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Of War-Councils and War-Mongering: Considering the Viability of Incitement to Aggression

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In representing Samoa as part of the Preparatory Commission for the International Criminal Court in reference to the crime of aggression, Roger Clark took an expansive view of the potential scope of liability and submitted a proposal that "raised the question whether there should be liability under the Rome Statute for direct and public incitement to aggression."[1] The proposal was tabled and incitement was not ultimately incorporated into the aggression amendments adopted at the Kampala Review Session in 2010.[2] In the meantime, as a normative matter, regardless of the Rome Statute's final text, Professor Clark's question remains unanswered: should incitement to aggression have been included in the Kampala Amendments? This paper analyses that question and concludes it should have -- but with important limitations on the scope of the crime.

So why include incitement to aggression and what kind of limitations would be implicated? To answer those questions, we must first consider that, in relation to incitement, aggression-related discourse can theoretically be bifurcated between what we may refer to as "war-council" speech and "war-mongering" speech. Regarding the former, it is important to consider that aggression is a leadership-oriented crime with an *in personam* jurisdiction limited to an individual exercising control over the political or military action of a State. However, such an individual, even if the most powerful dictator, is not capable of carrying out himself the multitude of simultaneous and multi-level tasks necessary to plan and launch a modern aggressive war. He will operate within some sort of bureaucratic framework and/or military hierarchy that will necessarily require communication with other government/military officials as part of such an enterprise. Such communications essentially represent "councils of war" conducted in the relatively insular corridors of power. With respect to such "war-council" aggression speech, the utility of any corollary incitement provision is questionable -- those who would act – the controllers of the government/military apparatus -- need no exhorting as they monopolize agency.

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[1] MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 240 (2007). Kearney refers to Dr Clark's proposal as being submitted as part of the Special Working Group on the Crime of Aggression. However, the proposal was submitted as part of the Tenth Session of the Preparatory Commission in July 2002. *See* Preparatory Commission of the International Criminal Court, Elements of the Crime of Aggression, Proposal Submitted by Samoa, June 21, 2002, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/438/52/PDF/N0243852.pdf?OpenElement.

[2] International Criminal Court, Assembly of State Parties, May 31-June 11, 2010, Resolution RC/Res.6, U.N. Doc. RC/Res.6 (June 11, 2010) [hereinafter Kampala Amendments], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (resolution adopting aggression amendments to the Rome Statute).

Related to this, and in contrast to the other ICC core crimes, war-council-related aggression conduct (necessarily entailing internal government discussions), is inextricably linked with speech. So it may appear somewhat redundant or superfluous to criminalize speech that would trigger other such speech. As a result, in order to capture the inchoate potential of the offence, "attempt to commit aggression" would seem to criminalize effectively essayed but unrealized projects of illegitimate state-initiated armed violence against other states. Moreover, unlike the other core crimes, any theoretical "inciting" speech connected to war-council aggression conduct does not as directly entail dehumanization or marginalization of an out-group being targeted for violence or inhumane treatment. Thus, the unique power of speech in relation to mass atrocity – its capacity to demean and objectify the other – is not as directly implicated with regard to war-council aggression.

But the other variety of aggression-related discourse that a theoretical incitement crime implicates, "war-mongering," is quite different. It entails government leaders conditioning their citizens to support illegal war campaigns through speeches and mass media. It is not always a *sine qua non* for perpetrating the crime of aggression (as war-council conduct is) but, in cases of controversial war campaigns, it is sometimes needed to assure sufficient troop morale and civilian cooperation. And it empirically implicates speech dehumanizing the enemy population. Further, it has historically been recognized as an offence. So criminalizing it via incitement makes more sense and, indeed, fills important gaps within the aggression offence's definitional and operational framework. Thus, the crime of direct and *public* incitement to commit aggression, the public element implicitly excluding "war-council" communication, is certainly viable.

This paper is divided into four parts. Part 2 will trace the origins of aggression as an offence in international law and show how it was eventually defined at Kampala in 2010. Part 3 will examine aggression's individual conduct elements in relation to incitement. Finally, Part 4 will consider the viability of an incitement to aggression offence and demonstrate why such a crime in relation to war-council discourse is doctrinally problematic but may be feasible in relation to war-mongering communication. Given aggression's role as the breeding ground for the other core ICL crimes, qualifiedly including it within the envelope of incitement achieves the proper balance between sound policy and doctrinal coherence.

