

Illegal Armed Force as a Crime against Humanity

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ABSTRACT:

At the Nuremberg Trials in 1946, the waging of aggressive war was indelibly branded as “the supreme international crime, The United Nations affirmed the Nuremberg principles and UN committees began creating a new International Criminal Court (ICC) to help maintain future peace. Half a century later, in 1998, in Rome, an enabling statute for an ICC was overwhelmingly acclaimed by 120 nations. After speedy ratification, the Court became operational in 2002. It was authorized to deal only with genocide, crimes against humanity, war crimes and the crime of aggression. However, several major powers were not prepared to accept any international judicial review of their perceived sovereign right to wage war; the same hesitations still prevailed at an

¹ Editor’s Note: The author is the former Nuremberg Chief Prosecutor of the Einsatzgruppen Case, in which 22 high-ranking Nazis were convicted of slaughtering of over a million innocent men, women, and children. In his opening statement to the Court, he declared, “The case we present is a plea of humanity to law.” (Original video footage is available online at http://www.ushmm.org/wlc/en/media_fi.php?ModuleId=10007080&MediaId=184) . He has been an active advocate for the rule of law throughout his career and a comprehensive selection of his writings, essays, and lectures may be accessed online at www.benferencz.org. He was assisted editorially in the preparation of this essay by his son, Donald M. Ferencz, who is also an active proponent of international justice and the rule of law; he may be reached at donferencz@aol.com.

amendment conference in Kampala, Uganda in 2010. Although aggression was re-defined by consensus, jurisdiction by the ICC was again postponed for consideration at some later date after 2017. The crime of aggression still hangs in legal limbo. There is a dangerous gap in the law.

Deterrence is the primary goal. If no court is competent to try aggressors, the crime is more likely to be encouraged than deterred. This paper seeks to narrow the immunity gap by suggesting a practical legal solution to discourage aggressive wars. Legal quibbling encourages evasions. Illegal use of armed force should be punishable as “other inhumane acts” within the meaning of the ICC prohibition of crimes against humanity. After considering the views of respected military commanders, distinguished academicians and noted human rights advocates, this paper concludes that those leaders who, without lawful justification and with the requisite knowledge and intent, are responsible for foreseeable large scale civilian casualties, should be accused of crimes against humanity and held accountable by fair trial in a competent national or international court of law.

1. From Nuremberg to Kampala

The history of humankind has been the history of wars. The father of international law, Hugo Grotius, had called for humane conduct even in warfare “lest by imitating wild beasts too much we forget to be human.”² Following the devastating

² Hugo Grotius, *On the Laws of War and Peace*, Book III. Chap XXV, Section II, available online at http://books.google.com/books?id=j1esrnUC-YQC&pg=PA83&lpg=PA83&dq=lest+by+imitating+wild+beasts+we+forget+to+be+human&source=bl&ots=5Qu504gqq_&sig=msOgyF3vNMlcNv8VM3NcFPuLM5s&hl=e

U.S. civil war, Francis Lieber's code set forth humanitarian Rules for the Governance of Armies in the Field.³ At The Hague in 1899, delegates adopted the famous Martens Declaration that "belligerents remain under the protection of the law of nations as they result from the usages established among civilized peoples, from the law of humanity and the dictates of the public conscience."⁴ The Commission on Responsibilities for World War I concluded that those who violated "the laws of humanity" were "liable to criminal prosecution".⁵ Rules outlawing the inevitable atrocities of war almost invariably contained exceptions in case of "military necessity" or "national interests" but the "laws of humanity" became an accepted minimum standard of binding customary international law.

In 1945, following the horrors of World War II, the International Military Tribunal (IMT) at Nuremberg, together with the United Nations, sounded a wake-up call. New thinking and new institutions would be needed, as stated in the preamble

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³ Available on-line at http://avalon.law.yale.edu/19th_century/lieber.asp .

⁴ See The Preamble to The Geneva Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, available online at <http://www.icrc.org/ihl.nsf/WebART/195-200001?OpenDocument> .

