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NUREMBERG AND CRIMES AGAINST PEACE

*Henry T. King, Jr.**

The Frederick K. Cox International Law Center at Case Western Reserve University sponsored a symposium, “The International Criminal Court and the Crime of Aggression,” on September 26, 2008. The purpose of the conference was to assist the ICC Assembly of State Parties’ Special Working Group on the Crime of Aggression create a workable definition of aggression and the conditions under which the Court could exercise its jurisdiction over it. This transcript contains the remarks of Henry T. King, who delivered the opening address at the symposium.

TRANSCRIPT

The international community has long sought to define “aggression” in a way that would serve as an effective tool in sustaining peace. I think that for this conference, I could serve you best by reviewing the origin of the Nuremberg aggressive-war charge—a crime against peace,¹ as defined by the victorious powers in the London Charter of August 8, 1945—and tracing the role the charge played through the twelve subsequent proceedings at Nuremberg.² By evaluating the checkered success of the aggression charge, I hope to provide context for the present effort to define aggression. Context will be vital to drafting a definition that will be both effective and acceptable to seven-eighths of the 106 or so nations of the governing assembly of states that have ratified the Rome Statute of July 1998.³

One of the revolutionary aspects of Nuremberg was that it held individuals responsible for the criminal acts they committed in the name of their country. Aggressive war was, up until then, an “act of state” that did not lead to individual liability. The new approach was based largely on the work of William C. Chanler, a law partner of the Secretary of War, Henry

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¹ London Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

² See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 47 (2007) (detailing the twelve subsequent proceedings).

³ Rome statute of the International Criminal Court art. 121 and List of Signatories, July 17, 1998, 2187 U.N.T.S. 3, available at http://www.iccopi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

L. Stimson, who succeeded in getting it adopted as U.S. Policy.⁴ Chanler was among the first to argue that there should be individual liability for engaging in crimes against peace.⁵

The basis of Chanler's argument that aggression should be an international crime was the Kellogg Briand Peace Act of 1928,⁶ which outlawed war as an instrument of national policy. The Act was ratified by over sixty nations, including Germany.⁷ Chanler's contribution was to criminalize aggression and to punish individuals for starting aggressive war.⁸ His approach was intended to correct the situation where individuals like Kaiser Wilhelm II, who helped launch World War I, would go scot-free after the war.

President Franklin Delano Roosevelt adopted Chandler's idea on January 3, 1945,⁹ and thereafter it became a part of American policy to include it in war crimes proposals.¹⁰ Roosevelt died on April 12, 1945, and on the following day Justice Robert Jackson gave a speech before the American Society of International Law in which he argued for the prosecution of Nazi war criminals and emphasized the importance of a fair trial.¹¹

At the suggestion of Samuel Rosenman, who had handled issues related to war crimes tribunals on behalf of President Franklin Roosevelt, President Truman appointed Robert Jackson to negotiate arrangements for the war-crimes trials and to represent the United States at the trials themselves.¹² Jackson strongly advocated for an international tribunal. His views sometimes ran counter to those of the other three countries participating in the war crimes project.¹³ Usually he prevailed. Jackson was dynamic and eloquent, and without him there might never have been any Nuremberg trials at all.

The four victorious, major powers met in London in the summer of 1945 to develop a charter governing the future International Military Tribunal (IMT) at Nuremberg.¹⁴ In preparing the United States' position, Jus-

⁴ See Benjamin B. Ferencz, *Tribute to Nuremberg Prosecutor Jackson*, 16 PACE INT'L L. REV. 365, 366 (2004)

⁵ See Jonathan A. Bush, "The Supreme...Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2324 (2002).

⁶ *Id.* at 2355.

⁷ *Id.* at 2334.

⁸ *Id.* at 2324.

⁹ See *id.* at 2363.

¹⁰ *Id.*

¹¹ See *id.* at 2365-66.

¹² See Ferencz, *supra* note 4, at 366.