II. The Origins and Formulation of the Aggression Offence

The modern crime of aggression traces its roots to violations of one half of the older doctrine of "just war" (the part dealing with the right to go to war as opposed to right conduct in war) – history's pre-twentieth century version of *jus ad bellum*. Guidelines for what constituted a "just war" were developed over the millennia and, from a Western perspective, originated from religious thinkers such as St. Augustine and Thomas Aquinas. By the seventeenth century, Dutch philosopher Hugo Grotius distilled this learning into seven required elements: (1) just cause; (2) "right authority" (i.e., a legitimate sovereign to initiate the war); (3) "right intention" on the part of the parties using force; (4) that the resort to force be proportional; (5) that force be a last resort; (6) that war be undertaken with peace as its goal (not for its own sake); (7) and that

there be a reasonable *hope of success*.[3] In the absence of these criteria, the state engaged in theoretical criminal conduct but there were no positive law consequences other than the self-help remedy of reprisal. [4]

That began to change in the twentieth century. The modern *jus ad bellum* regime was launched with the 1919 League of Nations Covenant, which restricted in three ways the right of members to resort to war: (1) imposing a three-month cooling off period after issuance of a Council report, arbitral award, or judicial decision; (2) precluding recourse to war before the dispute had been submitted to the League Council, arbitration, or adjudication for settlement; and (3) making war a matter not just of domestic concern but of international concern by mandating that any circumstance that threatened to disturb international peace be submitted to one of three dispute resolution agencies.[5] The Locarno Treaties of 1925 included additional legal impediments to waging war in Europe by setting out stipulations between Germany and her neighbours that they would not attack one another, except in cases of self-defence.[6] That legal framework was bolstered again by the 1928 Kellogg-Briand Pact, or Treaty of Paris, which was entered into by over sixty nations, including the great powers of the United States, France, the United Kingdom, the Soviet Union, Japan, as well as Germany.[7] The agreement sought to outlaw war but it contained no enforcement mechanism, which ultimately neutered it.[8] And various acts of aggression in the 1930s led to the Second World War and a reassessment of *jus ad bellum* in its aftermath.

World War II was a watershed event in the history and development of the crime of aggression. For purposes of bringing the major Nazi war criminals to justice, the victorious Allied Powers established the International Military Tribunal at Nuremberg (IMT). Article 6 of the IMT Charter provided for prosecution of three core crimes: war crimes, crimes against humanity and crimes against peace. The latter, contained in subsection (a) and the basis for the first charge against the defendants, consisted of the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy [to do so]."[9] Article 6 also provided that conspiracy to commit any of the core crimes gave rise to criminal liability. But the IMT held

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[3] Karma Nabulsi, *Just and Unjust War, in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 276 (Roy Gutman, David Rieff & Anthony Dworkin, eds., 2007).

[4] *See* Harry D. Gould, *What Happened to Punishment in the Just War Tradition, in* ETHICS, AUTHORITY, AND WAR: NON-STATE ACTORS AND THE JUST WAR TRADITION 73-75 (Eric A. Henize & Brent J. Steele, eds. 2009) (discussing just war theory, punishment and reprisal).

[5] Christopher R. Rossi, *Jus Ad Bellum in the Shadow of the 20th Century*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 49, 71-71 (1994).

[6] Alberto L. Zuppi, *Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil?*, 26 PENN ST. INT'L L. REV. 1, 8 n.28 (2007).

[7] U.S. Department of State Office of the Historian, The Kellogg-Briand Pact, 1928, http://history.state.gov/milestones/1921-1936/Kellogg (last visited June 4, 2014).

[8] PHIL WADSWORTH, CAMBRIDGE INTERNATIONAL AS LEVEL INTERNATIONAL HISTORY: 1871-1945 COURSEBOOK 57 (2013).

[9] Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279, 280, available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm. Unfortunately, "war of aggression" is left entirely undefined and the provision provides no insight as to the scope, if any, of individual responsibility. *See* Roger S. Clark, *Nuremberg and the Crime against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 529 (2007) (reviewing the negotiations that led to the drafting of the crimes against peace provision in the IMT Charter).

that the Charter supported a conspiracy count only with respect to crimes against peace. In the end, the Tribunal found twelve defendants guilty of crimes against peace and eight guilty of conspiracy to commit crimes against peace.[10] Based on substantially similar language in its Charter, which included conspiracy as a component of crimes against peace, the International Criminal Tribunal for the Far East (IMTFE) in Tokyo convicted twenty-four Japanese defendants for the same crime.[11]

In the initial post-IMT/IMTFE period, with the onset of the Cold War as a backdrop, little doctrinal progress was made in terms of defining the crime of aggression. Without furnishing additional insights into its meaning, the international community nevertheless continued to stress the illegal nature of aggression. For example, barring cases of self-defence, the 1945 U.N. Charter, in Articles 1 and 2(4) respectively, prohibited aggression and the threat or use of force against the territorial integrity or political independence of any state.[12] And the 1950 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, formulated by the International Law Commission (ILC), confirmed that the act of planning, preparing, initiating, or waging a war of aggression constitutes a crime against peace giving rise to individual criminal responsibility.[13]

In 1954, the ILC advanced the doctrinal project somewhat by adopting its Draft Code of Offences against the Peace and Security of Mankind.[14] Article 2, paragraph 1 of the Code declared as criminal "any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations."[15]

The big doctrinal breakthrough, however, came twenty years later. In 1974, the U.N. General Assembly adopted Resolution 3314, which laid the Rosetta Stone for the current modern definition of aggression. Meant to guide the Security Council in the exercise of its peace and security mandate, Article 1 of Resolution 3314, consistent with the notion of illegal use of force set forth in Article 2(4) of the UN Charter, defines "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or by any other manner inconsistent with the Charter of the United Nations."[16]

Article 3 of Resolution 3314 then went on to describe the following as constituting acts of aggression, despite no declaration of war, the list being non-exhaustive (per Article 4):

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[10] Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1, 2 n.3 (2009).

