

THE CRIME OF AGGRESSION: WHAT IS IT AND WHY DOESN'T THE U.S. WANT THE INTERNATIONAL CRIMINAL COURT TO PUNISH IT?

Debate: Anthony D'Amato, Marjorie Cohn, with comments by others from the Jurist Forum, beginning date March 22, 2001 <http://jurist.law.pitt.edu/forum/forumnew18.HTM>
For remarks by Heiko Recktenwald on this debate, see endnote.¹

Marjorie Cohn, Thomas Jefferson School of Law

From February 26 through March 8, the Preparatory Commission for the International Criminal Court met in an attempt to forge agreement on defining and punishing the crime of aggression. The Rome Statute for the ICC, written in 1998, will take effect after ratification by 60 states. It specifies the Court will hear charges of genocide, war crimes, crimes against humanity and the crime of aggression. But the drafters, unable to agree on a definition and scheme for punishing aggression, left that to an amendment process which allows statutory changes to become operative seven years after the Statute takes effect.

The United States has sought to ensure the ICC's legal processes do not jeopardize its role as global superpower by subjecting U.S. leaders to prosecution. It has consistently resisted definitions and jurisdictional provisions that may challenge U.S. impunity for wars of aggression.

Following the Holocaust, the International Military Tribunal at Nuremberg called the waging of aggressive war "essentially an evil thing . . . to initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Associate United States Supreme Court Justice Robert Jackson, one of the prosecutors at the Nuremberg Tribunal, labeled the crime of aggression "the greatest menace of our times."

At Nuremberg, for the first time, individuals were held criminally accountable for waging a war of aggression. The Nuremberg Charter proclaims the principle that "individuals have international duties which transcend the national obligations of obedience imposed by individual states." The fact that a defendant acted under orders from a superior did not absolve him of responsibility, although it was considered in mitigation of punishment.

The Tokyo War Crimes Tribunal was also established following World War II, to try Japanese military and political leaders accused of committing atrocities. United States leaders who were responsible for at least two of the most heinous war crimes in the history of the world – the atomic bombings of Hiroshima and Nagasaki – as well as unrestricted submarine warfare in the Pacific and the "Great Turkey Shoot," were never brought before these two tribunals.

Only the vanquished Germans and Japanese were held accountable for their war crimes and crimes of aggression. In the words of Justice Radhabinod Pal of India, dissenting at the Tokyo Tribunal, that was "victor's justice."

The United States and its "victorious" allies are once again escaping responsibility for war crimes, this time for those committed against the people of Yugoslavia. For although several war criminals have been brought before the International Criminal Tribunal for the Former Yugoslavia, it has refused to indict NATO leaders, in spite of criticism from Human Rights Watch and Amnesty International.

Walter Rockler, another Nuremberg prosecutor, has said the United States initiated a war of aggression against Yugoslavia. He wrote in the Chicago Tribune: "The notion that humanitarian violations can be redressed with random destruction and killing by advanced technological means is inherently suspect . . . This is mere pretext for our arrogant assertion of dominance and power in defiance of international law."

More than 50 years before, in his report to the State Department, Justice Jackson wrote: "No political or economic situation can justify" the crime of aggression. He also said: "If certain acts in violation of treaties are crimes they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." An impartial international criminal tribunal is necessary to prevent "victor's justice."

The major points of contention at the recent ICC PrepCom Working Group on Aggression centered around the definition of the crime of aggression (a legal question) and the jurisdictional authority to decide when aggression has occurred (a political question).

Many of the countries at the PrepCom advocated a definition set out in 1974 in General Assembly Resolution 3314, which was passed in the wake of Vietnam. It provides: "Aggression is 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, as set out in this definition."

The Resolution contains a non-exclusive list of actions that would constitute aggression, including the invasion or attack by armed forces of a state of the territory of another state; bombardment or use of weapons by the armed forces of a state against the territory of another state; and the blockade of ports or coasts of a state by the armed forces of another state.

Some countries, like Libya, argue that aggression should be defined to include the confiscation of property and the establishment of settlements in occupied territories. The United States continues to freeze Libyan assets and Israel persists in building settlements on the West Bank. Aggression could also conceivably be defined to outlaw preemptive strikes and the kind of naval blockade President John F. Kennedy used during the Cuban Missile Crisis.

The most controversial issue dealt with at the PrepCom was specifying which body will make the determination that a state has committed an act of aggression, if indeed such a finding is a condition precedent to individual liability. The United Nations Charter grants the Security Council primary responsibility to maintain international peace and security. Article 39 says: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression."

