Ever since the Judgment at Nuremberg, it has been universally binding law that aggressive war is not a national right but an international crime. The most fundamental human right is to be able to live in peace. Yet, since 1945, an estimated 170 million people have been killed in armed conflicts but no one has been held criminally accountable for their deaths. It is high time for the world community to get aggressive about deterring, punishing and suppressing aggression.

FOUNDATION STONES

Over fifty years ago, the Charter for the International Military Tribunal (IMT) at Nuremberg declared that three categories of offenses could be punished by the international tribunal: Crimes against peace (aggression), crimes against humanity and war crimes. Aggression was described in the IMT's Judgment as "the supreme international crime" and it was affirmed that crimes are not instigated or committed by abstract entities but only by people. Any individual - regardless of rank or station - responsible for "planning, preparation, initiation or waging a war of aggression..." was guilty of a Crime against Peace. Before any accused person could be held criminally responsible, certain customary
elements of criminality had to be present. The Charter stipulated that only those could be convicted who were proved to be "leaders, organizers, instigators and accomplices" to the crime. Persons occupying positions of such high responsibility were deemed to possess the required intent and capacity to be held accountable under ordinary principles of international and criminal law. (1)

Contrary to popular belief, the Charter was not an arbitrary assertion of power by vengeful victors. It was, as spelled out in detail by learned judges, an irrefutable expression of existing law that had been evolving over a long period. To be sure, the composition of the Tribunal was admittedly imperfect and its reach was not universal but that did not detract from the guilt of the defendants who were convicted or the fairness of the trials. Both Charter and Judgment were unanimously affirmed by the first General Assembly of the United Nations - reinforcing their standing as existing and binding international law. American prosecutors insisted that international law had to apply equally to everyone. "We must never forget", said Robert Jackson, Chief U.S. Prosecutor at the IMT, "that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."

The task of codifying the Nuremberg principles into a universally binding Code of Crimes against the Peace and Security of Mankind, as well as the creation of an International Criminal Court, fell to the United Nations where it was referred to various special committees. Despite political antagonisms between the Soviet Union and the United States and their respective allies, all seemed agreed that aggression had to be included in the criminal code but some argued that first it had to be more specifically defined. Until there was an agreed definition, no code would be acceptable and without a code there was no need for a criminal court. Thus definition, code and court were all linked - and gradually deposited in the deep freeze by the "cold-war". During years of fruitless discussion, Diplomats explained diplomatically: "The time is not yet
ripe." Decision-makers of powerful nations seemed to prefer war to the uncertainties of international law.

As the cold-war thawed, a consensus definition of aggression was finally reached by the U.N. in 1974 - after about 40 years of intermittent haggling. The generic outline of acts that would constitute the crime was quite clear:

"Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State..."

The definition then listed a number of prohibited transgressions such as "invasion", "attack", "bombardment", "blockade" and similar acts that might qualify as aggression. The definition confirmed that "A war of aggression is a crime against international peace" but no provision was made to hold accountable those responsible for the crime. (3)

As in many U.N. agreements, the price for consensus was the insertion of artfully contrived phrases that parties might cite to their own advantage. Thus, it might be permissible, under certain circumstances, to use armed force when seeking "self-determination" or freedom from "alien domination". Until the causes of violent unrest could be ameliorated, no legal restraints would prove acceptable to peoples who believed desperately in the righteousness of their particular cause. To balance, or negate, the exculpating clauses, it was reconfirmed that only the Security Council was authorized to decide whether aggression by a State had occurred. The new definition could serve as a guide but it could neither enhance nor diminish the Council's Charter authority "to determine the existence of any threat to peace, breach of the peace, or act of aggression..." and to decide upon measures to restore peace. Since the Security Council was essentially a political body with no special competence to conduct criminal trials, the question of punishment remained unresolved. (4)
There was no international court in the world to try those who committed the most atrocious international crimes. Unless the perpetrators could be defeated and captured, aggression, genocide and crimes against humanity could be committed with impunity. The existence in future of a Nuremberg-type international tribunal made possible by the unconditional surrender of the wrongdoers seemed remote. The Statute of the International Court of Justice restricted the jurisdiction of that august body to disputes between consenting States. It could have no criminal jurisdiction without a difficult statutory amendment. The Security Council was authorized to establish "subsidiary organs" "for the performance of its functions" and presumably could create a new judicial agency to cope with individual crimes that threatened world peace. The fact that there existed no criminal court to cope with devastating international crimes revealed a glaring gap in the international legal order.

