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Can Aggression Be Deterred by Law?

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ARTICLES

“You have it in your power to make the dream of a more human world order under law come true”

ADDRESS TO THE DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Benjamin B. Ferencz (Rome, 16 June 1998)

I have to come to Rome to speak for those who cannot speak - the silent victims of monstrous deeds. The only authorization I have comes from my heart.

Over fifty years ago, I stood in a courtroom at Nuremberg and accused twenty-two high-ranking German Storm Troopers of deliberately murdering more than a million men, women and children. The defenseless victims were slaughtered because they did not share the race or creed of their executioners. I asked the tribunal to affirm the legal right of every human being to live in peace and dignity. It was a plea of humanity to law - a plea that needs repeating.

Unanimous affirmation of the Nuremberg principles by the United Nations in 1947 implied a promise that “never again” would aggression, war crimes, and crimes against humanity go unpunished. War crimes trials after World War II came to grips with the past. We have yet to come to grips with the future.

I have come to Rome to plead for a more humane world order. Nuremberg was the beginning of a process. Failure to build on its precedents has cost the world dearly. Once the political will was aroused, the Security Council was able in 1993 and 1994 to establish competent criminal courts quickly to

bring perpetrators of genocide and crimes against humanity in former Yugoslavia and Rwanda to trial. But limited ad hoc courts created after the event is hardly the best way to ensure universal justice. A permanent court is needed for permanent deterrence. The time for decisive compromise has come. Now the challenge is in your hands. Outmoded traditions of State sovereignty must not derail the forward movement. National power and privilege must take account of international needs. We all share one interdependent planet, linked by new networks of instant communication. No nation and no person can feel secure until all are secure. The silent voices of "We the Peoples" - who are the true sovereigns of today - cry out for enforceable law to protect the universal human interest. You have it in your power to make the dream of a more human world order under law come true.

I have come to Rome to speak for peace. Ever since the judgment at Nuremberg, it has been undeniable that aggressive war is not a national right but an international crime. War is the soil from which the worst human rights violations invariably grow. The UN Charter prescribes that only the Security Council can determine when aggression by a state has occurred but it makes no provision for criminal trials. No criminal statute can expand or diminish the Council's vested power. Only an independent court can decide justly whether any individual is innocent or guilty. Excluding aggression from international judicial scrutiny is to grant immunity to those responsible for "the supreme international crime" - omission encourages war rather than peace.

Carefully selected judges and prosecutors, subject to supervision, public scrutiny and budgetary controls, provide adequate guarantees that they will not betray their trust. They must be given the authority and the tools to do their difficult job. The certainty of punishment can be a powerful deterrent. To condemn crime yet provide no institution able to convict the guilty is to mock the victims and encourage dangerous unrest. Human rights must prevail over human wrongs. International law must prevail over international crime.

I have come to Rome to encourage your noble efforts. A great deal more needs to be done before the causes of international crimes are removed. But one thing is sure - without clear

international laws, courts and effective enforcement there can be no deterrence, no justice and no world peace. Justice, reconciliation and rehabilitation are needed to bind up the wounds of humankind.

Hope is the engine that drives human endeavor. It generates the energy needed to achieve the difficult goals that lie ahead. Never lose faith that the dreams of today for a more lawful world can become the reality of tomorrow. Never stop trying to make this a more humane universe. If we care enough and dare enough, an international criminal court - the missing link in the world legal order - is within our grasp. The place to act is here and time to act is now!

CAN AGGRESSION BE DETERRED BY LAW?

