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GUEST EDITORIAL COMMENT

The Illegal Use Of Armed Force As A Crime Against Humanity

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In 1947, UN Resolution 177 affirmed the Nuremberg principles and condemned individual criminal liability under international law. One year before, the Nuremberg trials had branded the waging of aggressive war as 'the supreme international crime'. The legacy of Nuremberg culminated in the establishment of a new International Criminal Court (ICC), in 1998. After speedy ratification, the Court became operational in 2002; it was immediately authorised to deal with war crimes, crimes against humanity and genocide. In full compliance with its Nuremberg legacy, the statute reiterated the criminalisation of aggressive war. While jurisdiction over the first three categories of crimes was universally accepted, several major powers were, however, not prepared to accept an international judicial review of their perceived sovereign right to wage war; the same hesitations still prevailed at an amendment conference in Kampala, Uganda, in 2010. Today, the crime of aggression still hangs in legal limbo. If no court is competent to try aggressors, the crime of aggression is more likely to be encouraged than deterred. This guest editorial comment seeks to narrow the immunity gap by suggesting practical legal solutions to discourage aggressive wars. Incorporation of the offence under domestic criminal statutes, and universal jurisdiction, should grant domestic courts the right to try aggressors. The illegal use of armed force should also be punishable as an 'other inhumane act' within the meaning of the ICC prohibition of crimes against humanity.

Keywords: crimes against humanity; war crimes; illegal use of armed forces; universal jurisdiction; Nuremberg; International Criminal Court; human rights; rule of law; aggression; crimes against peace

I. From the Origins of Regulating War to Nuremberg

The history of humankind has been the history of wars. Hugo Grotius, the father of international law, called for humane conduct even in warfare 'lest by imitating wild beasts too much we forget to be human'.[1] Following the devastating US civil war, Francis Lieber's code set forth

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[1]Hugo Grotius, *On the Law of War and Peace* [*De Juri Belli Ac Pacis Libri Tres*], trans AC Campbell (Batoche, 2001 [1625]), book 3, ch XXV, s II.

humanitarian Rules for the Governance of Armies in the Field.[2] At The Hague Conference in 1899, delegates adopted the famous Martens Declaration that 'belligerents remain under the protection of the law of nations as they result from the usages established among civilized peoples, from the law of humanity and the dictates of the public conscience'.[3] The Commission on Responsibilities for World War I concluded that those who violated 'the laws of humanity' were 'liable to criminal prosecution'.[4] Rules outlawing the inevitable atrocities of war almost invariably contained exceptions in case of 'military necessity' or 'national interests' but the 'laws of humanity' became an accepted minimum standard of binding customary international law.

In 1945, following the horrors of World War II, the International Military Tribunals (IMTs) at Nuremberg and Tokyo, together with the United Nations, sounded a wake-up call. New thinking and new institutions would be needed, as stated in the Preamble to the UN Charter, 'to save succeeding generations from the scourge of war'.[5] The Charter clearly prohibited the threat or use of armed force, except in defence against an armed attack or after authorisation by the Security Council.[6] US Supreme Court Justice Robert Jackson, America's most distinguished jurist, was appointed to serve as Chief Prosecutor for the United States at the Nuremberg IMT. He reported to the President that the US legal position 'would be based on the common sense of justice', because 'we must not permit it to be complicated by sterile legalisms developed in the age of imperialism to make war respectable'.[7] In this spirit, the Nuremberg IMT declared: 'This law is not static but by continual adaptation follows the needs of a changing world.'[8] The jurisdiction of the Nuremberg IMT was based on existing customary international law and treaties, which condemned 'Crimes Against Peace, War Crimes and Crimes Against Humanity', such as 'murder, extermination, and "other inhumane acts committed against any civilian population"'.[9] General Telford Taylor (later a professor at Columbia University), who directed a dozen subsequent trials at Nuremberg, following the IMT, concluded, in a prescient speech in Paris in April 1947:

> If the trials in Nuremberg … can help to expand and refine the legal principles of crimes against humanity, and if the nations of the world can establish a permanent jurisdiction for their punishment based on practical, enforceable and enlightened principles, we will indeed have reached a turning point in the history of international law.[10]

Expanding and refining legal principles of crimes against humanity was not something that could be accomplished quickly or easily. Universal declarations of human rights and humanitarian