⁵ *Violations of the Laws and Customs of War*, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Clarendon Press, Oxford, 1919, at p. 20, available online at <http://archive.org/stream/violationoflawsc00pariuoft#page/n1/mode/2up> .

to the U.N. Charter, “to save succeeding generations from the scourge of war.”⁶ The Charter clearly prohibited the threat or use of armed force except in self-defense against an armed attack or after authorization by the Security Council.⁷ U.S. Supreme Court Justice Robert Jackson, America’s most distinguished jurist, served as Prosecutor for the United States at the IMT. He reported to the President that the American legal position “would be based on the common sense of justice . . . We must not permit it to be complicated by sterile legalisms developed in the age of imperialism to make war respectable.”⁸ The IMT declared: “This law is not static but by continual adaptation follows the needs of a changing world.”⁹

IMT jurisdiction was based on existing customary international law and treaties which condemned Crimes Against Peace, War Crimes and Crimes Against Humanity, such as “murder, extermination, and “other inhumane acts committed against any civilian population.”¹⁰ General Telford Taylor (later a professor at Columbia University), who directed

⁶ Preamble to the United Nations Charter, available online at <http://www.un.org/en/documents/charter/>.

⁷ U.N. Charter Articles 2(4), 42-51, available online at <http://www.un.org/en/documents/charter/> .

⁸ Letter from Justice Robert H. Jackson to the President of the United States, 6 June 1945, reporting on the Nuremberg Trials, available on-line at <http://avalon.law.yale.edu/imt/jack08.asp>.

⁹ IMT Judgement, The Law of the Charter, available on-line at <http://avalon.law.yale.edu/imt/judlawch.asp>. *See also* Benjamin B. Ferencz, *An International Criminal Court, A Step Towards World Peace*, p. 479, Oceana Publications, Inc. 1980 available online at <http://www.benferencz.org/books/FerenczAnInternationalCriminalCourtVol1.pdf>.

¹⁰ Constitution of the International Military Tribunal, Article 6(c), available online at <http://avalon.law.yale.edu/imt/imtconst.asp> .

a dozen subsequent trials at Nuremberg, following the IMT, concluded, in a prescient speech in Paris in April, 1947:

“If the trials in Nurnberg . . . can help to expand and refine the legal principles of crimes against humanity, and if the nations of the world can establish a permanent jurisdiction for their punishment based on practical, enforceable and enlightened principles, we will indeed have reached a turning point in the history of international law.”¹¹

Expanding and refining legal principles of crimes against humanity was not something that could be accomplished quickly or easily. Universal declarations of human rights and humanitarian proclamations have multiplied over the years but enforcement of the noble goals has been very slow in coming. Perpetrators of crimes in armed conflicts insist that their deeds were all necessary and justifiable; victims claim just the opposite. If such disputes cannot be resolved by peaceful means, and there is no impartial court competent to render a binding judgment, violence is unavoidable. Yet, we may be approaching a turning point as we peruse recent milestones that mark the progress in protecting humanity through law.

The 1948 General Assembly Universal Declaration of Human Rights proclaimed the inalienable right of all members of the human family to “freedom, justice and peace in the world.”¹² “Life, liberty and security of persons” was fundamental.¹³ Another Resolution, in 1984, proclaimed that

¹¹ Telford Taylor speech of April, 1947, translated copy on file with the author.

¹² See preamble to [General Assembly resolution 217 A \(III\)](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement), available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>.

¹³ Id. at Article 3.

“the peoples of our planet have a sacred right to peace.”¹⁴ In the 1990’s the UN Security Council created temporary courts to punish genocide and "other inhumane acts" committed in Rwanda and Yugoslavia. Yet, some powerful governments that supported the human rights system when it applied to others were unwilling to subject their own conduct to legal scrutiny. Despite such vacillation, the gradual movement toward a more humane world order protected by law was unmistakable. There has been a slow awakening of the human conscience.

In 1998, nations meeting in Rome adopted a Statute for an International Criminal Court (ICC) based on the Nuremberg precedents. The treaty establishing the Court received the required 60 ratifications and became operational for over 70 countries in July 2002. Ten years later the number of accepting State Parties had reached 121. With the creation of the ICC, for the first time in human history, a permanent international criminal court came into existence. Only four core crimes “of concern to the international community as a whole” came within the jurisdiction of the Court: genocide, crimes against humanity, war crimes and the crime of aggression.

Major powers were still opposed, as they had always been, to having any foreign court adjudicate the legality of their military actions. They balked at allowing the ICC to try aggressors. Small states insisted that without being able to punish aggression - "the mother of all crimes" - the ICC would be a farce. As a compromise, aggression was recognized as a crime, but the ICC was prohibited from dealing with it until certain additional restrictive conditions were met. What was demanded was an acceptable new definition of aggression and assurances that Security Council powers would not be

¹⁴ G.A. Res. 39/11, 1984, *available online* at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/459/88/IMG/NR045988.pdf?OpenElement>

diminished. No one seemed to notice, or wanted to notice, that in 1974, after years of negotiation, a consensus definition of aggression had already been reached and accepted by the UN General Assembly (GA Res. 3314).¹⁵ In any event, the impasse in Rome regarding the crime of aggression was bridged by postponing further consideration pending a Review Conference intended to be convened seven years later.

