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Manuel J. Ventura
The Peace and Justice Initiative

Matthew Gillett
International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor

THE FOG OF WAR: PROSECUTING ILLEGAL USES OF FORCE AS CRIMES AGAINST HUMANITY

MANUEL J. VENTURA*
MATTHEW GILLETT**

ABSTRACT

This Article considers the possibility of the prosecution of aggression as a crime against humanity before the International Criminal Court ("ICC"). First, it explores the constitutive elements of crimes against humanity and compares them to those of the crime of aggression. In doing so, it identifies a number of areas where aggression will assist in establishing critical elements required to sustain a conviction for crimes against humanity. Second, it presents a legal strategy whereby aggression can be adjudicated as an element of co-perpetration as a mode of liability when prosecuting crimes against humanity. In this manner, a factual finding that aggression has been committed can be made without entering a conviction per se *for the crime. Such a finding can then be considered at sentencing either as an aggravating factor or as indicative of the gravity of the crimes and could ultimately result in the imposition of a longer custodial sentence. Thus, whilst the ICC may not currently possess jurisdiction* ratione materiae *over aggression, this should not limit the ability of ICC prosecutors to substantively invoke the crime where crimes against humanity are committed as a result of the illegal use of armed force.*

> War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.[1]

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* Manuel Ventura is an AVINA Scholar in the LL.M Programme of the Geneva Academy of International Humanitarian Law and Human Rights. E-mail: manuel.j.ventura@gmail.com.

** Matthew Gillett is a Trial Attorney at the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). E-mail: gillettm@un.org. Both authors are Directors of The Peace and Justice Initiative, an NGO of international criminal law professionals that assists states in the national implementation of the Rome Statute of the International Criminal Court (www.peaceandjusticeinitiative.org). The views expressed herein are those of the authors alone and do not necessarily reflect the views of the institutions to which they belong.

1. United States of America et al. v. Göring et al., Judgment, *in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL—VOLUME 1: OFFICIAL DOCUMENTS 186 (International Military Tribunal 1947).

I. INTRODUCTION

The historic agreement on a definition for the crime of aggression reached at Kampala, Uganda in June 2010 brought to a close a long codification process that had remained outstanding since the end of World War II. However, the compromises necessary to arrive at a consensus decision mean that the International Criminal Court ("ICC") will not be able to exercise its jurisdiction over the crime of aggression until 2017 at the earliest.[2] In light of this reality, this paper examines the conditions in which illegal uses of armed force can instead be prosecuted as crimes against humanity, particularly where those responsible for launching such attacks are aware that their actions will result in a large number of civilian deaths.

The close relationship between armed conflict and crimes against humanity is hardly a new phenomenon. Indeed, at the time of the Nuremberg trials, crimes against humanity could not occur—as a matter of law[3]—in the absence of war.[4] In modern international criminal law, such a

2. According to the Kampala amendments, the earliest date that the ICC can exercise jurisdiction over the crime of aggression is 2017 and must be accompanied by a decision to activate the ICC's jurisdiction by states parties provided that at least one year has passed since 30 states have ratified the amendment: I.C.C. Res. RC/Res.6, Annex I, arts. 15 *bis* (2)–(3), 15 *ter* (2)–(3) (June 11, 2011). As of the end of February 2013, only four states—Liechtenstein, Trinidad and Tobago, Samoa, and Luxembourg—have done so. List of Acceptances and Ratifications to the Kampala Amendments to the Crime of Aggression, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (last visited Feb. 28, 2013). In short, the ICC is unlikely to try an aggression case in the foreseeable future.

3. The authors note that there has been some debate in the literature as to whether this requirement was substantive or jurisdictional in nature. For example, the ICTY opined in *Tadić* that it was jurisdictional. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm. As did Lord Millett of the House of Lords (as it then was) in *Pinochet (No. 3)*. R v. Bow Street Metropolitan Stipendiary Magistrate and Ors, Ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 272 (H.L.) (per Lord Millett). On the other hand, the Grand Chamber of the European Court of Human Rights (Korbely v. Hungary, Eur. Ct. H.R., App. No. 9174/02, ¶ 82 (2008)) and the late Professor Cassese (Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The* Kolk and Kislyiy v. Estonia *Case before the ECHR*, 4(2) J. INT'L CRIM. JUST. 410, 413 (2006)) appear to have taken the view that it was substantive. The Extraordinary Chambers in the Courts of Cambodia has taken the view that there is no consistency from the jurisprudence of the time to make a determination either way. Co-Prosecutors v. NUON Chea et al., Case No. 002/19-09-2007/ECCC/TC—E95/8, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, ¶ 20 (Oct. 26, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E95_8_EN.PDF.