[2]General Orders No 100: The Lieber Code.
[3]See the Preamble to the Geneva Convention (IV) 'Respecting the Laws and Customs of War on Land', and its annex 'Regulations Concerning the Laws and Customs of War on Land', The Hague, 18 October 1907.
[4]Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No 32 (Clarendon Press, 1919) 20, http://archive.org/stream/violationoflawsc00pariuoft#page/n1/mode/2up (accessed 3 August 2015).
[5]Charter of the United Nations, 1945 UNTS 1 XVI, Preamble.
[6]ibid, Arts 2(4), 42–51.
[7]Letter from Justice Robert H Jackson to the President of the United States, 6 June 1945, reporting on the Nuremberg trials, http://avalon.law.yale.edu/imt/jack08.asp (accessed 1 August 2015).
[8]Judgment of the International Military Tribunal, 1 October 1946, The Law of the Charter, http://avalon.law.yale.edu/imt/judlawch.asp (accessed 1 August 2015). See also Benjamin B Ferencz, *An International Criminal Court, A Step Towards World Peace* (Oceana Publications, 1980) 479.
[9]Charter of the International Military Tribunal, 8 August 1945, Art 6(c), http://avalon.law.yale.edu/imt/imtconst.asp (accessed 1 August 2015).
[10]Telford Taylor speech of April 1947, translated copy on file with the author.

proclamations have multiplied over the years but enforcement of the noble goals has been very slow in coming. Perpetrators of crimes in armed conflicts insist that their deeds were all necessary and justifiable; victims claim just the opposite. If such disputes cannot be resolved by peaceful means, and there is no impartial court competent to render a binding judgment, violence is unavoidable. Yet, we may be approaching a turning point as we peruse recent milestones that mark the progress in protecting humanity through law.

II. The Legacy of Nuremberg and the International Criminal Court

The 1948 General Assembly Universal Declaration of Human Rights proclaimed the inalienable right of all members of the human family to 'freedom, justice and peace in the world'.[11] 'Life, liberty and security of persons' was fundamental.[12] In 1984, another Resolution proclaimed that 'the peoples of our planet have a sacred right to peace'.[13] In the 1990′s, the UN Security Council created temporary tribunals to punish genocide and 'other inhumane acts' committed in Rwanda and Yugoslavia. Yet, some powerful governments that supported the human rights system when it applied to others were unwilling to subject their own conduct to legal scrutiny. Despite such vacillation, the gradual movement toward a more humane world order protected by law was unmistakable. There has been a slow awakening of the human conscience.

In 1998, nations meeting in Rome adopted a Statute for an International Criminal Court (ICC) based on the Nuremberg precedent. The treaty establishing the Court received the required 60 ratifications and became operational for over 70 states in July 2002. Ten years later, the number of accepting state parties had reached 121. With the creation of the ICC a permanent international criminal court came into existence for the first time in human history. Only four core crimes 'of concern to the international community as a whole' fell within the jurisdiction of the Court: genocide, crimes against humanity, war crimes and the crime of aggression.

Yet, major powers were still opposed, as they had always been, to having any foreign court adjudicate the legality of their military actions. They balked at allowing the ICC to try aggressors. Small states insisted that without being able to punish aggression—'the mother of all crimes'—the ICC would be a farce. As a compromise, aggression was recognised as a crime, but the ICC was prohibited from dealing with it until certain additional restrictive conditions were met. What was demanded was an acceptable new definition of aggression and assurances that Security Council powers would not be diminished. No one seemed to notice, or wanted to notice, that, in 1974, after years of negotiation, a consensus definition of aggression had already been reached and accepted by the UN General Assembly through Resolution 3314.[14]

The impasse in Rome over the crime of aggression was bridged by postponing further consideration pending a Review Conference to be convened seven years later. In June 2010, the promised Review Conference was held in Kampala, Uganda. The participants seemed to acknowledge at the outset that decisions would be reached only by consensus. 'Consensus', of course, meant that everyone had a veto right about anything. Under such restraints it would be exceedingly difficult to reach clear meetings of the mind on any important matters of substance.

[11]Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A (III), 8 December 1948, Preamble.
[12]ibid, Art 3.
[13]Right of Peoples to Peace, United Nations General Assembly Resolution 39/11, 12 November 1984.
[14]Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974. See also Benjamin B Ferencz, *Defining International Aggression*, vol II (Oceana Publications, 1975); and Benjamin B Ferencz, 'The United Nations Consensus Definition of Aggression: Sieve or Substance?' (1975) *George Washington Journal of Law and Economics* 701.