In June 2010, the promised Review Conference was finally held in Kampala, Uganda. The participants seemed to acknowledge at the outset that decisions would be reached only by consensus. "Consensus", of course, meant that everyone had a veto right about everything. Under such restraints it would be exceedingly difficult to reach clear meetings of the mind on any important matters of substance. Nevertheless, a revised consensus definition of aggression was finally reached that was largely based on the 1974 consensus.¹⁶ Its most significant change was that the aggression had to be a "manifest" violation of the UN Charter.¹⁷ What actually was meant by "manifest"

¹⁵ G.A. Res. 3314 (1974), available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>; see also Benjamin B. Ferencz, *Defining International Aggression*, Volume II, Oceana Publications, Inc. (1975), B. Ferencz, "The United Nations Consensus Definition of Aggression: Sieve or Substance?", *Journal of International Law and Economics*, National Law Center, George Washington University 10 (Aug.-Dec.,1975) 701-724.

¹⁶ For a comprehensive discussion of the Kampala amendments and process, see Stefan Barriga and Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, *American Journal of International Law*, July 2011 edition, Vol. 105:477, pp. 517-533, available online at http://www.regierung.li/uploads/media/105_AJIL_July_2011_-_Barriga-Grover_-_Historic_Breakthrough_on_the_Crime_of_Aggression_01.pdf.

¹⁷ For a discussion of the development of the definition of the crime of aggression up to and including the Kampala review conference, see Prof. Claus Kress and Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*,

remained uncertain. Still, no longer could the convenient but spurious argument be made that aggression could not be prosecuted because it had not been defined.

Yet, once again, as had been done in Rome, under pressure from powerful states, giving the ICC active jurisdiction over the crime of aggression was not accepted. As a compromise, it was agreed to postpone the issue for reconsideration at some unspecified future date after 2017. It was an echo of the lame historical excuse: "the time is not yet ripe." Thus, malevolent leaders responsible for what the IMT called "the supreme international crime" still remained beyond the ICC's reach. If illegal war-makers were to be deterred by the threat of punishment by a court applying "enlightened and enforceable principles", new ways had to be found to end the existing immunities.

2. Protecting Human Rights Through Law

"Enlightenment" begins with the recognition of the need for change. One of the primary objections to accepting new international rules to govern national conduct was the misguided complaint: "Our sovereignty is at stake!" For thousands of years, war was the accepted path to conquests, riches, and glory. Centuries ago, Thucydides articulated the oft-quoted observation: "We know as practical men that the question of justice arises only between those equal in strength, and that the strong do what they can, and the weak submit."¹⁸

available online at <http://intl-jicj.oxfordjournals.org/content/8/5/1179.full.pdf+html>.

¹⁸ Excerpted from a History of the Peloponnesian Wars, relevant portion *available online* at <http://www.rooseveltlausd.org/ourpages/auto/2010/9/29/49133548/Thucydides%20History%20of%20the%20Peloponnesian%20War.doc>.

Power was decisive. International law did not exist.

The treaties of Westphalia in 1648 ended 30 years of religious conflict in Europe by creating a regional system of sovereign States in which a monarch reigned supreme only within his realm. Conquest by combat remained legitimate. This condition persisted even up to the formation of the League of Nations, which recognized war-making as lawful – as long as the enemy was given three months' notice.¹⁹

The Nuremberg principles sought to substitute a rule of enforceable humanitarian law to replace the horrors of armed conflict. Those who stubbornly refused to be bound by new international rules failed to recognize that, in today's interdependent and increasingly democratic world, sovereignty belongs not to a monarch who is above the law but to the people. The notion of absolute sovereignty is absolutely obsolete.

Enlightened military leaders who experienced armed combat learned the hard way that law is always better than war. When Dwight D. Eisenhower, who had been Supreme Commander of the victorious allied forces in World War II, became President of the United States, he made an important speech in which he said: "In a very real sense the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law."²⁰ He was echoing General Douglas MacArthur, Commander in the Far East, who, in 1946 praised the new constitution of Japan, in which the Japanese people forever renounced war as a sovereign right.

¹⁹ Covenant of the League of Nations, Art. 12, *available online at* <http://www.unhcr.org/refworld/publisher,LON,,,3dd8b9854,0.html> .