[11] *Id.*

[12] U.N. Charter art. 1 (declaring that among the purposes of the UN is "the suppression of acts of aggression or other breaches of the peace . . ."); art. 2 (prohibiting the "threat or use of force against the territorial integrity or political independence of any state . . ."). *But see* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence . . .").

[13] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VI(a), 5 U.N. GAOR Supp. (No. 12) at 14, U.N.Doc. A/1316 (1950).

[14] Zuppi, *supra* note 6, at 17.

[15] *See* 1 Y.B. INT'L L. COMM'N 123 (1954), U.N. Doc. A/1858, A/2162 A/CN.4/85.

[16] Definition of Aggression, art. 1, G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[17]

Some twenty-four years later, delegates negotiating the International Criminal Court Statute in Rome included aggression within Article 5 as a crime within the jurisdiction of the Court.[18] But they failed to define the offence, or provide any other details regarding its function, choosing instead to defer consideration of those details to a mandatory Review Conference scheduled seven years hence.[19] This was followed by a series of Preparatory Commissions (1999-2002), Special Working Groups (2003-2009) and informal gatherings held at Princeton University (2004-2007) to flesh out the details regarding aggression in advance of the planned 2010 Review Conference in Kampala, Uganda.[20]

The Review Conference was held from 31 May to 10 June 2010. During this time, the Assembly of States Parties adopted a resolution that included a definition of the crime of

[17] *Id.*, arts. 3 & 4.

[18] Rome Statute of the International Criminal Court, art. 5, U.N. Doc. A/CONF.183/9 (1998) ("Rome Statute").

[19] Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 512 (2011).

[20] *Id.*

aggression and a regime covering operationalization of the offence.[21] Aggression was defined in new article 8 *bis* of the Statute, which reads:

> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
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> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: [containing the same list as contained in Article 3 of Resolution 3314].[22]

The key doctrinal developments in 8 *bis* are embodied in paragraph 1, which creates and assigns individual criminal responsibility -- in contrast to state liability -- for commission of the aggression offence.[23] Paragraph 1 also requires that, going beyond the 1974 GA Definition of aggression, any such act of aggression constitutes "by its character, gravity and scale" a "manifest violation of the Charter of the United Nations." This so-called "threshold clause" "ensures that only very serious and unambiguously illegal instances of a use of force by a State can give rise to individual criminal responsibility of a leader of that State under the Statute."[24]

Related to the leadership element of the crime, the Kampala Amendments also added Article 25(3 *bis*).[25] Article 25 sets forth different categories of participation in an offence that give rise to individual criminal responsibility.[26] Paragraph 3 *bis* provides that, in relation to the crime of aggression, Article 25 "shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State."[27] Thus, the new provision seeks to confirm that the leadership clause contained in Article 8 *bis* applies to secondary perpetrators -- accomplices will be found liable only if they too fulfil the leadership requirement.[28]

Finally, as part of the Kampala Amendments, Annex II effected changes to the ICC's Elements of Crimes to include elements for the aggression offence.[29] Those elements include:

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[21] FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 16 (2014).

[22] Kampala Amendments, *supra* note 2, art. 8 *bis*.

[23] Boucher-Saulnier, *supra* note 21, at 17.

[24] Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC [hereinafter "Ratification Handbook"] at page 8, http://crimeofaggression.info/documents/1/handbook.pdf (last checked June 7, 2014).

[25] Kampala Amendments, *supra* note 2, art. 25(3 *bis*).

[26] Rome Statute, *supra* note 18, art. 25.

[27] Kampala Amendments, *supra* note 2, art. 25(3 *bis*).

[28] Ratification Handbook, supra note 24, at page 16.

[29] Kampala Amendments, *supra* note 2, Annex II.

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.[30]

III. Aggression's Individual Conduct Elements and Incitement

A. The Individual Conduct Elements

To understand a potential range of individual incitement liability connected to the aggression offence, one must first consider the *actus reus* elements of aggression as well as the legal nature of incitement itself. Regarding the former, the language of Article 8 *bis* of the Rome Statute offers important preliminary insights. That provision states that individual liability for the "crime of aggression" means "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State . . ."[31] But what in particular is meant by the words "planning, preparation, initiation or execution"? Unfortunately, the Nuremberg and Tokyo Tribunals provided little guidance.[32] Still, the plain meaning of the words are nevertheless revelatory. Carrie McDougall notes that "planning" is likely to consist primarily of "participation in meetings during which plans for a use of force are formulated."[33] She notes that "preparation" could include:

[30] *Id.*

[31] Kampala Amendments, *supra* note 2, art. 8 *bis*.

