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ARTICLE

Charging Aggression as a Crime against Humanity? Revisiting the Proposal after Russia's Invasion of Ukraine

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Abstract

Much discussion over Russia's 2022 invasion of Ukraine focuses on the inability to charge aggression. However, another approach might be available: charging this under the ICC crimes against humanity (CAH) residual clause. First proposed in 2010 by Benjamin Ferencz, who lamented the circumscribed reach of aggression under the 'Kampala Compromise', the proposal has met with scepticism, primarily given that textbook aggression targets military forces, not civilians. Yet, civilian populations disproportionately bear the brunt of the violence of modern aggression (often being its direct targets). Russia's 2022 invasion is but the most recent and compelling example. Thus, this article resuscitates Ferencz's proposal, arguing that Russian leaders could be charged with using illegal force as a CAH under the residual clause. This approach would have practical advantages: initiating aggression in the Kremlin links liability to Putin much more directly for killing Ukrainian civilians, and charging it as CAH opens human victims to ICC participation and reparations. There are theoretical advantages, too, with utilitarian/retributive objectives better satisfied. Moreover, Ferencz's approach is better than recently proposed alternatives: using aggression merely as a gravity/liability modes/sentencing enhancer or alleging breach of the right to self-determination as the residual clause gravamen (arguably creating problems with victim group identification).

Keywords: Russian invasion; Ukraine; aggression; illegal use of force; crimes against humanity; residual clause; International Criminal Court; Rome Statute; Benjamin Ferencz; victim participation; reparations

1. Introduction

The 2010 International Criminal Court (ICC) Review Conference in Kampala (Uganda), which defined the crime of aggression and its jurisdictional parameters, was wrapping up. And former Nuremberg prosecutor Benjamin Ferencz, who had devoted much of his life to advocating the offence's criminalisation, was bitterly disappointed. He viewed it as a Pyrrhic victory owing, in large part, to the circumscribed jurisdiction of the crime: absent a Security Council referral, it would not cover leaders who were responsible for acts of aggression if their countries were not ICC members or, even if they were, had not chosen to submit to the Kampala amendments (similarly, even if the attacked state were not an ICC member and/or had not submitted to the Kampala amendments, jurisdiction would be excluded). Besides, the Court could not even exercise this narrow jurisdiction until, at the earliest, 2017, conditioned on a minimum of 30 state ratifications and adoption by consensus, or by a two-thirds majority of the states parties deciding to activate the jurisdiction.[1]

However, the 90-year-old Ferencz, who had grown impatient waiting for codified penal consequences for illegal use of armed force, hit upon an idea. Responsibility for such conduct, he reckoned, could be charged by the ICC as crimes against humanity (CAH) under Article 7(1)(k) of the Rome Statute, the so-called residual clause that permits prosecution of 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.[2] Ferencz began to seek support for this novel approach,[3] but the response among experts was mixed, with commentary lauding the spirit of the idea but doubting its viability, especially given the immediate focus of aggression on military, as opposed to civilian objectives.[4]

Thirteen years later, much has changed. In the first place, despite Ferencz's concerns, on 15 December 2017, the ICC Assembly of States Parties activated the Court's aggression jurisdiction, which became effective on 17 July 2018 (but with the circumscribed reach described above). Moreover, on 24 February 2022, Russia invaded Ukraine, representing 'the biggest land conflict in Europe since World War II', with Russian forces seemingly focused on inflicting massive 'civilian casualties, [damaging and destroying] civilian infrastructure and … accelerating [an] exodus of refugees'.[5]

[1] Noah Weisbord, *The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats* (Princeton University Press 2019) 105–10 (describing an encounter between Weisbord and Ferencz during which the latter expressed his negative views of the so-called 'Kampala Compromise').

[2] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 7(1)(k).

[3] See, eg, Benjamin B Ferencz, 'Illegal Armed Force as a Crime against Humanity', *Ben Ferencz.Org*, June 2015, https://benferencz.org/articles/2010-present/illegal-armed-force-as-a-crime-against-humanity.

[4] See, eg, Chet Tan, 'Punishing Aggression as a Crime against Humanity: A Noble but Inadequate Measure to Safeguard International Peace and Security' (2013) 29 *American University International Law Review* 145.

[5] Robert Burns and Lolita C Baldor, 'Ukraine War at 2-Week Mark: Russians Slowed but Not Stopped', *AP*, 9 March 2022, https://apnews.com/article/russia-ukraine-kyiv-europe-moscow-world-war-ii-81b2f12c177810ee8fef7c4ce832fd6f.

The ICC Prosecutor has launched an investigation regarding Russian commission of CAH and war crimes in connection with the Russian attack.[6] Although Russian President Vladimir Putin (along with Children's Rights Commissioner, Maria Lvova-Belova) are the subject of a March 2023 ICC arrest warrant regarding the war crime of unlawful deportation and transfer of children, Putin's liability for deadly violence inflicted on Ukrainian civilians is not within the warrant's purview.[7] In fact, the warrant's issuance has been described as 'largely symbolic', with experts and rights advocates calling 'for top Russian officials to be prosecuted for crimes against humanity' as well.[8]

Other than Putin and Lvova-Belova, top officials – such as Generals Valery Gerasimov and Sergei Surovikin – have not been the targets of an arrest warrant. Instead, at this relatively early stage of a conventional CAH probe, the focus on CAH-related violence appears to be on lower-level perpetrators operating at ground level rather than persons high in the Russian leadership structure.[9] Moreover, in the light of the aforementioned jurisdictional limitations, aggression charges against Putin and his generals would not be available either, as Russia is not an ICC member state and, with its status as a member of the Permanent Five (P5), would veto any attempted Security Council referral.[10]

Thus, on the surface, Ferencz's 13-year-old proposal would seem ripe for reconsideration in that we have an instance of large-scale interstate warfare arguably targeting civilians, which addresses the concerns of earlier critics, and, as noted, Putin and his henchmen cannot be charged with aggression before the ICC. However, the probe could turn directly to Putin if potential CAH charges include illegal use of force within their scope. Interestingly, however, Ferencz himself (before passing away in April 2023) had not attempted to resuscitate his proposal, deciding instead to join a group of experts calling for the creation of a special ad hoc tribunal to prosecute Russian leaders for aggression.[11]

[6] Ewelina U Ochab, 'Experts Call for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine', *Forbes*, 4 March 2022, https://www.forbes.com/sites/ewelinaochab/2022/03/04/experts-call-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/?sh=2b8e3e71e22d.

[7] Marlise Simons and Anushka Patil, 'The International Criminal Court Issues an Arrest Warrant for Putin', *The New York Times*, 17 March 2023, https://www.nytimes.com/live/2023/03/17/world/russia-ukraine-putin-news#the-international-criminal-court-issues-an-arrest-warrant-for-putin.

[8] Claire Parker and Robyn Dixon, 'ICC Issues Arrest Warrant for Putin over War Crimes in Ukraine', *The Washington Post*, 17 March 2023, https://www.washingtonpost.com/world/2023/03/17/icc-hague-arrest-warrants-putin-russia-ukraine.

[9] Jeff Neal, 'The International Criminal Court: Explaining War Crimes Investigations', *Harvard Law Today*, 4 March 2022, https://hls.harvard.edu/today/the-international-criminal-court-explaining-war-crimes-investigations (quoting international criminal law (ICL) expert Alex Whiting that 'mid-level commanders who are operating in Ukraine' are the likely initial focus of the ICC investigation).

[10] See Ochab (n 6) ('On March 4, 2022, experts from all over the world, including ... Benjamin Ferencz, former Prosecutor at the Nuremberg Military Tribunal, issued a joint statement calling for the creation of a special tribunal for the punishment of the crime of aggressions against Ukraine').

[11] ibid.

Otherwise, to date, in the light of Russia's latest acts of aggression, two pieces have considered Ferencz's proposal indirectly through different lenses: one considers aggression only as a kind of CAH enhancer (for gravity, modes of liability, and sentencing) rather than as an enumerated offence in itself;[12] the other under the residual clause, but as a breach of the right to self-determination.[13] Neither piece, however, historically contextualises Ferencz's proposal so as to best understand its unique suitability for the current situation in Ukraine (especially, as will be explained, given its emphasis on natural persons as victims). Nor does either piece directly consider the proposal as specifically framed by Ferencz – which grounds its residual clause harm on the killing of innocent civilians, not breach of the right to self-determination[14] – and then subject it to analysis in the context of Russia's civilian-focused aggression. Nor does either piece consider how charging illegal use of force as CAH is procedurally, normatively and/or jurisprudentially preferable in the case against Russian officials, given that it opens up the ICC participation and reparations regimes for victims (aggression charges likely would not) and aligns better with the philosophy of punishment, both in utilitarian and retributive terms.[15]

As a result, this article fills important gaps in the literature, in terms of:

- legal history – examining a hitherto ignored chapter – that is, the circumstances surrounding Ferencz's 2010 proposal, and then closely tracking the evolution of its treatment since to place it in its proper context;

[12] Terje Einarsen and Joseph Rikhof, 'Prosecuting the Russian Leadership for the Crime of Aggression at the International Criminal Court', *TOEAP Policy Brief Series*, No 129, 16 March 2022, https://www.toaep.org/pbs-pdf/129-einarsen-rikhof. This article follows up on ideas originally articulated in Manuel J Ventura and Matthew Gillett, 'The Fog of War: Prosecuting Illegal Use of Force as Crimes against Humanity' (2013) 12 *Washington University Global Studies Law Review* 523.

[13] Giulia Pinzauti and Alessandro Pizzuti, 'Prosecuting Aggression against Ukraine as an "Other Inhumane Act" before the ICC' (2022) 20 *Journal of International Criminal Justice* 1061. The final version of the manuscript for this article was approved and up to date as of July 2023. Since that time, and not long before it was slated to be published, another related article has come out: Frédéric Mégret, 'Why Prosecuting Aggression in Ukraine as a Crime Against Humanity Might Make Sense' (2023) 28 *Journal of Conflict & Security Law* 467. The article, which is largely in accord with the stance taken herein, examines the issue from a more theoretical perspective, focusing primarily on the implications of the preferred charging approach of this article for the CAH chapeau. Where relevant, it will be referenced in footnotes below.