²⁰ Statement by President Dwight D. Eisenhower made on April 30, 1958, in recognition of Law Day, *available online at* <http://www.eisenhowermemorial.org/pages.php?pid=504> .

MacArthur, a great war hero, called for universal renunciation of armed might. He pointed to modern science and warned that failure to unshackle ourselves from the past “may blast mankind to perdition.”²¹ Recently retired Chairman of the US Joint Chiefs of Staff, Admiral Mike Mullen, has repeatedly declared that he would rather prevent or deter a war than fight one.²² It should be noted that prohibiting the illegal use of armed force is designed to protect military as well as civilian victims.

Many of our most far-sighted international legal scholars, such as revered Professors Hersch Lauterpacht²³, Myres McDougal²⁴ and his protégé, Michael Reisman²⁵ recognized that

²¹ Excerpted from an address to The Allied Control Council in Tokyo, April 1946, *American Affairs*, Vol. III, No. 3, at p. 150, Summer Edition (July, 1946), available online at http://mises.org/journals/aa/AA1946_VIII_3.pdf.

²² See, for example, Mullen’s address to The Washington Center for Internships and Academic Seminars, Washington, DC, 6 January 2010, where he said “I would much rather prevent a war than fight a war.” Available online at <http://www.c-span.org/Events/Washington-Center-Seminar-with-JCS-Chair-Adm-Michael-Mullen/16680/>.

²³ For a short biographical sketch and tribute to Hersch Lauterpacht, see Philippe Sands, *My legal hero: Hersch Lauterpacht*, The Guardian Online, 10 November 2010, available online at <http://www.guardian.co.uk/law/2010/nov/10/my-legal-hero-hersch-lauterpacht>.

²⁴ See, for example, McDougal, Myres S., "International Law and the Future" (1979). *Faculty Scholarship Series*. Paper 2662, available online at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3677&context=fss_papers.

²⁵ As noted by Myres McDougal, *supra*, note 24, at p. 260, “Michael Reisman has appropriately emphasized that lawyers must continuously make judgments about the future. In Reisman, *Private Armies in a Global War System: Prologue to a Decision*, 14 VA. J. OO'L L. 1,33 (1973), he writes: Lawyers too often overlook the painfully obvious fact that though the events which precipitate decisions come from the past, decisions

the human rights of the individual can best be protected by an expansive and not restrictive characterization of prohibited behavior and that we should look to the future, and not to the past, in developing norms of acceptable conduct. With respect to crimes against humanity, the highly esteemed Prof. Cherif Bassiouni has observed that “the purpose of the prohibition is to protect against victimization irrespective of any legal characterization or the context in which it occurs.”²⁶ In his recent book “Unimaginable Atrocities”, Prof. William Schabas recognized that taking the Nuremberg principles forward is “the mission of international justice, as well as international human rights, as a civilizer not only of individuals but also of nations.”²⁷

Countless non-governmental organizations and official UN agencies have recognized the need for improved protection of humanity through law. In the absence of competent courts and political will by world leaders, the right to peace proclaimed in a wide variety of resolutions remained little more than an articulated but unenforceable aspiration. Declaring the law is one thing; respecting or enforcing it is another. The evolution of international law had not yet reached the point where institutions or means were available for effective

themselves are future oriented; the test of their quality is not whether they conform to the past, but rather whether they structure processes and value allocations in the near and distant future in preferred ways.”

²⁶ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, at p. 44, Kluwer Law International, 2d ed. 1999. For an excellent discussion of the movement toward an international convention for crimes against humanity, see also Leila N. Sadat, *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011.

²⁷ William Schabas, *Unimaginable Atrocities*, Oxford University Press, 2012, at p. 221.

peaceful enforcement of the rule of rule of law.²⁸ The existence of the ICC, with its legally binding statute that required all parties to the treaty to honor their obligations, held forth the implied promise that the future would be better than the past. Hope, however, does not become reality without sustained efforts to persuade the sceptics.

As a first step, all States Parties to the Rome Statute who were present in Kampala should now ratify the amendments on aggression, including the negotiated understandings agreed to by consensus in 2010.²⁹ Failure to provide the necessary 30 ratifications would undermine the utility and integrity of the entire Kampala effort. Those States Parties that accepted and ratified the Rome Statute are already legally bound by that treaty to assume primary responsibility for supporting the ICC goals and mandates. If they fail to ratify their own Kampala consensus, they foul their own nest.