The dispute centers around what happens if the Security Council doesn't make a determination that an act of aggression has occurred, either because one of the five permanent members (United States, Great Britain, France, China and the Russian Federation) vetoes such a finding, or because the Security Council simply fails to act.

Many countries, including the United States, feel that that ends the matter. Others believe an independent judicial finding of individual criminal liability could be made, even if the Security Council does not find as a threshold matter that a state has engaged in aggression. They fear that a Security Council veto would effectively block the ability of the ICC to act to punish aggression.

One possibility is that, in the absence of Security Council action, the General Assembly (the U.N.'s democratic organ) could ask the International Court of Justice (the World Court established in the U.N. Charter) for an advisory opinion on whether aggression has occurred. The ICJ doesn't have authority to hear criminal charges against individuals. But if the ICJ were to find a state had engaged in aggression, the ICC prosecutor could proceed against individuals in that state for the crime of aggression.

The United States is, of course, vehemently opposed to this procedure. It wants to maintain the prerogative to exercise its Security Council veto over a finding that the United States has committed aggression.

But there is precedent for General Assembly action in the absence of direction from the Security Council. It is the "Uniting for Peace" resolution. During the Korean War, the Security Council would not mandate a U.S.-led effort into North Korea, because of the Soviet veto. Secretary of State Dean Acheson secured the passage of the Uniting for Peace resolution in 1950, to legitimize the General Assembly's authority.

The Resolution reads: "If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures. These recommendations can include in the case of a breach of the peace or act of aggression the use of armed force when necessary to maintain or restore international peace and security."

Article 1 of the Charter of the United Nations proclaims the goal of suppressing acts of aggression "in conformity with the principles of justice and international law." The

International Criminal Court, which will serve a crucial purpose in the system of international justice, should be empowered to punish those who commit the supreme crime, the crime of aggression, regardless of their country of origin.

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Discussion

- Marjorie Cohn, like Ben Ferencz, wants aggression to be an international crime. It's easy to share that sentiment. But the hard question is defining aggression. I have had some fairly frustrating exchanges with Ben in which he says he has defined aggression elsewhere, and points me to those articles, but they do not define aggression. If Ms. Cohn wants to make a difference in this vastly important area of law, then she should use her talents to come up with the definition of aggression that she would want the ICC to adopt. It can be a sentence; it can be a paragraph. But until she does so, then I suggest that for all the rest of us know, she has NOTHING in mind when she advocates the adoption of a definition of aggression.

Anthony D'Amato, Northwestern Law School

[Marjorie Cohn replies: In response to Mr. D'Amato's suggestion, I have drafted a definition of the crime of aggression. The Charter of the United Nations prohibits the use of force by a member State against the territorial integrity of any other state, but an armed attack against a member State will enable that State to act in self-defense. Chapter VII of the Charter empowers the Security Council to authorize the use of force. It is the Security Council, not an individual State, which may allow a State to conduct a "humanitarian intervention" into the territory of another State.

My proposed definition is informed by these principles, and it defines self-defense according to traditional criminal law principles, since this is a statute for a criminal court. The specification of invasion, attack, bombardment, or use of any weapons by the armed forces of a state is based on the definition of aggression contained in General Assembly Resolution 3314:

AGGRESSION is any invasion, attack, bombardment, or use of any weapons by the armed forces of State A against the territory of State B, which is neither authorized by the Security Council of the United Nations, nor done to repel a danger of imminent attack of the borders of State A by State B.

- *Anthony D'Amato replies:* Thank you, Professor Cohn, for stepping up to the plate and taking a good swing.

The problem with your definition is that it would include Kosovo, Panama, Grenada, Libya, and other recent interventions. You may be opposed to these interventions for other reasons, but we should not debase the coinage of the realm by calling them aggression. There was no attempt by the United States to move in and annex any of these territories, which is the core idea of aggression.

Consider in domestic law a bunch of separatists on a Montana ranch. If the FBI and DEA personnel move in, is it 'aggression'? Are the separatists entitled to fire in self-defense? What I'm getting at, of course, is that there is a world of difference between the use of force for a 'police action' and the use of force preparatory to taking over another country.

Another major thing you lose in defining aggression your way is what a lot of right-wingers don't mind losing, namely, keeping the US military out of other countries' business. But if in that other country there is a brutal civil war, and people's homes are being looted and burned, and women are being raped, and men are being tortured, why would we NOT intervene? We would not intervene if we had no morality. To try to stop this kind of intervention by a definition of aggression is to abandon other people to a horrible fate in their own countries.

Now why don't you take your definition and see if you can work in an exception for the police-power use of force?