4. It was because of this 'war nexus' that the International Military Tribunal held that crimes that occurred prior to 1939 could not constitute crimes against humanity as defined at that time. United States of America et al. v. Göring et al., Judgment, *in* TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 254–55.

war nexus is no longer necessary, having been definitively severed in the seminal *Tadić* decision[5] and confirmed, *inter alia*, in Article 7 of the Rome Statute of the ICC.[6] Although this evolution was crucial in extending the protection of international criminal law, particularly to instances where political or military leaders attack their own people in a systematic manner or on a widespread scale, the historical provenance of crimes against humanity demonstrates that the international community saw them as inherently linked to the ravages of war. In fact, that connection is still regularly apparent, as shown during the recent horrific violence in Libya and Syria. By re-linking the notion of war to the prosecution of crimes against humanity, the question addressed in this paper could be misinterpreted as suggesting a return to the antiquated notion that the interests of the international community are coterminous with the existence of inter-State conflict, and that crimes committed outside that context are beyond the reach of international law. However, such a conclusion should be avoided, and instead the following analysis is premised on the basis that crimes against humanity can indeed occur irrespective of the existence of an armed conflict. The focus is instead on whether the existence of an illegal use of armed force may be prosecuted within the legal parameters of a crime against humanity and the conditions under which this could occur. As such, this approach is born out of legal necessity given the ICC's current lack of jurisdiction over aggression, rather than due to a restrictive reading of crimes against humanity as a matter of substantive law.

The manner in which this paper seeks to respond to the problem posed is twofold. First, it considers how the factual basis of an unlawful use of force could be prosecuted as one or more crimes against humanity and could in fact assist in meeting the relevant criteria. A number of areas are identified in which the inherent nature of armed aggression will, by definition, satisfy certain substantive elements of crimes against humanity. Second, this paper presents a legal strategy whereby instances of aggression could be adjudicated when prosecuting crimes against humanity through the co-perpetration mode of liability and, as a corollary of this strategy, be considered as a factor for sentencing purposes.

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5. *Tadić*, Case No. IT-94-1-AR72, ¶¶ 140–141.

6. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

II. THE IMPACT OF ILLEGAL FORCE ON THE ELEMENTS OF CRIMES AGAINST HUMANITY

As with any criminal prosecution, the analysis of responsibility for crimes against humanity by way of an illegal use of force must start from first principles and at all times adhere to the fundamental principle of legality, better known by its Latin name *nullem crimen sine lege*.

In order for conduct to constitute an illegal use of force prosecutable as a crime against humanity, it must meet the definition of one or more crimes contained in Article 7 of the Rome Statute.[7] This axiomatic requirement cannot be deviated from, no matter how manifestly illegal the use of force happens to be.

Every crime in Article 7 includes the so-called *chapeau*[8] elements of a widespread or systematic attack against a civilian population and the demonstration of a State or organizational policy behind the attack.[9] It is also necessary to prove the elements of the underlying crime(s) such as murder, extermination, or torture,[10] and the corresponding mental elements.[11] Additionally, the Court's jurisdiction must be established either by way of referral by a State Party,[12] an *ad hoc* referral by a State,[13] a referral by the United Nations Security Council,[14] or the exercise of the Prosecutor's *proprio motu* powers to launch an investigation and prosecution.[15]

Whilst illegal uses of force must meet the same essential elements required for any other conduct in order to be considered a crime against humanity, its factual context would have profound effects on the prosecution of such a crime.

First, the occurrence of an aggressive attack would assist in demonstrating the *chapeau* elements. An illegal use of force is not an accidental event. It would almost inevitably be orchestrated at high levels of the State or of an organization and carried out according to a defined plan, thereby fulfilling the element of a systematic attack and also

7. *Id.* art. 22(1).

8. The *chapeau* elements are the general requirements under the Rome Statute that apply to all crimes against humanity and must be established in addition to the specific elements of the underlying crimes.

9. Rome Statute, *supra* note 6, arts. 7(1), 7(2)(a).

10. *Id.* art. 7(1)(a)–(k).

11. *Id.* art. 30.

12. *Id.* art. 14.

13. *Id.* art. 12(3).

14. *Id.* art. 13(b).

15. *Id.* art 15.

demonstrating a policy behind the attack, both of which are necessary elements required to establish a crime against humanity.[16] Moreover, if the illegal use of force were of a sufficient scale to meet the definition of aggression adopted at Kampala,[17] then it would also likely be widespread and thus again satisfy the *chapeau* element.