[14] Benjamin B Ferencz, 'A New Approach to Deterring Illegal Wars' in Donald M Ferencz, 'Aggression in Legal Limbo: A Gap in the Law that Needs Filling' (2013) 12 *Washington University Global Studies Law Review* 507 (Appendix) (referring to the gravamen of residual clause harm as 'mass killing of innocents' and 'large-scale civilian casualties').

[15] As explained below, natural persons are not recognised as victims of aggression under customary international law (states are) and, while it is technically possible for natural persons to qualify as victims under the Rome Statute, it is not certain the ICC would allow them access to its participation and reparations regimes because 'it was not states' intention to create new rights for individuals suffering harm from the crime of aggression'; see Erin Pobjie, 'Victims of the Crime of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017) 816, 824, 846.

- policy prescription – analysing how Ferencz's specific proposal could be beneficial in terms of prosecuting Russia's illegal use of force, including with respect to modes of liability; and
- atrocity victim rights and punishment philosophy – considering the ICC victim participation and reparations implications as well as the utilitarian and retributive dimensions of the proposal.

Following this Introduction, Section 2 examines the contemporary history of aggression and its impact on victims. With that in mind, it then looks more carefully at the origins of the aggression offence, Ferencz's proposal, its contours, and its grounding in atrocity victim considerations. Section 3 then examines its initial mixed reception from experts in the field. From there, Section 4 considers revised views of Ferencz's proposal over time, especially after the ICC activated its aggression jurisdiction and Russia invaded Ukraine in 2022, and whether the proposal conforms with the principle of legality and/or could be stymied by realpolitik. Assuming, hypothetically, that obstacles remain, Section 5 considers whether variations of Ferencz's proposal – using aggression as a gravity/modes of liability/sentencing enhancer or alleging breach of the right to self-determination as the residual clause gravamen – would achieve the same results. While the aggression-as-enhancement approach would confer certain investigatory and prosecutorial advantages, it could also be problematic, especially with regard to charging modes of liability and allowing victim participation and reparations. Similarly, emphasis on a breach of the right to self-determination could be problematic given lack of clarity regarding the rights holder (or holders) and attendant problems in administering victims' participation/reparation rights.

In the process, Section 5 considers the comparative advantage of Ferencz's proposal and concludes that, given the civilian-focused nature of Russia's aggression, charging CAH as the use of illegal armed force via the residual clause (with breach of the right to life as the gravamen) would be the most viable option. This is so based on evidentiary advantages, philosophy of punishment considerations, and humanising the offence by emphasising the toll on natural persons, its real victims. The latter consideration in the context of the Russian invasion, the article posits, should trump any realpolitik challenges. Finally, the concluding section (6) reflects on the possibility for concurrent charges of aggression and CAH (illegal use of force) in the light of this special variety of civilian-targeted aggressive war. It also suggests additional avenues for research beyond the Ferencz proposal.

2. Modern aggression, its criminalisation, and the Ferencz proposal

2.1. Modern aggressive war and civilians

In a series of speeches in the late 1950s and early 1960s, retired US General Douglas MacArthur unequivocally declared that, in today's world, civilians are the primary target of war;[16] and this is backed up by statistics. In the

[16] Edward T Imparato, *General MacArthur Speeches and Reports 1908–1964* (Turner 2000) 233, 235, 238, 247.

twentieth century, an estimated 43 to 54 million non-combatants perished as a result of warfare, accounting for up to 62 per cent of all deaths in armed conflict during that time.[17] This is especially true when aggressive war is perpetrated.

According to Alexander B Downes, this is for a variety of reasons, such as eliminating 'fifth columns' (indigenous locals seeking to help to end alien occupation via sabotage/espionage) as well as heading off 'potential revolts that might occur later on'.[18] In certain cases, local civilians are targeted because the attacking state wishes to have higher numbers of its own people in the acquired territory to establish its 'national character' and thereby legitimise its sovereignty claim over it.[19] In other situations, high civilian casualty rates in aggressive wars occur because the aggressor wants 'to inflict enough pain on noncombatants that [enemy] leaders capitulate to halt the bloodshed – or that the people themselves rise up and demand an end to the war'.[20]

A sampling of aggressive warfare from the Second World War to the present day supports Downes's analysis. For example, in conquering Poland to begin the Second World War, the Germans killed 70,000 enemy soldiers.[21] However, given their desire to subjugate the Poles and 'remove those ... seen as most capable of organizing resistance to German rule', the invaders killed between 1.8 and 1.9 million non-Jewish Polish civilians during that war.[22] Similarly, in invading China and annexing it during the Second World War, Japan killed approximately 4 million Chinese combatants. However, during the same period, 16 million Chinese civilians lost their lives.[23] During the 1950–53 Korean War, North Korea's aggression against South Korea resulted in the deaths of 313,000 enemy military personnel while approximately 1,000,000 South Korean civilians perished.[24]

Between the Soviet Union invading Afghanistan in 1979 and pulling out in 1989, an estimated 108,000 Afghan fighters were killed (including both regular army forces and Mujahideen combatants) while approximately one million civilians died.[25] In launching an aggressive war against Iran in 1980, Iraq killed approximately 218,867 Iranians, of whom 44.6 per cent were military

[17] Alexander B Downes, *Targeting Civilians in War* (Cornell University Press 2012) 1.

[18] ibid 4.

[19] ibid 4–5.

[20] Alexander B Downes, 'Putin's War Against Ukrainian Civilians Is Not New — Nor Will It Work', *The Hill*, 26 March 2022, https://thehill.com/opinion/international/599866-putins-war-against-ukrainian-civilians-is-not-new-nor-will-it-work.

[21] 'The War in Europe, 1939-41', *Encyclopedia Britannica*, https://www.britannica.com/event/World-War-II/The-war-in-Europe-1939-41.

[22] 'Polish Victims', *Holocaust Encyclopedia*, https://encyclopedia.ushmm.org/content/en/article/polish-victims.

[23] 'Research Starters: Worldwide Deaths in World War II', *The National World War II Museum*, https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war.

[24] 'The Korean War', *Encyclopedia Britannica*, https://www.britannica.com/place/Korea/Armistice-and-aid.

[25] Alan Taylor, 'The Soviet War in Afghanistan, 1979–1989', *The Atlantic*, 4 August 2014, https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786.

personnel (regular army forces and Islamic Revolutionary Guards) and 55.4 per cent were civilians (many of whom were killed via chemical weapons).[26] In 1998, Rwanda invaded the Democratic Republic of the Congo (DRC), beginning the 'Great African War', which lasted until 2003. Rwanda was joined in the attack by Uganda and Burundi, while the DRC was aided in repelling it by Angola, Chad, Namibia, Zimbabwe, and Sudan. Over three million people are believed to have died in the conflict; although exact numbers are not known, an overwhelming majority of them were non-combatant Congolese.[27]

As will be fleshed out in greater detail below, the Russian invasion of Ukraine is but the latest example of this phenomenon. As explained by Downes:[28]

> The world has watched in horror as Russian forces have turned their guns, bombs, and missiles on civilian areas [in Ukraine]. This is not collateral damage. Russian ordnance is being lobbed into neighborhoods, hitting apartment buildings, schools, hospitals, and even a theater specifically marked as sheltering children. This is intentional targeting of civilians.

2.2. The criminalisation of aggression

2.2.1. Prosecuting crimes against peace at Nuremberg and Tokyo

In the wake of the Second World War, the Allies seemed to appreciate the egregious criminality of aggression, with Nuremberg's American Chief Prosecutor, Robert Jackson, referring to it as 'the worst crime of all, leading to and encompassing all the others'.[29] The victorious powers charged it as 'crimes against peace' in indicting many of the surviving major Nazi and Imperial Japanese leaders at international bodies in Nuremberg (1945–46, the International Military Tribunal or IMT) and in Tokyo (1946–48, the International Military Tribunal for the Far East or IMTFE – war crimes, and CAH were also among the available charges). Article 6 of the IMT Charter, which laid out these offences (and the provisions of which were replicated for the Charter of the Tokyo proceedings), defined crimes against peace as 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 for the accomplishment of any of the foregoing'.[30]

[26] Moosa Zargar and others, 'Iranian Casualties during the Eight Years of Iraq-Iran Conflict' (2008) 41 *Revista de Saude Publica* 1065. Of these civilians, approximately 41.1 per cent, primarily men, offered some sort of resistance to the Iraqi invaders and approximately 15.3 per cent, mostly women and children, had no connection with the hostilities: ibid.

[27] Center for Preventive Action, 'Conflict in the Democratic Republic of Congo', *Council on Foreign Relations*, 18 December 2023, https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo; Benjamin Coghlan and others, 'Mortality in the Democratic Republic of Congo: An Ongoing Crisis', *International Rescue Committee*, July 2006, 2, https://www.rescue.org/sites/default/files/document/661/2006-7congomortalitysurvey.pdf (indicating that fewer than 10 per cent of deaths were attributable to fighting among armed forces).

[28] Downes (n 20).

[29] Robert Jackson, 'Worst Crime of All', *The New York Times Magazine*, 9 December 1945, 45, https://www.roberthjackson.org/wp-content/uploads/2015/01/Worst_Crime_of_All.pdf.

[30] Charter of the International Military Tribunal (8 August 1945), 82 UNTS 279 (IMT Charter), art 6(a).