Nevertheless, a revised consensus definition of aggression was finally reached that was largely based on the 1974 consensus.[15] Its most significant change was that the aggression had to be a 'manifest' violation of the UN Charter.[16] What actually was meant by 'manifest' remained uncertain. Still, no longer could the convenient but spurious argument be made that aggression could not be prosecuted because it had not been defined.

However, again as had been the case in Rome, under pressure from powerful states, there was no agreement regarding the ICC acquiring active jurisdiction over the crime of aggression. As a compromise, it was agreed to postpone the issue for reconsideration at some unspecified future date after 2017. This was an echo of the historical excuse: 'the time is not yet ripe'. Thus, malevolent leaders responsible for what the IMT called 'the supreme international crime' still remained beyond the ICC's reach. If illegal war-makers are to be deterred by the threat of punishment by a court applying 'enlightened and enforceable principles', new ways have to be found to end existing immunities.

III. Protecting Human Rights through Law

'Enlightenment' begins with the recognition of the need for change. One of the primary objections to accepting new international rules to govern national conduct is the misguided complaint: 'Our sovereignty is at stake!' For thousands of years, war was the accepted path to conquests, riches and glory. Centuries ago, Thucydides articulated the often-quoted observation: 'We know as practical men that the question of justice arises only between those equal in strength, and that the strong do what they can, and the weak submit.'[17] Power was decisive; international law did not exist. The treaties of Westphalia in 1648 ended 30 years of religious conflict in Europe by creating a regional system of sovereign states in which a monarch reigned supreme only within his realm. Conquest by combat remained legitimate. This condition persisted even up to the formation of the League of Nations, which recognised war-making as lawful—as long as the enemy was given three months' notice.[18]

After the devastation of World War II, the Nuremberg principles sought to substitute a rule of enforceable humanitarian law to replace the horrors of armed conflict. The Hague Conventions of 1899 and 1907, the repudiation of war embedded in the Kellogg–Briand Pact, and the new idea that individuals were criminally liable for violations of *jus cogens*—principles so enshrined that no derogation would be permissible—became the bulk of a new set of international legal norms. Those who refused to be bound by these new international rules failed to recognise that, in today's interdependent and increasingly democratic world, sovereignty belongs not to a monarch who is above the law but to the people. The notion of absolute sovereignty became obsolete.

Prohibiting the illegal use of armed force is fundamental to the world order, and it protects the military as well as civilian victims. Enlightened military leaders who experienced armed combat learned the hard way that law is always better than war. When Dwight D Eisenhower, who had been Supreme Commander of the victorious allied forces in World War II, became President of the United States, he made an important speech in which he said: 'In a very real sense the world no

[15]For a comprehensive discussion of the Kampala amendments and process, see Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 *American Journal of International Law* 517.

[16]For a discussion of the development of the definition of the crime of aggression up to and including the Kampala review conference, see Claus Kreß and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179.

[17]Thucydides, *The History of the Peloponnesian Wars* (431 BC) (free eBook version, http://www.gutenberg.org/files/7142/7142-h/7142-h.htm, trans Richard Crawley).

[18]Covenant of the League of Nations, 28 April 1919, Art 12.

longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.'[19] He was echoing General Douglas MacArthur, Commander in the Far East, who, in 1946, praised the new constitution of Japan, in which the Japanese people forever renounced war as a sovereign right. MacArthur, himself a war hero, called for universal renunciation of armed might. He pointed to modern science and warned that failure to unshackle ourselves from the past 'may blast mankind to perdition'.[20]

Recently retired Chairman of the US Joint Chiefs of Staff Admiral Mike Mullen has repeatedly declared that he would rather prevent or deter a war than fight one.[21] Many of our most far-sighted international legal scholars, such as revered Professors Hersch Lauterpacht,[22] Myres McDougal,[23] and his protégé Michael Reisman,[24] have also recognised that the human rights of the individual can best be protected by an expansive and not restrictive characterisation of prohibited behaviour and that we should look to the future, and not to the past, in developing norms of acceptable conduct. With respect to crimes against humanity, highly esteemed Professor Cherif Bassiouni has observed that 'the purpose of the prohibition is to protect against victimization irrespective of any legal characterization or the context in which it occurs'.[25] In his recent book *Unimaginable Atrocities*, Professor William Schabas recognised that taking the Nuremberg principles forward is 'the mission of international justice, as well as international human rights, as a civilizer not only of individuals but also of nations'.[26] Countless non-governmental organisations, governments and official UN agencies have recognised the need for improved protection of humanity through law.[27]

