a new legal path must be found to condemn what has been properly described as “the supreme international crime.” If the courtroom door remains locked, another entry must be found to protect the public interest. Massive abominations, such as rape, torture, and murder—which occur in every war—are already recognized as punishable crimes against humanity. Surely, if one murder could qualify as a crime against humanity, the illegal use of armed force, in the knowledge that thousands of innocents will be killed, deserves at least equal condemnation.

The widely-hailed 1948 UN Universal Declaration of Human Rights proclaims that everyone has the right to life. Since it expresses the fundamental hopes of people everywhere, illegal war-making, which inevitably takes countless human lives, should be recognized as an inhumane act punishable universally in both national and international courts. Leading planners and perpetrators of such crimes against humanity should be held to account in a court of law whenever and wherever they may be apprehended. Furthermore, it is axiomatic that those who cause illegal damage should also be held accountable to compensate and mitigate the harm to the victims. These common-sense goals are all necessary steps toward making the Nuremberg legacy complete. Obviously, there is still a long way to go.

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War has been glorified for centuries as the road to power and prestige. The rule of law applies not merely to governments and their agents. Under principles of universal jurisdiction, it should also bind groups and persons prepared to kill and die for their particular cause. Changing hearts and minds cannot be done quickly or easily. You cannot kill an ideology with a gun. It requires a more humane ideology that does not threaten any peaceful person. Tolerance and compassion must be taught on all levels. Compromise cannot be seen as cowardice. It is understandable that those with conservative inclinations are hesitant about yielding new powers to untried tribunals. Yet they fail to recognize that in this modern, cyber age, the use of military force is a far greater menace than a safeguard. Only peaceful means, as described in the UN Charter, are legally permissible. The money saved by outlawing war could provide funds to abate social conditions that give rise to the despair that ignites unrestrained hatred and violence.

It takes courage not to be discouraged. Despite difficulties and shortcomings, progress toward a more humane world governed by law and the search for justice has been remarkable. There has been an awakening of the human conscience. Consider, for example, the end of colonialism and slavery, the emancipation of women, legalization of same sex partnerships, and a host of other advances considered impossible only a few decades ago.

The Nuremberg trials represented the search for a more humane world governed by law. The creation of the International Criminal Court in 2002 was another great step forward. It must be seen as a prototype that will need support as it improves by experience. In 2012, I was invited to make the closing remarks as the ICC completed its first case. I was then 92 years old. The chart of progress in advancing the rule of law does not move in a straight line but gradually spirals upward. Today, humanitarian law is being taught in universities throughout the world.

New means of instant universal communication must gradually lead to the recognition that we are all inhabitants of one small planet and that we must share its resources so that all may live in peace and human dignity. Accountability for the illegal use of force is an indispensable prerequisite. No one should be immune. Nuremberg pointed the way. The genocide in Rwanda sounded a belated alarm. Subsequent criminal proceedings under Security Council mandate and national jurisdictions for similar crimes against humanity were moves in the right direction. What has been sadly lacking has been the effective enforcement of the declared goals and aspirations. That is the challenge facing all who believe in the rule of law. Perfection should not be expected. Only when accountability for the illegal use of force becomes widely accepted and enforced will the Nuremberg legacy be complete.