Professor Otto Triffterer of the University of Salzburg, one of the earliest champions of an international criminal court, in his latest comprehensive commentary drew attention to the

²⁸ For a general discussion of the development of international law, see Benjamin Ferencz, *New Legal Foundations for Global Survival*, Oceana Publications, 1995 and *Enforcing International Law, A Way to World Peace*, Oceana Publications, 1983 (included among selected works of the author *available online at* <http://heinonlinebackup.com/HOLtest/UNLAV>).

²⁹ Ambassador of Liechtenstein to the United Nations, Christian Wenaweser, as the outgoing President of the Assembly of States Parties, declared, "It is now up to each one of us States Parties to do what is necessary to have this system become operational in 2017." Remarks by Christian Wenaweser as ASP President (2009-2011), p. 2, *available online at* http://www2.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-PASP-CW-CLRemarks-ENG.pdf. The Principality of Liechtenstein became the first State to deposit its instrument of ratification of the Kampala amendments on 8 May 2012.

Rome Statute's preambular mandate stressing "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."³⁰ The statute's preamble similarly speaks of punishment "at the national level and by enhancing international cooperation" and emphasizes that the ICC is "complementary to national criminal jurisdictions."³¹ This principle of "complementarity" meant that it was only when domestic courts were unwilling or unable to provide a fair trial that ICC intervention was appropriate. Of course, it made good sense to rely first on local courts where victims could see that justice was being done, evidence was more readily attainable, and costs would be limited. To be sure, the Security Council, as provided in the Charter and the Rome Statute, can always intervene in the interest of world peace.³²

It is particularly notable that States can trump and bypass ICC powers by enacting their own local laws authorizing their own courts to try any of the ICC crimes. Leaders who violate international criminal should have to answer to their own courts and their own citizens. If that is not possible or feasible, those

³⁰ For his major work reviewing the Rome Statute, see *Triffterer: Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Second Edition), Hart Publishing, 2008.

³¹ Preamble, The Rome Statute of the International Criminal Court, *available online at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>. See also the remarks of Amb. Tiina Intelmann, the current President of the Assembly of States Parties who, upon her election stated, "States Parties should increase their focus in building capacities of national jurisdictions. This is also the only way to deter future crimes." SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES, Tenth Session of the Assembly, New York, 12 – 21 December 2011, Remarks by Amb. Intelmann, the new President of the Assembly upon election, at p. 1, *available online at* http://www2.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-NPASP-Remarks-ENG.pdf.

³² ICC Statute Article 16, *available online at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

responsible for massive killings should not expect the world to turn a blind eye to their crimes, but should expect that in the final analysis justice will be done by the ICC.

3. The Primacy of National Courts

Addressing the Assembly of State Parties on 12 Dec. 2011, the highly respected United Nations High Commissioner for Human Rights, Navi Pillay, called on nations to fulfil their obligations by enacting comprehensive legislation incorporating the Rome Statute into their domestic criminal codes. She called upon the Assembly to work “toward ending impunity for gross human rights violations that amount to the worst crimes.”³³ She was right to note that the primary objective “is not to bring as many perpetrators as possible before the ICC, but to get states to diligently implement their obligation to prosecute international crimes.”³⁴ In reviewing the work of the ICC on its tenth anniversary, the President of the Court, Judge Sang-Hyun Song, correctly observed that “the most important aspect of the fight against impunity takes place in each country, society and community around the globe. Domestic justice systems must be strong enough to be able to act as the primary deterrent worldwide...”³⁵

³³ Statement of Navi Pillay to the Assembly of States Parties, 12 December 2011, available online at http://www2.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-UNHCHR-ENG.pdf.

³⁴ *Id.* See also speech of Navi Pillay, UN High Commissioner for Human Rights, at Cinema for Peace Dinner, December 2011, New York, NY, available online at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11724&LangID=E>

³⁵ *International Criminal Court Turns Ten*, Opinion piece by Judge Sang-Hyun Song, President of the International Criminal Court, 2 July 2012, available online at

The Human Rights Council Advisory Committee on the right of peoples to peace has recently similarly emphasized that there is a universal right for all peoples to be free from the use of force in international affairs, and that states should do their part in advancing such rights.³⁶ The net by which perpetrators of international crimes may be apprehended and brought to justice is still under construction. Yet, if enough states carry out their acknowledged primary responsibility to enforce the rule of law, those leaders responsible for massive human rights violations will eventually be left with no place to hide.

