Epilogue

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"The Long Journey to Kampala – A Personal Memoir"

The crime of aggression has been meticulously dissected and analysed in this comprehensive tome by an array of eminent international legal scholars who have viewed the past, present and uncertain future in considerable detail. Having spent a lifetime seeking a path to a more humane world, I have been invited, in my 94th year, to sketch 'the big picture' together with biographical insights that might illuminate the panorama and reveal the origins and reach of my current thinking about aggression and world peace.

1. A Brief Biographical Sketch

My earliest recollections begin in 'Hell's Kitchen', a dense crime area in New York City. My penniless young parents had fled from Romania with their two infants to avoid persecution and poverty. My father found work as the janitor of a tenement house and we lived in the cellar. I was educated in free public schools. Crime prevention was my chosen career path and I won a scholarship at the Harvard law school for my exam on criminal law.

When the United States went to war against Japan and Germany in 1941, I was completing my first year of legal studies. Everyone I knew rushed to volunteer for military service. My small height and my alien origin were temporary barriers. Professor Sheldon Glueck, Harvard's renowned criminologist, was writing a book dealing with aggression and war crimes. He hired me as a research assistant. Upon receiving my law degree in 1943, I enlisted in the US army as a Private. In December of that

year, the prestigious Journal of Criminal Law and Criminology published my article on the 'Rehabilitation of Army Offenders'. It identified me as a Corporal in an anti-aircraft battalion.

In due course, General George Patton's armored tanks raced across occupied France and into Germany. Reports were received that German mobs were murdering downed allied flyers. To my surprise, I was ordered to report to Patton's Judge Advocate section where I was informed that they had been directed to set up a War Crimes Branch and my name had been forwarded from Washington.

My new assignment required me to investigate atrocities and prepare dossiers for criminal trials. It was vital to proceed to the scenes as quickly as possible lest the evidence be destroyed. What I saw and felt cannot adequately be described in words. I saw disinterred bodies of murdered airmen who had been captured and killed by enraged German mobs. I followed Patton's tanks into Buchenwald, Flossenberg, Mauthausen and a host of other concentration camps where helpless civilians were being beaten and worked to death. The dead and dying covered the ground. Skeletons that had once been vibrant humans were stacked around the crematorium like cordwood waiting to be burned. Their melted body fat could be turned into soap and their bones used as fertilizer instead of manure. On occasion, I also witnessed vengeful inmates seize fleeing SS guards and beat them mercilessly or roast them slowly in the ovens. No one can ever convince me that wars can ever be glorious. I had peered into Hell.

My reports served as a basis for now-forgotten war crimes trials by US Military Commissions that took place in the liberated concentration camp at Dachau shortly after the war ended in May 1945. The crime of aggression was not an issue. Any resemblance to normal criminal proceedings was minimal. Summary death sentences imposed on Nazi concentration camp commanders and guards were plentiful. My only desire was to get home as quickly as possible and never again return to Germany.

By that time the victorious Allies were preparing for a highly-publicized quadripartite International Military Tribunal (IMT) to try major German war criminals in Nuremberg. When Robert Jackson, the American prosecutor, made his now-famous opening statement to the IMT on 21 November 1945, I was en route back to America. On the day after Christmas I was honourably discharged as a Sergeant of Infantry and awarded five battle stars for not having been killed or wounded. Not all wounds are visible. The trauma of my wartime experiences has never left me.

I returned to the US with about ten million other veterans looking for a job. Soon thereafter, the War Department invited me to Washington

for an interview. I was offered a commission as an army Colonel to do essentially what I had been doing as a Sergeant. I declined. Life in the military did not appeal to me. The offer was sweetened to allow me to retain civilian status with Colonel's privileges and the right to quit whenever I wished. It was an offer I could not refuse. I promptly married my childhood sweetheart and planned to take full advantage of my new rank, with its elevated prerogatives, to enjoy a brief honeymoon in Europe. Ten years later, we returned to the States. No one could have anticipated what happened during that decade.

2. *The Biggest Murder Trial*

At the Pentagon I met Colonel Telford Taylor, a Harvard law graduate with a record of distinguished public service. He was on Jackson's staff and had been appointed by President Truman to direct a dozen subsequent proceedings in Nuremberg as a follow up on the IMT trial. The new American prosecutions were designed to reveal how a broad spectrum of German society had made it possible for Hitler's aggressions and crimes against humanity to occur. Taylor hired me to help with his new assignment.

Taylor was promoted to General and head of the 'Office of the Chief of Counsel for War Crimes' (OCCWC). He sent me to Berlin to scour official Nazi archives for evidence against leading suspects. A staff of about fifty researchers combed through tons of captured records in the ruins of the German capital. We discovered an incredible cache of top-secret reports describing events that would seem incredible to a rational human mind. Top-secret dispatches from the Eastern front detailed the cold-blooded murder of millions of innocent men, women and children. Special killing squads, given the non-descript title of *Einsatzgruppen* (Action Groups, EG) and totalling about three thousand men, were assigned to 'eliminate' (a euphemism for 'kill') all Jews, Gypsies and others suspected of being current or future enemies of Germany. The chronicles contained names of officers in charge and the body count of the victims who had been systematically exterminated like vermin, in fulfilment of Nazi racial doctrines.