However, simply demonstrating that a widespread or systematic attack has been carried out according to a policy or plan is not sufficient to meet the *chapeau* requirements of a crime against humanity. The fundamental and defining characteristic of a crime against humanity is that the conduct must occur as part of an attack on a *civilian* population. In most situations that have come before international courts thus far involving some form of illegal use of force by States or State-like entities, the military action has been accompanied by targeted—but parallel—attacks against civilians. For example, the attack by the Bosnian Serb forces on the Srebrenica and Žepa enclaves in Bosnia and Herzegovina in July 1995, which arguably could constitute an illegal use of force, was accompanied by the mass killing and mistreatment of Bosnian Muslim men, women, and children by the Bosnian Serb forces under Ratko Mladić's command.[18] Similarly, Iraq's invasion of Kuwait in 1990 saw numerous attacks by Iraqi troops against Kuwaiti civilians.[19]

On the other hand, military operations, including those that involve the killing of civilians on a large scale, will not automatically fulfill the *chapeau* elements required for crimes against humanity. Military operations of any significant scale almost invariably entail civilian casualties, but such operations do not become crimes against humanity merely by virtue of that fact alone. In order to meet the requirements for prosecution as a crime against humanity in such circumstances, it must be shown that alongside the military operation an attack against a civilian population was also being conducted.[20] Only to the extent that civilian deaths form part of the attack on the civilian population, rather than being purely collateral damage of an attack aimed only at legitimate military targets, may the perpetrators be prosecuted for crimes against humanity.

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16. *Id.* arts. 7(1), 7(2)(a).

17. I.C.C. Res. RC/Res.6, Annex I, art. 8 *bis* (1) (June 11, 2011).

18. Prosecutor v. Popović et al., Case No. IT-05-88-T, Trial Judgement, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010), http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf.

19. *See, e.g.*, Amnesty International, *Iraq / Kuwait: Arbitrary Arrest / Fear of Torture: Haidar Ashkanani, Muhammad Kadhim, 'Ali Kadhim, 'Abd Al-Muhsin Kadhim, Jawad Al-Qallaf, Muhammad Ibrahim*, Doc. No. UA 344/90 (Aug. 29, 1990) (referring to the fear of torture committed by Iraqi forces against hundreds of people arrested since the Iraqi invasion of Kuwait).

20. *See, e.g.*, *Popović*, Case No. IT-05-88-T, ¶¶ 755, 775.

It is in this respect that the paradigm of an illegal use of force is potentially of significance. Its unlawful context could be used to refute the argument that the deaths can be classified as collateral damage resulting from a lawful military operation. Where civilian deaths flow from an unlawful use of force, it can be argued that they do not fall within the penumbra of permissible collateral damage. Indeed, certain prosecutors at Nuremberg took this notion even further and argued that all killing carried out by the perpetrators of aggressive wars is automatically illegal and that the architects of such aggression should be held liable for each killing as an act of murder.[21] Whilst that argument goes well beyond conventional understandings of humanitarian law and blurs the line between *jus in bello* and *jus ad bellum*, its rationale—that an illegally founded action should not provide a cloak of legitimacy for the act of killing—nonetheless holds certain persuasive force.[22] It suggests that the unlawful nature of an attack could have a profound effect on whether it is conceptualized as an attack on a civilian population and thus open the door to prosecution for crimes against humanity.

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21. *See* Walter G. Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1, 1 (1998) (referring to Shawcross' submission that "[t]he killing of combatants in war is justifiable, both in international and in national law, only where the war is legal. But where the war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber band").

22. For arguments supportive of this view, see generally DAVID RODIN & HENRY SHUE (eds.), JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS (Oxford University Press 2008). Of course, the converse cannot be true: the lawful nature of a conflict does not mean that all killings in that conflict are legal. Additionally, as Military Tribunal III in *Altstötter et al.* pointed out:

> If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality.