¹³ *Id.*

¹⁴ *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 476-477 (1995).

tice Jackson included charges not only of “crimes against peace,” but also of “conspiracy to wage aggressive war.”¹⁵ The concept of conspiracy as an independent crime was not part of the Napoleonic Civil Code followed by the continental states,¹⁶ so France and the U.S.S.R. initially opposed including conspiracy as an independent crime.¹⁷ This created rough going for Jackson, but he eventually prevailed.¹⁸

In approaching Nuremberg, the Soviet representatives wanted the charges of aggressive war limited to what the Nazis did, with no generic application.¹⁹ The Russians, I believe, felt that generic charges could extend to cover some of their own acts. At the same time, the French indicated that they wanted to limit the charges to violations of an established treaty.

Jackson’s definition of crimes against peace, which was included in the London Charter, read as follows: “Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in any common plan or conspiracy for the accomplishment of any of the foregoing.”²⁰

At Nuremberg, I worked on the case against the German general staff and high command. In fact, I wrote part of the final brief against the general staff and high command. I remember very clearly the evidence that we had against some members of this group on the issue of aggression. The evidence came from Hitler’s own files, prepared by his adjutants.

For example, at a meeting with his top commanders on November 5, 1937, Hitler said the following: “The history of all times—Roman Empire, British Empire—has proved that every space expansion can only be effected by breaking resistance and taking risks.” He continued “the question for Germany is where the greatest possible conquest could be made at the lowest cost. . . . The German question can only be solved by force and this is never without risk.”²¹

Later, on May 23, 1939, while meeting with his military commanders in the Reich Chancellery, Hitler announced his decision to attack Poland at the first suitable opportunity. He said: “There will be war. Our task is to isolate Poland.”²²

¹⁵ Bernard D. Meltzer, *Robert H. Jackson: Nuremberg’s Architect and Advocate*, 68 ALBANY L. REV. 55, 57 (2004).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Bush, *supra* note 5, at 2369.

²¹ XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 431 (1948).

²² *Id.* at 441–42.

On August 22, he again met with his top commanders and reiterated his decision to make war on Poland. He told them: "Now, Poland is in the position in which I wanted her . . . I am only afraid that at the last moment some *Schweinehund* will make a proposal for mediation."²³

"I shall give a propagandist cause for starting the war—never mind whether it be plausible or not. . . . The start will be ordered probably by Saturday morning."²⁴

A number of world leaders appealed to Hitler to not force war with Poland.²⁵ But their appeals fell on deaf ears, and on August 31, Hitler issued his final directive for the attack on Poland. The attack was launched on the morning of September 1, 1939. It marked the start of World War II.²⁶

There were a number of the defendants at Nuremberg who attended these meetings with Hitler and many were charged by the IMT with aggression and conspiracy to commit aggression.²⁷

The Nuremberg judges took a conservative view of the conspiracy charge. The judgments of the IMT reflected this conservative stance.²⁸ The Tribunal acquitted fourteen of the twenty-two defendants charged with conspiracy.²⁹ But, it convicted twelve of the sixteen defendants charged with crimes against peace, and acquitted only four.³⁰

The problem with the judgment of the IMT in its handling of the aggression charge and the conspiracy-to-commit-aggression charge is that it does not contain significant generic language dealing with the concept of aggression. The IMT came down hard against aggression, saying it is "the supreme international crime," which included, in essence, all other war crimes; but the Tribunal limited its discussion to the factual situations involving particular individuals.³¹ The Tribunal provided no sweeping discussion on aggression, per se, or what other prerequisites (e.g., rank) there are for convicting particular individuals of aggression. In other words, the IMT judgment left open the question of how involved in the policy of aggression an individual would have to be in order to be convicted. Specifically, the

²³ *Id.* at 442–43.

²⁴ *Id.* at 443 (that Saturday was August 26).

²⁵ *Id.* at 444.