Benjamin B. Ferencz¹

THE VISION OF NUREMBERG IN 1945: WORLD PEACE THROUGH WORLD LAW

At the end of the Second World War, one of the important goals of the victorious allied powers was to make international law effective to help maintain world peace. The illegal invasions and atrocities perpetrated by the Hitler regime were so outrageous that the temptation was great simply to arrest Nazi leaders and have them shot. This, in fact, was an early British proposal that probably would have been approved by Stalin, but was not acceptable to the United States. Contrary to some popular misconceptions, war-crimes trials were never intended as victor's vengeance over a vanquished foe. The leading juridical architect of the trials, highly respected Justice Robert M. Jackson, on leave from the Supreme Court to become America's Chief Prosecutor, reaffirmed the rule of law as he opened the trial before the International Military Tribunal (IMT) at Nuremberg in 1945: "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."²

The Charter of the United Nations (U.N. Charter) proclaimed the goals of saving succeeding generations from the

¹ J.D. Harvard 1943. Benjamin Ferencz was a Prosecutor at the Nuremberg Trials. Highly published, one of his books based on Jewish forced labor in Nazi concentration camps has been used as a basis for the right to reparations. Another book dealt extensively with U.N. efforts to reach consensus on a definition of aggression. He has also ceaselessly advocated the establishment of a permanent international criminal court. In May 1999, Benjamin Ferencz received the degree of Doctor of Laws, honoris causa, from Iona College. Aside from remaining a forceful advocate for a permanent International Criminal Court, he is an Adjunct Professor at Pace University School of Law.

² 1 BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 437 (1975) [hereinafter *FERENCZ, AGGRESSION*].

scourge of war, promoting human rights, justice and respect for international law. The Nuremberg trials were a cornerstone of the great effort to make the peace more secure. In Jackson's view, it was high time "to make war less attractive to those who held the destiny of peoples in their power,"³ and the way to protect people from domestic tyranny, violence and aggression was to make all men responsible to law and to make sure that those who start a war will pay for it personally.⁴ It was repeatedly confirmed by Nuremberg prosecutors and judges that the standards imposed on the German defendants were equally applicable to officials of the Allied Powers and to those of all nations. "To pass these defendants a poisoned chalice" said Jackson, "is to put it to our own lips as well."⁵

Outstanding jurists from the U.S., U.K., U.S.S.R. and France, meeting in London in 1945, listed only three types of crimes that would come within the jurisdiction of the IMT. The first—which is the subject of this article—was "*Crimes Against Peace: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.*"⁶ Defendants could be found guilty of that crime only if it was proved that they were leaders or accomplices who had personal knowledge that aggression was contemplated and had helped to plan or wage the crime of aggressive war. Exactly what was meant by *aggression* or *aggressive war* was not set forth. Jackson argued that the actions of the Nazi leaders were unambiguously aggressive when considered in the light of a multilateral 1933 convention on that subject and legal opinions that had already been well crystallized.⁷

In its carefully reasoned final judgment, the distinguished judges who sat on the IMT bench concluded that the London Charter was not *ex post facto* legislation but an expression of existing international law. Past legal precedents and treaties, that were cited in detail, had put the defendants on notice that

³ *Id.* at 450.

⁴ *See id.*

⁵ *Id.* at 439.

⁶ Charter of the International Military Tribunal, August 8, 1945, art. 6, 59 Stat. 1547.

⁷ *See* FERENCZ, *AGGRESSION*, *supra* note 2, at 446.

what they were doing was criminal. Justice demanded that they be punished.⁸ "Only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁹ High officials of the German Reich were executed for the crime of aggression, which the tribunal, after extensive analysis, condemned as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹⁰

Following the IMT trial, the United States conducted a dozen subsequent war-crimes trials at Nuremberg under the direction of General Telford Taylor, a Harvard Law School graduate who later became a Professor of International Law at Columbia and Yeshiva universities in New York. These trials were based on the London Charter for the IMT, as well as a clarifying law that added *invasions* as a crime against peace and noted that the listing was not exclusive.¹¹

Despite the absence of detailed definitions and rules of procedure, the fact that the Nuremberg proceedings were open to the public, that all defendants could choose their own counsel and receive the usual benefits of fair trial, confirmed the validity of the judicial findings. The fairness of the Nuremberg trials has been widely acknowledged. They served as models for war-crimes trials in Tokyo and other parts of the world. Telford Taylor shared the conviction of his predecessor Justice Jackson that law must apply equally to everyone. He too, was convinced that the greatest achievement of Nuremberg was the condemnation of aggressive war since the most heinous crime was *war-making itself*.¹²

JUMPING THE FIRST HURDLE: AGGRESSION DEFINED BY CONSENSUS IN 1974

The validity of the Nuremberg Charter and Judgment was unanimously affirmed by the General Assembly of the United

⁸ See *id.* at 479-481.