United States of America v. Altstötter et al., Case No. 3, Judgment, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10—VOLUME III: "THE JUSTICE CASE" 1027 (Nuernberg Military Tribunals 1951). Given that the aggression definition agreed upon at Kampala contains a "leadership" element, the concerns expressed in this case have certainly abated. The Appeals Chamber of the ICTY has also pointed out that "the application of [*jus in bello*] rules [are] not affected by the legitimacy of the use of force by a party to the armed conflict." Prosecutor v. Boškoski and Tarčulovksi, Case No. IT-04-82-A, Appeal Judgement, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010), http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf. Similarly, "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant. . . . The issue . . . is whether the way the military action was carried out was criminal or not." Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 812 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

A second issue raised in the paradigm of an unlawful use of force is that of the required mental elements for crimes against humanity. Where an illegal attack entails the large-scale killing of civilians, it is likely that the operation will constitute an attack on a civilian population. Accordingly, the objective elements of a crime against humanity such as murder or even extermination would be established *a priori*. However, to prosecute such conduct as a crime against humanity, the corresponding mental elements would have to be fulfilled. For murder, this would require showing that the perpetrator(s) (a) committed murder with intent and knowledge; and (b) knew or intended that the murder be part of a widespread or systematic attack on a civilian population.[23]

For mental element (a), intent and knowledge of an illegal killing is required for criminal liability.[24] If there were evidence that the proponents of the unlawful use of force directly intended murders of civilians to be committed as part of the unlawful attack, then this mental element would be satisfied. However, in the more likely circumstances where the evidence demonstrated that the perpetrator(s) knew that murders of civilians would occur as a consequence of the unlawful attack but did not necessarily desire this outcome, the analysis would be more complex. The key question would be whether the murders would have occurred in the ordinary course of events as a consequence of an unlawful attack. Analyzing this vague notion of "ordinary course of events"[25] will no doubt be the subject of intense litigation before the ICC for many years to come and will require a case-by-case assessment. Nonetheless, in the context of an illegal use of armed force, the murder of civilians will usually occur in the ordinary course of events. Examples of notorious uses of force throughout history support this proposition: the German aggressive campaign in World War II was accompanied by the large-scale killing of civilians, and Iraq's invasion of Kuwait in 1990 also saw large-scale killings.[26] Conversely, it is hard, if not impossible, to find examples of unlawful uses of force that have not been accompanied by the murder of civilians. Accordingly, under the Rome Statute, the mental elements for

23. Rome Statute, *supra* note 6, art. 30; I.C.C. Doc. No. ICC-ASP/1/3, ICC Elements of Crimes, General Introduction, para. 2.

24. Rome Statute, *supra* note 6, art. 30

25. *Id.* arts. 30(2)(d), 30(3).

26. David J. Scheffer, *U.S. War Crimes Ambassador Reviews Saddam Hussein's Criminality: The Case for Justice in Iraq*, MIDDLE EAST INST. & THE IRAQ FOUNDATION, NAT'L PRESS CLUB, WASH. D.C. (Sept. 18, 2000), *available at* http://www.fas.org/news/iraq/2000/09/iraq-000918.htm ("During the occupation [of Kuwait], Saddam Hussein's forces killed more than a thousand Kuwaiti nationals, as well as many others from other nations").

the underlying crime of murder would likely be established in the circumstances of an illegal attack where the large-scale killing of civilians is the natural and foreseeable outcome in the ordinary course of events.

In relation to mental element (b), namely the knowledge that the murders were part of an attack on a civilian population, this would likely be established if the perpetrator(s) were part of the forces leading or carrying out the unlawful attack. Such a perpetrator would likely be aware of the context and unlawful nature (in a factual sense) of the operation in which their conduct occurred as well as the occurrence of other murders and crimes against civilians, particularly in the case of any perpetrator occupying a leadership role.

The preceding analysis demonstrates not only that conduct amounting to an illegal use of force may be prosecuted as a crime against humanity, but also that such conduct will by its very nature often establish the critical *chapeau* and mental elements required for a conviction under Article 7 of the Rome Statute.

III. CO-PERPETRATION IN A COMMON PLAN OF AGGRESSION WHERE CRIMES AGAINST HUMANITY OCCUR IN THE ORDINARY COURSE OF EVENTS

Having analyzed the elements of crimes against humanity within the factual matrix of an illegal use of force, the question arises as to how such a prosecution would be conducted. One strategy under the current provisions of the Rome Statute would be to charge the perpetrators with crimes against humanity committed in connection with a joint criminal plan amounting to aggression.