[32] *See* CARRIE MCDOUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 187 (2013) (noting that the Nuremberg and Tokyo precedents provide little guidance in terms of the meaning of planning, preparation, initiation or execution/waging).

[33] *Id.*

> Acts such as creating the necessary military or economic capacities to commit acts of aggression (such as acquiring weapons for the specific purpose of committing an act of aggression, amassing troops on a border ready for a preemptive strike, or liquidating state assets to fund a state war machine), or political and diplomatic manoeuvers (such as forming military alliances with the specific aim of enhancing military might for a planned act of aggression or the making of high-level diplomatic representations in order to conceal a State's real intention and thereby gain the military advantage of surprise).[34]

"Initiation" is self-explanatory and means, according to the IMTFE, "commencing the hostilities."[35] Muhammed Aziz Shukri has reasoned that "initiating" an act of aggression is tantamount to "the decision to commit the act of aggression"[36] -- in other words, "the decision taken immediately before the actual use of force, not a general decision to act aggressively that might be taken in the planning stage."[37] Moreover, given the leadership requirement embedded in Art. 8 *bis*, "such decisions are necessarily limited to those taken at the strategic, as opposed to the tactical, level. . . ."[38]

Finally, as Stefan Barriga notes, conduct related to "execution" is typically within the realm of the soldier. But in reference to the usual activity of a leader in the context of modern warfare, it could, for example, refer to an upper tier official executing "a devastating act of armed force by a simple push of a button."[39] McDougall observes that "'execution' will be read as encompassing all substantive strategic acts undertaken after the initiation of an act of aggression to secure the continuation and success of the aggressive act."[40]

B. Incitement

The Oxford English Dictionary defines "incitement" as "the action of provoking unlawful behaviour or urging someone to behave unlawfully."[41] Similarly, Black's Law Dictionary describes "incitement" as "the act or an instance of provoking, urging on, or stirring up . . . the act of persuading another person to commit a crime . . . ." As these definitions suggest, "incitement is a speech act."[42] In his seminal treatise ON LIBERTY, John Stuart Mill indicated incitement consists of a speech intended by the speaker to provoke lawless action in a context

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[34] *Id.* at 187-88.

[35] The Tokyo War Crimes Trial (R.J. Pitchard & S.N. Zaide eds., 1981) vol. 20, at 48448-49 [hereinafter IMTFE Judgment].

[36] Muhammed Aziz Shukri, *Individual Responsibility for the Crime of Aggression*, *in* INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 528 (Roberto Bellilli, ed., 2013).

[37] MCDOUGALL, *supra* note 32, at 188.

[38] *Id.*

[39] Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, *in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION, 2003-2009, 7 (Stefan Barriga et al. eds., 2009).

[40] MCDOUGALL, *supra* note 32, at 189.

[41] Oxford University Press, Oxford Dictionaries Online, http://www.oxforddictionaries.com/definition/english/incitement (last visited June 26, 2014).

[42] Raphael Cohen-Almagor, *Boundaries of Freedom of Expression before and after Prime Minister Rabin's Assassination*, *in* LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 82 (Raphael Cohen-Almagor, ed. 2000).

conducive to such action being taken – that is to say, when the urging of action is direct.[43] Moreover, Mill would consider such speech to be incitement regardless of whether it actually provoked the intended criminal conduct.[44] In other words, as elucidated by Glanville Williams, incitement is an inchoate crime:

> An inciter is one who counsels, commands or advises the commission of a crime. It will be observed that this definition is much the same as that of an accessory before the fact. What, then, is the difference between the two? It is that in incitement the crime has not (or has not necessarily) been committed, whereas a party cannot be an accessory in crime unless the crime has been committed. An accessory before the fact is party to consummated mischief; an inciter is guilty only of an inchoate crime.[45]

International law has incorporated these elements into its definition of incitement, which has applied almost exclusively to the offence of direct and public incitement to commit genocide. Arising from cases adjudicating guilt in the planned mass slaughter of the Tutsi in 1994, the International Criminal Tribunal for Rwanda issued a series of groundbreaking judgments defining incitement.[46] This jurisprudence broke the offence down into the following elements: (1) public; (2) direct; (3) *mens rea*; and (4) speech content. In *Prosecutor v. Akayesu*, the ICTR held that, in the context of the crime of direct and public incitement to commit genocide, speech could be deemed "public" if addressed to "a number of individuals in a public place" or to "members of the general public at large by such means as the mass media, for example, radio or television."[47] And the communication could satisfy the "direct" criterion if, when considering the language "in the light of its cultural and linguistic content . . . the persons for whom the message was intended immediately grasped the implication thereof."[48] The requisite *mens rea* (element (3) above) bifurcates into a dual intent: (a) to provoke another to commit genocide, and (b) to commit the underlying genocide itself.[49] Significantly, given its inchoate nature as discussed

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[43] JOHN STUART MILL, ON LIBERTY 107-08 (2d ed. 1863). *See also* Raphael Cohen-Almagor, *supra* note 42, at 82.