After I had tabulated over a million murders, I flew down to Nuremberg and urged General Taylor to schedule a special trial against leaders of the EG killing squads. Taylor was hesitant; no such trial had been budgeted or approved by the Pentagon and no staff members were available. When I replied that I could handle it in addition to my other duties, he designated me the Chief Prosecutor of what was to be known as the

Einsatzgruppen case. On 29 September 1947, my opening statement made plain, with Taylor's approval, that vengeance was not our goal. The main charge was for crimes against humanity, including genocide and 'other inhumane acts committed against civilian populations.'[1]

The victims had been murdered because they did not share the race or ideology of their executioners. I asserted the right of all human beings to live in peace and dignity regardless of race or creed. It was a 'plea of humanity to law'. Two days after the trial opened, relying solely on documentary evidence and without calling a single witness, the Prosecution rested its case. After about five months of attempted evasions, all twenty-two EG defendants were found guilty by the three American judges and thirteen were sentenced to death. The press called it the ' biggest murder trial in history'. I was then twenty-seven years old and it was my first case.[2]

3. *The Mentality of Mass Murderers*

If aggression and crimes against humanity are to be averted one must understand the mentality of mass murderers. The *Einsatzgruppen* defendants had been selected on the basis of their rank and education. The number put on trial was limited by the rather absurd consideration that there were only twenty-two seats in the dock. The accused included many with doctorates and six were SS Generals. Had Germany not been at war they would probably have led normal lives. They were all well-educated men who considered themselves patriots.

The lead defendant, SS Major-General Dr Otto Ohlendorf, had legal training and was the father of five children. He admitted that the unit under his command had executed about ninety thousand Jewish men, women and children. He argued that he was only obeying superior orders. Hitler had secret information that Russia planned to attack Germany. According to Ohlendorf, the Germans were legally authorized to act in self-defence to avert the anticipated assault. It was known, said Ohlendorf,

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1 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg Oktober 1946 – April 1949, Vol. IV: "The Einsatzgruppen-Case", "The Rusha Case" (15 vols., Washington, DC: US Government Printing Office), 15.

2 My second case was in my ninety-secofifty year. On August 25th, 2011, I accepted the invitation of the then Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to make the closing statement in the ICC's historic first case, the conviction of Thomas Lubanga Dyilo.

that Jews supported the communists and therefore they had to be killed. Naturally, their children had to die too, he reasoned, in order to avoid future vengeance. Gypsies had to be killed because they could not be trusted and might aid the enemy. It was all so necessary, clear and simple – according to Dr Ohlendorf – who stated that he would do the same again under similar circumstances.

The putative 'self-defense' or 'necessity' argument, seeking to justify pre-emptive attacks on several countries that, in fact, posed no imminent threat to Germany, was firmly rejected in a detailed 176-page opinion by the three American judges. They were amazed by 'the manner in which the aggressive war conducted by Germany against Russia was treated by the defense as if it were the other way around.' The tribunal unanimously held that the anticipatory self-defence argument was 'untenable as being opposed to all facts, all logic and all law.'[3] I remembered Jackson's opening statement at the IMT: 'We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.' It is regrettable that arguments which did not save Ohlendorf from the gallows still stain the international landscape today.

Neither the perpetrator nor the victim can be relied on for an objective determination of when an enemy attack is so imminent that pre-emption is justified. Only an impartial court bound to take all the circumstances into account should be the judge. The impartial court that sentenced Ohlendorf to hang noted that crimes against humanity 'can only come within the purview of the basic code of humanity because the State involved, owing to indifference, impotence or complicity, has been unable or has refused to halt the crimes and punish the criminals.'[4] If a nation fails in its duty to protect humanity by law, an international court must step in. That conclusion reappeared when the principle of 'complementarity' was adopted by the International Criminal Court (Court) in Rome fifty years later.

As the Germans and the Japanese learned to their sorrow, loyalty to country – or any other cause however admirable – can never be an acceptable justification for genocide or crimes against humanity. Everyone must be presumed to intend, and be responsible for, the foreseeable consequences of his deliberate deeds. Patriotism cannot erase the evil intent or *mens rea* that is inherent in knowingly and deliberately slaughtering large numbers of innocent people – whether in war or peace. Whether the crime

3 Trials of War Criminals, *supra* note 2, 466, 470.
4 Trials of War Criminals, *supra* note 2, 208.

is called 'aggression' or 'crimes against peace', or anything else, is not decisive. Common sense dictates that inhumane acts of such enormity must also be condemned as crimes against humanity. My opening statement in the *Einsatzgruppen* trial warned: 'If these men be immune then law has lost its meaning and man must live in fear.'[5]

After several higher US military authorities rejected their appeals, an unrepentant Ohlendorf was hanged on 7 June 1951. Three other EG commanders suffered the same fate. The remainder were sentenced to long prison terms. The other approximately three thousand EG accomplices, who surely aided and abetted and were part of the Nazi common plan and design for mass murder, were never tried. In 1958, as an act of 'clemency' all US trials in Germany were halted and war criminals convicted by the US were freed. There is little doubt that the premature release of convicted war criminals was influenced by cold-war political considerations. It was a sad day for those who believed in the rule of law.

