

On the Adjudication of the Illegal Use of Force at the ICC

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“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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¹ HEIKELINA VERRIJN STUART & MARLISE SIMONS, *THE PROSECUTOR AND THE JUDGE* 35 (2009).

² *Id.*

³ *Id.* at 35–36.

⁴ *Id.* at 35.

⁵ Harold H. Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 265 (2015).

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.⁷ 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."⁸ Collectively, the P5 claim that they act out of altruism, in defense of the "integrity of the UN Charter."⁹ 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.¹⁰

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.

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.¹¹ This clearly does not accord with the agenda of the P5.¹² But the outcome of Kampala is justified. The importance of the

epi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-OS-USA-ENG.pdf (recalling "concerns" about the aggression amendments, and believing there to be a "dangerous and substantial degree of uncertainty with respect to quite basic issues").

⁷ Koh & Buchwald, *supra* note 5, at 266.

⁸ Gennady Kuzmin & Igor Panin, *Russia*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 1264, 1266 (Claus Kreß & 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 Kreß & 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 Kreß & 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

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).

¹⁴ Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 208 (1947).

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.”).

¹⁶ *E.g.*, G.A. Res. 48/88, U.N. Doc. A/RES/48/88 (Dec. 20, 1993); G.A. Res. 37/233A, U.N. Doc. A/RES/37/233A (Dec. 20, 1982); G.A. Res. ES-9/1, U.N. Doc. A/RES/ES-9/1 (Feb. 5, 1982); G.A. Res. 36/27, U.N. Doc. A/RES/36/27 (Nov. 13, 1981).

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.”¹⁹ All acts that arise in an unjust war are unjust, as a sort of “internal” or moral injustice.²⁰ 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.²¹

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.²² Depending on their interests, whether well or poorly understood, sovereign states have authority to determine the just causes for war, under Vattel’s view.²³ 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 Koskeniemi argues that in the trial of an aggressor, “each party is a judge, and each a criminal.”²⁴ 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.”²⁵ However, this refrain is losing its audience.²⁶

¹⁹ Translated from HUGO GROTIUS, *LE DROIT DE LA GUERRE ET DE LA PAIX*, Bk. II, Chapt. XXII (P. Pradier-Fodéré trans., D. Alland & S. Goyard-Fabre eds., 1999) (1625).

²⁰ *Id.*, at Book III, Ch. X, Sec III.

²¹ *Id.*, at Book III, Ch. X, Sec. IV.

²² EMER DE VATTEL, *THE LAW OF NATIONS*, Bk. III, Chapt. III (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. of Wash., 1916) (1758).

²³ Slim Laghmani, *Vattel et le Ius ad Bellum*, in *VATTEL’S INTERNATIONAL LAW FROM A XXIST CENTURY PERSPECTIVE* 307, 313 (Vincent Chetail & Peter Haggemacher eds., 2011). See also Philip Allott, *The Emerging Universal Legal System*, 3 *INT’L L. F.* 12, 13 (2001); Iain Scobbie, *A View of Delft: Some Thoughts about Thinking about International Law*, in *INTERNATIONAL LAW* 53, 78 (Malcom D. Evans ed., 4th ed., 2014).

²⁴ Martti Koskeniemi, “*A Trap to the Innocent . . .*,” in *THE CRIME OF AGGRESSION: A COMMENTARY* 1359, 1382 (Claus Kreß & Stefan Barriga eds., 2017).

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.

²⁸ William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 549 (2010).

²⁹ Rod Rastan, *Comment on Victor's Justice & The Viability of Ex Ante Standards*, 43 J. MARSHALL L. REV. 569, 601 (2010).

³⁰ *Id.*

³¹ R v. Sussex Justices, *Ex parte McCarthy* [1924] 1 K.B. 256, 259 (Eng.).

constituted an “act of aggression.”³² Nor has it ever referred to, let alone given meaning to, General Assembly Resolution 3314 on the definition of aggression, issued in 1974.³³ The defining question, then, is not “whether the Court is acting independently of politics and public perception,”³⁴ 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.

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.”³⁵ 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 activation³⁶—and there is still a considerable opportunity for the P5 to shape the outcome of the vote.³⁷ 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.

³² ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 148–49 (2004).

³³ CARRIE MCDUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 10, 83 (2013).

³⁴ Cf. Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 566–67 (2010).

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 MCDUGALL, *supra* note 33, at 50–51.