⁹ *Id.* at 81.

¹⁰ *Id.* at 452.

¹¹ See Control Council Law No. 10 reprinted in FERENCZ, *AGGRESSION*, *supra* note 2, at 491-496.

¹² See TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 64-66. See generally Benjamin B. Ferencz, *Telford Taylor, Pioneer of International Law*, 37 COLUM. J. TRANSNAT'L L. 662 (1999).

Nations (U.N.) in 1946.¹³ U.N. Committees were appointed to prepare both a code of international crimes based on the Nuremberg principles and to draft the *statute* for a new international criminal tribunal that could enforce the penal code. It soon became apparent that political rivalries between the major powers made consensus agreements impossible. It was argued that without a clear definition of the crime of aggression, no criminal code would be complete, and as long as there was no code, there was no need for a court to enforce it. Thus everything was linked, and progress was stymied, with the weak excuse that the time was not yet ripe. In the meanwhile, nations went back to killing as usual.

After more than a quarter-of-a-century of fruitless wrangling, a definition of aggression was reached by consensus in 1974. It condemned the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State and, after listing several illustrations of prohibited actions, concluded that whether the crime of aggression had been committed had to be considered "in the light of all the circumstances of each particular case."¹⁴ The final decision was left to the Security Council since, under the U.N. Charter, the Council bore primary responsibility for determining whether aggression by a State had occurred.¹⁵ As with many U.N. resolutions, in order to reach agreement, it became necessary to include several ambiguous phrases that nations might interpret for their own advantage.¹⁶

The existence of the definition removed the artificial barrier that had been used as the excuse to defer action on the criminal code and court. The International Law Commission (ILC), a U.N.-related body of thirty-four independent legal experts from various regions of the world, resumed deliberations on the Draft Statute for an International Criminal Court and a Code of Crimes against the Peace and Security of Mankind. Progress in building on the Nuremberg legal foundations was labored and

¹³ See G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc A/Res/95 (1946).

¹⁴ G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Annex para. 10, Supp. No. 31, U.N. Doc. A/9631 (1974).

¹⁵ See U.N. CHARTER art. 39.

¹⁶ See G.A. Res. 3314, *supra* note 14, at *Definition of Aggression*. See generally Benjamin B. Ferencz, *The UN Consensus Definition of Aggression: Sieve or Substance?*, 10 J. INT'L & ECON. 701 (1975).

slow. But unanticipated intervening events produced a dramatic demonstration that international criminal tribunals were needed and could be created quickly once the political will to act was aroused.

THE SECURITY COUNCIL TAKES CHARGE: INTERNATIONAL
CRIMINAL COURTS À LA CARTE

The International Court of Justice, sitting in the Hague and often referred to as the World Court, has roots going back to the first World War. According to its Statute (which is very difficult to amend) it can deal only with legal disputes between consenting States. It has no authority to hear criminal charges against individuals. Before Nuremberg, heads of sovereign States were traditionally considered to be immune from legal process. What was still missing was a new legal institution to close a gap in the existing international legal order.

Around 1991, armed violence between rival nationalistic and ethnic groups erupted in former Yugoslavia accompanied by widely publicized mass rapes and so-called "ethnic cleansing" bordering on genocide. Unable or unwilling to risk their own troops to halt the carnage, major powers, in response to public outrage, decided to create a special international criminal court to bring to trial those deemed responsible for the outrageous war-crimes and crimes against humanity. In a matter of weeks, it was possible for the Security Council to lay the foundation for an *ad hoc* International Criminal Tribunal for Yugoslavia (ICTY) that would sit in the Hague and be empowered to bring violators to justice.¹⁷ When acts of genocide erupted in Rwanda in 1994, the Security Council again responded promptly by creating a similar International Criminal Court for Rwanda (ICTR).¹⁸