Of the 21 Nuremberg defendants in the dock, 12 (including top Hitler paladins such as Hermann Göring and Joachim von Ribbentrop) were found guilty of this crime (with eight found guilty of participation in a common plan or conspiracy);[31] and the IMTFE convicted 24 Japanese defendants of the same offence.[32]

2.2.2. Defining 'aggression' during the Cold War

Neither the IMT and IMTFE Charters nor the Tribunal judgments themselves defined aggression (nor did the United Nations Charter, which entered into force in October 1945 and declared among its purposes 'suppression of acts of aggression').[33] In fact, in legal terms, 'aggression', which over time replaced 'crimes against peace' as the name of the offence, remained undefined for nearly 30 years. (The International Law Commission made an attempt in the early 1950s, but concluded that it was 'not susceptible of definition'.)[34]

Finally, in 1974, years of arduous negotiation under UN auspices (and with Ben Ferencz's key involvement – see below) yielded General Assembly Resolution 3314, which defined 'aggression' in Article 1 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'.[35] Article 3 then went on to provide a non-exhaustive list of examples of such uses of force, which included invasion, bombardment, blockade, attacks against another state's armed forces, and the use of mercenaries.[36]

2.2.3. Defining and operationalising the crime of aggression in the Rome Statute

Resolution 3314, however, was intended only to assist the Security Council in determining, as part of its UN Charter Chapter VII maintenance of peace and security mandate, whether a state had engaged in an act of aggression in violation of Article 2(4) of the Charter. It was silent on the issue of individual criminal responsibility of state leaders for acts of aggression.[37] However, nearly a quarter of a century later, in 1998, diplomats in Rome negotiating the ICC treaty (Rome Statute) included aggression within Article 5 as a crime within the Court's jurisdiction (along with genocide, crimes against humanity, and

[31] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf 1992) 588–97.

[32] Noah Weisbord, 'Conceptualizing Aggression' (2009) 20 *Duke Journal of Comparative & International Law* 1, fn 3.

[33] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16 (UN Charter), art. 1.

[34] Jean Spiropoulos, 'Second Report on a Draft Code of Offences Against the Peace and Security of Mankind' (12 April 1951), UN Doc A/CN.4/44.

[35] UNGA Res 3314 (XXIX) (14 December 1974), Annex, UN Doc A/RES/3314(xxix), art 1.

[36] ibid art 3.

[37] UN Charter (n 33) art 2(4). See also Marina Aksenova, 'Substantive Law Issues in the Tokyo Judgment: From Facts to Law?' in Viviane E Dietrich and others (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (Torkel Opsahl Academic EPublisher 2020) 235 ('[The] General Assembly aimed at obliging States to refrain from aggression and did not deal with matters of individual criminal responsibility').

war crimes – defined in Articles 6, 7 and 8 respectively).[38] However, once again, they offered no definition of aggression or provided any other details regarding the offence, opting instead to defer hammering out such particulars at a later mandatory Review Conference, which was ultimately held in Kampala (Uganda) from 31 May to 11 June 2010.[39] At the Conference, delegates adopted a resolution that included a definition of the offence of aggression and a regime covering its activation and operationalisation.[40]

The definition of the offence was laid out in Article 8 *bis*. This largely tracked the language of GA Resolution 3314 but included individual criminal responsibility for state leaders (persons in a position to effectively control/direct political/military action) and a 'threshold clause' mandating that any charged act of aggression 'by its character, gravity and scale' constitute a 'manifest violation of the Charter of the United Nations'.[41]

While we can largely connect the doctrinal dots from Nuremberg and Tokyo to Resolution 3314 to Kampala in terms of the definition of the offence, jurisdiction is another story. The IMT and IMTFE were, in essence, post-war occupation courts, which could assert unfettered personal jurisdiction over their captured Axis defendants, whereas the treaty-based ICC is much more limited. Per the Rome Statute, jurisdiction is available only for (i) crimes committed by a state party national or on the territory of a state party, or on the territory of a state that has accepted the jurisdiction of the Court;[42] or (ii) crimes referred to the ICC Prosecutor by the Security Council via a resolution adopted pursuant to its Chapter VII powers.[43]

Jurisdiction over the crime of aggression is more limited still, owing to compromises made at the Kampala Conference (collectively referred to as the Kampala Compromise).[44] Under Article 15 *bis* (4), a state party can opt out and declare that it does not accept the ICC's aggression jurisdiction by lodging a declaration with the Registrar.[45] Moreover, per Article 15 *bis* (5), in respect of

[38] Rome Statute (n 2) arts 5, 6, 7, 8.

[39] Beth Van Schaack, 'Negotiating at the Interface of Power and Law: The Crime of Aggression' (2011) 49 *Columbia Journal of Transnational Law* 505, 512.

[40] ibid 556–59.

[41] International Criminal Court (ICC), Assembly of States Parties (ASP), Resolution RC/Res.6 (11 June 2010), UN Doc RC/Res.6 (Kampala Amendments) (resolution adopting aggression amendments to the Rome Statute, art 8 *bis*). The leadership requirement for defendants is also set out in art 25(3 *bis*).

[42] Rome Statute (n 2) art 12.

[43] ibid art 13(b).

[44] Weisbord (n 1) 109.

[45] Rome Statute (n 2) art 15 *bis* (4). In the end, once jurisdiction was activated in December 2017, only state parties that ratify the amendments can be subject to the aggression jurisdiction: Klaus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 *Journal of International Criminal Justice* 1, 12. This was not consistent with the Kampala Amendments (n 41), which had stipulated that all state parties would be subject to the aggression jurisdiction upon 30 state parties ratifying the Amendments and sufficient ASP votes or consensus (with any state party being able to opt out after activation of the jurisdiction). However, when it came time to put the Amendments to vote/consensus, certain state parties (especially France and the United Kingdom) insisted on a more restrictive regime whereby, absent a Security Council referral, the

a non-party state 'the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'.[46] On the other hand, under Article 15 *ter*, jurisdiction can be asserted over nationals of non-party states pursuant to a Security Council referral under Chapter VII.[47] Thus, as formulated, absent a Security Council referral, and unlike the other three Rome Statute crimes, aggression could not be prosecuted against nationals of non-party states (even if crimes were committed on the territory of a Kampala-ratified victim state party). Furthermore, as for any member of the Security Council's P5, veto power could be exercised to thwart attempts at a referral resolution.

2.3. Situating Ben Ferencz's historic role in international criminal law (ICL) and his proposal

So now it would behove us to consider where Ben Ferencz fits into this history. Although he was not part of the American staff who prosecuted Nazi defendants during the IMT trial at Nuremberg, in the spring of 1946 he joined the IMT American prosecution team as part of the Subsequent Proceedings Division that was preparing to launch post-IMT trials against remaining high-ranking Nazis before the Nuremberg Military Tribunals (NMTs).[48] Thus, he observed portions of the IMT proceedings (and conferred with those prosecuting the case), and subsequently became Chief Prosecutor himself of the *Einsatzgruppen* trial, the ninth of the twelve Nuremberg post-IMT trials. At the conclusion of the inquest, the NMT convicted all 22 *Einsatzgruppen* defendants in the dock, former SS special squad chieftains whose units had murdered over 1 million 'enemies' of the Third Reich, primarily Jews, in the Nazi-occupied Soviet Union, in what is considered the first phase of the Holocaust.[49]

After Nuremberg (and especially flowing from *Einsatzgruppen*), Ferencz spent years serving as an attorney seeking reparations for Holocaust survivors and became a pioneer in the field of atrocity victim justice. From the late 1940s through to the early 1980s – initially as a director of such organisations as the Jewish Restitution Successor Organization and the United Restitution Organization, and then as a private attorney working on behalf of the Conference on Jewish Material Claims against Germany – Ferencz helped to

jurisdiction would be available only over state parties that ratified the Amendments: Kreß, ibid 9–12.

[46] Rome Statute (n 2) art 15 *bis* (5).

[47] ibid art 15 *ter*.

[48] Benjamin Ferencz, 'Detained for Impersonating an Officer', *Stories, Ben Ferencz.Org*, https://benferencz.org/stories/1946-1949/detained-for-impersonating-an-officer.

[49] Federica D'Alessandra, '"Law Not War": Ferencz's 70-Year Fight for a More Just and Peaceful World', *TOAEP Occasional Paper Series*, 6 February 2018, https://www.toaep.org/ops-pdf/7-dalessandra; Yisrael Gutman, 'The Response of Polish Jewry to the Final Solution' in David Cesarani (ed), *The Final Solution: Origins and Implementation* (Routledge 1994) 154 ('[With] the killing operations of the Einsatzgruppen … the Nazi state crossed the Rubicon and transformed extreme oppression into … systematic murder of a people').

secure billions of dollars in reparations for the victims of Nazi crimes.[50] In the lead-up to the Rome Conference (during which the ICC treaty would be drafted), during the Preparatory Committee phase Ferencz remained invested in atrocity victim issues, offering his insights on drafting victim provisions for the treaty.[51] At the June–July 1998 Conference, he worked to persuade delegates to accept the extensive victim rights provisions (both as to victim participation and reparations) that were ultimately incorporated into the ICC treaty.[52]

However, there had been another core thread in Ferencz's career which factored into his negative reaction to the 'Kampala Compromise': he had also become one of the world's leading experts on unauthorised state use of armed force. From his Second World War and Nuremberg experiences, he came to realise that illegal war had always been the empirical breeding grounds for atrocity.[53] He had been representing atrocity victims for decades, but in 1969 he had had an epiphany – his efforts would be better spent preventing future atrocities than seeking reparations for past ones.[54] So he began to wind down his work on behalf of Holocaust victims and dedicate himself to the pursuit of defining and criminalising aggression (and, as it was related, advocating the establishment of a permanent international criminal court).

In fact, through active lobbying, writing articles, and participating in sessions of the UN Special Committee on the Question of Defining Aggression, Ferencz had been a vital contributor to the UN General Assembly Resolution 3314 definition of the crime (and had even acquired the moniker of 'Mr Aggression').[55] He followed this by publishing a seminal treatise on the

[50] D'Alessandra (n 49) 8, 13–18.