²⁶ *Id.* at 444–45.

²⁷ *Id.* at 441.

²⁸ *See id.* at 522.

²⁹ *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 226 (1949).

³⁰ John F. Murphy, *Crimes Against Peace at the Nuremberg Trial*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 141, 152 (George Ginsburgs & V.N. Kurdiavtsev eds., 1990).

³¹ TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 21, at 427.

Tribunal never resolved whether an individual must have been on a policy level where he could have influenced policy but failed to do so.

In essence, the IMT held in its judgment that aggressive war was the ultimate international crime, but did not elucidate the scope of the aggressive-war charge, or distinguish its application to lower-ranking government officials and non-government actors, from those tried at Nuremberg.

Telford Taylor, my superior at Nuremberg, said that certain questions about crimes against peace remained unanswered after Nuremberg.³² How to assess the accused individual's relation to the unlawful enterprise? What degree of knowledge of the plans or of the aggressive character of the war must the accused individual have possessed? What type of action must he have taken? How important a position must he have occupied? How influential in determining national policy must he have been? At what stage of the criminal enterprise must he have become involved? And, is it sufficient that he merely waged aggressive war after its inception if he had no role in its planning or initiation?

Criticism of the decision has been based upon the lack of any authoritative definition of aggressive war. The question which proved most troublesome was how to assess the guilt of the accused individuals.

The principles laid down in the judgment of the IMT were endorsed by the General Assembly of the United Nations in late 1946.³³ The landmark IMT case was followed by twelve subsequent proceedings at Nuremberg.³⁴ Although the aggressive-war charge was raised in a number of these proceedings, it struck out in all but one of them. Control Council Law Number Ten, enacted by the four powers in December, 1945, governed the subsequent Nuremberg proceedings.³⁵ The definition of crimes against peace was broadened to include not only aggressive war, but also "invasions" (e.g., Austria and Czechoslovakia).³⁶

There were twelve subsequent proceedings at Nuremberg. In each of the industrialists' trials crimes against peace was charged, but there was not one finding of guilt.³⁷ It was a different story in the ministries case, which was the last of the Nuremberg subsequent proceedings. In the ministries case, five of the defendants were convicted of crimes against peace—Von Weizsacker, Woermann and Keppler of the Foreign Office, Lammers,

³² TELFORD TAYLOR, *supra* note 29 at 221–22.

³³ Benjamin B. Ferencz, *The Holocaust and the Nuremberg Trials*, UN CHRONICLE ONLINE EDITION, 2005, <http://www.un.org/Pubs/chronicle/2005/issue4/0405p03.html>.

³⁴ DRUMBL, *supra* note 2, at 47.

³⁵ See AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* 513–17 (Elizabeth D. Schmitt trans., 1959).

³⁶ See *id.* at 513–14.

³⁷ TAYLOR, *supra* note 29, at 196–97.

Chief of Hitler's Reich Chancellery, and Koerner, Goring's alter ego in the four year plan.³⁸ These were the first convictions for the commission of crimes against peace that were obtained at Nuremberg since the IMT judgment, and to quote General Telford Taylor, the chief prosecutor, "in a vastly altered international climate."³⁹ This quote is from Taylor's final report to the Secretary of War.

Judgment in the Ministries case was rendered between April 11 and April 13, 1949.⁴⁰ In a supplementary decision upon motion in December 1949, Judge McCoy inexplicably reduced the sentences of Von Weizsacker and Woermann from seven years to five.⁴¹ But, that same month, the crimes-against-peace convictions of Keppler, Lammers, and Koerner were reaffirmed.