[44] Raphael Cohen-Almagor, *id*.

[45] GLANVILLE WILLIAMS, CRIMINAL LAW, 612 (2d ed. 1961).

[46] *See Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998) (ICTR's first incitement decision finding liability based on defendant's urging Hutu militia to slaughter town's Tutsi population); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998) (incitement charge against Prime Minister of rump genocide regime based in part on his congratulating génocidaires who had already killed and analogizing Tutsis to dogs drinking Hutu blood); *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence (June 1, 2000) (Belgian RTLM announcer's incitement conviction based on broadcast of euphemisms, such as "go to work," idiomatically understood by listeners as calls for mass murder); *Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-T, Judgment and Sentence (May 16, 2003) (Rwandan minister's use of bullhorn directly after massacre to thank killers for "good work" considered incitement); *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003) (finding radio and print media executives guilty of incitement in connection with establishment of RTLM and dissemination of its genocidal broadcasts as well as founding and publishing of anti-Tutsi newspaper *Kangura*); *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment (Dec. 2, 2008) (extremist Hutu tunesmith's liability based on code-word calls for murder directly before massacre, not on hate songs written before the genocide and disseminated by others).

[47] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 556 (Sept. 2, 1998).

[48] *Id*. ¶¶ 557-58.

[49] *Id*. ¶ 560.

above, causation is not a required element -- put another way, to make out a prima facie case, the prosecutor need not prove the incitement resulted in genocide.

Incitement's most complex and problematic feature involves its core defining element -- "speech content." In formulating this criterion, the ICTR had laboured to distinguish between legitimate exercise of free speech (regardless of how offensive) and corrosion of such words into criminal advocacy. The jurisprudence has suggested four analytic criteria to establish whether speech could be characterized as either lawful expression or illicit advocacy: text (involving a parsing and exegetical interpretation of the key words in the speech);[50] purpose (embracing, on one end of the spectrum, clearly lawful goals, such as historical research or distribution of news, and, on the other end, clearly unlawful ends such as explicit exhortations to violence); [51] context (circumstances surrounding the speaker's text – such as contemporaneous large-scale interethnic violence, as well as the speaker's tone of voice);[52] and the relationship between the speaker and the subject (the analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population).[53]

With reference to the last criterion, it should be pointed out that incitement has empirically involved persons in positions of authority urging subordinates or segments of the population at large to engage in attacks against innocents. The ICTR cases again are illustrative -- political leaders persuading subordinates (*e.g.*, Mayor Jean-Paul Akayesu urging *Interahamwe* militia to kill local Tutsis[54] or Prime Minister Jean Kambanda exhorting the public at large to murder Tutsis[55]); radio announcers urging listeners to victimize Tutsis (*e.g.*, broadcaster Georges Ruggiu whipping up violent impulses in Hutus on the RTLM airwaves);[56] and celebrities trying to inspire violence among fans (pop music start Simon Bikindi prodding Hutu civilians on a bullhorn to murder Tutsis).[57] In the military context, officers encourage subordinates to commit illegal violence against persons *hors de combat*.[58]

One other point about the incitement crime in international law bears mention. One of its prominent features is its projection of hatred toward and dehumanization of intended victims to anesthetize would-be perpetrators to extreme and large-scale violence. In the genocide context, the ICTR cases are rife with examples. Mayor Jean-Paul Akayesu, in encouraging militia members to kill Tutsis, referred to the latter as "cockroaches."[59] In conditioning the population for mass murder, Prime Minister Jean Kambanda analogized Tutsis to dogs drinking Hutu blood.[60] Pop singer Simon Bikindi referred to Tutsis as "snakes" in urging *Interahamwe* militia

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[50] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-T, ¶ 1001.

[51] Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶¶ 1000-1006 (Nov. 28, 2007).

[52] *Id.* ¶¶ 1004-1006.

[53] *Id.* ¶ 1006.

[54] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, ¶ 674.

[55] *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 39(viii) (Sept. 4, 1998).

[56] *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶¶ 44(iii), (iv) (June 1, 2000).

[57] *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment and Sentence, ¶ 5 (Dec. 2, 2008).

[58] See Gregory S. Gordon, *Formulating a New Atrocity Speech Offense: Incitement to Commit War Crimes*, 43 LOY. U. CHI. L. J. 281, 284-88 (2012) (demonstrating instances of incitement to commit war crimes).

[59] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, ¶ 674.