A single person acting alone would not generally have the capacity to carry out international crimes of the kind that attract the attention of the ICC. The Office of the Prosecutor ("OTP") has put into place an explicit policy decision to focus its investigative and prosecutorial attention "on those who bear the greatest responsibility" for international crimes "such as the leaders of the State or organization allegedly responsible for those crimes."[27] This means that, more often than not, ICC cases will concern

27. ICC Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor*, at 7 (Sept. 2003), *available at* http://icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf; *see also* ICC Office of the Prosecutor, *Report on Prosecutorial Strategy*, at 5 (Sept. 14, 2006), *available at* http://icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf ("Based on the statute, the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for those crimes."); ICC Office of the Prosecutor, *Prosecutorial*

the actions of a small plurality of persons either acting jointly (direct co-perpetration) or jointly through other persons (indirect co-perpetration).[28] In the context of aggression where crimes against humanity have potentially been committed, this is all the more likely due to their requisite elements: the former requires a leadership element[29] and the latter a state or organizational policy,[30] both of which are conducive to interaction amongst a number of persons. As such, illegal uses of force resulting in the commission of crimes against humanity will most likely result in charges containing co-perpetration (direct or indirect) as the mode of liability at the ICC.

Utilizing co-perpetration in the context of an illegal use of force is significant because this mode of liability requires the existence of an agreement or common plan.[31] Importantly, according to current ICC jurisprudence, the common plan need not be directed at committing the crime in question (in this case crimes against humanity), nor need it be intrinsically criminal in nature, but it must contain "a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed."[32] In

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Strategy 2009–2012, at 5–6 (Feb. 1, 2010), *available at* http://icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf ("In accordance with this statutory scheme, the Office consolidated a policy of focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the great responsibility for the most serious crimes.").

28. Rome Statute, *supra* note 6, art. 25(3)(a).

29. I.C.C. Res. RC/Res.6, Annex I, art. 8 *bis* (1) (June 11, 2011).

30. Rome Statute, *supra* note 6, art. 7(2)(a).

31. For examples of the ICC addressing direct co-perpetration, see Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 343 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf; Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 350 (June 15, 2009), http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf; Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-121, Corrigendum of the "Decision on the Confirmation of Charges," ¶ 128 (Mar. 7, 2011), http://icc-cpi.int/iccdocs/doc/doc1036947.pdf; Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶ 981 (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf. For examples of the ICC addressing indirect co-perpetration, see Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 492, 522 (Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf; Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 301 (Jan. 23, 2012), http://icc-cpi.int/iccdocs/doc/doc1314535.pdf; Prosecutor v. Muthaura et al., Case No. ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 297 (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf. It should be added that responsibility pursuant to Article 25(3)(d) of the ICC Statute also explicitly requires the existence of a plurality of persons acting pursuant to a common purpose/plan. Rome Statute, *supra* note 6, art. 25(3)(d).

32. Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶ 984; *see also* Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the Confirmation

other words, the nature of the common plan is to a certain degree irrelevant; it need not fall within the ICC's jurisdiction so long as the underlying crime (crime against humanity) does and there is a sufficient risk of its commission.[33] Although the idea that a common plan can have at its core a non-criminal purpose (at least not a crime known to international criminal law) has been subject to harsh criticism (albeit in the context of joint criminal enterprise ("JCE")),[34] the same cannot be said where the purpose of the common plan is to commit aggression, a crime that is clearly recognized at international law, was envisaged in the Rome Statute,[35] and has now been defined by the Kampala amendments.[36]

If the OTP were to charge the accused with crimes against humanity as a co-perpetrator on the basis that there was a common plan to commit the crime of aggression, and a sufficient risk existed that a crime against humanity would be committed in the ordinary course of events, the OTP could require the Trial Chamber to adjudicate on the issue of aggression. In other words, the Trial Chamber would be asked to make a factual determination for the purpose of proving a legal element of the mode of liability only—beyond a reasonable doubt—which would in turn only

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of Charges, ¶ 344; Banda and Jerbo, Case No. ICC-02/05-03/09-121, Corrigendum of the "Decision on the Confirmation of Charges," ¶ 129; Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-465, Decision on the Confirmation of Charges, ¶ 271 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf. For a closer analysis of the nature of the common plan as formulated by the *Lubanga* Trial Judgment, see Manuel J. Ventura, *Two Controversies in the* Lubanga *Trial Judgment of the ICC: The Nature of Co-perpetration's Common Plan and the Classification of the Armed Conflict*, *in* STUART CASEY-MASLEN (ed.), WAR REPORT: 2012 (Oxford University Press 2013) (forthcoming), *available at* http://ssrn.com/abstract=2283443.

