

Introduction

To initiate a war of aggression . . . is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

—Judgment of the Nuremberg tribunal, 1946¹

I first met former Nuremberg prosecutor Benjamin Ferencz in The Hague in 2004. International Criminal Court (ICC) prosecutor Luis Moreno Ocampo, whose law clerk I had just become, introduced us in the doorway to his office. Ferencz was livid and Moreno Ocampo found this amusing.

Five foot tall and eighty-four years old, Ferencz stood three inches from my face bellowing: “Why aren’t you screaming? Why aren’t you screaming? This is the job for the young people to do.” What made him especially angry was that the United States had lobbied forcefully to exclude the crime of aggression—individual criminal responsibility for aggressive war—from the ICC’s code of crimes, or—if aggression were included—that US leaders would not be prosecuted. Then the United States had illegally invaded Iraq without any leadership accountability and undermined his life’s work: criminal accountability for aggressive war.

“Conservatives intent on destroying the International Criminal Court have misstated the facts and have done a disservice to the United States and its military personnel,” Ferencz raged. “How much more suffering must the innocents of this planet endure before decision-makers recognize that law is better than war?”

After the Second World War, Ferencz had prosecuted the *Einsatzgruppen Case*, a trial of twenty-two Nazi death-squad leaders who had killed over a million victims and claimed self-defense. Ferencz spent the rest of his life campaigning to create a permanent ICC modeled on the Nuremberg precedent, capable of punishing leaders who committed any of the four core international crimes: genocide, war crimes, crimes against humanity, and aggression. For him, a proud American, the US invasion of Iraq, based on falsified information about a future attack, signaled a Bush administration campaign to undermine international law. “They are entitled to their opinion but they are not entitled to lie to the American public and get away with it,” he fumed. For Ferencz, lying to justify war and exempting American leaders from the Nuremberg precedent were shortsighted hypocrisy. If legal accountability was not equally applied to

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all, Ferencz believed it would undermine the rule of law and destroy the world.

I had just been admitted to a doctoral program at Harvard Law and was trolling for a dissertation topic. Moreno Ocampo told Ferencz he was encouraging me to study the so-called peace-versus-justice dilemma. “You wanna talk about peace versus justice?” Ferencz nudged. “Imagine prosecuting the Germans while we needed them to fight the Cold War against the Russians!”

Moreno Ocampo was silent. He was sympathetic to the Nuremberg principle that aggressive war must not be tolerated, but he was overloaded and a new law meant more prosecutions.

The dilemma landed on me.

Would criminal accountability for aggression set back alternative avenues for peace? Or was there no lasting peace without justice? Was Ferencz overzealous, or was he right?

I decided to study the crime of aggression and find out.

Ferencz advocated for my inclusion as a nonstate delegate to the Special Working Group on the Crime of Aggression, charged with drafting the crime by the Assembly of States Parties to the ICC. I started as a note taker, beginning my journey to understanding the way modern war is conceptualized and judged. In time, I earned a place as an independent expert wrestling with the design of international law’s supreme crime, a crime one scholar pessimistically dubbed “a Gordian knot in search of a sword.”²

The crime of aggression would provide domestic and international courts with a powerful check on authoritarian power. After a decade of negotiations and against all expectations, in 2010, the signatory states of the ICC convened a multilateral conference in Kampala and added aggression to the list of crimes the court and its signatory states are empowered to prosecute. Comprising 123 states, the Assembly of States Parties scheduled the activation of the law for 2017, enough grace time for governments and militaries to revise their policies. Waging war, the traditional prerogative of presidents and princes, was about to become an international crime.

A prosecutable crime of aggression would strengthen the prohibition on war by making leaders—rather than their populations—personally responsible for the wars they start. The crime of aggression allows domestic and international courts to make principled, as opposed to political, determinations on whether a war is legal or illegal. It is based on the Nuremberg precedent, the UN Charter, and customary international law binding on all states. Aggressive acts enumerated in the definition of the offence include invasion, bombardment, blockade, and armed attacks on another state’s forces. If a state ratifies the crime of aggression—as fifteen

NATO states have already done—and incorporates it into domestic law, its courts have the authority to prosecute rogue leaders. If states falter, the ICC can step in and prosecute perpetrators, as it currently does in cases of genocide, crimes against humanity, and war crimes.

The basis of the crime of aggression is the conviction that leaders bring their populations to war, not the reverse, and it is with leaders that responsibility should lie. Languishing in his prison cell in Nuremberg, Hermann Goering, Hitler's second-in-command, explained the relationship to Gustave Gilbert, his prison psychologist:

Why, of course, the *people* don't want war. . . . Why would some poor slob on a farm want to risk his life in a war when the best that he can get out of it is to come back to his farm in one piece. . . . But, after all, it is the *leaders* of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship or a Parliament or a Communist dictatorship.³

When Gilbert argued that democracies are different because the people have a say, Goering had a ready reply:

Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same way in any country.⁴

Today, with unprecedented means to disseminate, measure, and control propaganda, the capacity of leaders to bring their populations to war has increased exponentially. The crime of aggression offers an opportunity to assign responsibility where it belongs.