The Ministries judgment also broke new ground by holding that the "invasions" of Austria in February 1939 and of post-Munich Czechoslovakia in March 1939, each of which was a bloodless conquest—a victory achieved by an overwhelming display of military might without resort to a "shooting war"—were also wholly aggressive in character and were, accordingly, crimes against peace.⁴²

In the Tokyo trials, which followed Nuremberg, General MacArthur, the U.S. commander, appointed judges from a number of countries to pass judgment on the evidence against the Japanese war criminals.⁴³ A number of the defendants were found guilty of crimes against peace and punished by hanging for the commission of the crimes.⁴⁴

After Nuremberg and Tokyo, the Cold War ensued, and there was no longer any punishment in the courts for aggression.⁴⁵ The special war-crimes tribunals, which were established by the United Nations after the end of the Cold War, were designed to try crimes against humanity and genocide. But the charge of aggressive war was never raised in those courts.⁴⁶

When plans for the International Criminal Court were being developed in 1998, three former Nuremberg prosecutors, including Ben Ferencz

³⁸ *Id.* at 214–15.

³⁹ *Id.* at 196–97.

⁴⁰ United States Holocaust Memorial Museum, Holocaust Encyclopedia, Subsequent Nuremberg Proceedings, Case #11, the Ministries Case, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007082> (last visited Feb. 2, 2009).

⁴¹ Jonathan Friedman, *Law and Politics in the Subsequent Nuremberg Trials, 1946-1949*, in *ATROCITIES ON TRAIL* 75, 89 (Patricia Heberer & Jurgen Matthaues eds., 2008).

⁴² TAYLOR, *supra* note 29, at 222–23.

⁴³ See DRUMBL, *supra* note 2, at 49.

⁴⁴ *See id.*

⁴⁵ See Antonio Cassese, *On Some Problematical Aspects of the Crime of Aggression*, 20 *LEIDEN J. INT'L L.* 841, 844 (2007).

⁴⁶ *Id.* at 842.

and me, worked very hard toward naming aggression as a crime in the ICC's founding document, the Rome Statute.⁴⁷ Although aggression was included, it was not defined in the statute, and it was not until later that a working group of the assembly of states, whose nation members have ratified the Rome Statute and have oversight over the International Criminal Court, began trying to formulate a suitable definition that could be ratified by seven-eighths of the membership of the assembly of the states.⁴⁸ That project will hopefully be completed by 2010,⁴⁹ and I think the time is ripe for a comprehensive definition of aggression to be included in the amended Rome Statute.

The charge of aggressive war had an uneven early history. It was an American creation, largely suggested by William C. Chanler, and it was endorsed by President Roosevelt as early as 1945. But, although it became an integral part of the Nuremberg tapestry, the IMT never specified what generic ingredients were necessary for a finding of aggression. Yet a considerable number of the defendants in the IMT and Ministries Cases were found guilty of aggressive war, and that, in itself, was important. Unfortunately, the holdings in those cases were limited to the guilt or innocence of the particular defendants, so the theory behind the aggressive war charge was never elucidated. Excepting the Ministries case, there were no crimes-against-peace convictions in the subsequent proceedings. Additional cases alleging crimes against peace, brought against industrialists and members of the military, were always dismissed, both at the time and throughout the Cold War.

We now have an opportunity to build a better world for the future by agreeing on a definition of aggression that can be used by the International Criminal Court. This is a golden moment in history, and I hope that we will take full advantage of it by securing a mutually acceptable definition which can be adopted for the world of states—some 106—that have ratified the Rome Statute.

We can no longer afford the existence of aggressive war. It is too costly, both in terms of its toll in human lives and its physically destructive effects on our planet.

The world waits—the time is late—this is why our conference today is crucial.

⁴⁷ See, e.g., Benjamin B. Ferencz, *Can Aggression be Deterred by Law?*, 11 PACE INT'L L. REV. 341, 342 (1999).

⁴⁸ See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CIC BACKGROUND PAPER ON THE CRIME OF AGGRESSION 1 (2007) http://www.iccnw.org/documents/Aggression_Background_Paper_ASP5ResumedSession_23Jan07.pdf

⁴⁹ See *id.* at 6.