Despite initial organizational and continuing enforcement problems, both the ICTY and the ICTR have been functioning

¹⁷ See generally VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

¹⁸ See generally VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). Aggression did not seem to be an issue in the internal strifes of Yugoslavia or Rwanda, and that crime was not included in the jurisdiction of the *ad hoc* penal courts.

with relative effectiveness since their creation. These tribunals demonstrated that it is feasible for the Security Council, acting under its U.N. Charter authority to create subsidiary organs, to establish *ad hoc* criminal tribunals quickly.¹⁹ To be sure, temporary courts created by the Council *after* massive crimes have occurred, with only limited jurisdiction to try a limited category of crimes in a limited area during a limited period, is not the most effective way to ensure universal justice. Such courts are certainly better than nothing, and they need and deserve all the support they can get, but the international community can hardly be expected to set up franchised criminal courts every time major atrocities occur around the globe. The need for a permanent international criminal court with a broader mandate, that might deter such crimes before they are committed, became increasingly apparent.

A PROBLEM UNRESOLVED: SUPREME CRIME LACKS A SUPREME COURT

Prodded by the U.N. General Assembly, the ILC, in 1996 finally completed its draft *Code of Crimes* to supplement the *Statutes* that had been drafted two years earlier for an International Criminal Court (ICC). The statute described "the crime of aggression" as a "customary law crime." The distinguished lawyers on the ILC described aggression as a peremptory norm binding on all states and, without specifying any more detailed definition, advised that it should be left to practice to determine the exact contours of the crime.²⁰ The Code upheld the Nuremberg principles and confirmed that crimes against peace were punishable under international law.²¹

The ILC Commentary to the Draft Code dealt in considerable detail with the crime of aggression for purposes of individual criminal responsibility. It noted that "[a] State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, ini-

¹⁹ See U.N. CHARTER art. 29.

²⁰ See *Report of the ILC*, U.N. GAOR, 51st Sess., Supp. No. 10, at 15, U.N. Doc A/51/10 (1996).

²¹ The other crimes, including serious violations of the laws applicable to armed conflict, crimes against humanity and certain crimes widely condemned by international treaties, are outside the scope of this article.

tiate or wage aggression."²² Aggression by a State was stated to be a *sine qua non* condition for the attribution of individual criminal responsibility for the crime of aggression.²³ Since Article 39 of the U.N. Charter vested the Security Council with primary authority to determine the existence of an act of aggression, the ILC Statute made plain that no complaint of aggression could be brought unless the Security Council first determined that a State had committed the act of aggression which was the subject of the complaint.

The absence of a more specific definition of aggression and the reference to the Security Council in the ILC recommendations, was supportive of the Nuremberg Charter and Judgment that had been affirmed by the entire General Assembly in 1946. Nevertheless, those two points gave rise to major differences when nations convened to consider a permanent criminal court.

As the General Assembly had recommended, the ILC drafts formed the basis for consideration by open-ended U.N. Committees preparing the foundation for a permanent international criminal court. By 1996, much of the earlier opposition to the idea of a permanent international criminal court seemed to have disappeared. U.S. President William Clinton appeared before the General Assembly of the U.N. on 22 September 1997 to call for a permanent international criminal court before the century ends. He had earlier publicly pledged support for the principles of Nuremberg, and Secretary of State Madeleine Albright had made many similar statements. But the powerful United States, often called upon for military interventions that it perceived to be justifiable on humanitarian grounds, showed little enthusiasm for including the crime of aggression within the jurisdiction of the planned new court. Smaller nations resented the privileged veto power reserved to the five permanent members of the Security Council and they opposed any dependence of the ICC on a Council that many regarded as politicized and self-serving.

When the final plenipotentiary negotiating sessions began in Rome in the summer of 1998, most states, including the European Union and about 30 nations united in the Non-Aligned

²² *Report of the ILC, supra* note 20, at 84.