IV. Some Ways Forward

In the absence of competent courts and political will by world leaders, the right to peace proclaimed in a wide variety of resolutions might remain little more than an articulated but unenforceable aspiration. Declaring the law is one thing; respecting or enforcing it is another. The evolution of international law has not yet reached the point where institutions or means are available for effective peaceful enforcement of the rule of law. A number of steps forward, however, can and should be taken.

[19]Statement by President Dwight D Eisenhower made on 30 April 1958, in recognition of Law Day.
[20]General Douglas McArthur, Address to the Allied Control Council in Tokyo, April 1946.
[21]See, for example, Chairman, Joint Chiefs of Staff Admiral Michael Mullen, Speech of 11 January 2008 ('I would much rather prevent a war than fight a war').
[22]For a short biographical sketch of and tribute to Hersch Lauterpacht, see Philippe Sands, 'My Legal Hero: Hersch Lauterpacht', *The Guardian Online*, 10 November 2010.
[23]Myres S McDougal, 'International Law and the Future' (1979) *Yale Law School Faculty Scholarship Series*, paper 2662.
[24]ibid, 260 ('Michael Reisman has appropriately emphasised that lawyers must continuously make judgments about the future … . [he has written that]: "Lawyers too often overlook the painfully obvious fact that though the events which precipitate decisions come from the past, decisions themselves are future oriented; the test of their quality is not whether they conform to the past, but rather whether they structure processes and value allocations in the near and distant future in preferred ways"', referring to, and quoting from, Michael Reisman, 'Private Armies in a Global War System: Prologue to a Decision' (1973) 14 *Virginia Journal of International Law* 1, 33).
[25]M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Kluwer Law International, 2nd edn 1999) 44. For an excellent discussion of the movement toward an international convention for crimes against humanity, see also Leila N Sadat, *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011).
[26]William Schabas, *Unimaginable Atrocities* (Oxford University Press, 2012) 221.
[27]For a general discussion of the development of international law, see Benjamin Ferencz, *New Legal Foundations for Global Survival* (Oceana Publications, 1995); and Benjamin Ferencz, *Enforcing International Law, A Way to World Peace* (Oceana Publications, 1983).

i. *Ratifying the Kampala Amendments to the Rome Statute*

The existence of the ICC, with its legally binding statute, for example, held forth the promise that the future would be better than the past. Hope, however, does not become reality without sustained efforts. As a first step, all states parties to the Rome Statute who were present in Kampala should ratify the amendments on aggression, including the negotiated understandings agreed to by consensus in 2010.[28] Failure to provide the necessary 30 ratifications would undermine the utility and integrity of the entire Kampala effort. Those states parties that accepted and ratified the Rome Statute are already legally bound by that treaty to assume primary responsibility for supporting the ICC. As the late Professor Otto Triffterer of the University of Salzburg (one of the earliest champions of an international criminal court) highlighted in his comprehensive commentary on the Rome Statute, it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[29]

The Statute's Preamble similarly speaks of punishment 'at the national level and by enhancing international cooperation', and emphasises that the ICC is 'complementary to national criminal jurisdictions'.[30] This principle of 'complementarity' meant that it was only when domestic courts were unwilling or unable to provide a fair trial that ICC intervention would be appropriate. It made good sense to rely on local courts first, where victims could see that justice was being done, evidence was more readily attainable and costs would be limited; whereas the Security Council, as provided in the UN Charter and the Rome Statute, could always intervene in the interest of world peace.[31] The purpose of that provision was to make sure that no one escapes the reach of justice. States would avoid being subjected to ICC powers by enacting their own local laws authorising their own courts to try any of the ICC crimes. This was agreed upon by virtue of the principle that leaders who violate international criminal law should have to answer to their own courts and their own citizens. If that is not possible or feasible, however, those responsible for massive killings should not expect the world to turn a blind eye to their crimes. Thus, as it was agreed, they could expect that justice would be done by the ICC.

ii. *Using National Courts to Deter Illegal War-making*

It is, of course, inevitable that on such difficult problems as war and peace there will be differences of opinion. As long as such differences are dealt with by peaceful means they might be considered legitimate. The use of armed force against innocent civilians, however, should not and cannot be tolerated as a legitimate way to solve disputes. If the Security Council fails in its duty to maintain peace, other lawful means must then be found to protect innocent victims and end the outrage that leaders responsible for the most atrocious crime of illegal war-making remain immune.