The situation began to change when, following the dissolution of the Soviet Union, Yugoslavia was fractured by rival ethnic groups declaring their independence as sovereign states. Worldwide television showed Nazi-type concentration camps in Bosnia and Serbia. U.N. investigators, led by Professor M. Cherif Bassiouni of DePaul University, confirmed that thousands of women, mostly Moslem, were being systematically raped and murdered. The outrages were so shocking that it was no longer possible for the world to do nothing. Once the political will to act was aroused, the Security Council was able to create the ad hoc International Criminal Tribunal for Former Yugoslavia (ICTY) in very short order. Highly competent prosecutors and judges were appointed with approval of the General Assembly. Despite inadequate support in arresting major offenders, the ICTY managed to overcome great administrative hurdles and established a fully functioning new criminal court in the Hague to bring before the bar of international justice some of those responsible for crimes against humanity and war crimes committed in former Yugoslavia after 1992. It was the first truly international criminal court since Nuremberg. (5)
In 1992 half-a-million men, women and children were butchered in genocidal slaughter by rival tribes in Rwanda. By 1994, the Security Council had created another ad hoc tribunal to bring responsible leaders to trial. (6) Neither the International Criminal Tribunal for Rwanda (ICTR) nor the ICTY were authorized to deal with the crime of aggression since that was not the burning issue that demanded immediate action. Nor could they deal with similar barbarities being committed in Burundi, Algeria, the Congo and other countries. Ad hoc courts, created after tragedies occurred, to punish a limited number of crimes committed in a limited area during a limited time, is not an ideal way to assure universal justice. It was becoming obvious that deterrence would be enhanced by an independent permanent court set up before outrageous offenses against human dignity are committed. The war crimes trials in Nuremberg, Tokyo and elsewhere, the consensus definition of aggression and the two ad hoc tribunals created by the Security Council were foundation stones illuminating the path toward a permanent International Criminal Court (ICC).

STEPPING FORWARD IN ROME

The subject of international criminal jurisdiction had been languishing on the U.N. agenda for almost fifty years while armed violence and human rights outrages continued to disgrace the human landscape. The availability of instantaneous reports of atrocities anywhere in the world sparked renewed demands by human rights activists for action to curb the publicized depravities. Small nations were apprehensive about tribunals created a la carte by the privileged States sitting on the Security Council. The General Assembly called for new committees to expedite the movement toward the creation of a permanent International Criminal Court. Prodded by the Assembly, the International Law Commission (ILC) finally concluded its 60 article draft Statute for an International Criminal Court in 1994. The proposed court would be competent to deal only with the three Nuremberg Charter crimes: aggression, crimes against humanity and war crimes, to which were added genocide and
crimes prohibited by widely-accepted treaties prohibiting such crimes of
international concern as torture, hostage-taking, aircraft hi-jacking,
apartheid, drug trafficking and attacks on U.N. personnel. (7)

In 1996, the ILC (after 48 years) also completed its draft *Code of Crimes
against the Peace and Security of Mankind*. The first crime listed was
the Crime Against Peace.

"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 a crime of aggression."

It was agreed that aggression (without further definition) was universally
recognized as a crime in international law and was therefore a
"peremptory norm" which meant that it was fully binding on all states.
All 34 ILC members concluded that failure to include it would be
retrogressive fifty years after Nuremberg and that it could be left to
practice to define the precise contours of the crime. Before any
individual could be accused of aggression, however, it would be
necessary for the Security Council to determine that aggression by a
State had occurred since the UN. Charter specifically assigned that
function to the Council and it had been accepted by all member States.
(8)

Using the ILC drafts as a basis, new U.N. Preparatory Committees
(PrepCom) put their shoulders to the wheel to comply with Assembly
mandates calling for an ICC Statute by July 1998. Delegates from all
over the world, shepherded by PrepCom Chairman Adriaan Bos of the
Netherlands, after years of diligent efforts, produced a draft that
incorporated the views of 185 nations with different legal traditions. As
should have been expected, the text was covered by over a thousand
brackets indicating divergent opinions on terminology and substance. (9)
The most dramatic change was little noticed: no nation spoke out against the idea of having a permanent International Criminal Court. The time for an ICC was finally ripe!

A Diplomatic Conference in Rome, chaired by Phillipe Kirsch of Canada, who replaced the ailing Adriaan Bos, hammered away at the draft for five full weeks of intense debate. At the end, on July 17, 1998, nations from all over the world - by overwhelming majority - voted to create the first permanent International Criminal Court in human history. Many delegates and representatives of non governmental organizations wept with joy and it was generally hailed as a great event. U.N. Secretary-General Kofi Anaan called it "a gift of hope to future generations". (11)

Not all nations shared the enthusiasm. To be sure, the draft was far from perfect. China remained steadfast in its focus on the need to protect its national sovereignty while India objected to provisions that failed to respect the equality of all states. Israel said it would have been honored to endorse the treaty but regrettably was unable to accept a last-minute insertion of a political clause that seemed to threaten its resettlement policies. A few Islamic States also found parts of the statute objectionable. Many provisions, such as the rules of procedure and financing for the court, would have to be worked out later. All eyes were focused on the United States, as it made an anticipated last-minute procedural motion that might have derailed the Statute. When the U.S. motion was defeated by an overwhelming vote of 120 to 7, it became clear that the Statute would be accepted by almost all participants. The hall burst into sustained wild applause.