What is needed now is new national criminal legislation to put perpetrators of human rights violations on notice that their evil deeds will no longer be tolerated. As far as punishing the crime of aggression is concerned, the lock will unfortunately remain on the closed ICC door until some unpredictable date after 2017 – at the earliest. Still, it may be possible for the essence of the egregious offence to make its way into national criminal jurisdictions of peace-loving nations. It should be noted that national laws to protect the right to life and other peaceful humanitarian goals do not require Security Council approval.

It is, of course, inevitable that on such difficult problems as war and peace there will be differences of opinion. Those powerful states that prefer to rely on their own unrestrained

<http://appablog.wordpress.com/2012/07/02/international-criminal-court-turns-ten-opinion-piece-by-judge-sang-hyun-song-president-of-the-international-criminal-court/>.

³⁶ See Progress Report of the Human Rights Council Advisory Committee on the Right of Peoples to Peace, as reproduced 9 December 2011, A/HRC/AC/8/2, *available online at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Session8/A-HRC-AC-8-2_en.doc.

military might remain free to go their own ways. As long as such differences are dealt with by peaceful means they deserve respect. But the use of armed force, particularly against innocent civilians, should not be tolerated. If the Security Council fails in its duty to maintain peace, other lawful means must be found to protect innocent victims and end the outrage that leaders responsible for the most atrocious crime of illegal war-making remain immune. Recent experience has shown that when illegal violence becomes unbearable, tyrants may be toppled by the awakened and unrestrained outrage in the court of public opinion; surely, a peaceful legal resolution of such conflicts would be more humane and in everyone's interest.

Although uniformity is desirable, different countries have differing legal systems, and different terminology may be needed to enable national codes to curtail the illegal use of force. If the term "aggression" seems too politically sensitive, States should consider criminalizing the offense under a more general description. "The illegal use of force" should be recognized and condemned as a "crime against humanity". Of course it would have to be more explicitly defined and explained, but it might induce militant extremist groups or states to pause or desist from causing great suffering to large numbers of blameless victims.

Even powerful countries may come to see the value of restraining their own military might. The post-war constitutions of Japan and Germany, for example, contain provisions recognizing that aggression is a crime and curtailing their own right to use armed force except in self-defense.³⁷

³⁷ The Japanese Constitution at Article 9 reads "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling

Many other states condemn various human rights violations such as genocide, apartheid, torture and other crimes against humanity as punishable in their national courts because they are recognized as customary international law that should bind all countries. Other states do not recognize customary international law unless specifically adopted in their own legislation.³⁸ The humanization of man's most inhumane activity must be an ongoing process in the interest of our common humanity.

To be sure, many smaller states may need help in adapting their local laws to meet contemporary needs or threats. The ICC should, as a form of "positive complementarity," assist States to close the impunity gap that now exists for crimes that were universally outlawed at Nuremberg. They

international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized. "(available online at http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html). Art. 26(1) of the German Basic Law reads: "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense." (available online at <http://www.iuscomp.org/gla/statutes/GG.htm#26>); moreover, German Ambassador Hans-Peter Kaul, a respected judge at the ICC, has been an ardent and outspoken champion of criminalizing the crime of aggression and the illegal use of force on both the international and national level (See, for example, *Is it Possible to Prevent or Punish Future Aggressive War-making?* Address by Judge Dr. jur. h. c. Hans-Peter Kaul, Second Vice-President of the International Criminal Court at the Li Haopei Lecture Series "Implications of the Criminalization of Aggression" , 8 February 2011, Forum for International Criminal and Humanitarian Law, Oslo, Norway, available online at http://www.icc-cpi.int/NR/rdonlyres/6B2BA9C6-C5B5-417A-8EF4-DA3CA0902172/282974/07022011_ImplicationsoftheCriminalizationofAggress.pdf).

³⁸ See, for example, *R. v. Jones*, where the U.K. Law Lords opined that the crime of aggression exists in customary international law, but must first be domesticated into national law by specific legislative action before it can be prosecuted in domestic courts, [2006] UKHL 16, available online at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm>.

should let it be known that if nations fail in their duty to protect their own citizens from slaughter, the responsible leaders may be brought to The Hague to face trial for their inhumane acts. Similarly, NGO's and other supporting institutions can play a valuable role with respect to informing and galvanizing support from the general public and sympathetic legislators. The goal should be to include in national criminal codes all of the crimes that were punishable in Nuremberg and are listed as crimes by the ICC and other new international courts. Humanitarian law enforcement begins at home.