In 1950, US forces intervened in a gruelling civil war between rival political factions in Korea. A similar intervention took place later in Vietnam. Neither Congress nor the United Nations authorized these presumably well-intentioned wars. Many denounced the US for its aggressions, which cost the lives of countless Americans and displaced millions of terrified civilians. Atrocities committed by US troops brought shame upon their country. Young people everywhere were filled with rage and desperation. What was declared in principle at Nuremberg was repudiated in practice. On the fields of battle, the voice of the law was not heard. Ignoring or bending the law backwards to accommodate political goals is self-destructive and achieves nothing. Similar conflicts in Iraq and efforts to shape other countries to our own image have produced only more blood and tears.

4. Reparations to Victims

The Rome Statute authorizes the Court (article 75) to establish principles for 'restitution, compensation and rehabilitation' to victims of crimes within its jurisdiction. 'The crime of aggression' is listed as one of the four

5 This sentence was quoted fifty years later by the late Professor Antonio Cassese when he made his first Report to the UN General Assembly and Security Council as a President of the ICTY in 1997 (General Assembly, 52nd session, 18 September 1997, A/52/375, S/1997/729), citing Trials of War Criminals, *supra* note 2, 53. We shared the prestigious Erasmus prize in The Hague on 13 November 2009.

'Crimes within the jurisdiction of the Court' (article 5). Compensating victims of any of the four core crimes is important for reconciliation as well as justice. Reparation and rehabilitating individual victims of aggressive war presents a very daunting challenge. A brief review of my personal experiences with this problem, starting in the ruins of a divided Germany in 1948, might be enlightening.

In 1947, US Military Government restitution laws decreed that properties of Nazi victims that had been confiscated or 'aryanized' could be reclaimed. Unclaimed Jewish assets were presumed to be heirless and could be acquired by a charitable successor organization mandated to use proceeds to benefit survivors of persecution. A consortium of leading Jewish charities persuaded me to take on the unprecedented assignment. In August 1948, I designated myself the Director-General of the Jewish Restitution Successor Organization (JRSO) and hoped the task would soon be completed. The difficulties turned out to be unimaginable.

The sponsors were unwilling to risk funds for administrative costs. Germany's currency had been devalued, properties had been bombed, repairs had been made, mortgages had been discharged, valuations had changed, new owners insisted they had paid fair value. Good faith acquirers screamed they had helped Jews to escape. Disputed claims had to be adjudicated by frequently hostile German agencies and courts. There was the imminent threat that Soviet troops would sweep over Germany and seize all private properties. Concentration camp survivors were desperate. Speed was of the essence. Over 300 hastily-employed JRSO clerks, typists and investigators raced to file over 163,000 claims for restitution to beat the deadline at the end of 1948.

The return of private and organisational properties was only the beginning. Post-war Germany was defeated, devastated and destitute. In 1951, West German Chancellor Konrad Adenauer acknowledged that, unspeakable crimes were perpetrated in the name of the German people, and this imposes upon them the obligation to make moral and material amends.[6] Special German indemnification laws had to be enacted. The consent of all political parties was vital. The lead negotiating partner for claimants was the Conference on Jewish Material Claims Against Germany (Claims Conference), an amalgam of leading Jewish organizations that paralleled the JRSO. I served as counsel to the team that met German delegates for long highly-tense secret negotiations in The Hague. On 10 September

6 *Konrad Adenauer*, in speech before the Bundestag, 27 May 1951. See http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/Entschaedigung_node.html.

1952, a 'Reparations Treaty' between West Germany, the new State of Israel and the Claims Conference was concluded.[7]

Victims of Nazi persecution submitted over one million personal injury claims – Jews and non-Jews alike. A small army of German bureaucrats had to evaluate the applications from claimants scattered all over the world. I directed legal aid offices with a staff of about a thousand people in nineteen countries where survivors had found refuge. In due course it became clear that settling claims would take very many more years than I wanted to remain in Germany. In 1956 I returned home with my wife and our four children, born in Nuremberg.

By that time the total cost of compensating Hitler's victims had exceeded fifty-billion dollars and was rising. How obstacles were overcome is too long a story to be told here.[8] Fifty years later, compensation payments, which victims felt were 'too little and too late', were still being settled by Germany. In a comprehensive study by the UN in 1993, Rapporteur Theo von Boven concluded: 'It is obvious that gross violations of human rights … on a massive scale, are by their very nature irreparable'.[9] My personal conclusion is that the only satisfactory solution to the problem of having to compensate victims of war crimes is to avoid war-making itself.