[60] *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, ¶ 39(viii)

to kill them. Incitement to commit war crimes is no different.[61] In my scholarship, I have pointed out that military commanders have referred to would-be murder victims (such as civilians and prisoners of war) as crocodiles, dogs, pigs, fish and insects.[62]

C. The Relationship between Aggression and Incitement

In light of these considerations, how can one best situate any potential relationship between aggression and incitement? Does it make sense to criminalize incitement to aggression? Given the range of relevant aggression conduct considered above -- planning, preparing, initiating, and executing -- as well as aggression's leadership component, incitement (*i.e.* advocating illegal conduct) would seem to apply in two key contexts: (1) urging persons within the leadership apparatus to participate in conduct that contributes to the planning, preparation, initiation or execution of acts of aggression; and (2) advocating to lower-level officials or soldiers or to members of the public at large to execute the leaders' plans for aggression.

The first type of urging -- in other words, something that would fit into the definition of "incitement" -- seems to contemplate meetings and/or discussions within the cadre of government or military high-level decision-makers. The International Military Tribunal at Nuremberg explained that this group could be rather large in scope:

> Hitler could not make aggressive war by himself. He had to have the **cooperation** of statesmen, military leaders, diplomats, and businessmen . . . .[63]

And certainly, any advocacy toward committing acts of aggression in this context could be more pronounced in a leadership framework less dictatorial than Nazi Germany. Such advocacy would take place in councils of government or military within the more sequestered corridors of power.[64] It is submitted that this sort of "behind closed door" advocacy for aggression should be referred to as "war-council" incitement.

The second kind of advocacy is directed toward persons outside of the leadership cadre who are nevertheless essential to the prosecution of acts of aggression. At the 1945 negotiations in London for the IMT Charter, Chief U.S. Prosecutor Robert Jackson alluded to this kind of incitement in the following colloquy with British representative Sir David Maxwell Fyfe:

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[61] *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment and Sentence, ¶ 268.

[62] Gordon, *supra* note 58, at 284-88.

[63] Judgment, *United States v. Goering et al.*, International Military Tribunal, Oct. 1, 1946, *Nazi Conspiracy and Aggression: Opinion and Judgment* (1947) (hereinafter IMT Judgment), at 223 (emphasis added).

[64] *See, e.g.*, JACK O'CONNELL, KING'S COUNSEL: A MEMOIR OF WAR, ESPIONAGE, AND DIPLOMACY IN THE MIDDLE EAST 119 (2011) ("The Egyptian government made the formal decision to attack Israel in a secret high-level meeting in October 1973 . . ."); PAUL R. GREGORY, LENIN'S BRAIN AND OTHER TALES FROM THE SECRET SOVIET ARCHIVES 125 (2008) ("The actual [Soviet] decision to invade Afghanistan was made at a meeting [attended by politburo members] held in Brezhnev's country house . . . ."); GREGORY D. KOBLENTZ, LIVING WEAPONS: BIOLOGICAL WARFARE AND INTERNATIONAL SECURITY 47 (2011) ("During the second week of January [1991,] Saddam Hussein held a high-level meeting to discuss the status of Iraq's chemical and biological weapons and plans on how they could be used.").

> SIR DAVID MAXWELL FYFE: Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?
>
> MR. JUSTICE JACKSON: Yes. The knowing **incitement** and planning is as criminal as the execution.[65]

The IMT indictment specified the kind of incitement to which Justice Jackson referred. It "ascribed . . . criminal responsibility to the defendants with regard to . . . propaganda intended to directly incite to specific wars of aggression."[66] And responsibility for such propaganda factored into the convictions of crimes against peace for IMT defendants Rudolf Hess, Wilhelm Keitel, and Alfred Rosenberg.[67] The IMTFE judgment focused even more on individual criminal responsibility for this variety of incitement to commit aggression. For example, the Tribunal found Sadao Araki guilty of crimes against peace in large part for advancing "the Army policy to prepare for wars of aggression by . . . speeches and by control of the press, inciting and preparing the Japanese people for war."[68] The IMTFE found Kingoro Hashimoto guilty on similar grounds, specifying that he incited "the appetite of the Japanese people for the possessions of Japan's neighbours, by inflaming Japanese opinion for war to secure these possessions . . . ."[69] It is submitted that this sort of "appeal to the public" advocacy for aggression should be referred to as "war-mongering" incitement.

IV. The Viability of an Incitement to Aggression Offence

In light of the above considerations, does it make sense to criminalize incitement to aggression within the context of the Rome Statute? That depends on the category of incitement. The arguments for criminalizing "war-council" incitement are not terribly compelling. First of all, as formulated in the Rome Statute, aggression is a leadership-focused crime limited to an individual exerting control over a country's political or military operations. As established above, though, such an individual depends on others to handle the myriad undertakings involved in initiating and sustaining acts of aggression in modern times.