- Marjorie Cohn replies: *Of course my definition would include Kosovo, Panama, Grenada, Libya and other recent interventions. Whether I am personally opposed to them is irrelevant. If they were not sanctioned by the Security Council, and our borders were not threatened, they constituted aggression. Nothing in the definition of aggression approved by the General Assembly in Resolution 3314 links aggression to an attempt at annexation.*

Your Montana and police hypotheticals are totally inapposite since they don't involve the armed forces of one country invading another country. The word "State" in my definition, and indeed, in virtually all international treaties, refers to "countries."

Finally, although I'm not a right-winger, I certainly agree with those who advocate "keeping the US military out of other countries' business." But notwithstanding his campaign rhetoric, our President lost no time in invading Iraq without Security Council permission and certainly didn't act in self-defense. This was clearly aggression. Your examples of brutal civil war, looting, burning, rape and torture may and perhaps should move the Security Council to order a "humanitarian intervention." This eventuality is well covered by my definition. It is the prerogative of the Security

Council, not an individual State such as the US, to determine the need for humanitarian intervention. Your suggested exception for the "police-power use of force" would put an international law imprimatur on the United States' selective (why not Rwanda??) invasions of other countries (unauthorized by the Security Council) under the guise of "humanitarian intervention," when the real motive is the desire for US hegemony over other regions, and frequently, over their oil resources.

- *Anthony D'Amato replies: But WHY would you want a definition of "aggression" that rules out humanitarian intervention? Why should a legal definition get in the way of preventing people from the tyranny and brutality of their own governments? If Hitler hadn't committed aggression, then should the world have stood idly by while he committed genocide against his own nationals within his own territory? Why put all your faith in the UN? It's subject to veto. Prior to 1990, the UN hadn't intervened to stop any aggressions. When it did -- Iraq's aggression against Kuwait -- you mischaracterize it as US aggression. I respectfully suggest that you have a lot of reading to catch up on.*
- *Marjorie Cohn replies: You seem to have complete faith in the US to decide when a "humanitarian intervention" is necessary and how it should be conducted. When the US bombed Iraq and Yugoslavia, hitting civilians with depleted uranium, cluster bombs and environmental devastation, was that "humanitarian" intervention?*

I, for one, have more confidence in our world government than in the US government's "humanitarian" motives. In fact, US "humanitarian intervention" may be aggression in disguise. The UN is a workable system. It includes not just the Security Council with its veto power, but also the more democratic General Assembly, which has power to act when the Security Council doesn't, under the Uniting for Peace Resolution.

The issue is how to define the crime of aggression. If you read the ICC Statute, you will see that genocide is listed as a separate crime (article 5), and is defined there (article 6). Aggression is also listed in article 5, but not defined, and that's the question before us. Hitler's men were indeed punished for waging a war of aggression (see Nuremberg Charter, section (a)), and also for crimes against humanity (section (c)), which included "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds . . ."

Article 39 of the UN Charter requires the Security Council to deal not only with aggression, but also any threat to the peace or breach of the peace. Domestic human rights violations may be deemed threats to or breaches of the peace. The Security Council labeled the repression in South Africa "a threat to the maintenance of international peace and

security," and imposed a mandatory arms embargo against South Africa in 1977.

- An open comment to Anthony D'Amato:

Your comment/discussion of Ms Cohn's piece on ICC states "It's easy to share that sentiment. "(that aggression should be forbidden by international law.) Do you share it? Ms. Cohn suggests a definition set out in 1974 in UN Resolution 3314. What's wrong with that definition?"

Urban Kohl
Washington

- How's 'bout the 1970 & 1987 UN "Declarations on Principles of IL Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations?" For example, the '87 Declaration includes the (rather broad) prohibition of "economic, political, or any other type of measures to coerce another State" for the purpose of securing advantages of any kind. I'm not taking a position, but there have been other UN resolutions attempting to flesh out the arguably skeletal int'l instruments to date....

William Slomanson
Thomas Jefferson School of Law

- Including the crime of aggression under the jurisdiction of the ICC won't happen quickly. Expanding the ICC's jurisdiction is a very deliberate process. First the ICC must be established, which will only happen after 60 states ratify. Then, according to Articles 121 and 123, seven years must pass before the statute is amended. Then, if half of the States Parties agree, they can begin to discuss the question. Then, if they come to an agreement, seven-eighths of the States Parties must ratify the change, which in many cases would involve a constitutional amendment (as it has for some ratifications of the ICC treaty). Then a year would have to pass. Even then, the ICC would only have jurisdiction over crimes involving the territory or nationals of the states who have ratified the change. Both Professors Cohn and D'Amato should be saluted for offering concrete suggestions and pointing out difficulties with the issue. All readers should know that both sides will have plenty of time to continue to disagree.