[51] Interview with Benjamin B Ferencz, Delray Beach, FL (US), 9 January 2019 ('There was a recognition that victims should be compensated … I was already highly experienced, the most experienced man in the world on that topic [i.e., compensating victims in international criminal law]. And so mostly it was just done through … meetings').

[52] Ferencz was often able to exert indirect influence on delegates regarding the victim provisions through the good offices of chief German representative Hans Peter Kaul. According to the International Criminal Tribunal for the former Yugoslavia's representative at the Rome Conference, Morten Bergsmo, in bringing other delegates to Ferencz's position, Kaul 'would frequently refer to Mr. Ferencz's … views. And not only because of there being a moral authority projected by Mr. Ferencz, but, if you like, a form of moral sovereignty that he would represent': Interview with Morten Bergsmo, Florence (Italy), 27 August 2021, conducted in Hong Kong by telephone.

[53] Benjamin B Ferencz, 'The Illegal Use of Armed Force as a Crime Against Humanity' (2015) 2 *Journal on the Use of Force and International Law* 187, 189 (referring to aggression as 'the mother of all crimes').

[54] Benjamin B Ferencz, 'Contemplating Life and Death in Puerto Rico', *Stories, Ben Ferencz.Org*, https://benferencz.org/stories/1970-present/contemplating-life-and-death-in-puerto-rico.

[55] Benjamin B Ferencz, 'Getting Aggressive about the Crime of Aggression', *Stories, Ben Ferencz.Org*, https://benferencz.org/stories/1970-present/getting-aggressive-about-the-crime-of-aggression; Benjamin B Ferencz, 'Aggression Defined by Consensus', *Stories, Ben Ferencz.Org*, https://benferencz.org/stories/1970-present/aggression-defined-by-consensus; Benjamin B Ferencz, 'Where the ICC Stands and Where It Is Going', *Stories, Ben Ferencz.Org*, https://benferencz.org/stories/global-survival/where-the-icc-stands-and-where-it-is-going.

subject.[56] Then, as with the victim provisions of the Rome Statute, during the Prep Com sessions and at the Rome Conference, he played an important role in aggression being added to Article 5 of the Rome Statute (that is, included among the Court's chargeable crimes).[57] Ferencz was also an active participant in the preparations that led to the Kampala Conference, especially during the so-called Princeton Process, which produced working drafts of the proposed amendments defining aggression and setting out its jurisdictional parameters. During the Kampala Conference, he leveraged his 'elder statesmen' status to prod delegates to finalise a deal, giving a crucial speech towards the end of the gathering.[58]

So, having invested so much in Kampala's final outcome, Ferencz was bitterly disappointed in its realpolitik compromises.[59] As delegates celebrated, whooping it up around him, he concentrated on the two key post-Nuremberg strands of his career: helping atrocity victims, and preventing aggression.[60] The glum Ferencz then had a eureka moment. It occurred to him that prosecuting use of illegal force as aggression might not be the only way to seek justice against responsible state leaders. What about crimes against humanity?[61] Although the relevant provision of the Rome Statute (Article 7) had a specific list of offences covered (such as murder, rape, torture), there was a 'residual' clause that allowed for prosecution of 'other inhumane acts'. Remarkably, 'Mr Aggression' began to embrace the idea that leaders responsible for crimes against peace could be brought to justice for crimes against humanity.[62]

The more he thought about it, the more it made sense. For many years, apart from prevention, his central international justice concern had been victims.[63] The name of the offence itself, crimes against humanity, betokened the centrality of *human* victims in charging it.[64] In contrast, the direct 'victim' of the offence of aggression is another state (as the crime focuses on breaching the territorial integrity and sovereignty of another nation) – in other words, it is a 'state-centric' offence, not as directly or immediately concerned with human victims.[65] Thus, Ferencz began thinking that prosecuting the illegal

[56] Benjamin B Ferencz, *Defining International Aggression, The Search for World Peace: A Documentary History and Analysis* (Oceana 1975).

[57] See Benjamin B Ferencz, 'Notes at Meeting for Coalition of an International Criminal Court, August 12, 1996', *Benjamin B. Ferencz Collection*, United States Holocaust Memorial Museum (copy of document on file with the author); Christian Wenaweser, '"Law. Not War" – Special Event Honouring Ben Ferencz on his 101st Birthday', Nuremberg Principles Academy, 11 March 2021, https://www.youtube.com/watch?v=QkXBfAmwWFY ('It was because of you, and ... [chief German representative] Hans Peter Kaul, that we ended up with this [aggression] provision ... Without you, [we would not have had the crime of aggression in the Rome Statute]').

[58] Interview with Stefan Barriga, Brussels (Belgium) 29 September 2021.

[59] Weisbord (n 1) 109.

[60] Interview with Donald Ferencz, Wales (UK), 26 March 2021.

[61] Interview with Luis Moreno Ocampo, Los Angeles, CA (US), 28 January 2022.

[62] ibid.

[63] D'Alessandra (n 49) 13–18.

[64] Donald Ferencz interview (n 60).

[65] Pobjie (n 15) 816, 821.

use of force as crimes against humanity was the way forward, whether the plight of victims was the result of an external state's illegal use of force or their own state's internal infliction of violence.[66]

3. An initial mixed reception

Ferencz was soon floating his idea to others in the field.[67] One of them, the eminent ICL expert M. Cherif Bassiouni, declared that 'it was a brilliant idea to think of inserting "aggression" as part of CAH',[68] but Ferencz's own son, Donald, a well-regarded aggression expert in his own right, was 'not particularly convinced of the proposition'.[69] This was because, given 'the traditional concept of international armed conflicts' wherein military efforts entail government troops attacking opposing government troops,[70] he was concerned that 'whatever harms were inflicted' would not 'strictly track the language of Article 7 of the Rome Statute'.[71] In other words, such conduct may not be considered 'part of a widespread or systematic attack directed *against any civilian population*'.[72]

Picking up on this trepidation, Chet Tan objected that CAH charges against officials responsible for use of illegal force, as opposed to aggression charges, were ill advised because:

(1) the chapeau of CAH requires a widespread or systematic attack against a civilian population; the attack cannot be directed primarily at the enemy's military and only incidentally against its civilians, disqualifying most, if not all, uses of force;
(2) in modern times, most uses of armed force are limited in scope and thus do not satisfy the 'widespread or systematic' aspect of the chapeau;
(3) various acts enumerated in the Kampala Amendments definition of aggression (now codified in Article 8 *bis* of the Rome Statute) – such as targeting civilian objects (as opposed to persons) or using armed forces in another state's territory in contravention of an agreement) – are not sufficiently heinous to qualify as CAH under Rome Statute Article 7;
(4) prosecuting relatively minor acts of aggression as CAH – such as using F-16s to destroy a nuclear reactor complex – could subvert the Article 8 *bis* requirement that aggressive acts constitute a manifest violation of the UN Charter; and
(5) acts of aggression, in themselves, fall short of 'the standard of depravity' that should characterise CAH and thus would serve to dilute what should be perceived as strictly a heinous crime.[73]

[66] Donald Ferencz interview (n 60).
[67] Benjamin Ferencz interview (2019) (n 51).
[68] M Cherif Bassiouni, e-mail to Donald Ferencz, 6 April 2012 (on file with the author).
[69] Donald M Ferencz, 'Aggression in Legal Limbo: A Gap in the Law that Needs Closing' (2013) 12 *Washington University Global Studies Law Review* 507.
[70] Geneva Academy, 'Contemporary Challenges for Classification', https://www.rulac.org/classification/ contemporary-challenges-for-classification.
[71] Ferencz (n 69) 515.
[72] ibid (citing Rome Statute (n 2) art 7(1) (emphasis added).
[73] Tan (n 4) 159–64.

Manuel J Ventura and Matthew Gillett suggested a separate concern regarding Ferencz's proposal. They pointed out that, with reference to the 1945–46 trial of the major Nazi war criminals, CAH could not be charged unless linked to one of the IMT Charter's other principal crimes – crimes against peace or war crimes.[74] This requirement, a nod to state sovereignty, came to be known as the 'war nexus'.[75] Moreover, as ICL was being resuscitated in the aftermath of the Cold War, the International Criminal Tribunal for the Former Yugoslavia (ICTY) reimposed the war nexus element but interpreted it to be merely jurisdictional, as opposed to a substantive prima facie requirement.[76]

Ventura and Gillett suggested that reinjecting armed conflict so directly into CAH charges could have the unfortunate side effect of opening the door to reimposing the CAH war nexus requirement. In other words, they noted that by 're-linking the notion of war ... to the antiquated notion that the interests of the international community are coterminous with the existence of inter-State conflict', there is a risk that a newfangled war nexus requirement could mean that instances of CAH 'committed outside [the] context [of armed conflict] are beyond the reach of international law'.[77]

4. Initial reconsideration of Ferencz's proposal

4.1. Considering the activation of the aggression jurisdiction and the 2022 invasion of Ukraine

At the time during which experts such as Tan, Ventura and Gillett were expressing certain reservations regarding Ferencz's proposal in the early 2010s, the ICC's jurisdiction over the crime of aggression had not yet been activated. However, as we have seen, all that changed during the early morning hours of 15 December 2017, when the Assembly of States Parties decided by consensus to activate the ICC's aggression jurisdiction. Moreover, the February 2022 Russian invasion of Ukraine has brought large-scale interstate warfare back after essentially being mothballed since negotiation of the Rome Statute.

The first year of this brutal armed conflict, apart from wrecking the Ukrainian economy (shrinking it by 45 per cent and costing US$ 113.5 billion), has led to approximately 15,000 Ukrainian civilian casualties and over 13 million displaced.[78] Russia's illegal attack, a textbook case of aggression, has caused untold misery for the Ukrainian people, but it cannot be charged as

[74] Ventura and Gillett (n 12) 525.

[75] Gregory S Gordon, 'Hate Speech and Persecution: A Contextual Approach' (2013) 46 *Vanderbilt Journal of Transnational Law* 303, 309.