State responsibility suffers from two frustrating deficiencies. It targets only states and fails to effectively leverage the potential of international law. The Nuremberg tribunal was prescient in its 1945 judgment: "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."⁵ Sidelined during the Cold War, individual responsibility has made a comeback.

It has become increasingly clear that twentieth century notions of state responsibility underlie contemporary international law and frustrate enforcement. The UN has no standing army and relies on cooperative states to pressure rogue states into compliance. Had the drafters of the UN Charter focused their energy on individuals instead, they may have leveraged their force and more effectively compelled compliance. At the turn of the millennium, dissatisfied states have resurrected the Nuremberg precedent, hoping to fix the defect. Beyond dispensing just deserts and vindicating the suffering of victims, retributive justice can have a deterrent effect on

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political and military leaders and change the rules of international relations. Criminal accusations can seriously undermine the political ambitions of existing or aspiring leaders.⁶

Furthermore, al Qaeda's attacks all over the world, and now those of the Islamic State (IS, or ISIS), have demonstrated that states are no longer the only, or even the primary, threat to the peace. Technology is culminating in the ability of one person to wage war on the world and win.⁷ Corporations have adjusted to the emergence of the individual as a global threat and are fast-tracking the development of military technologies, including drones and cyberweapons, designed to target individuals from afar. International lawyers have taken the hint. By regulating the individual, they hope to better capture the sociological dimensions of modern war and, in this way, make international law more effective.

Criminal accountability will not end war, but has the potential to influence the practice of domestic and international politics so that aggressive war is no longer a tempting option. Even when countries do not sign on to the law or opt out, an activated crime of aggression will provide opponents of authoritarian leaders with the legal leverage to curtail impulsive wars. Had the crime of aggression been law in 1990, Iraqi president Saddam Hussein could have been punished for the invasion of Kuwait (as US President George H. W. Bush and UK Prime Minister Margaret Thatcher discussed), perhaps precluding the 2003 Iraq War and saving Hussein's civilian population from crippling sanctions. Arguably, had aggression been a prosecutable crime in 2003, UK Prime Minister Tony Blair—who relied heavily on the legal advice of his attorney general—would not have brought his country to war in Iraq. And without the Iraq War there would be no ISIS. The law can also be used to defend cases involving the legitimate use of force. A clear legal standard provides legitimacy for leaders unfairly maligned for using necessary and proportional self-defense in response to an armed attack on their territory.

The enforcement of international criminal law has been more successful than most people realize, although prosecution occurs more often domestically than in The Hague's courts. But even The Hague has had success. Once-powerful presidents, prime ministers, and vice-presidents have been brought before the ICC. Every one of the 161 Yugoslav war criminals indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) was captured or killed. The Rwanda Tribunal (ICTR) had similar success.

The crime of aggression holds the promise of buttressing the rule of law when it works, and revealing the futility of the rule of law when it fails. The ideal of law is that reason can constrain violence. Yet violations such those of the United States and Russia, unending warfare in Iraq and Syria, state-sponsored terrorism, and paralysis of the UN Security Council

challenge this conviction. The crime of aggression embodies a beleaguered hope that the rule of law can help create a more stable, peaceful world.

Although international law may sometimes seem meaningless as a means of opposing powerful leaders, it is the most reliable set of objective standards for checking unbridled greed and nationalism. By setting benchmarks for behavior, and rules of evidence and procedure, it allows government officials, lawmakers, courts, media, and civil society to evaluate the legality of their leaders' propaganda for waging war. The rule of law is the most effective resistance tool to sway institutions and to keep authoritarian leaders in check.

The revival of the crime of aggression is an overdue response to deepening dissatisfaction with the way wars are started and judged. Particularly frustrating was contemporary international law's emphasis on collective responsibility of states rather than individuals, its reliance on a biased political process to judge wars, and patchy enforcement. After a century of failed attempts and false starts, the impulse to hold individuals accountable for aggressive war resurfaced after the US-led invasion of Iraq, and, even more surprisingly, gained newfound traction. It emerged alongside pre-existing, competing practices for managing interstate conflict, such as negotiation, collective security, and balance of power.

Under the current UN regime, states are responsible for judging other states. Their decisions are influenced by politics as much as principles. The UN Security Council, a political body consisting of five permanent members—Britain, China, France, Russia, and the United States—and ten elected members sitting for two-year terms, has primary responsibility for determining whether aggression has occurred, and for mustering a collective response.⁸ Any one of these states, granted permanent seats on the council after World War II, can veto a decision of the other fourteen members of the council at will and without justification, leading to seventy years of chronic deadlock and biased decision making. Five powerful nations control determinations of aggressive war in a political process that favors the aggressors, leading victims of international aggression to conclude that the system is rigged.