Jens Iverson
New York

- Without inclusion of the crime of aggression in the Statute of the ICC and giving the jurisdiction of the ICC over it there is no sense in the establishment of that court. As a matter of fact, a selective justice is even worse than no justice at all, because it makes mockery of the very concept of justice. That's exactly what's happening with the ICTY: it doesn't have jurisdiction aggression, over the crime

which "is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole", as stated in the Nuremberg judgment.

When we ponder about the definition of aggression we have to have in mind the fact that today the threat to the international community, to the peace and security, comes more from internal secessionist and civil wars than from the outside classical aggression. Therefore, any definition of aggression should include the concept of INTERNAL AGGRESSION. Secessionist wars are examples of "internal aggression". Southern Confederacy made aggression on the United States of America; Croatia, Slovenia, Bosnia-Herzegovina and even Macedonia made the aggression on Yugoslavia. This concept of internal aggression does not annul the so-called right of self-determination of peoples. What it says is that the secession should be pursued only in peaceful manner, without recourse to armed violence. After all, this is fully in accordance with the resolutions of the General Assembly of the UN 51/55 of December 10, 1996 and 53/71 of December 4, 1998 entitled "Maintenance of international security - prevention of the violent disint

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- In his exchange with Marjorie Cohn, Anthony D'amato refers to "humanitarian intervention" and from my understanding suggests that Cohn's proposed definition of aggression would in fact, compromise humanitarian interventions.

As noted by Professor Cohn, accepting "humanitarian intervention" as just cause to engage in war, assumes that the U.S., in this case, is itself qualified to form an objective legal conclusion as to whether "humanitarian intervention" is needed.

With all due respect, I see several other problematic elements. Even if we accept that "humanitarian intervention" is or should be a legal basis to circumvent the U.N. Charter, what assurance is there that similar conduct will in fact be based on humanitarian factors, rather than geo-political, economic or other factors? With all due respect, I think this constitutes a threat to international law itself. Another factor of interest lies in the definition of "humanitarian intervention." Why, for example, doesn't Afghanistan qualify for a "humanitarian intervention?" Why don't the Kurds in Turkey merit a humanitarian intervention?

It seems to me that acceptance of humanitarian intervention as a basis for war, is really an argument of convenience.

Perhaps the most disconcerting element lies in the current viewpoint, that fighting the "humanitarian war" somehow provides immunity from Geneva Law and other relevant areas of Humanitarian law. I respectfully submit, this begs the question,

is it acceptable to fight a "humanitarian war" in a manner that is anything but "humanitarian?"

Naturally, the argument goes that war is anything but humanitarian. But we still have the *ius im bello*, which I respectfully submit has not been applied consistently in the case of NATO, when compared to the basis for indictments against Yugoslav officials.

Another thing that strikes me, is the history of humanitarian intervention. Generally, this was a basis under which Imperial Europe justified its atrocities during the Crusades. I don't mean to be sarcastic or nasty, but I think that when one country has an unchallengeable degree of military strength and that same country deems itself the sole judge of determining when it should intervene on "humanitarian" grounds, it is behaving like an empire - not a country concerned about the rights of others.

Maria Greifeneder
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ⁱ Heiko Recktenwald uzs106@uni-bonn.de wrote:

There is no crime of aggression yet and reading a blog with Antony opposing it, <http://jurist.law.pitt.edu/forum/forumnew18.HTM>, with his definition of aggression ("The problem with your definition is that it would include Kosovo, Panama, Grenada, Libya, and other recent interventions. "), I came to the conclusion that I would oppose it too, but for a completely different reason.

I don't buy the argument that the U.S. should not join the ICC because it can be misused, but see also <http://law.ubalt.edu/asil/rubin.html> and the way Milosevich was handled, for the ICC as it is and the crimes of today.

But in the case of a possible crime of aggression it seems that some flexibility is needed.

According to Kelsen, if one can say so, states obey PIL just mostly, Kelsen's definition of a norm.

They do this probably not because they are bad, but because there are political reasons. Those reasons may be right or wrong, but it seems to be unthinkable that world politics, the great questions of mankind, are decided by judges, at least in such a strict way (prison).

Some norms should be like bamboo boats, like Chinese ships in a storm as described by Peter Freuchen in his book on the seven seas, maybe stupid and dangerous, but I simply cannot imagine such a strict system.

H.