5. The Search for World Peace

Once again, I found myself in New York looking for a job. Successful law firms wanted to know what clients I could bring. I had none. I was also unwilling to accept fees from Holocaust survivors. My private practice of law was limited and uninspiring. Telford Taylor and I became law partners. After a few years, he accepted a professorship at Columbia University and later at Cardozo Law School in New York.

US military interventions in Korea and Vietnam had ignored the lessons of Nuremberg. Confronted with reports of aggression and unpunished atrocities perpetrated by US troops, I recalled the writings of the American

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7 The treaty was signed by German Chancellor Adenauer, Israel Foreign Minister Moshe Sharett and Nahum Goldman President of the Claims Conference – who signed with the fountain pen my wife had given me for good luck when I finished Harvard Law School and went off to war in 1943.

8 See *C. Goschler*, Schuld und Schulden: Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945 (Göttingen: Wallstein, 2005), pp. 474, 539.

9 Commission on Human Rights, Final Report submitted by Mr. Theo van Boven, 2 July 1993, E/CN/SUB.2/1993/8, 53.

revolutionary Tom Paine, who died near my home in New Rochelle. He wrote that the duty of a patriot is not to follow his country, right or wrong, but to uphold it when it was right and try to correct it when it has gone astray. I decided to fold up my limited legal practice and dedicate myself to seeking a more tranquil and humane world through the rule of law.

My pen became my weapon for peace. I obtained access to UN libraries and meetings and buried myself studying past efforts. In 1946, the UN General Assembly had affirmed the Nuremberg principles and called for a Code of International Crimes and an International Criminal Court. Special Committees were repeatedly assigned to define aggression as part of the anticipated Code. Those who opposed controls argued that, until aggression was defined there could be no Code, and without a Code there was no need for a Court. Thus, they were all linked together and deliberately put into a deep freeze by the Cold War.

Interest in war crimes trials diminished as ideological tensions between the US and USSR increased. Partners in war became adversaries in peace. The lessons that far-sighted legal visionaries tried to teach the world at Nuremberg, and later at Tokyo and elsewhere, seemed to have been forgotten as powerful nations went back to killing as usual. They asserted ancient sovereign prerogatives to decide for themselves whenever force should be used to protect their national interests. The world pays dearly, in lives and treasure, for the short-sighted intransigence of powerful political leaders. It was twenty-nine years later, after the Vietnam War was receding, that the ice began to melt.

Over the years I had appealed to UN delegates and written many articles urging compromise solutions. Some called me 'Mr. Aggression'. A UN Committee finally reached a consensus definition in 1974 replete with ambiguities.[10] The Chairman, Bengt Broms of Sweden, invited me to come down from the balcony and stand with the group for the official photo. I was the only person in the room who was not being paid to be there. My two-volume book on 'Defining International Aggression – the Search for World Peace' appeared in 1975. Four more volumes followed: 'An International Criminal Court' and 'Enforcing International Law'. These tomes were my notebooks documenting man's efforts to replace the law

10 General Assembly 'Definition of Aggression', 14 December 1974, GA Res. 3314 (XXIX). See *B. Ferencz*, 'The UN Consensus Definition of Aggression: Sieve or Substance', *The International Journal of Law and Economics*, 10 (1975), 701–724, available online at http://www.benferencz.org/index.php?id=4&article=30.

of force by the force of law. 'New Legal Foundations for Global Survival' summarized my thinking in 1994. It was generously hailed by UN Secretary-General Kofi Annan as a remarkable work that could 'further the cause of the United Nations and its aims of peace and justice.'[11]

6. *The Road to Rome*

Equivocating lawyers are very skilful at finding detailed objections to conclusions they wish to avoid. The questions 'Who is the aggressor?' and 'Who decides?' had stymied the League of Nations after World War One. The truth is that, even after World War Two, powerful states and particularly the Permanent Members of the Security Council remained unwilling to yield their powers and privileges to any untried tribunals. They found problems for every solution.

The International Law Commission's Draft Code of Crimes was finally completed in 1996 endorsing the Nuremberg definition of aggression. It thereby opened the way to further work on establishing an international court. Preparatory Committees laboured hard and long and by 1998, plenipotentiaries from more than one hundred nations were ready to meet in Rome to seek reconciliation of more than a thousand points of disagreement. The key problems still revolved around how aggression was to be defined and who would decide whether the crime had occurred.

Before the official opening of the Rome Conference in June 1998, I was invited to address the delegates. Speaking for those who could not speak – the silent victims – I admitted that my only authorisation came from my heart. I recalled that, after Nuremberg, waging war ceased to be a national right but had become an international crime. I urged them to end equivocation and rely on Court prosecutors and judges to interpret any vague clauses. I warned that excluding aggression would grant immunity to malevolent leaders and would cost the world dearly.

Under the politically powerful influence of a conservative Senate Foreign Relations Committee and the Pentagon, the unspoken US policy and strategy seemed clear: oppose any international court that might try Americans. If that fails, delete aggression as a punishable crime. If that also fails, insist on a new definition of aggression that guarantees Security

11 Personal letter 24 June 1997. My books as well as articles, lectures and films are available free of charge on the internet courtesy of the Audio/Visual program of the UN Legal Division, see http://www.un.org/law/avl/.