The crime of aggression is a legal response to these frustrating deficiencies. Tools to identify breaches of widely accepted international standards give government officials, lawmakers, the courts, the media, and civil society the means to hold perpetrators to account. In regulating the individual, the new law has the potential to make international law fairer and more effective.

The new law responds to loss of faith in the Security Council's politicized decisions and to demands that justifications for armed force be tested against a universal standard by impartial judges. International, regional, and domestic courts are meant to serve as a check on the frivolous claims

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of leaders who would frighten their populations with vague threats to their safety or the safety of others in order to justify aggressive war.

Whether or not criminal law deters aggressive war, the crime of aggression also has an important retributive function. When a criminal court punishes a perpetrator, it is inflicting a publicly visible defeat on behalf of the community meant to correct “the wrongdoer’s false message that the victim [is] less worthy.”⁹ Punishment serves to recognize wrongdoing even when it fails as a deterrent, and regardless of the effects of that punishment.¹⁰ The Nuremberg tribunal, for example, systematically debunked the alibis of the Nazi leaders and revealed to the world, beyond a reasonable doubt, the extent of their depravity. The crime of aggression provides the legal basis for judges hearing an aggression case to reveal the defendant’s true reasons for war and hold wrongdoers to account.

The new law responds to the perception that unbridled politics has failed to advance international peace. The drafters of the crime wager that the new law will infiltrate institutional practices and become a more compelling safeguard against reckless leaders intent on bringing their nations to war.

Critics worry that the crime of aggression will destabilize international relations by impeding negotiated solutions to international disputes. Andrew Natsios, President George W. Bush’s special envoy to Sudan, argues that the threat of arrest for international crimes increased Sudanese President Omar al-Bashir’s incentive to cling to power as the only means of avoiding punishment.¹¹ Natsios favored a political deal between the north and south “based on a realistic appraisal of what is achievable under the current unfavorable circumstances.”¹² But with ruthless leaders still in power in Sudan and South Sudan, the peace deal unraveled, resulting in mass atrocities and perpetual war.¹³ What Natsios overlooked is that justice can also contribute to sustainable peace by discrediting and marginalizing destabilizing political leaders. Serbian President Slobodan Milošević’s fall from power is a prime example.¹⁴ Following indictments issued by the ICTY, the Serbian people forced the authoritarian, internationally marginalized Milošević out of office, achieving peace without amnesty.¹⁵ It is leaders who invade other states who threaten international peace, not the laws enacted to check them.

Other critics worry that the crime of aggression will put a chill on humanitarian intervention.¹⁶ They warn that the prohibition will be *too* effective, stymying the use of force for humanitarian ends, preventing states from cooperating to stop mass atrocities where the legality of military action is contested.¹⁷ In fact, the new law finally makes it possible to transparently evaluate the veracity of a leader’s claim that an unauthorized war was undertaken for humanitarian ends, and distinguish genuine humanitarian

intervention from spurious self-interest under the guise of “Responsibility to Protect.”

Cynicism about legal rationality undermines the logic of institutional checks and balances on the arbitrary exercise of political and military power and concedes defeat to the forces critics claim to oppose. Empty calls for “ethical choice and responsibility” in politics are, unfortunately, vulnerable to the same critiques leveled at law, without law’s institutional leverage.¹⁸ Exaggeration of law’s indeterminacy results in the paralyzing conclusion that legal norms never trump self-interest.¹⁹ It is true that ambiguities in the law create opportunities for strategic lawyering, but this is an argument for skillful drafting and adjudication, not for jettisoning the law.

The League of Nations collapsed because nations failed to enforce its prohibition on aggressive war. International justice, however, is not the same as collective security. Key differences create new possibilities to advance the rule of law in matters of war and peace. Although states’ refusal to arrest powerful leaders could reveal the ICC’s impotence and snuff out the court’s authority, political and military leaders, even the leaders of great powers, are more vulnerable to enforcement than entire states. Perpetrators of international crimes face the possibility of arrest at home or abroad. Domestic political opponents, successor regimes, the legislature, or the judiciary may spearhead an arrest and trial for the crime of aggression. Foreign militaries, foreign police, UN peacekeepers, regional peacekeepers, and even private contractors have arrested fugitives for international crimes.

The peace versus justice dilemma raised by Ferencz led me to a decade of research and study. I came to believe that abstract forces and state competition are the tinder of war, but pyromaniacs are required to light the fire. Law provides institutional possibilities to resist the human decision to set the world ablaze. The cynical view that war is inevitable creates space in which leaders can harness dangerous forces and shirk responsibility for their aggression. It seemed to me that the Nuremberg judgment’s breakthrough conclusion that wars are caused by individuals and that those individuals are personally accountable embodied the future’s most hopeful approach to peace.