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[28] Ambassador of Liechtenstein to the United Nations, Christian Wenaweser, as the outgoing President of the Assembly of States Parties, declared: 'It is now up to each one of us States Parties to do what is necessary to have this system become operational in 2017′, Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Tenth Session, 12–21 December 2011, New York, Closing Remarks by Christian Wenaweser as ASP President (2009–11). The Principality of Liechtenstein became the first state to deposit its instrument of ratification of the Kampala amendments, on 8 May 2012.

[29] For his major work reviewing the Rome Statute, see Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing, 2nd edn 2008).

[30] Rome Statute of the International Criminal Court, 1998, Preamble. See also the remarks of Ambassador Tiina Intelmann, the former President of the Assembly of States Parties who, upon her election stated: 'States Parties should increase their focus in building capacities of national jurisdictions. This is also the only way to deter future crimes', Secretariat of the Assembly of States Parties (n 28), Remarks by Ambassador Intelmann, the new President of the Assembly upon election.

[31] Rome Statute (n 30), Art 16.

Recent experience has shown that when illegal violence becomes unbearable, tyrants may be toppled by the awakened and unrestrained outrage in the court of public opinion. This pressure should be used to convince the governments of peace-loving nations to rely on domestic legal tools. This notion that national courts have the primary responsibility to uphold international law is in fact a widespread and accepted idea. Addressing the Assembly of State Parties to the Rome Statute on 12 December 2011, highly respected UN High Commissioner for Human Rights Navi Pillay called on states to fulfil their obligations by enacting comprehensive legislation incorporating the Rome Statute into their domestic criminal codes. She called upon the Assembly to work 'toward ending impunity for gross human rights violations that amount to the worst crimes',[32] and was right to note that the primary objective 'is not to bring as many perpetrators as possible before the ICC, but to get states to diligently implement their obligation to prosecute international crimes'.[33]

In reviewing the work of the ICC on its tenth anniversary, the President of the Court, Judge Sang-Hyun Song, correctly observed that 'the most important aspect of the fight against impunity takes place in each country, society and community around the globe. Domestic justice systems must be strong enough to be able to act as the primary deterrent worldwide'.[34] The Human Rights Council Advisory Committee on the right of peoples to peace has recently similarly emphasised that there is a universal right for all peoples to be free from the use of force in international affairs, and that states should do their part in advancing such rights.[35]

The net by which perpetrators of international crimes may be apprehended and brought to justice is still under construction. Yet, if enough states carry out their acknowledged primary responsibility to enforce the rule of law, those leaders responsible for massive human rights violations will eventually be left with no place to hide. What is needed now is new national criminal legislation to put perpetrators of human rights violations on notice that their evil deeds will no longer be tolerated. As far as punishing the crime of aggression is concerned, it is possible for the essence of the egregious offence to make its way into national criminal jurisdictions of peace-loving nations, as domestic laws that protect the right to life and other peaceful and humanitarian goals do not require either consensus or Security Council approval. Although uniformity is desirable, different states have differing legal systems, and different terminology may be needed to enable national codes to curtail the illegal use of force. If the term 'aggression' is too politically sensitive, states should consider criminalising the offence under a more general description. 'The illegal use of force' could, for example, be recognised and condemned as a 'crime against humanity'. Of course, it would have to be more explicitly defined and explained, but it might induce militant extremist groups or states to pause or desist from causing great suffering to large numbers of blameless victims. Even powerful states may come to see the value of restraining their own military might. The post-war constitutions of Japan and Germany, for example, contain provisions recognising that aggression is a crime and

[32]Statement of Mrs Navi Pillay, United Nations High Commissioner for Human Rights to the Assembly of States Parties, 12 December 2011.

[33]ibid. See also speech of Navi Pillay, UN High Commissioner for Human Rights, at Cinema for Peace Dinner, December 2011, New York, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11724&LangID=E (accessed 25 July 2015).