[76] ICTY, *Prosecutor v Kunarac and Others*, Judgment, IT-96-23 and IT-96-23/1-A, Appeals Chamber, 12 June 2002, para 83.

[77] Ventura and Gillett (n 12) 525.

[78] Julian Hayda and others, '6 Key Numbers that Reveal the Staggering Impact of Russia's War in Ukraine', *NPR*, 24 August 2022, https://www.npr.org/2022/08/24/1119202240/ukraine-russia-war-by-numbers; Elizabeth Throssell, Ravina Shamdasani and Jeremy Laurence, 'Ukraine: Civilian Casualty Update 29 August 2022', UN Office of the High Commissioner for Human Rights, 29 August 2022, https://www.ohchr.org/en/news/2022/08/ukraine-civilian-casualty-update-29-august-2022#:~:text=63%20killed%20and%20217%20injured,26%20percent%20of%20the%20total).

aggression before the ICC. This is so because, as previously explained, Russia is not a member of the ICC and Security Council referral is not an option given Russia's P5 veto.

We have also seen that when Ferencz initially introduced the idea, there was general resistance. Tan, for instance, argued that use of armed force by one state against another involves targeting the victim state's military, and only incidentally affects the civilian population. Moreover, in recent times, he observed, modern warfare has been smaller in scale, not involving the kind of 'widespread/systematic' attack needed for the CAH chapeau. Further, the kind of targeted/precision attacks that characterise recent armed conflicts are likely not to implicate manifest violations of the UN Charter. Besides, focusing CAH on armed conflict would dilute the CAH charge being reserved for truly heinous crimes against civilians, certainly not the key distinguishing characteristic of state-on-state armed conflict.[79]

However, Russia's recent invasion of Ukraine proves Ferencz to have been prescient and answers the kinds of concern raised by Tan. First, large parts of the Russian attack arguably have been directed against civilians, and not merely incidentally affecting them. In a March 2023 report, the UN High Commissioner for Human Rights documented direct targeting of civilians through widespread summary executions and enforced disappearances.[80]

The Russians have also directly targeted civilian infrastructure, causing more widespread civilian casualties. As explained by the Associated Press, 'Russia claims its assault on Ukraine is aimed only at military targets, but bridges, schools and residential neighborhoods have been hit and civilians have been killed and injured'.[81] *The New York Times* reports that from the initial phases of the invasion:[82]

> [Russia attacked] highly populated areas with important civilian infrastructure. Russian attacks have damaged preschools, post offices, museums, sports facilities and factories. Power and gas lines have been severed; bridges and railway stations blown up. At least 10 houses of worship have become targets, including a now-crumpled church in Malyn. Civilians have been killed in their cars. Remnants of a missile were found in a zoo. At least one war memorial in the small city of Bucha took gunfire. A car wash in Baryshivka, east of Kyiv, was reduced to rubble. Onions spilled from a warehouse that was destroyed in Mykolaiv, where several residential neighborhoods have been shelled to pieces and the morgue has overflowed with bodies.

[79] Tan (n 4) 159–64.

[80] United Nations Office of the High Commissioner for Human Rights, 'Report on the Human Rights Situation in Ukraine, 1 August 2022 to 31 January 2023' (24 March 2023) 1, para 5.

[81] Emily Schultheis, 'Ukraine Invasion: What to Know as Russian Forces Target Kyiv', *Associated Press*, 27 February 2022, https://apnews.com/article/russia-ukraine-conflict-updates-today-c489b6f56d84f9483802dc3f142cbc8e.

[82] Keith Collins and others, 'Russia's Attacks on Civilian Targets Have Obliterated Everyday Life in Ukraine', *The New York Times*, 23 March 2022, https://www.nytimes.com/interactive/2022/03/23/world/europe/ukraine-civilian-attacks.html.

Moreover, responding to the balance of Tan's other concerns, as Europe's largest ground war since the Second World War (according to well-respected sources, such as the Council on Foreign Relations and the Brookings Institution),[83] it is sufficiently widespread and/or systematic[84] and represents, per Amnesty International, a manifest violation of the UN Charter.[85] Finally, given the direct and callous ways in which civilians have been targeted, these crimes are quite heinous and would in no way dilute the CAH 'standard of depravity'.

4.2. Considering the legality principle

Still, charging CAH via the residual clause to prosecute Russian conduct in this case could be problematic and/or unrealistic, notwithstanding Tan's particular concerns being allayed. For one, it raises a possible violation of the principle *nullum crimen sine lege* (no crime without law) – the principle of legality.[86] Ventura and Gillett tackle this question in their article and find that, on balance, *nullum crimen* would not likely be violated. First, as a threshold matter, citing the International Court of Justice's 1986 holding in the *Nicaragua* case,[87] they observe that illegal use of force against the territorial integrity of another state represents a clear breach of customary international law.[88] Thus, charging such conduct today would not violate the *nullum crimen* norm; any leader launching an aggressive attack against another state should be aware of its illegal nature.

With regard to the legality principle with reference to the CAH chapeau (i.e., as part of a widespread or systematic attack against a civilian population pursuant to state/organisational policy, and with knowledge), Ventura and Gillett go through each element and suggest that, overall, charging an aggressive attack would not violate the legality principle. In particular, given the leadership element of aggression, the state/organisational policy criterion would be met. Furthermore, in the light of their central role in planning, the leaders responsible for this policy would have the requisite 'knowledge'.[89]

Moreover, one country invading another, by way of example, is likely to satisfy the 'widespread/systematic' element (although more discrete incursions on territorial integrity, such as precision missile strikes against a small number

[83] 'The Invasion that Shook the World', *Council on Foreign Relations*, 22 February 2023, https://www.cfr.org/councilofcouncils/global-memos/invasion-shook-world; Oona A Hathaway, 'How Russia's Invasion of Ukraine Tested the International Legal Order', *Brookings*, 3 April 2023, https://www.brookings.edu/on-the-record/how-russias-invasion-of-ukraine-tested-the-international-legal-order.

[84] Mégret (n 13) 483 ('[W]hat is going on as part of the aggression is very much a "widespread or systematic attack against the Ukrainian civilian population"').

[85] 'Ukraine 2022', *Amnesty International*, https://www.amnesty.org/en/location/europe-and-central-asia/ukraine/report-ukraine.

[86] Ventura and Gillett (n 12) 526.

[87] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* Merits, Judgment [1986] ICJ Rep 14, 62.

[88] Ventura and Gillett (n 12) 536.

[89] ibid 526–27, 530.

of targets, may not be sufficient; in any event, the scale of the attack will always be assessed on a case-by-case basis).[90] That civilians may not be the initial/key object of the aggressive use of force, Ventura and Gillett note, should be of no moment in terms of satisfying the chapeau. More specifically, they observe that where 'civilian deaths flow from an unlawful use of force, it can be argued that they do not fall within the penumbra of permissible collateral damage'[91] (and where, as in the Russian invasion of Ukraine, civilians are arguably the principal target of the attack, as contended herein, then this presents no issue at all).[92]

Finally, Terje Einarsen also considers whether charging illegal use of armed force under the Article 7(1)(k) residual clause would violate the *nullum crimen* principle. After considering the ICC Elements of Crimes for this provision (that is, other than the chapeau elements, great suffering/serious injury and a character similar to the other enumerated acts in Article 7),[93] he concludes that prosecuting illegal use of force in this way would not infringe the legality principle. According to Einarsen:[94]

> The wide range of acts presumably falling within the term "other inhumane acts," and the purpose of Article 7 to protect civilians from severe violence and suffering, jointly support the view that the illegal use of armed force may not be categorically excluded from its scope. Serious suffering inflicted upon civilians is a regular and often inevitable consequence of the illegal use of armed force.

This is consistent with ICL jurisprudence, which has found that a wide range of acts fall within the CAH residual clause, including physical or mental injuries short of murder,[95] forced undressing of women and marching them in public, beatings, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.[96] Further, the late and eminent ICL expert Antonio

[90] ibid 527.

[91] ibid 528. The authors also find that the legality principle would probably be satisfied if 'murder' were charged as the CAH enumerated act, if the attack did not specifically target civilians (but, rather, represented collateral damage). For them, the key question is whether the murders would have occurred in the ordinary course of events as a consequence of an unlawful attack: ibid 529. They conclude that 'in the context of an illegal use of armed force, the murder of civilians will usually occur in the ordinary course of events': ibid.

[92] Even if a 'military operation of significant scale' is conducted with both attacks on the victim country's military *and* its civilian population simultaneously, this should satisfy the chapeau, per Ventura and Gillett: ibid 527 (showing that 'alongside the military operation an attack against a civilian population was also being conducted' would allow 'perpetrators [to] be prosecuted for crimes against humanity').

[93] International Criminal Court, Elements of Crimes (2000), UN Doc PCNICC/2000/1/Add.2, art 7(1)(k).

[94] Terje Einarsen, 'Prosecuting Aggression through Other Universal Core Crimes at the International Criminal Court' in Leila Nadya Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (Cambridge University Press 2018) 337, 366.

[95] ICTY, *Prosecutor v Blaškić*, Judgment, IT-95–14-T, Trial Chamber, 3 March 2000, para 239.

[96] ICTY, *Prosecutor v Brima, Kamara, and Kanu*, Judgment, SCSL-2004–16-A, Appeals Chamber, 22 February 2008, para 184.

Cassese opined that acts of terrorism – conduct arguably analogous in its larger scale and scope to acts of aggression – would fit within the broad ambit of the CAH residual clause.[97]

4.3. Considering realpolitik

However, even if the legality principle were satisfied, there could be another significant hurdle for Ferencz's proposal to overcome. More specifically, as Manuel Ventura points out in a sole-authored 2018 piece, from a realpolitik standpoint, the proposal could be seen as a kind of legal *legerdemain* to circumvent the difficult negotiation compromises agreed in Kampala. According to Ventura:[98]

> States would be more than a little surprised (to say the least) to discover overnight that acts that overlap significantly (though not entirely) with aggression could have been prosecuted the whole time at the ICC as a crime against humanity without the need for the Kampala Amendments of 2010. States will (and justifiably) wonder why they wasted their time, energy and political capital in coming up with a definition for the crime of aggression only to have the rug pulled from under them a few years later via the recognition of the illegal use of force as a crime against humanity (other inhumane act).