On September 22, 1997, President William Clinton had personally come to the General Assembly to call for an ICC before the end of the century. His views had repeatedly been echoed by Madeleine Albright as America's representative at the U.N. and as Secretary of State. The U.S. had always been a strong supporter of the ad hoc tribunals for Yugoslavia and Rwanda and its strong delegation had worked actively to
improve the wording of the Statute. Certainly the U.S. had a few substantive objections but these were not generally shared by others and did not seem to be irreconcilable. Many concessions had been made to accommodate U.S. concerns yet, at the end, American Ambassador David Scheffer was unable to go along with the views of most other States. Domestic political considerations certainly influenced American recalcitrance. (12).

The Chairman of the U.S. Senate Foreign Relations Committee, without waiting for the ICC treaty to be submitted for the needed Senate's advice and consent before the treaty could be ratified, defiantly declared that the treaty would be "dead on arrival." The Defense Department had also made plain that the Pentagon was strongly opposed to empowering any foreign court to try American nationals for war crimes. Conservatives with isolationist sentiments launched a vigorous legislative and media campaign to abort the ICC before it was born. These were among the concerns that encouraged the U.S. not to sign the accord - even though signature without ratification would have imposed no obligation other than a duty not to subvert the treaty. The President as Commander-in-Chief and Executive authorized to negotiate and sign treaties seemed to allow his Constitutional powers to be eroded to maintain political tranquility at home. (13)

Perhaps the most contentious issue faced by the delegates was the inclusion of the crime of aggression within the jurisdiction of the new criminal court. The American Prosecutors at Nuremberg, including U.S. Supreme Court Justice Robert M. Jackson and General (later Columbia Professor) Telford Taylor - both men of great legal ability and distinction - considered that the most important achievement of the Nuremberg trials was the outlawry of aggressive war. "It is high time", said Justice Jackson, in his report to the U.S. President on June 6, 1945, "that we act on the juridical principle that aggressive war-making is illegal and criminal." The conclusion that aggression was a punishable crime was not a legal doctrine invented at Nuremberg. It resulted from the gradual evolution of a long series of warnings, treaties and
declarations following the first World War. After Hitler's aggressions and crimes against humanity during the second World War, with over 40 million killed, Jackson was convinced that civilization could not tolerate such wrongs being ignored because it could not survive their being repeated. (14)

Despite the clear views of the Nuremberg Charter and Judgment, the affirmation by the entire General Assembly, the opinions of Justice Jackson, Telford Taylor, other Nuremberg prosecutors and the entire International Law Commission, the United States was less than enthusiastic about including aggressive war as a crime within the jurisdiction of the ICC. The official U.S. position, stated long before the conference in Rome, was that "with respect to individual culpability the crime of aggression should be excluded..."at this stage." (15) Even when it became clear that most other nations favored the inclusion of aggressive war as a punishable crime, U.S. equivocation continued. Until the very end of the Rome conference it looked as though aggression would be dropped and not included in the statute of the ICC. Although the Rome Statute made plain that the ICC would not replace but only complement national courts that were unable or unwilling to punish the crimes, and that only future and not past crimes could be considered, career militarists disinclined to encourage new legal restraints on activities that some might consider criminal. They seemed to forget that the innocent need never fear the rule of law.

The main reasons given by states that objected to including aggression were that it seemed inadequately defined for inclusion in a criminal statute and it was feared that any role for the Security Council might destroy the independence of the court. The European Community and the Non-Aligned Movement, comprising about 30 states, were among those that insisted upon aggression being included. They were supported by "Like-minded States", an informal coalition of ICC supporters that finally included the United Kingdom. They favored a clarified definition yet one that would not detract from the Security Council's existing powers under the U.N. Charter. Germany pressed specific drafts along
those lines. Arab states wanted the 1974 definition, with its exculpating clauses, retained. During the very last frenzied days of the conference there simply was not enough time to reconcile the different views. In a skillful move, the Chairman struck a compromise whereby irreconcilable issues were deferred for possible reconsideration at a future time when the Statute might be amended or reviewed. (16)