Although the defendant will facilitate actions within the framework of a leadership cadre and while this likely implies a range of communication entailing persuasion, such persuasion does not bear the traditional indicia of incitement. First, although persons within the leadership core may be in superior-subordinate relationships, they are all part of the same team and are, by virtue of their jobs, working in cooperation to plan, prepare, initiate and execute acts of aggression. By virtue of their respective leadership roles, they are all subject to the ICC's *in personam* jurisdiction. So the value of any attendant incitement provision is doubtful -- those who would act – the controllers of the government/military apparatus -- need no exhorting as they are in many senses a single corporate entity and therefore monopolize agency.

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[65] ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (Dept. of State 1945) 376.

[66] KEARNEY, *supra* note 1, at 35.

[67] *Id*. at 38.

[68] Judgment of the International Military Tribunal for the Far East, 1146-7 (1948).

[69] Judgment of the International Military Tribunal for the Far East, 1152 (1948).

Additionally, unlike genocide or war crimes, for instance, advocacy speech in the war-council context does not as directly involve demonization of the intended victims. Decisions made within the leadership clique imply consensus through facilitated group discussion, not frenzied soap-box oratory. While deficits in consensus-building may entail negative references to the intended objects of aggression, it would seem any such aspersions would rarely, if ever, degrade to the base level of dehumanization. As a result, the distinctive power of inciting speech to inspire mass atrocity is not sufficiently at issue in the war-council aggression context.

Finally, war-council-related aggression conduct -- necessarily entailing internal government/military discussions in the planning, preparation, initiation and execution stages -- is indissolubly connected to speech in the first place. It represents group action and group action is only possible through communication by members within the group. So it may seem rather unnecessary or gratuitous to criminalize speech that merely generates other such speech. Consequently, in cases of inchoate conduct within the war-council aggression context, from a policy perspective, "attempt to commit aggression" better satisfies any justice concerns.

The same is not true for incitement in the war-mongering context. The speech involved there does bear the traditional hallmarks of incitement. In the first place, it involves state officials employing inflammatory rhetoric to mould opinion and agitate for action among the public at large or the rank-and-file military to back acts of aggression. While, in contrast to war-council discourse, it may not always be a necessary component of an aggression campaign, in instances of more divisive government conduct, it may be needed to promote *esprit de corps* and morale among soldiers and/or cooperation and sacrifice among civilians.

Moreover, such speech empirically seeks to vilify and dehumanize the targeted enemy. In this regard, reference to Article 20 of the International Covenant on Civil and Political Rights (ICCPR) is instructive.[70] ICCPR Article 20(1) prohibits "any propaganda for war" and its twin provision in subsection (2) makes illegal "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." That the two sub-provisions are paired together is no coincidence. Article 20's drafting history reveals certain delegates perceived the prohibition against war propaganda to include "the dissemination of slanderous rumours which undermined relations between States, and incitement to national, racial, or religious hatred."[71] Thus, war propaganda was linked in the drafting history to incitement to national, racial, or religious hatred. In fact, Michael Kearney posits that "'war propaganda' represented a composite of different forms of incitement to violence. . . ."[72] Consistent with this, one commentator has noted that ICCPR Article 20(1) seeks to prohibit "individuals from vilifying other individuals."[73]

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[70] International Covenant on Civil and Political Rights art. 5(2), Dec. 19, 1966, 999 U.N.T.S. 171.

[71] KEARNEY, *supra* note 1, at 116 (one delegate, the USSR, sought a combined provision for "prevention of war propaganda, incitement to enmity among nations, racial discrimination, and dissemination of slanderous rumours.").

[72] *Id*. at 117.

[73] Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57, 74 (1999).

And even apart from ICCPR Article 20(1), other commentators have noticed the similarities between the traditional nature and contours of incitement and war-mongering. For example, Parvesh Singla observes:

> Propaganda is a powerful weapon in war; it is used to dehumanize and create hatred toward a supposed enemy . . . by creating a false image in the mind. This can be done by using derogatory or racist terms . . . or by making allegations of enemy atrocities.[74]

So criminalizing war-mongering speech via incitement to aggression is more feasible and desirable from a policy perspective. And if the offence were styled as direct and *public* incitement to commit aggression, the public element would implicitly exclude "war-council" communication, making it viable within the normative framework of the Rome Statute.[75] The elements of the crime would be roughly consistent with incitement to genocide – direct, public, a *mens rea* consistent with the target crime, and a parsing of the text to determine if the speech represents permissible expression or criminal advocacy. In other words, any divergences from incitement to genocide would owe to any differences in the target crime.