This could have various deleterious consequences. From a doctrinal perspective, in terms of CAH, states could interpret the Rome Statute's Article 7(1)(k) residual clause as a kind of unpredictable Pandora's box if something as capacious and normatively freestanding as aggression could be shoehorned within it.[99] This could have a perceived distorting effect, undermining confidence in the law.[100]

From a related political perspective, 'the recognition of the illegal use of force as a crime against humanity easily risks the creation of a lightning rod for anti-ICC sentiment'.[101] This, in turn, could have an adverse impact on state cooperation with the ICC as well as potentially disincentivise new countries from acceding to the Rome Statute.[102]

[97] Antonio Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 98, 157–58.

[98] Manuel J Ventura, 'The Illegal Use of Force (Other Inhumane Act) as a Crime against Humanity: An Assessment of the Case for a New Crime at the International Criminal Court' in Sadat (n 94) 386, 421.

[99] ibid 421–22.

[100] ibid (noting that 'from a legal perspective, the illegal use of force as an other [sic] inhumane act creates an uncomfortable and serious anomaly'). See also Mégret (n 13) 475 (noting that this could 'feel like trying to fit a square peg in a round hole').

[101] Ventura (n 98) 422.

[102] ibid.

5. Variations of Ferencz's proposal and a final assessment

Even if these objections have merit and, for the moment, we posit that Ferencz's proposal is not feasible, certain experts have offered variations of it that they believe would render the proposal (or key parts of it) palatable to the international community. The first of these, presented by Terje Einarsen and Joseph Rikhof (and not referencing Ferencz's proposal directly), would inject consideration of aggression into prosecuting CAH against Russian leaders to enhance gravity, strengthen modes of liability and influence sentencing.[103] The second of these, formulated by Giulia Pinzauti and Alessandro Pizzuti, posits that violation of the right to self-determination of the Ukrainian people qualifies as 'other inhumane acts' under Rome Statute Article 7(1)(k) (as opposed to violation of the right to life, as posited by Ferencz).[104] Both of these variations are considered in turn.

5.1. Consideration of aggression as an 'enhancer' in a standard CAH prosecution

5.1.1. Examining the proposal

For Einarsen and Rikhof, the prosecution and an ICC trial bench could take 'the factual matrix' of aggression into account through the various stages of a CAH prosecution.[105] In particular, they focus on the importance of considering aggression during the preliminary phase of the proceedings in terms of assessing gravity, during the charging phase in respect of selecting modes of liability, and during the sentencing phase with regard to imposing punishment.

Assessing gravity

One of the most important ways in which this can be done is in assessing the gravity of the crimes at issue, and this becomes a concern in the nascent portions of a case – that is, during its preliminary examination phase. To wit, per Article 53(1) of the Rome Statute, in conducting the preliminary examination (and, by extension, deciding whether to initiate an investigation), the Prosecutor must determine whether the case is 'admissible' under Article 17 of the Statute.[106]

This is tantamount to assessing whether the 'complementarity' and 'gravity' requirements have been satisfied.[107] The first of these, with which we are not directly concerned here, posits that primacy of jurisdiction lies with a state's domestic courts unless the ICC determines that the state is 'unwilling or unable genuinely to carry out the … prosecution'.[108] The second admissibility

[103] Einarsen and Rikhof (n 12) 1. This idea was first brought up by Ventura and Gillett (n 12) 534, 537.

[104] Pinzauti and Pizzuti (n 13) 1061–62.

[105] Einarsen and Rikhof (n 12) 1–2. See also Einarsen (n 94) 352.

[106] Rome Statute (n 2) art 53(1).

[107] It should be noted that Article 17 also includes *ne bis in idem* considerations: Rome Statute (n 2) art 17(1)(c), although that is not relevant for the purposes of this article.

[108] ibid art 17(1)(a).

criterion, gravity – our main focus at present – mandates that the delicts at issue be sufficiently serious to 'the international community as a whole'.[109] This is where aggression comes into play. According to Einarsen:[110]

> [It] is when the leaders at the top of the relevant power structures are involved as planners, decision makers, or commanders that the most grave crimes are typically committed. This implies that possible crimes of aggression committed at the leadership level should be a relevant consideration with regard to assessment of gravity … In this third phase the OTP will continue to collect information on subject-matter jurisdiction, when new or ongoing crimes are alleged to have been committed within the situation. If some or all of the alleged crimes are committed within a context of aggression, or are closely connected to – or may simultaneously constitute – acts of aggression, this may impact the gravity assessment as a possible aggravating factor.

Similarly, assuming that the Prosecutor eventually concludes that relevant offences have been committed, case selection – in terms both of homing in on enumerated acts under Article 7(1)(a) to (k) and of identifying individual suspects – will also turn on considerations of gravity. In particular, per internal regulations of the Office of the Prosecutor (OTP), gravity of crimes should be measured pursuant to (i) their scale; (ii) their nature; (iii) the manner of their commission; and (iv) their impact.[111] The Rome Statute characterises these offences as 'unimaginable atrocities' and 'grave crimes' that 'deeply shock the conscience of humanity'.[112] Einarsen observes that, in the light of these criteria, the OTP 'may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under Article 17. A context of aggression might thus in theory be important for the assessment'.[113]

[109] Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 *Fordham International Law Journal* 1400.

[110] Einarsen (n 94) 354. Of course, complementarity could also be a consideration at this phase because the Prosecutor may be investigating the individuals who would be the object of aggression charges – political and military leaders: Einarsen, ibid. Similarly, a further consideration that factors into the Prosecutor's Article 53(1) analysis, whether launching an investigation would not be 'in the interests of justice', may involve taking aggression into account: Rome Statute (n 2) art 53(1). This is so because it is 'hard to imagine from a "justice" point of view that a context of aggression might weigh against prosecution of crimes against humanity. To the contrary, a context of aggression is likely to weigh in favour of investigation and prosecution, considering the interests of victims and the increased gravity of the crimes': Einarsen (n 94) 354–55.

[111] Office of the Prosecutor (OTP), Regulations of the Office of the Prosecutor, Doc No ICC-BD/05-01-09, 23 April 2009, r 29(2); OTP, Policy Paper on Preliminary Examinations, November 2013, para 9.

[112] Rome Statute (n 2) Preamble.

[113] Einarsen (n 94) 355.

Charging modes of liability

Also at this stage of the process, while assessing the proper charges, the OTP will need to determine the mode(s) of liability on which it will rely. Once again, illegal use of armed force could factor in. More specifically, given the OTP's policy preference for prosecuting those who 'bear the greatest responsibility' for international crimes, such as the leaders of the state or organisation allegedly responsible for those crimes,[114] more often than not 'ICC cases will concern the actions of a small plurality of persons either acting jointly [characterised by the mode of 'direct co-perpetration' (Rome Statute Article 25(3)(a)[115]] or jointly through other persons [corresponding to the mode of 'indirect co-perpetration' (also in Article 25(3)(a)].[116] Both of these require the existence of an agreement or 'common plan'.[117]

For crimes against humanity committed in the context of an aggressive war 'this is all the more likely due to [the] requisite elements' of the two crimes[118] – in other words, CAH requires a 'state or organizational policy'[119] and aggression requires the leadership element.[120] Both of these are 'conducive to interaction amongst a number of persons' and thus 'illegal use of force resulting in the commission of crimes against humanity will most likely result in charges containing co-perpetration (direct or indirect) as the mode of liability at the ICC'.[121]

This could result in the ICC making a factual finding that aggression has been committed. In particular, if the OTP were to charge someone with CAH as a co-perpetrator based on a common plan to commit the aggression offence, which, once implemented, would result in the commission of the relevant crime (i.e., CAH) in the ordinary course of events, the OTP could trigger the Trial Chamber's obligation to adjudicate on the issue of aggression.[122] In other words, the Trial Chamber would be asked to make a factual determination 'for the purpose of proving a legal element of the mode of liability only – beyond a reasonable doubt – which would in turn only incur the individual criminal responsibility of the accused for crimes against humanity and avoid any finding of guilt for the crime of aggression per se'.[123]

[114] eg, ICC OTP, Prosecutorial Strategy 2009–2012, 1 February 2010, 5–6 ('In accordance with this statutory scheme, the Office consolidated a policy of focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes').

[115] Rome Statute (n 2) art 25(3)(a).

[116] Ventura and Gillett (n 12) 530–31.

[117] ICC, *Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, Pre-Trial Chamber I, 29 January 2007, para 343 (setting out what the prosecution must prove in relation to a defendant charged with a crime under the Rome Statute when acting pursuant to a common plan and charged as co-perpetrator under Article 25(3)(a)).

[118] Ventura and Gillett (n 12) 531.

[119] Rome Statute (n 2) art 7(2)(a).

[120] ibid art 8 *bis* (1).

[121] Ventura and Gillett (n 12) 531.

[122] ICC, *Prosecutor v Lubanga*, Judgment, ICC-01/04-01/06, 14 March 2012, para 1018.

[123] Ventura and Gillett (n 12) 532–33.

Sentencing the convicted

This also has relevance during the final portion of criminal proceedings – at sentencing. Article 78(1) of the Rome Statute declares that the principal criteria to consult in determining the sentence are 'the gravity of the crime and the individual circumstances of the convicted person'.[124] Thus, in reference to a co-perpetrator, aggression as a backdrop for crimes against humanity should factor into the punishment calculus. According to Einarsen, '[a] person at a leadership level convicted for crimes against humanity, who simultaneously satisfies all material requirements of criminal responsibility for a crime of aggression, deserves a longer prison sentence than another person at a leadership level who is only responsible for similar crimes against humanity'.[125]

Einarsen, along with Joseph Rikhof, has recently advocated the incorporation of this 'aggression factual matrix' approach into the ICC OTP's current CAH/war crimes investigation connected to the Russian invasion of Ukraine.[126] As urged by the authors:[127]

> [An] indirect, somewhat hidden, but perfectly legal gateway to de facto prosecution of aggression already exists under the ICC Statute. This window of opportunity exists if the ICC prosecutes the same persons for war crimes and crimes against humanity ('CAH') in a context where a crime of aggression is committed. The ICC Prosecutor should now seriously consider this option.

