

The Crime of Aggression: Following the Needs of a Changing World?

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

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

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

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

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¹ Benjamin B. Ferencz, *International Trials for Internal Armed Conflicts*, 95 AM. SOC’Y INT’L L. PROC. 35 (2001).

² International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

³ Charter of the International Military Tribunal art. 6, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

⁴ Muhammad Shukri, *Will Aggressors Ever Be Tried before the ICC, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 33 (Maouro Politi and Giuseppe Nesi eds., 2004).

interests of states. Article II of Control Council Law No. 10, which supplemented the Charter, stated that acts of aggression were acts directed against other states.⁵ Since almost every case of aggression results in the commission of other international crimes,⁶ the Tribunal considered the crime of aggression “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁷ In 1946, the United Nations (UN) General Assembly (GA) affirmed the legal principles laid down in the Nuremberg Charter and the judgment. It was held that these should serve as the basis for the codification of international law.⁸

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

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

⁵ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity art. II, para. 1(a), Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50–55 (1946).

⁶ Matthew Gillet, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT’L CRIM. L. REV. 829, 832 (2013); PATRICIA GRZEBYK, CRIMINAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION 251 (2013).

⁷ Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 186 (1947).

⁸ Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT’L L. REV. 203, 218 (1998).

⁹ MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 27, 28, 31 (3rd ed., 2014).

¹⁰ *Id.* at 1–2.

¹¹ *Id.* at 9.

¹² The Law of the Charter, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 464 (1948).

accordingly. The first agreement on a definition of aggression after the International Military Tribunals of WWII was not reached until 1974, when the General Assembly adopted Resolution 3314.¹³ It took another thirty-six years before the global community could agree on a definition of aggression that was actually meant to be used for criminal prosecution. The definition agreed on at the Kampala Conference is based on pre-existing, decades old sources: the 1974 definition and article 2(4) of the UN Charter.¹⁴ This definition recognizes only a person acting on behalf of a state as the perpetrator and only another state as the victim.¹⁵ It is argued that the purpose of including the crime of aggression within the ICC's jurisdiction is "to prevent the suffering caused by armed conflict by deterring *state* actors from using aggressive force."¹⁶ This aspect of the definition of aggression is based on the view, adopted at the Nuremberg Tribunal, that the act of aggression is a high-level crime that "contains within itself the accumulated evil of the whole"—in other words, that it is the "supreme international crime."¹⁷ This is supported by the fact that several experts refer to the crime of aggression as the "supreme international crime" or the "crime of crimes."¹⁸

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

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

¹³ Definition of Aggression, Dec. 14, 1974, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

¹⁴ Rome Statute of the International Criminal Court art. 8 *bis*(1–2), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

¹⁵ *Id.*

¹⁶ Anouk T. Boas, *The Definition of Aggression and Its Relevance for Contemporary Armed Conflict* 6 (International Crimes Database Brief 1, June 2013), <http://www.internationalcrimesdatabase.org/upload/documents/20141020T170547-ICD%20Brief%201%20-%20Boas.pdf> (emphasis in original).

¹⁷ *Id.* at 6–7.

¹⁸ See, e.g., Stefan Barriga, *Negotiating the Amendments on the Crime of Aggression*, in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 4 (Stefan Barriga & Claus Kreß eds., 2012); Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1, 1 (2009); Astrid R. Coracini & Pål Wrangé, *The Specificity of the Crime of Aggression*, in THE CRIME OF AGGRESSION: A COMMENTARY 338 (Claus Kreß & Stefan Barriga eds., 2017).

¹⁹ Weisbord, *supra* note 18, at 27–30.

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/3/260 A (Dec. 9, 1948).

²¹ Rome Statute, *supra* note 14, art. 7.

²² *Id.*, art. 8(2)(c–f).

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

²³ Benjamin B. Ferencz, *Defining Aggression – The Last Mile*, 12 COLUM. J. TRANSNAT'L L. 430, 463 (1973).