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A NUremberg LEGACY: THE CRIME OF AGGRESSION[†]

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As the sole surviving Nuremberg War Crimes prosecutor, in my 97th year I remain a believer in the rule of law. While there will inevitably be people who believe, as has been believed for centuries, that military power is how a nation measures its worth, many who oppose the strengthening of international criminal law simply lack the imagination necessary for creating a more peaceful world.

I was a combat soldier in World War II and was awarded five battle stars for not being killed in any of the major battles. I have prosecuted mass murderers, understood their mentality, and heard their arguments. These individuals were not wild animals. These were educated patriots for their own country. I have seen that war makes murderers out of people who are otherwise normal human beings. And I have come away with the determination that what has been glorified for centuries as heroic and necessary for the strength, prestige, and power of a nation is really just a horrible thing. It is a point of view which was not invented by this poor immigrant boy from Transylvania; it was espoused by the much admired President Dwight D. Eisenhower in many speeches in which he said very specifically that the world can no longer rely on force but must turn to the rule of law or else it will end all civilization.¹

† Comment at 2015 ASIL Conference at panel on the ICC Crime of Aggression.

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1. See, e.g., "The peace we seek and need means much more than mere absence of war. It means the acceptance of law, and the fostering of justice, in all the world." Dwight D. Eisenhower, 282-Radio and Television Report to the American People on the Developments in Eastern Europe and

In 1945, with the world still reeling from World War II, the trial of the major German war criminals before the International Military Tribunal (IMT) in Nuremberg began.² Nuremberg prosecutors, myself included, tried and convicted 161 of the defendants in the IMT and Subsequent Nuremberg Trials for crimes against peace, crimes against humanity, war crimes, and the crime of aggression.³ About a half century later, the International Criminal Court (ICC) was given jurisdiction over crimes against humanity, genocide, and war crimes.⁴ The progress, however, has been slow.

The ICC is a prototype, and it is just beginning. Just as the first computer occupied most of a room and now you carry it in your pocket, so it will be for international criminal law. If you believe in the rule of law as I do, then you must seek to find a way to try to stop this horrible thing called war. We must continue to build on the Nuremberg legacy and the progress of the ICC to strengthen the rule of law through a more effective and robust international criminal legal system.

The crime of aggression has fueled much debate in recent years despite its effective use at the Nuremberg trials so many decades ago. The Rome Statute of the ICC did not initially include punishment for aggression. At the first review conference of the ICC in Kampala, Uganda, in June 2010, an amendment was adopted to grant the ICC jurisdiction over the crime of aggression.⁵ The requirements specified in the amendment, however, have not been met as of the writing of this piece so aggression remains outside the jurisdiction of the ICC.⁶ Many people get caught up in the supposed difficulties of defining aggression. I believe it is readily definable: the use of armed force that was not in self-defense and has not been approved by the Security Council, knowing that it will inevitably kill large numbers of

the Middle East, THE PRESIDENCY PROJECT (Oct. 31, 1956), *available at* <http://www.presidency.ucsb.edu/ws/?pid=10685>.

2. 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUERMBERG, 14 NOVEMBER—1 OCTOBER 1946, Judgement (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

3. FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 241 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf.

4. Rome Statute of the International Criminal Court, adopted on July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002).

5. Amendments to the Rome Statute of the International Criminal Court, Adoption of amendments on the crime of aggression (Nov. 29, 2010), *available at* <https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf>.

6. *Status of ratification and implementation*, THE GLOBAL INSTITUTE FOR THE PREVENTION OF AGGRESSION, <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (last visited July 17, 2016).

innocent civilians. But perhaps it is too difficult to reach consensus using that term. Perhaps it is too loaded with political anxieties and “manifest violations of” this and that. Perhaps we should not call it aggression at all. Instead, let’s call it something more acceptable, and call it what it is: a crime against humanity.⁷

Nearly everybody would agree that crimes against humanity should be diminished to the extent possible. We are never going to completely stop people from killing each other—it has been happening since Cain slew his brother Abel—but we may be able to deter it by letting it be known that those responsible will be held to criminal account. Otherwise, they will continue to send young people out to kill other young people that they do not even know, who have never done them any harm, and may never have done harm to anyone. They send those young people out to kill as many people as they can. And when you get tired of killing each other you go home and you wait a while and you start again. That is the present system.

We cannot sit here and say that any proposal to diminish and criminalize aggression is too complicated or that it is too difficult, cannot be interpreted or defined. One way to prevent aggression is to say that those who are responsible will answer in a court of law. As was held in Nuremberg, this is a crime for which an individual can be held responsible, and that individual must be held to account in a competent court of some kind to explain their behavior.

The world is changing. I have seen war and its horrors, but that is nothing compared to what still awaits in store from cyberwarfare. You will not hear it, you will not see it, you will just wake up in a different reality. So we need new thinking based on the old, and we must recognize that law has a role to play. U.S. Secretary of State Elihu Root, the first and longest-serving president of the American Society of International Law, once said the following: “Make us effective for the cause of peace and justice and

7. Under the Rome Statute, Crimes Against Humanity are defined as follows:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) . . . sexual violence. . . ; (h) Persecution against any identifiable group or. . . ; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute of the International Criminal Court art. 7, adopted on July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002).

liberty in the world.”⁸ Law is the medium for doing that. It has its problems, but do not destroy it. We must find a way to deter that particular crime which, as was stated repeatedly in Nuremberg, is the supreme international crime.

8. Engraved above a portal at Harvard School of Law.