Nevertheless, one can anticipate certain arguments against inclusion of an incitement to aggression provision. As a threshold matter, it could be contended that inchoate offences in relation to the crime of aggression are not possible given the Elements of the Crimes in relation to aggression adopted as part of the Kampala Amendments. In particular, the third element provides that "The act of aggression . . . was committed."[76] In other words, it could be argued that the State's act of aggression must have already been committed before any individual criminal responsibility could attach to leaders. But this argument has no merit. The ICC Elements of Crimes for other offences are phrased in the same way. For instance, one of the common elements for crimes against humanity is that "The conduct was committed as part of a widespread or systematic attack directed against a civilian population." And yet inchoate crimes can be committed in reference to crimes against humanity – for example, Article 25(3)(f) would permit prosecution of attempted crimes against humanity.[77]

Similarly, it has been suggested that inchoate versions of aggression, given their incomplete nature, may not satisfy the gravity admissibility criterion found in Articles 17 and 53 of the Rome Statute. McDougall observes that "given the gravity threshold employed by the OTP, and the Rome Statute's requirement that the Court's jurisdiction be limited to the most serious crimes of concern, it is difficult to see the point [of whether inchoate aggression is a viable crime] ever coming before the judges of the Court to determine."[78] This argument is flawed for the same reason as the previous one – the Rome Statute implicitly allows for the

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[74] PARVESH SINGLA, UNDERSTANDING COUNTER-TERRORISM 9 (2002).

[75] This contrasts with my other incitement scholarship where I have otherwise advocated eliminating the "public" element of the crime. See GREGORY S. GORDON, ATROCITY SPEECH LAW (Oxford University Press, forthcoming 2016) (arguing that the "public" element of incitement should be eliminated from the incitement to genocide offense as "private" incitement can be just as potent as "public," depending on the surrounding circumstances).

[76] Kampala Amendments, *supra* note 2, Annex II.

[77] MCDOUGALL, *supra* note 32, at 200-201.

[78] *Id*. at 202.

gravity of inchoate crimes by deeming them prosecutable through Article 25 (attempt at (3)(f) and incitement to commit genocide at (3)(e)).

However, even assuming the Statute's criminalization parameters are not enough to allay this concern, we can certainly imagine a scenario where justice would demand prosecution of an inchoate crime linked to aggression. For example, imagine a regime whose recently prepared act of aggression has not yet been carried out. Suppose as well that the regime has committed acts of aggression in the past (and perhaps individuals in that regime have been prosecuted for those acts). If the regime had been planning future acts of aggression that were stymied for any number of reasons, we may very well wish to prosecute those of its members who had been verbally grooming its citizens to participate in the illegal use of armed force.

Still, another potential argument is that the crime is redundant. In other words, speaking to the public or subordinates to garner support for successfully committing an act of aggression is implicitly part of "preparing" to commit an act of aggression. There is therefore no need to have a separate "incitement" offence. But this does not take into account the fact that "verbal support for aggressive acts is . . . likely to be insufficient to meet the definition of either planning or preparation."[79] As a result, a separate offence of incitement would permit prosecution of verbal conduct used to rouse public opinion against a targeted enemy and raise support and morale for the planned act of aggression.

Free speech advocates may object to the proposed crime based on fears of it chilling legitimate expression, regardless of how repugnant the speech. But this objection is similarly unavailing. Incitement to aggression, as proposed herein, can only be prosecuted if sufficiently "direct" within a context demonstrating the speech could imminently and realistically contribute to the perpetration of the target crime. Moreover, given the gravity of aggression itself -- considered the poisonous tree of crimes bearing the fruit of atrocity in the form of genocide, crimes against humanity and war crimes – any potential chilling effect is significantly outweighed.

V. Conclusion

Among other things, the empirical link between aggression and mass atrocity makes clear the epochal nature of the 2010 Kampala achievement. Defining aggression and operationalizing it within the Rome Statute, assuming the necessary ratifications and adoption, will go a long way toward eliminating the scourge of illegal war. But that is likely not enough. There are ancillary pockets of aggression-related criminality that may be implicated and failing to deal with them could prove fatal. One of those is incitement to commit aggression. As this essay has demonstrated, incitement within the aggression framework theoretically arises in two different instances. The first is in the "war-council" context, when elite-tier leaders gather to design and effectuate acts of aggression – such speech does not really amount to traditional incitement and its use by individuals in cases of unrealized acts of aggression can be adequately punished as attempt. The second theoretical instance of such speech is the "war-mongering" context, when

[79] *Id*. at 188. *See also* Sascha Mueller, *The Crime of Aggression under German Law*, 6 NEW ZEALAND YEARBOOK OF INT'L L. 183, 189 (2008) (In reference to the German domestic law against aggression, "due to the severity of punishment [for preparatory acts] incitement or verbal support . . . do not meet this requirement.").

leaders appeal to lower-level subordinates or the public at large to garner necessary support for aggressive designs. Policy and history suggest this latter variety of incitement be criminalized as "direct and public incitement to commit aggression." With modifications taking into account differences in the target offences, the elements of this crime would track those of incitement to genocide. Such a doctrinal formulation should allay free speech concerns while criminalizing an often indispensable aspect of preparation for acts of aggression. In raising the issue of aggression and incitement all those years ago, it turns out Roger Clark's doctrinal and policy instincts were spot on – the war-mongering variety of incitement should indeed be criminalized. And so, as we celebrate in this volume Dr Clark's great achievements in the area of international law, we can only hope his instincts will eventually prove prophetic.