Council control. In any case, postpone further action on the issues as long as possible and boycott the Court. The American public was lulled into inaction by patriotic slogans and pretensions that their UN representatives were merely seeking greater clarity to protect US vital interests and military personnel.[12]

Despite official US opposition, and its disingenuous arguments, on 17 July 1998 the overwhelming majority of States voted by wild ovation of 120 in favour and 7 against to create an ICC with aggression listed as a crime. However, a decisive compromise stipulated that aggression charges could only be activated if a new definition of that crime was agreed upon and other vital hurdles were also surmounted. Punishment for aggression remained in limbo. Further consideration of amendments was postponed for at least 7 years to allow new committees to seek new compromises. It was twelve years after Rome that the ICC Review Conference finally convened in Kampala, Uganda in the summer of 2010. US policy had not changed. The insistence on consensus in Kampala in effect meant that everyone would have the power to veto anything.

7. What Really Happened at Kampala

On the Sunday evening before the Review Conference there was a gala dinner for the assembled Ambassadors and highest UN officials. I was invited to make a filmed keynote address.[13] In a rather frank and impassioned appeal, I urged the delegates to honour the Nuremberg Principles by going forward and not backward. I warned there could be no war without atrocities and continued immunity for aggressors would encourage rather than deter the crimes we were seeking to prevent. I suggested that the use of armed force in violation of the UN Charter should be made punishable by international and domestic criminal tribunals as crimes against humanity. If 'aggression' was not alleged, no prior Security Council consent would be required. The reaction to the speech was quite

12 US policy softened during the Presidency of Barack Obama, who sent representatives to ICC meetings and acknowledged a moral responsibility and security interest in preventing mass atrocities through international criminal justice, see *J. R. Crook*, 'US Official Describes US Policy Toward International Criminal Court', American Journal of International law 106 (2012), 384–386.

13 Cinema for Peace Foundation, Berlin, 'Special Evening on Justice' Kampala 2010, available online at http://www.benferencz.org/index.php?id=5&media=22.

enthusiastic, yet the final action taken at the Conference left much to be desired.

There can be no doubt that in many respects the compromises reached at Kampala have been significant and noteworthy. Aggression remains confirmed as a crime and there is a new consensus definition included in the Statute. After Kampala, no one can persuasively repeat the canard that aggression has not been defined and hence cannot be punished.

Nevertheless, the desire for consensus embraced ambiguities that invite future debates. Whether non-ratifying States Parties may be bound by the aggression amendments remains contentious. Opt-out options continue to be controversial. The 1974 consensus definition was incorporated by reference in the 2010 amendments, thereby enabling arguments to be made that the exculpatory clauses and Security Council powers sealed in the earlier formulation must also be respected.[14] Some ambiguities were clarified by 'Understandings', skilfully negotiated by Professor Claus Kreß, to avoid complete stalemate. The most noteworthy compromise was the confirmation that aggression, to be punishable, must be a 'manifest' violation of the Charter, as determined by three more – rather imprecise – hurdles of 'character, gravity and scale'. The hurried acceptance of these additional obstacles enabled the delegates to go forward.

The earliest date mentioned for possible Court action on the crime of aggression – after 1 January 2017 – was an optical illusion. Setting a minimum but no maximum or firm date is hortatory but not mandatory. A host of additional requirements, such as thirty ratifications and a minimum of two-thirds approval by the Assembly of State Parties, must also be met before the Court can act on the crime of aggression. The illusion of unanimity cloaked the reality of stalemate on key issues.

The fact that the Conference did not fail completely was due in large part to the skill and persistence of its Chairman, Ambassador Christian Wenaweser and his Deputy, Ambassador Zeid Ra'ad Zeid Al-Hussein of Jordan. Despite shortcomings, it is hoped that those present in Kampala who agreed to the changes 'by consensus' will soon ratify their own decisions. To do less would be to repudiate them and condemn the Kampala effort as a charade.

14 See *B. Ferencz*, *supra* note 11, 'The UN Consensus Definition of Aggression', 701, available online at http://www.benferencz.org/index.php?id=4&article=30.

8. Aggression as a Crime Against Humanity

On 6 June 1945, Robert Jackson reported to President Truman that the legal position of the US in prosecuting German war criminals would be 'based on the common sense of justice … We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.'[15] After a perfectly fair trial, the Nuremberg judges recognized aggression as 'the supreme international crime'.

Rome and Kampala were important stepping stones in the evolution of international law; but as far as punishing aggression was concerned, Jackson's warning about not being hamstrung by 'sterile legalisms' was ignored.

We must learn from the past if we hope to master the future. Progress in enabling the International Criminal Court to prosecute individuals for 'the crime of aggression' has been, and will likely continue to be, a very long and difficult process. A better way must be found to end the stalemate that has been so long persistent. It is prudent, and essential, therefore to seek parallel or new fallback measures to end the dangerous impunity gap that still exists. Even sceptics and cynics should recognize that, if the use of armed force can be deterred to only a small extent, the achievement would surely be worthwhile. Do not expect a perfect or easy solution, but doing nothing to hasten desired change is not a productive option.