33. In this respect, co-perpetration as currently formulated at the ICC is potentially a broader basis for criminal liability than the mode of joint criminal enterprise ("JCE") that is utilized at the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda. Whereas JCE requires the participants in the common criminal plan to share the intent to commit one or more crimes within the jurisdiction of the court, seeProsecutor v. Brđanin, Case No. IT-99-36-A, Appeal Judgement, ¶ 431 (Apr. 3, 2007), http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf; *see also* Prosecutor v. Martić, Case No. IT-95-11-A, Appeal Judgment, ¶ 172 (Oct. 8, 2008), http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf (co-perpetration in its present form only requires the risk that the common plan result in the crimes charged). This issue is now squarely before the ICC Appeals Chamber, having been raised by Lubanga's defense team in their appeal of the trial judgment. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2948, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du «*Jugement rendu en application de l'Article 74 du Statut*» rendu le 14 mars 2012, ¶¶ 327–31 (Dec. 3, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1529983.pdf.

34. *See, e.g.*, Wayne Jordash & Penelope van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8(2) J. INT'L CRIM. JUST. 591, 592–93 (2010); Jennifer Easterday, *Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone*, 3 BERKELEY J. INT'L L. PUBLICIST 36 (2009).

35. Rome Statute, *supra* note 6, art. 5(1)(d).

36. *See* I.C.C. Res. RC/Res.6, Annex I, art. 8 *bis* (1) (June 11, 2011); *supra* text accompanying note 2.

incur the individual criminal responsibility of the accused for crimes against humanity and avoid any finding of guilt for the crime of aggression *per se*.[37]

The approach outlined above for the judicial adjudication of aggression would not be entirely unprecedented before international criminal tribunals. For example, in the case against Charles Taylor at the Special Court for Sierra Leone ("SCSL"), the common plan (pursuant to JCE as the mode of liability) was described as being one to "wag[e] war in Liberia, Sierra Leone and the Gambia"[38] and to "gain and maintain political power and physical control over the territories of Liberia and Sierra Leone, terrorizing the civilian population in the process."[39] This could also have been expressed as the accused being part of a common plan to commit the crime of aggression upon the territory of Sierra Leone through the use of "armed bands, groups, [or] irregulars" on Liberia's behalf,[40] which involved, in the ordinary course of events, the terrorization of the civilian population (together with the other underlying crimes).

Through this innovative legal strategy, a judgment of guilt for crimes against humanity could be attained that would inherently recognize and implicitly condemn the illegal use of force giving rise to the underlying violence and crimes.

IV. THE CRIME OF AGGRESSION AS A FACTOR IN SENTENCING

Further, a positive factual finding that a common plan of aggression existed would have a tangible effect when the time arrives for deliberations on imposing the appropriate sentence.

At the ICC, Chambers are required, for sentencing purposes, to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."[41] Judges are also empowered to consider, *inter alia*, "the nature of the unlawful behaviour and the means

37. It is important to note that the Pre-Trial Chamber would also make this same determination, albeit to lower evidentiary standards: 'reasonable grounds to believe' for the arrest warrant or summons to appear stage and 'substantial grounds to believe' for the confirmation of charges stage. Rome Statute, *supra* note 6, arts. 58(1)(a) or 58(7), 61(7).

38. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Judgement, ¶ 23 (May 18, 2012), http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREEPCQ%3d&tabid=107.

39. *Id.* ¶ 2220.

40. The use of such groups by one state on the territory of another could *prima facie* constitute an 'act of aggression' for the purposes of the crime of aggression. I.C.C. Res. RC/Res.6, Annex I, art. 8 *bis* (2)(g) (June 11, 2011).

41. Rome Statute, *supra* note 6, art. 78(1).

employed to execute the crime."[42] In addition, a non-exhaustive list of aggravating circumstances are outlined including, *inter alia*, "[a]buse of power or official capacity"[43] and other non-enumerated circumstances which "by virtue of their nature are similar to those mentioned."[44]

These sentencing considerations are wide enough to permit judges to consider a factual determination that a common plan to carry out the crime of aggression was executed by the accused, as a result of which crimes against humanity were perpetrated in the ordinary course of events. This could either be considered as part of the gravity of the crime or, alternatively, as an aggravating factor.[45] With respect to the latter, as was held in *Lubanga*, "[s]ince any aggravating factors established by the Chamber may have a significant effect on the overall length of the sentence . . . it is necessary that they are established to the criminal standard of proof, name 'beyond a reasonable doubt.'"[46] Therefore, a positive factual determination (to the same evidentiary standard) that a common plan was formed and executed to commit the crime of aggression would dovetail nicely for sentencing purposes and could ultimately lead to a longer sentence than would otherwise have been imposed on the convicted perpetrator.