5.1.2. Assessing the proposal

Is this proposal from Einarsen and Rikhof, which does not explicitly reference Ferencz's original proposal, the best way for the ICC to deal with Russian crimes connected to the invasion of Ukraine? I think the answer is 'no' for three reasons: (i) conferring advantages in prosecution evidentiary logistics; (ii) accounting for important philosophy of punishment considerations; and (iii) humanising the offence by focusing on natural persons as the key victims of the crime and thereby granting them access to judicial participation and reparations.

Evidentiary logistics

Regarding prosecution evidentiary logistics, in a case when the enumerated CAH act is murder committed on the territory of the attacked state pursuant to Rome Statute Article 7(1)(a), Einarsen observed, in his 2018 piece, that proving crimes against humanity against leaders at the top of an extended command hierarchy may be 'out of prosecutorial reach due to the difficulties in proving a sufficient causal link'[128] because:[129]

[124] Rome Statute (n 2) art 78(1).
[125] Einarsen (n 94) 380.
[126] Einarsen and Rikhof (n 12) 1.
[127] ibid.
[128] Einarsen (n 94) 375.
[129] ibid 374.

> Underlying crimes of crimes against humanity are often committed by personnel at the intermediate and low levels of the relevant power structure. This creates a possible lacuna in the suggested strategy to prosecute aggression through crimes against humanity. It will often be difficult to prove sufficient involvement of the high-ranking leaders in various crimes against humanity, each committed at a particular crime scene.

He suggested, however, that in such cases (i.e., an ordinary CAH case with, for example, murder as the enumerated act):[130]

> [making use] of the common plan element in co-perpetration might enable the Prosecutor to move the relevant time frame backward even to the early criminal planning stages, thereby extending provable liability higher up in the power structure and to the leadership level for clearly foreseeable crimes against humanity occurring in the ordinary course of executing the common plan to wage aggression.

Yet, Einarsen's analysis may not withstand scrutiny. In particular, although the actus reus of co-perpetration requires the existence of an agreement or common plan between two or more persons, it also requires a coordinated 'essential contribution' by each co-perpetrator.[131] And the ICC has clarified that the 'essential contribution made by each co-perpetrator [must result] in the realization of the objective elements of the crime'.[132] 'This means that … the physical commission of the crime [must be] carried out by at least one of the accused's co-perpetrators'.[133] From this, we can infer that a link between the crime on the ground and the common plan must be demonstrated.[134]

[130] ibid 375.

[131] *Lubanga*, Confirmation of Charges (n 117) paras 346–48.

[132] ibid para 346.

[133] Lachezar D Yanev, *Theories of Co-Perpetration in International Criminal Law* (Brill Nijhoff 2018) 435.

[134] This is true unless the mode of liability charged is 'indirect co-perpetration' pursuant to Rome Statute art 25(3)(a). However, this mode of liability, which in this fact scenario would involve perpetration through an individual's organisational control along with that individual being linked to co-perpetrators, has its own stringent requirements. Robert Cryer helps to explain why: this liability mode involves a complex combination of horizontal and vertical perpetration. In other words, it entails a horizontal co-perpetrator being co-responsible for crimes committed by those for whom another co-perpetrator is vertically responsible (i.e., by having strict control over an organisation): Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 368–69. See also Kai Ambos, 'Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart 2016) 997. To illustrate, Cryer and co-authors (ibid 368–69) give the example of a foreign minister participating in a common plan with a minister of defence that will lead to the commission of war crimes. The minister of defence is in control of the armed forces, but the foreign minister is not. Based on the common plan, the foreign minister could be held responsible by indirect co-perpetration for the crimes of the armed forces, as the defence minister's guilt would be attributed to the foreign minister, and would include the former's indirect perpetration of the crimes by the armed forces. In the case of the Russian invasion of Ukraine, the co-perpetrators could be Putin and his top general Valery

As a result, if, for example, the enumerated CAH act were murder, a connection between the common plan and the murder itself would need to be proven beyond reasonable doubt. This is to say that, contrary to Einarsen's assertion, if an ordinary enumerated act were charged, the Prosecutor would still be saddled with a significant evidentiary burden, even if co-perpetration were the operative mode of criminal liability. Interestingly, Einarsen himself explains how this could become an issue by acknowledging the possibility of 'acts committed by individuals or groups of foot soldiers acting unpredictably and outside the agreed operational plan or code of conduct in the execution of the common plan'.[135]

However, this is arguably not true if the enumerated CAH, via the Article 7(1)(k) residual clause portal, is planning or preparing for (or even initiating/executing) an aggressive war. In that case, even in the context of co-perpetration liability, the target crime takes place not in a location physically removed from the upper-tier leadership cadre, but rather within its midst (such as in the Kremlin, in the case of Russia's invasion of Ukraine). In other words, the essential contribution requirement is much more easily satisfied.[136] (The advantages of physical proximity between the operative conduct of the

Gerasimov, who is currently in charge of Russian ground forces. However, to establish such liability for Putin, eight different requirements (combining the elements of both co-perpetration and indirect co-perpetration) must be satisfied, including the fact that the execution of the crimes must be secured by almost *automatic* compliance with the orders issued by Gerasimov (a very stringent requirement): ibid (emphasis added). Perhaps because of this very high burden, Einarsen, in his piece, does not put forth indirect co-perpetration as a possible mode of liability, only co-perpetration: Einarsen (n 94) 375.

[135] Einarsen (n 94) 377. While such a result theoretically could be avoided if indirect co-perpetration could be charged, as noted previously, this mode of liability is quite difficult to prove. In particular, if it were shown, as posited by Einarsen, that certain foot soldiers had acted unpredictably and outside the agreed operational plan, then it might not be possible to prove that the execution of crimes more generally could have been secured by almost *automatic* compliance with the orders issued by the organisation's leader, a requirement for indirect co-perpetration: Cryer and others (n 134) 369.

[136] Presumably, showing a connection between the launch of the aggressive war and 'intentionally causing great suffering or serious injury to body or to mental or physical health', as required in Rome Statute Article 7(1)(k), would not pose the same kind of daunting evidentiary challenge (especially when, as argued here, civilians were the primary target of the war). This must be contrasted with the more burdensome task of showing, per the essential contribution requirement of co-perpetration, the specific connection between a particular murder or murders (per Article 7(1)(a)) carried out on the ground by a lower-level perpetrator and going up the chain of command to link it to one or more of the co-perpetrators at the top. With respect to the Article 7(1)(k) charging strategy, even if civilians were not the primary object of the aggressive attack, per Article 30, a person shall have intent if 'in relation to a consequence' the accused 'is aware that it will occur in the ordinary course of events'. In planning/launching an aggressive war, an awareness that civilians will suffer serious bodily/mental injury can be easily imputed: see Ferencz (n 69) 515 ('[One] can show that the decision to illegally use armed force [would lead] to deaths … "in the ordinary course of events" [because] conflict after conflict has shown that such deaths occur on a regular, ongoing, and repeated basis'). See also Einarsen (n 94) 366 ('Serious suffering inflicted upon civilians is a regular and often inevitable consequence of the illegal use of armed force').

leadership cadre and the CAH enumerated crime would also be apparent if other modes of liability were relied on, including direct individual perpetration (Article 25(3)(a)), or even if modes of accessorial liability, such as ordering (Article 25(3)(b)) or 'common purpose liability' (Article 25(3)(d)), were charged.[137])

Additionally, co-perpetration imposes challenging *mens rea* requirements: (i) the suspects must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime; and (ii) they must be aware of the factual circumstances enabling [them] to jointly control the crime. Einarsen refers to these as 'precarious' elements, and they would not have to be grafted onto the prosecutorial prima facie burden if other modes of liability are relied on via a charge under the CAH illegal use of force residual clause.[138]

Legally protected interests and justifications for punishment

Apart from evidentiary logistics, prosecuting the responsible Russian leaders under the Article 7(1)(k) residual clause for planning/initiating an aggressive war targeting Ukrainian civilians makes sense in terms of aligning prosecutorial strategy with protected legal interests.[139] In particular, the CAH chapeau in Article 7(1) refers to acts 'committed as part of a widespread or systematic attack directed against any *civilian* population'[140] – and the important civilian-focused aspects of the Russian invasion of Ukraine appear to satisfy this requirement. Moreover, in terms of the enumerated act(s), the Article 7(1)(k) residual clause opens the door to charges that go to the essence of Russian criminality – again, launching an aggressive war that disproportionately involves direct, intentional civilian attacks and casualties.

Thus, even if ICC jurisdiction were available to charge the crime of aggression in this case, such a prosecution would not capture the legally protected interests of natural persons being affected and/or targeted. This is so because the key legal interest protected vis-à-vis the crime of aggression is state sovereignty/territorial integrity,[141] and not the security and wellbeing of natural persons, which reflects the 'human rights perspective' that is the central concern of CAH.[142]

[137] Elies van Sliedregt, 'The ICC Ntaganda Appeals Judgment: The End of Indirect Co-perpetration?', *Just Security*, 14 May 2021, https://www.justsecurity.org/76136/the-icc-ntaganda-appeals-judgment-the-end-of-indirect-co-perpetration (referring to 'liability for contributing to crimes as secondary parties, accessories, or accomplices under Article 25(3)(b–d)').

[138] Einarsen (n 94) 374–75.