It thus came about that aggression was listed (along with genocide, crimes against humanity and war crimes) as one of the four "core crimes" within the ICC's jurisdiction but the Court would not be authorized to deal with it until a much later date after certain specified pre-conditions were first met. The Parties would have to agree upon a provision defining the crime and setting out the conditions under which the court could exercise its jurisdiction - consistent with the relevant provisions of the U.N. Charter. The Statute must first have entered into force - which meant that it had been ratified by at least 60 nations. Then at least seven more years had to expire - presumably to test how reliably the ICC was functioning. The new provision had then to be approved by 7/8ths of the Parties and a dissenting Party could immediately withdraw from the Statute. (17) It was a significant victory that the crime of aggression was finally included but it may have been illusory. To say that aggression - the supreme crime - may only be prosecuted under conditions that may never be met, is to mock the dead, imperil the present and threaten future generations yet unborn.

CONCLUSION

The Nuremberg Judgments, as unanimously approved by the United Nations, created a noble precedent and held forth an implied promise to all the world that "never again" would genocide, aggression, crimes against humanity, and war crimes go unpunished. That promise has yet to be fulfilled. The Rome Statute for an International Criminal Court, building on the foundation stones of the ad hoc tribunals for Yugoslavia and Rwanda, was a great step forward in an irreversible evolutionary process. But it did not go far enough. The medieval notion of absolute
state sovereignty is absolutely obsolete in the new global age that appears on the horizon. In a democratic world, sovereignty belongs not to the State but to the people. The modern "high-tech" universe, saturated with weapons of mass destruction, cries out for a new way of thinking about how this planet is to be managed. New international "rules of the road" are being developed to benefit and protect people everywhere.

It is impossible to predict how long it will take for powerful nations to ratify any treaty that may curb outmoded notions of sovereign power. If the treaty route should fail or falter, the Security Council has demonstrated that it has the authority and ability to create new ad hoc tribunals to prosecute those whose deeds threaten world peace. Smaller nations fear that a politically oriented Security Council might jeopardize the independence of a permanent judiciary. To gain greater acceptance as the impartial guardian of universal security, the Council must reform itself to fulfill the role originally envisaged by the U.N. Charter. The unfair Charter provisions giving a veto right to only a few privileged Members can, and should, be allowed to lie dormant or be modified to reflect the Council's proper role as the protector of humanity. Required changes can be made procedurally without having to traverse the laborious Charter-amendment route; all that is needed is the political will to do so. (18) Non-governmental organizations of all kinds - religious, political and humanitarian - that propelled the victory in Rome, have an important role to play in educating those who have the destiny of peoples in their power.

The Nuremberg Charter contained a completely adequate definition of aggression that proved acceptable to IMT Judges and many other experts. It is absurd to believe that skilled lawyers are unable to define the crime in a way that will be clear, binding and fair. All that is needed now is to delete the few ambiguous clauses that were inserted in the 1974 definition to achieve consensus. (19) Those provisions seemed to allow unrestrained violence to cope with political problems that, experience has shown, can only be resolved by peaceful means. The
primary role of the Security Council is set by the U.N. Charter that binds all nations: to determine when aggression by a State has occurred. Only an independent court can determine the guilt or innocence of individual perpetrators. If the ICC proceeds without such a prior Council determination, a defendant accused of aggression may argue successfully that the Court is usurping the Council's perogatives and by-passing the Charter. If the ICC finds the accused not guilty of aggression, it can and should release the prisoner - regardless of the Security Council determination. The nexus between Council and Court offers a balance that serves the cause of peace. Failure to punish aggression will allow perpetrators of the worst international crime to remain immune - and the world will continue to live in fear.

A new Preparatory Commission will soon begin to lay the ground for the effective functioning of the ICC and it should still be possible to reconcile views by consensus. (20) The basic question that must be answered soon is whether sovereign States are really willing to change traditional ways of thinking and acting in order to move toward a more secure and humane world. The enormous expenditures for weaponry of infinite destructive capacity and the appetite for violence must be curbed. War-making itself must be seen as unlawful. The war-ethic must be replaced by a peace-ethic and powerful nations must be willing to take a chance for peace by finally turning to law rather than war. Preventing aggression by punishing aggressors remains a primary goal of the international legal order so that all who dwell upon this planet may live in peace and human dignity.

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Notes
1- Extracts of the Nuremberg Charter and Judgment can be found in B. Ferencz, Defining International Aggression: The Search for World Peace (Dobbs Ferry N.Y., Oceana Publ., 1975) Vol. 1, Documents 18, 19, 20.


13- See many press reports from July 17 to July 31, 1998.

14- Ferencz, Aggression, supra n.1, Doc.18(b)


17-Rome Statute, Articles 5, 121, 123.


19- Ibid. Ferencz, Chap. 6.