4. Some Practical Suggestions

The Rome Statute that binds the ICC spells out the parameters of all of the crimes within its own current jurisdiction. Enumeration of certain actions as “crimes against humanity” in the ICC statute and similar codes was never intended to be exhaustive or exclusive. Crimes which were separately categorized as “genocide” and “aggression” were being dealt with by special UN committees, but such separate crimes could very well have fit within the broader categorization of “crimes against humanity”. The ICC statute includes, by way of example, acts which qualify as crimes against humanity: murder, enslavement, apartheid, rape, torture, and half a dozen similar outrages. The final enumeration of offending types of conduct also condemned a catch-all category: “other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.”³⁹ This provision is consistent

³⁹ The Rome Statute of the International Criminal Court, Article 7, Paragraph 1.k, *available online at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>. By way of example, courts have interpreted beatings and acts of violence, including forcing a woman to exercise naked in public to constitute “other inhumane acts”. See Substantive and Procedural Aspects of International Criminal Law, the Experience of International and National Court,

with the IMT language and with the statutes and jurisprudence of the *ad hoc* tribunals which have been set up by the Security Council.

The precise character of “other inhumane acts” as crimes against humanity was left to interpretation by courts and judges. The door was deliberately left open to possible inclusion of other unforeseeable major inhumanities that might otherwise have escaped judicial scrutiny. Nuremberg correctly condemned aggression as “the supreme international crime” because it included all the other crimes.⁴⁰ Even if the appellation “aggression” is not used, the consequences of the illegal use of armed force may be equally reprehensible and should not be allowed to escape criminalization because of nomenclature.

It may be useful, therefore, to consider a draft of a model code or template to help define the conditions under which an illegal use of force may come within the purview of Crimes Against Humanity, possibly as a category of crime included within “other inhumane acts.” In essence, what is required is national legislation along the following lines:

"Any person responsible for the illegal use of armed force in violation of the United Nations Charter, which unavoidably and inevitably results in the death of large numbers of civilians, is subject to

Gabrielle Kirk McDonald and Olivia Swaak-Goldman, Volume I, Kluwer Law International, 2000, at p. 244. Author’s note: If crimes such as these are within “other inhumane acts”, surely killing masses of civilians in an illegal war merits at least equal condemnation as a prosecutable crime.

⁴⁰ Judgment of the International Military Tribunal at Nuremberg, under the heading The Common Plan or Conspiracy and Aggressive War, *available online at* <http://avalon.law.yale.edu/imt/judnazi.asp>.

punishment for crimes against humanity.”

Limiting the crime to persons responsible implies a leadership position. What is illegal is made plain by the UN Charter itself: there is an inherent right to individual or collective self-defense against an armed attack (Art.51), and, of course, the Security Council can authorize any measures to maintain peace (Art. 42). If those conditions do not exist, the use of armed force is illegal.

It should be noted that those who undertake legally authorized armed force fall into a different category altogether. The legitimate use of armed might is permissible so long as such force is applied in a manner proportional to the harm sought to be redressed and consistent with established rules of armed conflict. It is the illegality of the use of force that gives rise to a crime against humanity because it shocks the human conscience by violating fundamental norms of permissible human behavior.

Of course, all of the safeguards of due process and fair trial must apply to both national and international courts. The ICC, for example, can only consider "crimes of concern to the international community as a whole." It must be shown that the crime against humanity was part of a widespread or systematic attack against any civilian population, with knowledge of the attack. The Prosecutor must prove that the accused meant to cause the consequences "or is aware that it will occur in the ordinary course of events." (Art.30). The judges and the Prosecutor must take into account the gravity of the crime and

whether the prosecution would serve the interests of justice. (Art.53). The law must be strictly construed and not extended by analogy. It will be up to the judges rather than the protagonists to decide whether the specific deeds are "other inhumane acts" as contemplated by the law.

With such a wide array of safeguards, leaders who do not plan to use armed force illegally need not fear their national courts or the ICC. They should welcome this extension of international law as a protective shield for themselves and their citizens. True, national courts are not likely to bring charges against their own tyrannical leaders. But changes in regime are not uncommon and an independent and transparent judiciary may offer justice instead of vengeance.

The international community, frustrated by political inability to use authorized armed force, has heralded a new justification under the guise of a "responsibility to protect." But one should never forget that lawful goals should not be pursued by unlawful means. Humanitarian intervention must not be a cloak for concealed political objectives. The use of armed might can only be legitimate under circumstances permitted by the U.N. Charter. The determination of whether armed force is lawful or criminal cannot be left to the self-serving and biased protagonists or their allies. ICC prosecutors and judges are required by law to take account of all relevant circumstances, including mitigating factors, in order to serve the interests of justice. A fair and transparent judicial decision by judges of mixed gender and varied nationalities, applying humanitarian rules of law remains the safest path to peace.