[34]*International Criminal Court Turns Ten*, Opinion piece by Judge Sang-Hyun Song, President of the International Criminal Court, 2 July 2012, http://appablog.wordpress.com/2012/07/02/international-criminal-court-turns-ten-opinion-piece-by-judge-sang-hyun-song-president-of-the-international-criminal-court/ (accessed 23 July 2015).

[35]Progress Report of the Human Rights Council Advisory Committee on the Right of Peoples to Peace, as reproduced 9 December 2011, UN Doc A/HRC/AC/8/2.

curtailing their own right to use armed force except in self-defence.[36] Many more peace-loving nations should thus be following suit.

iii. *Jus Cogens and Universal Jurisdiction*

The recognition of the illegal use of armed forces as a crime under domestic criminal jurisdictions might have other benefits. Once recognised as a violation of *jus cogens* it might be tried domestically under universal jurisdiction. There are precedents in the history of humanity that courts can rely upon in using their universal jurisdiction. Many states, in fact, condemn various human rights violations such as genocide, apartheid, torture and other crimes against humanity as punishable in their national courts because they are recognised as customary international law that binds all states.

Although some states do not recognise customary international law unless specifically adopted in their own legislation,[37] the humanisation of man's most inhumane activity should be an ongoing process in the interest of our common humanity. Assisting the outlawing of war by bringing back the offence to its Nuremberg value of violation of *jus cogens* that might be tried domestically by any state that recognises its jurisdiction should be welcome as a positive development for world security.

iv. *Positive Complementarity*

Participation in the Rome Statue and the greater international justice community comes with unforeseen benefits. Many smaller states might, for example, need help in adapting their local laws to meet contemporary needs. The ICC should, as a form of 'positive complementarity', assist states to close the impunity gap that now exists for crimes that were universally outlawed at Nuremberg. It should be known that, if nations fail in their duty to protect their own citizens from slaughter, the responsible leaders may be brought to The Hague to face trial for their inhumane acts.

Similarly, NGOs and other supporting institutions can play a valuable role with respect to informing and galvanising support from the general public and sympathetic legislators, and assisting fragile states in boosting their domestic capacity. The goal should be to include in national criminal codes all of the crimes that were punishable at Nuremberg and are listed as crimes by the ICC and other new international courts. The inclusion of the prohibition of the illegal use of force, especially when directed towards civilians, should be no exception to this rule.

[36]Art 9 of the Constitution of Japan, 1946, reads: 'Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.' Art 26(1) of the Basic Law of the Federal Republic of Germany, 1949, reads: 'Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense.' Moreover, German Ambassador Hans-Peter Kaul, a respected judge at the ICC, has been an ardent and outspoken champion of criminalising the crime of aggression and the illegal use of force on both the international and national level. See, for example: 'Is it Possible to Prevent or Punish Future Aggressive War-Making?', address by Judge Dr jur h c Hans-Peter Kaul, Second Vice-President of the International Criminal Court, at the Li Haopei Lecture Series 'Implications of the Criminalization of Aggression', 8 February 2011, Forum for International Criminal and Humanitarian Law, Oslo, Norway.

[37]In *R v Jones* (judgment) (2005), Appeal from the Court of Appeal (Criminal Division) [2006] UKHL 16, the UK Law Lords opined that the crime of aggression exists in customary international law, but must first be domesticated into national law by specific legislative action before it can be prosecuted in domestic courts.

V. The Illegal Use of Armed Force as a Crime against Humanity under the Rome Statute

The Rome Statute that binds the ICC spells out the parameters of all of the crimes within its own current jurisdiction. Enumeration of certain actions as 'crimes against humanity' in the ICC statute and similar codes was never intended to be exhaustive or exclusive. Crimes that were separately categorised as 'genocide' and 'aggression' were being dealt with by special UN committees, but such separate crimes could very well have fit within the broader categorisation of 'crimes against humanity'. The ICC Statute includes, by way of example, acts that qualify as crimes against humanity: murder, enslavement, apartheid, rape, torture and half a dozen similar outrages. The final enumeration of offending types of conduct also condemned a catch-all category: 'other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health'.[38] This provision is consistent with the IMT language and with the statutes and jurisprudence of the ad hoc tribunals.