²³ *See id.* at 85. *See also Report of the ILC, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc A/49/10 (1994).*

Movement, insisted that without the inclusion of aggression as a crime they would be unable to support the new court. Many Arab states wanted the 1974 consensus definition, with possibly some improvements in their favor, included in the ICC Statute. Germany's delegate, Dr. Hans-Peter Kaul, pressed various compromise solutions. India and Pakistan, busy testing new nuclear weapons, were not inclined to subject themselves to possible charges of aggression. China stressed the protection of its national sovereignty. The U.S., mindful of military and political considerations, remained aloof on the question of including aggression and insisted on preserving the Security Council's veto rights as guaranteed by the U.N. Charter. A host of real or politically motivated concerns about including aggression that had been voiced during earlier meetings remained unaltered.²⁴ There simply was not enough time in Rome to reach agreement on these sensitive questions. In the end, the agile and adroit Chairman Philippe Kirsch of Canada found the only compromise possible: the resolution of the differences was postponed to a later day.

When, despite U.S. objections on many points, the Rome Statute was overwhelmingly endorsed by a vote of 120 to 7 and 21 abstentions, all that could be agreed upon concerning the inclusion of the crime of aggression was that it was recognized as an international crime subject to the Court's jurisdiction. But that was only the first step. The second step, allowing the Court to act, could only be taken after certain conditions were met. There had to be a near-consensus agreement on a definition of aggression and the relationship between the ICC and the Security Council had to be clarified, consistent with the U.N. Charter. As a third and final step, the proposed new definition and clarification could only be considered for adoption at an amendment conference that could not take place until more than seven years had elapsed after the Statute had gone into effect by being ratified by at least sixty nations.²⁵ When, and if, all of those conditions could be met, was rather uncertain.

²⁴ See ICC Preparatory Commission Reports Aug. 1996, Vol. 1 and Feb. 21, 1997.

²⁵ See Rome Statute, A/Conf.183/9, 17 July 1998, arts. 5, 121, 123, 126.

THE IMMEDIATE GOALS: RATIFICATION AND IMPLEMENTATION

The primary and most urgent goal, of course, must be to obtain the sixty ratifications without which the Rome Treaty cannot come into effect.²⁶ This will require new legislation and even constitutional amendments in many countries. The process is now under way at various national levels. Reasonable estimates indicate that it will still take at least several years before all the necessary ratifications are attained.

A Preparatory Commission (PrepCom) is in the midst of a series of meetings designed to carry out certain implementing requirements that must be in place before the ICC can begin operations. Rules of Procedure and Evidence and specifying the Elements of Crimes that must be proved to obtain convictions must be finalized before 30 June 2000. How the ICC will be financed in the short and long term must also be resolved and other technical arrangements must be made before an Assembly of State Parties can take over supervisory responsibilities for the Court and the Commission disbanded.²⁷ Nations that may not have signed the Treaty, such as the United States, are participating in the negotiations at the U.N., trying to shape the proceedings in ways that may be generally acceptable even though it is mandated that the Rome Statute cannot be substantively modified or subjected to any reservations.²⁸

The Commission was also directed to prepare proposals for a provision on aggression and its elements and the conditions under which the ICC could exercise jurisdiction with regard to that crime. A coordinator, Tuvako Manongi of Tanzania, was appointed to sound out the delegates. A compilation of proposals regarding aggression, including new papers by eight Arab states, the Russian Federation and Germany, was put on the table.²⁹ On 2 August 1999, twenty-two delegates spoke up in a

²⁶ See *id.* art. 126.

²⁷ See U.N. Res. F, U.N. GAOR, 53rd Sess., Annex 1, Agenda Item 153, at 3-4, U.N. Doc. A/53/387 (1998).

²⁸ See Rome Statute, *supra* note 25, art. 120.

²⁹ See generally *Compilation of Proposals on the Crime of Aggression Submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998)*, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999), Prep. Comm. For the I.C.C., U.N. Doc. PCNICC/1999/INF/2 (1999).

debate on the subject. It was clear that there remained a wide diversity of views. Some urged that a working group be appointed to deal with the matter further. Australia noted the reality that, given the complexity and sensitivity of the subject, reaching agreement would take time and priority should be given to the other issues that had an early deadline.³⁰ What to do about aggression remained unresolved, and was left for further consideration at the next session of the PrepCom at the end of 1999.

