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The Crime of Aggression: Some Personal Reflections on Kampala

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Abstract

The International Military Tribunal at Nuremberg established a legal precedent for the proposition that waging a war of aggression is an international offence, for which individuals may be held criminally accountable. The efforts of the First Review Conference of the Rome Statute have resulted in a definition of the crime of aggression being included in the Rome Statute. Although a framework for the International Criminal Court's exercise of jurisdiction over the crime of aggression was also included in the amendments adopted at the Review Conference, such exercise of jurisdiction has not been given immediate effect and is subject to further action by the members of the Assembly of States Parties.

Key words

aggression; Kampala; Nuremberg; Review Conference

Prior to setting off for the International Criminal Court (ICC) review conference in Kampala, I had attended every meeting of the special working group on the crime of aggression over the previous five years. During this period, I had actively participated as a technical non-governmental organization (NGO) consultant, exchanging ideas not only with other NGOs, but also with the chair of the working group and a number of key country delegates.

My views regarding possible innovative approaches to the problem of activating the ICC's jurisdiction over the crime of aggression have been set out in a previous article.[1] In summary, I suggested the possibility of allowing states to accept the ICC's state referral or *proprio motu* jurisdiction on a voluntary basis, both with room for Security Council pre-clearance, and also with the possibility of aggression investigations without such pre-clearance where states had assented to such unrestricted jurisdiction.

During the opening days of the review conference in Kampala, I was contacted by the executive director of the American Society of International Law, Elizabeth Andersen, who asked me to post a note on the society's 'Live from Kampala' review conference blog, rebutting an early commentary that had been posted which argued that the conference should take no action at all with respect to including the crime

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1 D. Ferencz, 'Bringing the Crime of Aggression within the Active Jurisdiction of the ICC', (2009) 42 *Case Western Reserve Journal of International Law* 531, available at www.case.edu/orgs/jil/afterguan2.html.

of aggression in the active jurisdiction of the Court. My comments on that subject, posted on 8 June, may bear repeating here:

> The characterization of aggressive war-making as the supreme international crime didn't originate at Nuremberg. In 1758, the Swiss jurist, Emmerich de Vattel wrote, in his *Law of Nations*, that the sovereign who takes up arms without a lawful cause is 'chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy . . . he is guilty of a crime against his people . . . finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example.'
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> Following the carnage of World War I, the 1920s saw various resolutions and protocols providing that a war of aggression is an international crime (among them the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, and unanimous resolutions of both the Eighth Assembly of the League of Nations in 1927 and the Sixth Pan-American Conference of 1928), but they lacked meaningful enforcement or sanctions.
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> There is little doubt that the IMT [International Military Tribunal] at Nuremberg intended to establish a binding precedent that aggression is a punishable crime, enforceable as a matter of international law. As US Chief Prosecutor, Robert H. Jackson put it in his report to President Truman of 7 October 1946: 'No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction.' The UN General Assembly resolved to adopt the Nuremberg Principles in its first session that same year.
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> Fast-forward to the Speke Conference Center in Kampala, June 2010, from where I'm writing. The argument has been made by opponents of activation of the Court's exercise of jurisdiction over the crime of aggression that the ICC isn't yet ready and can't handle it. But if you ask the highest-ranking personnel at the ICC, they'll uniformly tell you that they disagree. Last week, while walking to breakfast together, one of them told me, in obvious exasperation, that this argument against activating the Court's jurisdiction over the crime of aggression is simply 'ridiculous.'
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> Could aggression involve issues of a 'political' nature? Sure. So what? The Court will judge on the facts and the law, not on the politics. (Is there really anyone out there who doesn't believe that the Court's prosecution of the three other core crimes might also be criticized as involving so-called political issues?) But if the final formulations on jurisdiction considered here in Kampala vest only the Security Council with the right to initiate a case (as the P-5 would like), I think it's fair to say that when the roll-call is taken on this, in addition to translation headsets, there will be many who'd like noseclips to be provided as well.
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> But it doesn't have to be that way. To quote Cherif Bassiouni: 'Legal imagination knows no bounds.' Proposals are being discussed which would give the Security Council the right to refer cases on aggression, but which would also give consenting states the right to agree to be bound by the Court's jurisdiction over the crime, at least as among themselves. And why shouldn't they be permitted to be so bound? The Rome Statute, after all, is conventional treaty law – a contract among consenting states.
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> In the end, if the home state of an accused is required to consent to jurisdiction as a prerequisite to possible ICC prosecution of its citizens for the crime of aggression, 'political' issues will certainly be greatly diminished, if not eliminated altogether. In my view, such consent-based aggression jurisdiction doesn't really 'give away the store' for