The precise character of 'other inhumane acts' as crimes against humanity was purposely left to interpretation by courts and judges. The door was deliberately left open to possible inclusion of other unforeseeable major inhumanities that might otherwise have escaped judicial scrutiny. Nuremberg correctly condemned aggression as 'the supreme international crime' because it included all of the other crimes.[39] Even if the appellation 'aggression' is not used, the consequences of the illegal use of armed force may be equally reprehensible and should not be allowed to escape criminalisation because of nomenclature.

i. *Proposing a Definition*

It may be useful, therefore, to consider a draft of a model code or template to help define the conditions under which an illegal use of force may come within the purview of 'crimes against humanity' under the Rome Statute, possibly as a category of crime included within 'other inhumane acts'.[40] The author proposes that *any person responsible for the illegal use of armed force in violation of the UN Charter, which unavoidably and inevitably results in the death of large numbers of civilians, should be subject to punishment for his individual criminal responsibility in the perpetration of a crime against humanity.*

ii. *Clarifying the Definition*

The proposed definition is based on the Nuremberg principles, and the widespread understanding —accepted under the Rome Statute—that illegal war-making should be punished. The proposed definition already contains important safeguards and limits. First of all, limiting the crime to persons responsible implies a leadership position, although the modern nature of warfare no longer ensures that states retain the monopoly of force, and thus official capacity is not required

[38]The Rome Statute of the International Criminal Court (n 30), Art 7(1)(k). By way of example, courts have interpreted beatings and acts of violence, including forcing a woman to exercise naked in public, to constitute 'other inhumane acts'. See Gabrielle Kirk McDonald and Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law, the Experience of International and National Court*, vol I (Kluwer Law International, 2000) 244. In the view of the present author, if crimes such as these fall within 'other inhumane acts', surely killing masses of civilians in an illegal war merits at least equal condemnation as a prosecutable crime.

[39]Judgment of the International Military Tribunal at Nuremberg 1946, The Common Plan or Conspiracy and Aggressive War, http://avalon.law.yale.edu/imt/judnazi.asp (accessed 7 August 2015).

[40]The Rome Statute of the International Criminal Court (n 30), Art 7(1)(k).

by this proposed definition. Finally, what is illegal under the law of nations is made plain by the UN Charter itself: there is an inherent right to individual or collective self-defence against an armed attack,[41] and, of course, the Security Council can authorise any measures to maintain peace.[42] If those conditions do not exist, however, the use of armed force is illegal.

Those who undertake legally authorised armed force fall, of course, into a different category. The legitimate use of armed might is permissible so long as such force is applied in a manner proportional to the harm sought to be redressed and consistent with established rules of armed conflict. It is the illegality of the use of force that gives rise to a crime against humanity because it shocks the human conscience by violating fundamental norms of permissible human behaviour. Of course, all of the safeguards of due process and fair trial must apply to both national and international courts.

The ICC can only consider 'crimes of concern to the international community as a whole'. In accordance with the elements of the crime embedded in the Rome Statute, it must be shown that the crime against humanity of illegally using military force was part of a widespread or systematic attack against civilians, with knowledge of the attack. This means that the Prosecutor must prove that the accused meant to cause the consequences 'or is aware that [said consequences] will occur in the ordinary course of events'.[43] Of course, all other limitations remain in place, and the judges and the Prosecutor must take into account the gravity of the crime and whether the prosecution would serve the interests of justice.[44] It will be up to the judges to decide whether the specific deeds are 'other inhumane acts' as contemplated by the law, and not left to the decision of the individual perpetrators.

With such a wide array of safeguards, leaders who do not plan to use armed force illegally need not fear their national courts or the ICC. They should welcome this norm of international law as a protective shield for themselves and their citizens. One should never forget that lawful goals should not be pursued by unlawful means. Humanitarian intervention, for example, must not be a cloak for concealed political objectives. The use of armed might can only be legitimate under circumstances permitted by the UN Charter and the international legal framework.