WHERE DO WE GO FROM HERE? A COMPROMISE SOLUTION

Let us consider the alternatives now faced by the international community:

(1) Beginning at the most negative end of the spectrum, let us assume that no agreement can be reached on an acceptable definition of aggression or the role of the Security Council in relationship to the proposed ICC. If that happens, the ICC, as proposed by the Rome Statute, will have no jurisdiction to deal with the crime of aggression. If past experience is any guide, it is most likely that heads of state and other leaders responsible for "the supreme international crime" will remain immune from prosecution.³¹ Impunity can hardly be a deterrent to despots contemplating future acts of aggression.

(2) Absence of an international criminal jurisdiction does not necessarily mean that the perpetrators will escape punishment completely. If the aggressor is defeated, the guilty party may still be tried by the victor or by a new national government should the wrongdoing state have been replaced. Standards of fair trial may, or may not, be applied, depending upon the domestic law and practices of the state concerned.

(3) The criminal may also be brought to trial by an *ad hoc* tribunal created at some future date by the Security Council. Such U.N. tribunals are under consideration in addition to the existing ICTY and ICTR and the possibility of expansion along those lines should not be ruled out.

³⁰ ICC Preparatory Commission Press Release L/2931. 2 and 6 Aug. 1999.

³¹ See Benjamin B. Ferencz, *The Nuremberg Principles and the Gulf War*, 66 ST. JOHN'S L. REV. 711 (1992).

(4) An international criminal court based on the Rome Statute, focusing on crimes of concern to the international community as a whole and acquiring jurisdiction only when national States are unable or unwilling to try the offenders in a fair trial, can try the accused in a public forum directed by carefully selected judges under the supervision and effective control of the international community.

It has long been an established principle of criminal law that if crime is to be deterred, the wrongdoers should know in advance that punishment will be swift and certain. If one considers the alternatives listed, it will be clear that alternative four is most likely to produce the desired result. The Rome Statute seems an infinitely better way to proceed to a system of international justice than any other available choice.

If one recalls that it took nations at least several decades to reach the 1974 consensus definition of aggression, and that it was a finely balanced document in which every word was carefully weighed, the prospects for being able, in a reasonable period of time, to reach agreement on a new definition by consensus do not appear very bright. If one adds the requirement that the relationship between the ICC and Security Council must also be clarified to assure the independence of the Court, while remaining consistent with the Charter, it might appear that nations now face a "mission impossible." But, with some creative legal imagination, perhaps a solution may be found. If acceptable new compromises seem very time-consuming or impossible, why not simply accept what has already been accepted and perhaps add a few undisputed clauses that may help to assuage the legitimate concerns of those who have hesitated to take a bold step forward? It can be done.

Let us begin by accepting the definition of aggression already approved by U.N. General Assembly Resolution 3314 in 1974. True, it has its defects and some states would like changes, but the fact is that it has already been approved and accepted and it is most unlikely that significant changes can be adopted quickly by all parties to the Rome Statute. The most frequently voiced objection to accepting the 1974 definition of aggression now is that it was intended only as a non-binding guide to the Security Council (that paid practically no attention to it thereafter) and that it is not suitable in a criminal statute

that, in fairness, must specify the elements of the crime. These objections are not well founded.

During the many years of debate by special U.N. committees, representative of all nations, no one ever suggested that the definition was to have only a very restricted and limited significance. The definition of aggression was intended as a definition of the *crime of aggression*! Its preamble said specifically that the definition was intended to deter a potential aggressor. The agreed definition specifically stated: "A war of aggression is a crime against international peace."³² The consensus was consistent with the original General Assembly mandate based on the Nuremberg principles. The elements of *mens rea*, or guilty knowledge, flowed from the position of the defendants as important leaders. They could only be indicted for the crime if their knowledge, capacity and authority were made clear from the very nature of their authority. These criminal provisions and elements were considered adequate by the Prosecution and Tribunals at Nuremberg, affirmed by the entire General Assembly, recommended by the ILC and a host of independent experts and a worldwide public that recognized the fairness of the Nuremberg trials. Surely, it should be possible, by way of compromise, for nations to accept what has already been so universally accepted.