At the same time, permitting the crime of aggression to be considered at sentencing can be objected to on the basis that the accused was never charged, let alone convicted, of such a crime. However, this same issue has already played out in the *Lubanga* case, albeit with respect to different crimes. There, the prosecution submitted that sexual violence perpetrated upon female child soldiers should be considered at sentencing, notwithstanding the fact that they had (a) not charged the accused with this crime; and (b) had actively opposed victims' counsel unsuccessful attempts to 'add' such crimes via the recharacterization procedure pursuant to Regulation 55.[47] The Trial Chamber stated that the

42. ICC Rules of Procedure and Evidence, I.C.C. Doc. No. ICC-ASP/1/3, Rule 145(1)(c).

43. *Id.* Rule 145(2)(b)(ii).

44. *Id.* Rule 145(2)(b)(vi).

45. "[F]actors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances." Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 78 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf; *see also id.* ¶ 35.

46. *Id.* ¶ 33.

47. *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2205, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court" (Dec. 8, 2009), http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf.

prosecution's failure to charge Lubanga with sexual violence did not determine the question of whether it could be considered as a relevant factor.[48] Instead, it held that it was indeed "entitled to consider sexual violence . . . [as part of] the nature of the unlawful behavior; the . . . manner in which the crime was committed; . . . [and] as showing the crime was committed with particular cruelty."[49] The fact that sexual violence had not formed part of the decision on the confirmation of charges did not alter this position.[50] Ultimately, sexual violence was not considered in Lubanga's sentencing, not because the Court was unable to do so, but because "the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt."[51]

The same reasoning that was applied in *Lubanga* must also apply to the crime of aggression if presented in the manner outlined in this paper: the fact that the accused was not charged nor convicted for this offence is irrelevant.

As has been outlined, it is in the sentencing that the hard work of prosecutors with respect to proving the common plan of aggression would bear fruit. Such a strategy is therefore not a trip through uncharted legal waters merely for the sake of it or a means to satisfy lingering academic curiosities, but a justifiable exercise with practical implications. It would also be the best manner by which to fairly capture and expose the true extent of the criminality encompassed in the crimes against humanity.

Furthermore, there is already precedent from the SCSL's *Taylor* case for considering an act of aggression—the use of force—as an aggravating circumstance. In its sentencing judgment, the Trial Chamber considered

48. Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, ¶ 67.

49. *Id.*

50. *Id.* ¶¶ 29, 68. This particular holding has been objected to by Lubanga's defence team in their appeal of the trial judgment. However, because it did not ultimately affect the sentence, his lawyers indicated that «[l]a Dèfense n'entend donc pas soulever formellement ce moyen d'appel dans le cadre du présent mémoire.» They nevertheless reserved the right to raise it, as appropriate, on account of the submissions of the Prosecutor on appeal. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2949, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la «*Decision relative à la peine, rendue en application de l'article 76 du Statut*» rendue par al Chambre de première instance I le 10 juillet 2012, ¶¶ 107–108 (Dec. 3, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1519325.pdf.

51. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, ¶ 75. The authors note that the OTP has appealed this finding on the basis that the Chamber applied too stringent a test in order to establish aggravating factors, and that in any event, it reached unreasonable findings of fact. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2950, Prosecution's Document in Support of Appeal Against the "Decision on Sentence Pursuant to Article 76 of the Statute" (ICC-01/04-01/06-2901), ¶¶ 67–93 (Dec. 3, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1519360.pdf.

the "extra-territoriality" of the crimes at issue in the case and in doing so, invoked the International Court of Justice ("ICJ")'s holding in *Nicaragua*:

> The International Court of Justice has held that acts of intervention by a State in support of an opposition within another State constitute "a breach of the customary principle of non-intervention [and] will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations. . . ." While these provisions of customary law govern conduct between States, the Trial Chamber considers that the violation of this principle by a Head of State individually engaging in criminal conduct can be taken into account as an aggravating factor.[52]

Considering that Taylor was in fact found guilty of aiding and abetting the crimes of two rebel forces (the Revolutionary United Front ("RUF") and the Armed Forces Revolutionary Council ("AFRC")) in Sierra Leone by providing them with arms and ammunition, military personnel, operational support and moral support,[53] it could be concluded that the facts at issue also constituted the indirect and illegal use of force by Liberia (through Taylor's actions) upon Sierra Leone in the manner described by the ICJ in *Nicaragua*. The key issue would have been whether the control exercised by Liberia over the RUF and the AFRC was of a sufficient level so as to attribute their acts back to Liberia.[54] Nevertheless, it is clear that the Trial Chamber considered Liberia's cross-border aiding of the rebels as a factor in its sentencing deliberations.