It should be recalled that isolationist sentiments in America prevented the US from joining the League of Nations after the First World War. When the UN Charter was signed in 1945, those who had borne the heaviest burdens of the victory understandably insisted upon maintaining control over future measures to secure the peace. The UN Security Council (Council) was empowered to determine the existence of 'any act of aggression' and the steps 'to maintain or restore international peace and security.' (Article 39). Substantive Council decisions required affirmative votes from all five self-appointed permanent members (US, USSR, UK, France and China). The veto right was a political necessity in 1945, without which the US, and others, would not have been able to join the UN. During the last 68 years, there has been no indication that the permanent members were ready to give up any of their basic Charter privileges and obligations.

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15 Report to the President by Mr. *Robert Jackson*, 6 June 1945, International Conference on Military Trials, London, 1945, Sec. IV.

Whether it is fair or not, practical international enforcement relating to the crime of aggression may unavoidably be linked to the UN Security Council. Unfortunately, for various political reasons, the Council has not succeeded in achieving the UN's primary goals of saving 'succeeding generations from the scourge of war' and ensuring 'that armed force shall not be used save in the common interest' (Preamble). As a result, many smaller nations, particularly those that did not exist when the Charter was drafted, are understandably reluctant to trust their own security to an ineffective Council. These hesitations, doubts and failures resonated during the many years of unsuccessful efforts to define the crime of aggression. The tactic of finding a problem for every solution and blaming inaction on the inability to agree on a definition was a convenient subterfuge to maintain the status quo.

If, in reality, aggression had not been defined, of course it would have been unfair to convict any perpetrator. But where the elements of the crime had been adequately set forth in past decisions, proclamations and common sense, it would have been unfair to allow arch-criminals to escape because of the disingenuous argument that the crime had not been defined. The vital ingredient that was really lacking was the political will of a few major powers that persisted in their refusal to accept rational international controls over the irrational and inhumane use of military force.

Every good lawyer can find new ambiguities to block what his client, or his government, does not want to accept. In fact, aggression had been adequately defined by the Nuremberg tribunals, the International Law Commission, the 1974 consensus definition and a host of legal commentators. Nevertheless, Kampala finally produced a new consensus definition on 12 June 2010. It should be ratified despite its numerous imperfections. Something is better than nothing.

Jurists will now be aided by the *Travaux Préparatoires of the Crime of Aggression* by Kreß and Barriga on which to base sound and fair decisions. Judges should be allowed to judge. Masses of innocent people were killed while diplomats and academics argued and quibbled about 'sterile legalisms'. The definition of aggression has been debated for over sixty-five years. It is high time to move on to another approach. Enough is enough!

As long as the definition of aggression was being debated, little effort was made to find another route or simpler way to stop the atrocity of illegal war-making itself. There is no need to wait for all of the hurdles blocking prosecutions for 'aggression' to be overcome. If the Court door to punishing the 'crime of aggression' is closed, those who prefer law to war

must seek and find another entrance. The primary goal now is to end the existing impunity for the crime of aggression.[16] The sooner the better!

The use of armed force that is not in self-defence and has not been approved by the Security Council, is a clear violation of the UN Charter. The Council has been vested with responsibility for determining whether aggression by a State has occurred. Such a prerequisite does not exist, regarding any other of the core crimes. On the contrary, crimes against humanity do not require any Security Council involvement. The decision rests with the Court, no strings attached.

Since modern weapons of war are unpredictably variable, the listings of illustrative 'Crimes against humanity' often contain a residual catch-all clause to cover 'other inhumane acts', which resemble 'murder', 'enslavement', and similar abominations on the prohibited list. It is hard to imagine anything that could be a more 'inhumane act' than the illegal use of military might in the form of a systematic attack knowing that it will kill massive numbers of innocent people. It is both logic and law that perpetrators are presumed to intend the consequences normally foreseeable 'in the ordinary course of events' (article 30, Rome Statute). Charging aggressors with crimes against humanity – instead of waiting indefinitely for 'aggression' to become actionable – would be a more effective way to warn tyrants everywhere that their days of immunity are over.

It should be noted particularly that punishment for 'crimes against humanity' requires no new definition and no prior Security Council consent or involvement. Like genocide, humanity crimes are also immune from statutory time limitations. Many pre-eminent jurists point out that 'crimes against humanity' are already punishable as universal or 'customary crimes' from which there can be no derogation.[17] For over a hundred years, going back to the Hague Peace Conferences starting in 1899, it has been indisputable that 'the human person remains under the protection of the principles of humanity and the dictates of the public conscience.' What distinguished crimes against humanity was that their magnitude and offensiveness shocked the human conscience and thereby constitutes a crime against all of humanity.[18]

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16 *B. Ferencz*, 'Ending Impunity for the Crime of Aggression', *Case Western Journal of International Law*, 41 (2009), 281–290.

