

## Accountability for the Illegal Use of Force – Will the Nuremberg Legacy Be Complete?

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

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<sup>1</sup> 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 427 (1948).

<sup>2</sup> 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).

<sup>3</sup> *See* Stefan Barriga & Niels Blokker, *Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues*, in THE CRIME OF AGGRESSION: A COMMENTARY 634–37 (Claus Kreß & Stefan Barriga, eds., 2017).

<sup>4</sup> “The Biggest Murder Trial in History”, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007155> (last visited Mar. 15, 2017).

Jewish Material Claims Against Germany, he helped negotiate the treaty between the Claims Conference, West Germany, and the State of Israel.<sup>5</sup>

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.”<sup>6</sup> 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<sup>7</sup> and by insisting that the “supreme international crime” remain judiciable as an offense under international criminal law.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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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

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<sup>5</sup> BENJAMIN FERENCZ & TELFORD TAYLOR, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979).

<sup>6</sup> *Id.*

<sup>7</sup> BENJAMIN B. FERENCZ, *NEW LEGAL FOUNDATIONS FOR GLOBAL SURVIVAL: SECURITY THROUGH THE SECURITY COUNCIL* (1994); BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: STEP TOWARD WORLD PEACE* (1980).

<sup>8</sup> BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* (1975); BENJAMIN B. FERENCZ, *ENFORCING INTERNATIONAL LAW: A WAY TO WORLD PEACE* (1983).

<sup>9</sup> The Illegal Use of Force: Reconceptualizing the Laws of War, International Experts Meeting, Washington University School of Law, Whitney R. Harris World Law Institute, Sept. 11–12, 2015, <http://law.wustl.edu/harris/IllegalUseForce.aspx>.

<sup>10</sup> See, e.g., *SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE* (Leila Nadya Sadat, ed., forthcoming 2017); *THE CRIME OF AGGRESSION: A COMMENTARY* 634–37 (Claus Krefß & Stefan Barriga, eds., 2017).

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.<sup>11</sup> 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-judiciable political question.<sup>12</sup>

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.”<sup>13</sup> 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.<sup>14</sup> 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*.<sup>15</sup>

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.<sup>16</sup> 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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<sup>11</sup> Federica D'Alessandra, *Accountability for Violations of the Prohibition against the Use of Force at a Normative Crossroads*.

<sup>12</sup> Anthony Abato, *On the Adjudication of the Illegal Use of Force at the ICC*.

<sup>13</sup> 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*.

<sup>14</sup> Donald M. Ferencz, *Continued Debate over the Crime of Aggression: A Supreme International Irony*.

<sup>15</sup> William Schabas, *The Human Right to Peace*.

<sup>16</sup> Dapo Akande & Antonios Tzanakopoulos, *The Crime of Aggression in the ICC and State Responsibility*.

Rome Statute.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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, MacKenna 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.<sup>20</sup>

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.<sup>21</sup> 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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<sup>17</sup> Marissa R. Brodny, *Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court*.

<sup>18</sup> Volker Nerlich, *The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?*.

<sup>19</sup> Juan P. Calderon-Meza, *Non-State Accessories Will Not Be Immune from Prosecution for Aggression*.

<sup>20</sup> MacKenna Graziano & Lan Mei, *The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability*.

<sup>21</sup> Frédéric Mégret, *State Responsibility for Aggression: A Human Rights Approach*.

the ICC plays—and should play—a role in *preventing* acts of aggression, not merely adjudicating completed acts.<sup>22</sup>

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.<sup>23</sup>

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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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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

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<sup>22</sup> Hector Olasolo & Lucia Carcano, *The ICC Preventive Function in Respect of the Crime of Aggression in International Politics*.

<sup>23</sup> Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*.

<sup>24</sup> Leila Nadya Sadat, *Accountability for the Unlawful Use of Force: Putting Peacetime First*.

<sup>25</sup> Sanji Mmasenono Monageng, *The Crime of Aggression: Following the Needs of a Changing World?*; David Scheffer, *The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute*.

<sup>26</sup> 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.”<sup>27</sup> To promote this end, “[a]ccountability for the illegal use of force is an indispensable prerequisite.”<sup>28</sup>

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<sup>27</sup> Benjamin B. Ferencz, *Epilogue: A Nuremberg Prosecutor’s Summation Regarding the Illegal Use of Armed Force*.

<sup>28</sup> *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.