The relationship between an independent Court and Security Council can also be resolved. It is the U.N. Charter that determines the role and authority of the Council. All members of the U.N. are legally bound by the Charter they have freely accepted. The Charter cannot be altered by any criminal statute. It can be changed only by amendment of the Charter itself, in accordance with its terms. Since the five permanent members would have to consent to any amendment, that possibility is clearly not in the cards at this time. True, the Charter provisions giving only five nations special veto rights are manifestly unfair, but they were accepted for vital political reasons without which the U.N. probably would not have come into existence. The time may come when privileged members will recognize the value of voluntarily restraining their unjust veto power, but the Rome Statute cannot diminish the Council's authority nor its

³² G.A. Res. 3314, *supra* note 14, art. 5(2).

Charter obligation to determine when aggression by a State has occurred. The concerns that the Council will act unfairly may perhaps be met by other means.

Article 1 of the U.N. Charter sets forth the goal of suppressing acts of aggression "in conformity with the principles of justice and international law."³³ All members of the Security Council are bound by that mandate. Should a State member of the Council be accused of aggression and its representative on the Council fail to recuse himself from consideration or voting on the matter (as is customary) that would seem to be *not* in conformity with principles of justice. Under those circumstances, perhaps ICC judges might be justified in disregarding an improper Security Council resolution. To give the ICC this possibility, it would be helpful to insert the cited clause into a compromise amendment regarding the crime of aggression.

If, as is suggested by those who fear a biased Council, the ICC were to bypass the Council's duty to determine when aggression by a State has occurred, it would almost surely encounter the argument from the defendant that the Court was usurping the Council's Charter authority and was acting outside its own judicial competence. Even a guilty defendant might thereby escape punishment, and the prospects of deterrence of war through law would be diminished rather than enhanced.

Any proposed amendment that can quickly attain general acceptance (and several have been put forth by various countries) would be an advance over the current stalemate. If such agreement cannot be reached fairly soon however, another alternative should merit consideration: Nations that are determined to bring aggression under international legal control should be ready to endorse the provisions that have already been universally accepted verbatim or in principle. The definition of aggression can then be put to rest and the ICC would have authority to act on aggression as soon as the amendment has been passed by the requisite number of votes as required by the Rome Statute. The suggested text of such an amendment is attached as an Annex hereto.

³³ U.N. CHARTER art. 1.

CONCLUSION: THERE'S ALWAYS HOPE

The solution here suggested is certainly not the last word. Other creative solutions are surely possible. No one can believe that competent lawyers are unable to reach agreement on what constitutes the crime of aggression and how its cruel perpetrators may be brought to account. But there is no need to try to spell out in advance every possible contingency and expect over 188 countries with different standards and cultures to agree on every word. Law is constantly changing to meet the needs of a changing world society. ICC Judges must be trusted to judge fairly according to the circumstances and conditions before them.

International law is slowly evolving as nations crawl toward a more humane world order. Notions of absolute State sovereignty and traditional prohibitions against interference in a country's internal affairs are still heard as justification for massive violations of human rights. The line between aggression and humanitarian intervention has not yet been clearly drawn. Nor are the parameters of self-defense sharply defined. Lawful goals can only be sought by lawful means, but where the law itself is unclear, it is understandable that powerful nations may hesitate to subject their leaders to the uncertainties of an untried international penal tribunal. In the thermonuclear age, with instant planetary communications, the risks of uncontrolled self-help are far more hazardous than the risk of accepting binding legal obligations to maintain peace. Powerful states should recall the grandeur of past empires that have turned to dust and put their faith in law rather than war. New thinking will be needed and new institutions created to enforce international law collectively on behalf of all. That is what the ICC is all about.³⁴

One must have confidence that highly qualified jurists who have been carefully selected will be able to render wise deci-