17 See for example writings of Professors *Bassiouni*, *Scharf*, *Schabas*, *Kreß* and *Cassese*. To restrict prosecutions, some domestic laws stipulate that only the crimes listed in their criminal codes can be prosecuted in their courts.

18 See *B. Ferencz*, 'The Nuremberg Principles and the Gulf War', *St. John's Law Review*, 66 (1992), 711–732, at 713.

To be sure, the laws of humanity must apply equally to all nations, groups and individuals. They apply in times of war or peace or regional conflict. It can be left to independent jurists, carefully selected on the basis of qualifications, region and gender, to decide if the accused is guilty of 'crimes against humanity' within the meaning of the ratified Rome Statute, which incorporates the Kampala amendments. It is a much easier road to travel than the blocked and hazardous terrain that has shielded perpetrators of 'the crime of aggression' for too long. It is high time for the common sense voice of humanity to be heard and respected.

Admittedly, the way people think about strongly-held traditions cannot easily be altered. The mind cannot be changed until the heart is changed. We have seen that the complete absence of remorse by those responsible for the slaughter of masses of innocent people, who had done them no harm and whom they did not even know, remains a frightening reality. Fear that cherished values are being threatened makes murderers out of otherwise decent people – regardless of nationality. Nothing can stop a person who is ready to sacrifice his life for ideals valued more than life itself. We have yet to learn that we cannot kill an ideology with a gun. The rule of law offers a peaceful way to deter uncontrollable violence.

We need young leaders who are prepared to think 'outside the box' and courageous enough to act for the general welfare. Law must not remain helpless to bring the worst criminals to justice. It is a disgrace to the so-called 'civilized world' that – after the Nazi Holocaust – genocide was possible in Rwanda and similar mass slaughters continue to this day. Silence in the face of evil is a form of complicity. Pious declarations without implementation are not good enough. Those leaders, who are responsible for the use of armed force, knowing that it will kill large numbers of civilians, must be held to personal account. Whether it be called 'war crimes', 'genocide', 'crimes against humanity', or its original title 'crimes against peace', should not be decisive. Criminality should be determined by the facts of the offense and not by deliberately ambiguous nomenclature. Noted English Barrister Geoffrey Robertson QC hit the nail on the head: 'Planning or waging a war of aggression is a crime against humanity…'.[19]

As long as the International Criminal Court remains blocked and cannot activate its jurisdiction over the crime of aggression, the same basic facts that would constitute the aggression crime should now be chargeable,

19 *G. Robertson*, Crimes Against Humanity: The Struggle for Global Justice (London: Penguin, 1999), p. 269.

by the Court and national courts, as a 'crime against humanity'. Every accused is entitled to the presumption of innocence and a fair trial but the possibility of conviction would surely have an electrifying deterrent effect throughout the world. Therein lies the key to opening the lock on the courthouse door.

9. Priority of National Courts

The 1948 Universal Declaration of Human Rights sets the desired standard. It recognizes that the inherent dignity and 'inalienable rights of all members of the human family is the foundation for freedom, justice and peace in the world'. The preamble to the Rome Statute requires States to take measures at the national level to ensure that the listed crimes do not go unpunished. The Court's complementary jurisdiction was never intended to replace States' primary obligations.

In addition to ratifying the Kampala amendments, what is needed now is a vigorous campaign – led by the Court and civil society – urging more national legislatures to incorporate the Rome Statute, or equivalent, into their national criminal codes. Many countries all over the world have already started to do so, as evidenced by detailed reports of many learned authors included in this comprehensive Commentary. No further commentary is required here. It may be noted that the number of national courts that are already trying international criminal law offenders for crimes against humanity has been authoritatively described as 'nothing short of amazing.'[20] A twenty-four page study by the US Library of Congress in 2010 described the provisions in national legislation or penal codes of about fifty countries that made crimes against humanity punishable locally.[21] Uniformity is desirable but not essential, since needs and opportunity will vary in different communities. There has been a gradual awakening of

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20 *J. Rikhof*, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' in M. Bergsmo (ed.), Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes (Oslo: Torkel Opsahl Academic EPublisher, 2010), pp. 7–81, at 80 and passim. See also *M.C. Bassiouni* (ed.), 'Special Issue: Accountability for International Crimes and Serious Violations of Fundamental Rights', Law and Contemporary Problems *59* (*1996*), 1–347.

21 See the 'Law Library of Congress Multinational Report Crimes Against Humanity Statutes and Criminal Code' prepared by the Foreign Law Specialists and Legal Research Analysts of the Law Library of Congress, April 2010, available online at http://www.loc.gov/law/help/crimes-humanity_MULTI_RPT_final.pdf.

the human conscience. The enactment and enforcement of humanitarian law and the criminalisation of the illegal use of force are the foundation stones for a more humane world order governed by the rule of law.