Yet, the determination of whether armed force is lawful or criminal cannot be left to the self-serving and biased protagonists of those circumstances. Prosecutors and judges are required by law to take account of all relevant circumstances, including mitigating factors, in order to serve the interests of justice. A fair and transparent judicial decision by judges of mixed gender and varied nationalities, applying humanitarian rules of law, remains the safest path to peace.

iii. *The Value of Deterrence*

ICC rules of procedure and decisions by the specialised tribunals created by the Security Council to penalise the horrors committed in this century are creating valuable jurisprudence by which the legality of human inhumanity can be judged. If even one murder can qualify as a crime against humanity, surely maiming and killing thousands of innocents should also be recognised as a punishable crime by competent national, regional or international tribunals. No one can expect all crimes to be eliminated simply by making them punishable locally or internationally. As was

[41] Charter of the United Nations (n 5), Art 51.
[42] ibid, Art 42.
[43] The Rome Statute of the International Criminal Court (n 30), Art 30.
[44] ibid, Art 53.

wisely stated by Professor Theodor Meron, an internationally esteemed legal scholar who has presided over the International Criminal Tribunal for the Former Yugoslavia and is now presiding over its residual mechanisms, 'to genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict'.[45] To achieve this, a vast matrix of social improvements is required. The threat of punishment, however, certainly has some deterrent effect. A guarantee that the offender cannot or will not be tried can only encourage more criminality. If the illegal use of armed force can be deterred, even to a slight extent, the effort to save human lives should be welcomed.

VI. Concluding Thoughts

Without a proper framework that can be operationalised to deter the violence of those who possess the military means, internal and external wars will continue to brutalise human beings. Powerful individuals, wherever they may be apprehended, must be held to the fundamental legal principle that those who illegally cause harm are legally and morally obliged to pay for their deeds. New legal approaches are required to deter man's capacity to kill his fellow human beings. The threat to humanity posed by the illegal use of armed force by nations and militant groups increases daily. There will always be those who still believe, as Thucydides did, that wars are inevitable and people will act only to protect their own interests.

Yet, history has proven us wrong and the notion of absolute state sovereignty has become obsolete. In today's interdependent and potentially life-ending world, where the electrical grid on planet Earth can be paralysed from cyberspace or by unmanned drones, and unimaginable weapons can perpetrate unspeakable horrors, is it not in the interest of all states to do what they can to deter humankind from spiralling into another war of destruction? The notion that killing those you perceive to be your adversaries is an immutable manifestation of some divine providence simply cannot stand the light of intelligent, informed analysis. War is never providential; quite the contrary. In his farewell address to the nation in 1961, US President Eisenhower warned about the power of a self-serving military–industrial complex that could only be controlled by 'an alert and knowledgeable citizenry'.[46] Whether they are nations or armed bands, militants must learn to resolve their differences without killing their adversaries. There must be a change of heart and mind among our fellow human beings, and we must use every educational tool to teach compassion, tolerance and compromise. The rule of law, nationally and internationally, points the way toward our world's future. Protracted failure to enforce the law that regulates our nations undermines the law itself.

Scepticism is understandable but, if change is desired, inaction is intolerable. Legislators, diplomats, students, teachers, religious leaders, NGOs and every segment of society are all called to be alert to the vital importance of developing national and international criminal legislations and institutions. When the Statute for the International Criminal Court emerged from the negotiations at Rome, UN Secretary General, Kofi Annan, called it 'the hope of future generations'.[47] Let us not allow this hope to fade unrealised. As Justice Jackson noted in his brilliant opening statement in 1945, putting Nuremberg defendants on trial was

[45]Theodore Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.
[46]Eisenhower's Farewell Addresses to the Nation, 17 January 1961. For a video of the speech, as delivered, see http://www.youtube.com/watch?v=CWiIYW_fBfY (accessed 7 August 2015).
[47]See Statement of UN Secretary-General Kofi Annan at the opening of the Preparatory Commission of the International Criminal Court, New York, 16 February 1999, http://www.ngos.net/un/icc.html (accessed 7 August 2015).

'one of the most significant tributes that Power has ever paid to Reason'.[48] Failing to recognise that illegal war-making is a punishable crime against humanity repudiates Nuremberg and would be a tragic triumph of Power over Reason. 'Law, not war' remains my slogan, and my hope for the future.

[48]Transcripts of the IMT proceedings and judgment may be found online at The Avalon Project, with the opening statement of Justice Robert Jackson at http://avalon.law.yale.edu/imt/chap_05.asp. The trial transcript erroneously reports that Jackson used the phrasing 'Power ever has paid to Reason'; what Jackson *actually* said was 'Power has ever paid to Reason', as may be seen on live video footage of his opening statement, http://www.youtube.com/watch?v=L50OZSeDXeA (accessed 7 August 2015).