It is important to recall here that such indirect use of force—an act of aggression—carried out by a Head of State such as Charles Taylor (easily satisfying aggression's "leadership" element) must amount to a "manifest violation" of the UN Charter (by reference to its character, gravity, and scale) to be transformed into the *crime* of aggression.[55] In the absence of a

52. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgement, ¶ 27 (May 30, 2012) (citations omitted), http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107.

53. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Judgement, ¶¶ 6910–6915, 6918–6924, 6927–6937, 6940–6946 (May 18, 2012), http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREEPCQ%3d&tabid=107.

54. Utilizing the ICJ's *Nicaragua* test of "effective control," it is unlikely that the acts of the rebels could be directly attributed to Liberia. However, it is possible that the facts could meet the ICTY's less stringent test of "overall control" as set out in the *Tadić* Appeal Judgement. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J, 14, ¶ 116 (June 27); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

55. I.C.C. Res. RC/Res.6, Annex I, art. 8 *bis* (1)–(2) (June 11, 2011).

factual finding with respect to the latter and the issue of state attribution, the SCSL was only two substantive elements away[56] from considering the crime of aggression as defined by the ICC as a sentencing factor as advocated by this paper, notwithstanding the fact it has no jurisdiction *ratione materiae* over such a crime (or the use of the force for the purposes of state responsibility) and was considered *proprio motu*, since the Prosecutor had not expressly raised the issue in her submissions.[57]

V. CONCLUSION

In its final judgment, the International Military Tribunal at Nuremberg described aggression as "differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[58] While there was undoubtedly a certain amount of rhetoric at play, it is all-too-apparent that illegal uses of armed force almost inevitably entail the large-scale commission of violent crimes and humanitarian abuses. However, aggression and crimes against humanity are not two sides of the same coin. Although a case for the former does not necessarily equal a case of the latter, there are areas where they overlap. Indeed, it is entirely possible for the ICC at some point in the future to cumulatively convict person(s) for both crimes relying upon the same factual matrix.[59]

That aggression is an international crime, at least since Nuremberg, has never been in doubt.[60] What was in doubt was if the crime would ever be defined. With the Kampala amendments, the question has now turned to

56. However, given the appalling and depraved nature, scale and spread of the acts perpetrated by the RUF and the AFRC during the conflict in Sierra Leone, particularly during the invasion of Freetown in January 1999, were they to be attributable to Liberia, it is almost certain that the "manifest violation" element would be established.

57. It should be pointed out that Taylor's defense team have appealed the Trial Judgement's sentencing on the grounds that it, *inter alia*, (1) impermissibly utilized principles of state responsibility and (2) impermissibly considered aggravating factors *proprio motu*. Prosecutor v. Taylor, Case No. SCSL-2003-01-A, Appellant's Submissions of Charles Ghankay Taylor, ¶¶ 780–784, 744–751 (Oct. 1, 2012), http://www.sc-sl.org/LinkClick.aspx?fileticket=R5js%2fPiBejc%3d&tabid=107. It remains to be seen whether such considerations survive appellate review.

58. United States of America et al. v. Göring et al., Judgment, *in* TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 186.

59. This is because crimes against humanity and aggression both contain elements that the other does not. According to the jurisprudence, in such circumstances cumulative charging or convictions would not offend the *ne bis in idem* principle. *See* Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeal Judgement, ¶ 412 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

60. Even before the Kampala amendments, the House of Lords (as it then was) had held that aggression was a crime known to international law. R v. Jones, [2006] UKHL 16, ¶ 19 (per Lord Bingham), ¶ 59 (per Lord Hoffmann).

when the ICC will ever consider the offense. The analysis herein suggests that in instances where crimes against humanity occur in the ordinary course of events of an aggressive war and the requisite elements for both crimes are present, ICC Prosecutors should not proceed on the assumption that they are entirely prohibited from touching upon aggression. To do so, without consideration of the option presented above, would only serve to downplay the true level of criminality inherent in the launching of an illegal use of force.

Although the legal strategy suggested herein is an innovative and untested solution to the ICC's lack of current jurisdiction over aggression, it is driven by a desire to reign in the destructive potential of the illegal use of armed force. High level perpetrators with military personnel and equipment capable of large-scale violence at their behest should be aware of the potential for criminal prosecution, and a long custodial sentence, if their actions result in mass killing. In this manner, a small step can be taken towards achieving the peaceful vision of those who sought justice at Nuremberg, in Rome, and at Kampala.