To be sure, nations are not likely to try their own leaders for either aggression or crimes against humanity. However, 'regime change' against tyrants has become more frequent in recent years. The deterrent effect of national courts enforcing national human rights obligations should not be underestimated. A recent example is the10 May 2013 conviction by a Guatemalan court of their former Dictator Rios Montt for the crime of genocide and other crimes against humanity. UN High Commissioner for Human Rights, 'Navi' Pillay, welcomed the judgment as one 'of monumental importance at the international as well as the national level.'[22] Notwithstanding the cloud that has been raised by the almost immediate reversal of this decision by Guatemala's High Court, the case remains significant and is being closely watched by the international justice community.[23]

Although regional economic and social disparities slow the march of progress, we must, and will, find means and methods to make humanitarian ideals more universally acceptable and available. Short-term thinking that may have been tolerable in ancient times is too hazardous for acceptance in the cyberspace age. New generations must try to persuade old decision-makers that planetary thinking is now imperative. Today, sovereignty belongs not to a monarch but to the people. In this interdependent world, the notion of absolute State sovereignty is absolutely obsolete. The future belongs to those who are capable of thinking universally and acting locally.

As noted at Nuremberg, the law does not and cannot remain static. The clear trend has been to expand the area of humanitarian protection for both military and civilian populations.[24] Surely, every accused is entitled to a fair trial as mandated by the Rome Statute. But, as Jackson noted, that does not call for the abandonment of common sense. The primary goal is

22 As reported by the United Nations News Centre, 13 May 2013, available online at http://www.un.org/apps/news/story.asp?NewsID=44884#.UfFEO0ZwaM8.

23 For a summary of the status of the legal proceedings against Rios Montt, see Open Society Justice Initiative account by *Emi MacLean*, 'Guatemala's Rios Montt Genocide Prosecution: The Legal Disarray Continues', 18 June 2013, available online at http://www.opensocietyfoundations.org/voices/guatemalas-rios-montt-genocide-prosecution-legal-disarray-continues.

24 See *E. La Haye*, War Crimes in Internal Armed Conflicts (Cambridge University Press, 2008).

to protect the victims of crime and not to encourage more crime. To do less is to increase criminality at the expense of law-abiding society. Law can only be effective if it is respected and accepted by the community it is expected to serve. It must be left to competent and independent judges to take all the facts into consideration and to do what is just and seen to be just. That is what law is all about.

10. Concluding Thoughts

Failure to enforce law undermines law itself. The original UN Charter plan for comprehensive disarmament and an independent military force was never given a chance. Most nations do not feel obliged to protect the weak unless it is in their own self-interest. In desperation, those who fear their values are threatened strike back with whatever terror weapons they have. As long as militants – whether individuals, groups or nations – insist that they alone can determine the legality of their actions, their military power is not a safeguard but a menace. Vengeance begets vengeance. War-making – the illegal use of armed force – is the biggest atrocity of all but it can only be curbed rationally by peaceful means. Unauthorized humanitarian interventions may be morally legitimate but it is not up to the protagonists to decide whether they are lawful. An illegal use of force does not automatically become lawful because it is done with good intentions. Courts and prosecutors are required to take all relevant facts and circumstances into account. Despite understandable provocations, assassinations and the torture of suspects should have no place in lawful societies. Let so-called 'terrorists' have their day in court. Ranting by fanatics will not be persuasive to rational minds but will, in time, be repulsed by public revulsion. As long as society does not provide enforceable international laws that bind everyone equally, and independent institutions empowered to settle vital disputes by impartial and peaceful means, forceful means will remain inevitable.

Courts alone cannot solve all social problems. Peace requires more intensive efforts to ameliorate root causes of discontent that give rise to violence. Tolerance and willingness to compromise are indispensable norms that must be taught by every means and at every educational level. For their own self-interest, and to protect the brave young people who do the fighting, nations must stop glorifying war. The prevailing 'war ethic' must be replaced by a 'peace ethic'.

Hope is the engine that drives human endeavour. Hope provides the energy to do all the difficult things that must be done to establish a more

humane and peaceful planet. From the perspective of one who has witnessed the evolutionary progress for a lifetime, I am convinced that if humankind is to survive, the illegal use of armed force, whether it is labelled aggression, a crime against peace or anything else, must be contained and deterred by the rule of law. Even at the risk of some miscarriages of justice, law is always better than war, which inevitably destroys countless innocent lives. The only victor in war is Death.

I am encouraged by the awareness that progress toward humanitarian law during my lifetime has been phenomenal. I recall when going to war was hailed as a legal path to power and glory. Colonialism, racial discrimination and exploitation of women were the rule. There was no such thing as international criminal law. Human rights law did not exist. Today, aggressors and those who trample illegally on human life are on notice that they may have to explain their behaviour to a national or international court of law. Deterrence is more important than conviction. Equity, morality and common sense should always be part of our evolving law.

New communication networks beyond human imagination are now globally widespread. What was ridiculed as 'reaching for the moon', has become reality. We must harness the explosive power of public opinion to counteract the devastating power of uncontrollable military might.

The profound historical, philosophical and legal essays contained in this *Magnum Opus* commentary reflect the enormous advances made and some of the difficult legal problems that still remain. Hopefully, the wisdom of the learned contributors will help illuminate the path of new torchbearers, who will see the light of a more humane world.

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