ICC rules of procedure and decisions by the specialized

tribunals created by the Security Council to penalize the horrors committed in this century are creating valuable jurisprudence by which the legality of human inhumanity can be judged. If even one murder can qualify as a crime against humanity, surely maiming and killing thousands of innocents should also be recognized as a punishable crime by competent national, regional or international tribunals.

No one can expect all crimes to be eliminated simply by making them punishable locally or internationally. As wisely stated by Professor Theodor Meron, an internationally esteemed legal scholar and currently the President of the International Criminal Tribunal for the Former Yugoslavia, “To genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict.”⁴¹ Of course, he’s right. Furthermore, a vast matrix of social improvements is also required. The threat of punishment, however, certainly has some deterrent effect. A guarantee that the offender cannot or will not be tried can only encourage more criminality. If the illegal use of armed might can be deterred, even to a slight extent, the effort to save human lives and treasure is surely worthwhile.

5. Concluding Thoughts

Internal and external wars that brutalize human beings continue to deface the human landscape. New technologies enhance man’s capacity to kill his fellow humans. The threat to humanity posed by the illegal use of armed force by nations and militant groups increases daily. Having invented the means for destruction of all life, it is difficult to believe that we lack the intelligence and capacity to prevent it from happening. Of course, there are those who still believe, as Thucydides did, that

⁴¹ 94 American Journal of International Law (pp.240) (April 2000).

wars are inevitable and people will act only to protect their own interests. Yet, in today's inter-dependent and potentially life-ending world, is it not in the interest of all nations to do what they can to deter war? The notion that war is an immutable manifestation of some Divine providence simply cannot stand the light of intelligent, informed analysis. War is never Divine; in fact, war is hell. The willingness among some to accept violence as the final arbiter of disputes has given us the world of terror, genocide, mass killings of children, and similar atrocities that raise doubts about whether humans are really human.

In his farewell address in 1961, U.S. President Eisenhower warned about the power of a self-serving military-industrial complex that could only be controlled by "an alert and knowledgeable citizenry."⁴² An ideology cannot be killed by a gun. It requires a more acceptable ideology. The logic of armed might breeds crime. Every war makes murderers out of otherwise decent men. Whether they are nations or armed bands, militants must learn to resolve their differences without having to kill their adversaries and their neighbors. The rule of law, nationally and internationally, points the way toward a more humane world. Failure to enforce the law undermines law itself.

Skepticism is understandable but, if change is desired, inaction is intolerable. When the Statute for the International Criminal Court emerged from the negotiations at Rome, U.N. Secretary General, Kofi Annan, called it "The hope of future

⁴² Eisenhower's farewell addresses to the nation, 17 January 1961, text *available online at* http://avalon.law.yale.edu/20th_century/eisenhower001.asp. For a video of the speech, as delivered, see http://www.youtube.com/watch?v=CWiiYW_fBfY.

generations.”⁴³ Legislators, diplomats, students, teachers, religious leaders, non-governmental organizations and every segment of society must be alerted to the vital importance of developing national and international criminal law to help protect the basic human rights of people everywhere. There is nothing more important than the right to life. Putting Nuremberg defendants on trial, as Justice Jackson noted in his brilliant opening statement in 1945, was “one of the most significant tributes that Power has ever paid to Reason.”⁴⁴ Failure to recognize that illegal war-making is a punishable crime against humanity repudiates Nuremberg and would be a tragic triumph of Power over Reason. “Law, not war” remains my slogan and my hope.

August 22nd, 2012

⁴³ See Statement of U.N. Secretary-General Kofi Annan at the opening of the Preparatory Commission of the International Criminal Court, New York, 16 February 1999, available online at <http://www.ngos.net/un/icc.html>.

⁴⁴ Transcripts of the IMT proceedings and judgement may be found on-line at The Avalon Project, with the opening statement of Jackson at http://avalon.law.yale.edu/imt/chap_05.asp. The trial transcript erroneously indicates that Jackson used the phrasing “Power ever has paid to Reason”; what Jackson *actually* said was “Power has ever paid to Reason,” as may be seen on live video footage of his opening statement available at <http://www.youtube.com/watch?v=L50OZSeDXeA>.