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two reasons: first, the Court can already prosecute 'bad guys' for the other three crimes without any such jurisdictional consent limitations, so aggressors could be charged, 'in the normal course' with the other crimes within the Court's jurisdiction. Secondly, in the absence of a referral by the Council on aggression which is backed up with meaningful enforcement muscle, it may prove impossible for the Court to prosecute nationals of non-cooperating states. And, speaking of the Council, let's not forget in all this, that it can do what it wants in terms of bringing prosecutions for aggression outside the scope of the ICC if it should ever choose to (though, I suspect it would take a professional statistician to tell us what the precise odds of that might be) – so allowing it to do so within the context of the Rome Statute isn't giving it something it doesn't already have.

Imbedded in the discussions here in Kampala is the subtext that powerful countries aren't keen on eroding their power by having the crime of aggression bandied about – regardless of the Court's jurisdiction over them. It's perhaps perceived as bad public relations, at a minimum, and enforceable provisions on aggression – regardless of their terms – could have a potentially chilling effect on armed interventions without Security Council authorization. (And, yes, isn't that just the whole point!)

And what of 'humanitarian interventions'? What of Kosovo? Can there be exceptions to the general proscription on the use of force in contravention of the UN Charter? It's a tricky business: what looks to some as humanitarian intervention may appear to others as self-interested adventurism.

Some would say that what we're working on here in Kampala boils down to the question of whether the international collective is willing to take a step forward in replacing the law of force with the force of law by operationalizing Nuremberg's promise that criminal sanction awaits those who seriously violate international norms on the illegal use of force. According to a recent pronouncement by the UK's Law Lords, such norms have been unchanged, at least at their core, since Nuremberg (*In re Jones*, 2006).

If we get something workable in the Statute here in Kampala, we'll have taken a valuable step in moving humankind forward towards de-glorifying war-making itself as an ongoing 'norm'. As my dad likes to put it: 'Law. Not war.' There will never be a war without atrocities. If we want to discourage atrocities, discouraging war-making itself might be a good place to start.

To fail to grasp the moment here in Kampala would betray the promise of Nuremberg – as Jackson put it to Truman, the promise of having 'put International Law squarely on the side of peace as against aggressive warfare.' Perceived imperfections with respect to whatever may come out of Kampala can (and will) surely be refined and improved, but the first meaningful steps must be taken in order to begin to move forward. Failure is not an option. After twenty million dead in World War I, the failure of the League of Nations generation to curtail aggressive war-making left fifty million more dead in World War II. And why? Because the time to criminalize illegal war-making was 'not yet ripe.' Sound familiar?

Let's do better than that. Let's do it now. And let's do it here, in Kampala.

By now, the results in Kampala are well known, and I shall leave it to your readers to look elsewhere for a more detailed commentary and analysis. As for me, I would summarize the failure to activate the ICC's current jurisdiction over the crime of aggression quite simply in this way: the action taken in Kampala was akin to a doctor putting a patient in a medically induced coma in order to save its life. There was

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simply not the political will in Kampala to overcome the concerns of the permanent members of the UN Security Council (the P-5), who unanimously expressed the view that the Security Council must be given the right to act as the sole filter as to whether the ICC may proceed with investigations into the crime of aggression. Thus additional 'handcuffs' have been inserted into the process of bringing aggression within the active jurisdiction of the ICC, and it will remain to be seen whether such 'handcuffs' can effectively be removed by requisite ratifications and greater consensus in the future.

For now, however, a substantive definition of the crime of aggression has at least been included in the ICC Statute – a positive and much-hoped-for result in the eyes of many (notwithstanding its acknowledged imperfections).

It is often said that the wheels of justice grind slowly. In this case, some may go so far as to say that they have temporarily ground to a halt. Yet the outlines of the wheels of justice relative to the crime of aggression as crafted in Kampala may yet serve to give pause to would-be perpetrators of the crime of aggression. In time, if sufficient political will can be mustered, the Assembly of States Parties may yet move forward in making it clearer to all (as it was certainly clear at Nuremberg) that the crime of aggression is, indeed, 'law with a sanction'.