³⁴ See generally BENJAMIN B. FERENCZ, *NEW LEGAL FOUNDATIONS FOR GLOBAL SURVIVAL* (1994). See also recent publications dealing with the Rome Statute: *THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME STATUTE* (Roy Lee ed., 1999); *1 INTERNATIONAL CRIMINAL LAW* (M. Cherif Bassiouni ed., 2d. ed. 1999); *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT – ESSAYS IN HONOR OF ADRIAAN BOS* (H. von Hebel et. al. eds., 1999); *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Otto Triffterer ed., 1999).

sions based on a fair interpretation of the Statute. This point has been repeatedly stressed by former Nuremberg lawyers and Judges of the *ad hoc* tribunals created by the Security Council. Experience shows that such learned and competent persons will honor their mandates. They are subject to a wide variety of controls, from appellate proceedings to supervision by the Assembly of States, and to budgetary restraints and removals, should they fail in their duty. The ICC, with no independent enforcement powers, is dependent upon the good will of nations to see that Court decisions are accepted. Respect for the court and its effectiveness can only be maintained if the judges perform their duties faithfully and well on behalf of world peace.

Nations must decide which of the listed alternatives they prefer. Surely small nations and those who do not contemplate acts of aggression have much to gain by creating an international system to help curb a terrible crime that is the breeding ground for the most atrocious crimes against humanity. Whether aggression can be deterred by law depends upon the willingness of states to change their way of thinking and acting. No one expects perfection but the enforcement of criminal law is still regarded as a useful tool for the benefit of humankind.

As we enter a new millennium, decision-makers must realize that the practices and slogans of the past must give way to a new humanity, which recognizes the sovereignty of the individual as the guiding norm of international society. At the U.N. and in international conferences throughout the world, statesmen and nongovernmental organizations are beginning to speak about a "culture of peace." They have come to recognize that the right to live in peace is the most fundamental human right. The war-ethic that steeped past generations in wasted human blood and misery must be replaced by a "peace-ethic," in which aggression is properly condemned as the supreme international crime. Those who are responsible for incalculable harm to innocent victims of aggression must know that they will answer for their evil deeds before the bar of international justice. When such a needed system of international controls is finally put in place and its decisions fairly enforced, one can hope that wars of aggression can be deterred and the world will become a more humane and peaceful place for everyone.

ANNEX

Amendment of the Rome Statute to Bring Aggression Within ICC's Jurisdiction

In the exercise of its jurisdiction over the crime of aggression pursuant to Article 5- 1(d) and 2, the following provisions, adopted in accordance with Articles 121 and 123, shall apply:

For the purpose of this Statute, aggression shall be defined as set forth in General Assembly Resolution 3314 (XXIX) on 14 December 1974.

No complaint of aggression may be brought under this statute unless the Security Council has first determined, in conformity with the principles of justice and international law as laid down in Article 1 of the Charter of the United Nations, that a State has committed the act of aggression which is the subject of the complaint.*

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for the crime of aggression.**

The Court shall be completely independent in determining the guilt or innocence of the accused.

COMMENTARY

The Proposed amendment upholds the 1974 GA consensus definition, the Judgment and Charter of the Nuremberg and Tokyo tribunals, the consensus recommendations of the International Law Commission as well as relevant provisions of the Charter of the United Nations. The last sentence emphasizes the independence of the ICC.

The UN Charter (Article 39), GA Resolution 3314 (Art.4) and the ILC all confirm the primary authority of the Security Council to determine whether aggression by a State has oc-

* I.L.C. Consensus Draft Statute for ICC, U.N. GAOR, 49th Sess., Supp. No. 10, at 84, art.23(2), U.N. Doc. A/49/10 (1994) (except for reference to principles of justice and law).

** I.L.C. Consensus Draft Code of Crimes, U.N. GAOR, 51st Sess., Supp. No. 10, at 83, art. 16, U.N. Doc. A/51/10 (1996).

curred. Reference to the principles of *justice and international law* has been added to stress the Council's legal obligation as specifically prescribed in the UN Charter. Limiting criminal culpability to those individuals who occupied high positions of responsibility confirms the Nuremberg principles and adds the necessary elements required by criminal law.