[139] See Morten Bergsmo, 'On Legally Protected Interests in International Criminal Law', *Centre for International Law Research and Policy*, 26 August 2017, https://www.cilrap.org/cilrap-film/170826-bergsmo/ (explaining the importance of identifying and correlating legally protected interests in ICL).

[140] Rome Statute (n 2) art 7(1) (emphasis added).

[141] Pobjie (n 15) 826; Einarsen (n 94) 364.

[142] Einarsen (n 94) 364.

Similarly, enumerated acts such as murder ((Article 7(1)(a)), extermination (Article 7(1)(b)), torture (Article 7(1)(f)), and rape (Article 7(1)(g)) do not capture the overarching criminal scheme of launching an aggressive war (only fragments of it), which the residual Article 7(1)(k) charge would cover. In other words, via crimes against *humanity*, this approach permits prosecuting the *natural-persons-as victims* aspect of the illegal use of force – a key aspect of the aggressive war being pursued by Russia in Ukraine. However, this is not a zero-sum game – one charge does not have to exclude the other.

For example, for a charge under Article 7(1)(a), the murder would focus on the act of killing at the ground level (and then, to be connected to Putin and others, linked to Kremlin leaders up the chain of command), but even if connected to these superiors, the gravamen of the crime is the taking of the life on the ground. On the other hand, if the gravamen of the crime charged is launching an aggressive war that leads to civilian deaths (the Ferencz proposal), the emphasis then is on the legally protected interest of the security of natural persons in not having their country attacked for illegal purposes. That is different from a legal interest focused directly (and narrowly) on the right to life.

This has important philosophy of punishment implications, both deontological and teleological. From a deontological perspective, a retributive approach demands that the human toll of illegal use of force be adequately accounted for. This would effectuate just deserts and capture the heinousness of the transgressions, both in terms of expressing global outrage (as reflected in the 140-nation UN General Assembly Resolution of 2 March 2022 condemning the invasion) and upholding fundamental human rights norms.[143] In the words of the ICTY in the *Nikolić* case:[144]

> [In the context of international criminal justice], retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the *harm and suffering caused to the victims*. Furthermore, within [this context], retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.

From a teleological perspective, even if, as is often perceived, the deterrence value of ICL is minimal because its utilitarian base assumption of 'rational calculators' rarely applies, given ideological distortions in this context (such as deep-seated racial/ethnic/religious hatred), punishment of ICL perpetrators still might go some way towards preventing the would-be future offender

[143] 'UN Resolution against Ukraine Invasion: Full Text', *Aljazeera*, 3 March 2022, https://www.aljazeera.com/news/2022/3/3/unga-resolution-against-ukraine-invasion-full-text (noting that the vote was 141 to five with 35 abstentions and quoting the resolution as condemning 'all violations of international humanitarian law and violations and abuses of human rights').

[144] ICTY, *Prosecutor v Nikolić*, Sentencing Judgment, IT-02-60/1-S, Trial Chamber I, Section A, 2 December 2003, paras 86–87 (emphasis added).

from engaging in prohibited conduct.[145] Ben Ferencz himself, in announcing the proposal, made it abundantly clear that its 'basic goal is to deter the unlawful use of armed force',[146] and he has emphasised that, even if such force is deterred only 'to a slight extent', this would be of great value as an 'effort to save human lives'.[147]

Moreover, the utilitarian goal of incapacitation is also at play, not only in the light of arrest warrants being issued for CAH (illegal use of armed force), but also via the totemic power of that evocative offence hanging over the heads of at-large aggression entrepreneurs, such as Vladimir Putin, and potentially constraining their kinetic tactical decisions aimed at civilians (granted, the existing arrest warrant issued for Putin already achieves this but it focuses on the war crime of deportation of children, and not the killing of civilians – which would place on Putin a greater badge of shame).[148]

In any event, regardless of its deterrence/incapacitation value, charging such an offence also has utilitarian benefits in terms of expressing denunciation and promoting education. Denunciatory and educative approaches treat specific invocations of ICL as 'an opportunity for communicating with the offender, the victim and wider society the nature of the wrong done'.[149] In other words, they inform perpetrators about the 'wrong … they have done' while also 'educating society about the unacceptable nature of the conduct condemned'.[150] In the case of labelling/condemning the launch of a civilian-focused aggressive war as a crime against humanity, this would satisfy a crucial hortatory need. Indeed, Ferencz has described his proposal as a vital part of effecting 'a change of heart and mind among our fellow human beings' by using an 'educational tool'.[151]

Humanising the nature of the offence and providing individual victims access to the justice process

There is another significant advantage to charging CAH (planning/launching aggressive war) in relation to unlawful use of force under the residual clause: its vindication of victims' interests and elevation of their visibility in the justice process.[152] Considering Ben Ferencz's extensive personal history of

[145] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 26.

[146] Ferencz (n 14) 520.

[147] Ferencz (n 53) 197.

[148] Cryer and others (n 134) 35.

[149] Lucia Zedner, *Criminal Justice* (Oxford University Press 2004) 109.

[150] Cryer and others (n 134) 36.

[151] Ferencz (n 53) 197.

[152] While it is true that Einarsen and Rikhof's proposal assumes that CAH will be charged, the contemplated CAH charges, such as murder, represent a fragmented aspect (or fragmented aspects) of only the last link in the chain of launching aggressive war: victimhood via immediately proximate physical harm. This myopic treatment of victimhood deprives natural persons, whose lives have been upended or destroyed by aggression, to present themselves in the justice process as victims of that particular (and broader) conduct: the illegal use of force. Thus, although this is a more indirect critique of the Einarsen/Rikhof proposal, it has been included in this section.

representing atrocity victims, his proposal for charging aggressive war under the CAH residual clause was victim-focused from the very beginning. As he explained in introducing this new approach: 'Keep in mind that the basic goal is to deter the unlawful use of armed force *that kills or maims countless innocent men, women, and children*'.[153]

Chiara Redaelli explains that Ferencz's proposal gives the prosecution of illegal use of force 'meaningful impact' because it reframes it 'in terms of human rights'.[154] Others have implicitly followed Ferencz's lead in reconceptualising aggressive war-making as a crime against humanity by stressing its impact on natural persons as its victims, not states. For instance, it is the 'widespread killing and the infliction of human suffering without justification' that Tom Dannenbaum identifies as the element that warrants criminalising such conduct.[155] Similarly, Frédéric Mégret views categorising aggression as a crime against sovereignty as 'out of tune with contemporary humanitarian sensitivities'[156] and argues that aggression should be recast as primarily a crime against human rights.[157]

And the issue of recognising 'victim' status for natural persons is not strictly a metaphysical point; there are tangible procedural consequences at stake. Pursuant to Article 68(3) of the Rome Statute, where the 'personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court'.[158] Moreover, the ICC gives victims a key role in the end phase of the criminal proceedings, with Article 75 of its Statute providing for victim reparations, 'including restitution, compensation and rehabilitation'.[159]

However, states, not natural persons, are recognised as victims of aggression under customary international law.[160] Although, in principle, natural persons could qualify as victims under the Rome Statute, it is not clear that the

[153] Ferencz (n 14) 520 (emphasis added).

[154] Chiara Redaelli, 'The Human Dimension of Peace and Aggression' (2020) 96 *International Law Studies* 603, 617.

[155] Tom Dannenbaum, 'Why Have We Criminalized Aggressive War?' (2017) 126 *Yale Law Journal* 1242, 1263.

[156] Frédéric Mégret, 'What is the Specific Evil of Aggression?' in Kreß and Barriga (n 15) 1398, 1444–45.

[157] ibid 1437. See also Mégret (n 13) 480.

[158] Rome Statute (n 2) art 68(3).

[159] ibid art 75(1). Again, although Einarsen and Rikhof contemplate CAH charges in their proposal, persons going through the process as victims of the illegal use of force will undoubtedly perceive themselves, and their role in the justice process, differently as victims of a launch of aggressive war (versus the other, more specific enumerated acts, such as murder). The importance of the process for victims as properly focused catharsis should not be overlooked. See Rudina Jasini and Gregory Townsend, 'Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap between Research and Practice', UK Economic and Social Research Council, 30 November 2020, 34, https://www.law.ox.ac.uk/sites/default/files/migrated/iccba_-_oxford_publication_30_november_2020_.pdf.

[160] Pobjie (n 15) 824.

ICC would grant them access to its participation and reparations regimes as 'it was not states' intention to create new rights for individuals suffering harm from the crime of aggression'.[161]

Thus, absent Ferencz's proposal, human victims whose lives have been shattered (or otherwise adversely affected) by aggressive war, would have no formal access to the participation and reparations privileges in the Rome Statute that were intended for persons like them, who have suffered directly as the result of the commission of international crimes.[162]

5.2. Violation of the right to self-determination as the residual clause gravamen

For their part, Giulia Pinzauti and Alessandro Pizzuti do not advocate the partial approach recommended by Einarsen and Rikhof; they are entirely on board with the idea of prosecuting Russia's underlying acts of aggression against Ukraine as CAH before the ICC. However, they propose altering Ferencz's proposal in one significant way: by alleging a violation of the right to self-determination of the Ukrainian people as the residual clause gravamen under Article 7(1)(k).

Their argument that Russia's aggression has violated the Ukrainian people's right to self-determination is fairly compelling; they detail the evidence (via various speeches and writings, and the nature of the aggression itself) that indicate Russia's goal of erasing the Ukrainian nation as a separate political/social/cultural entity, and cite eminent publicist James Crawford for the proposition that 'the invasion and annexation of a country for the purpose of coercing a people to choose their political status engages, and violates, their right to self-determination'.[163] In the light of this, Pinzauti and Pizzuti conclude:[164]

> [The] right to self-determination is implicated by both the use of force against the sovereignty, political independence and territorial integrity of Ukraine, as well as by the progressive erasure of Ukrainian national identity in the territories occupied by Russian forces. Russian authorities are violently quelling protests, interfering with local administration through the installment of new mayors, and organizing referendums to create new, separate entities in violation of Article 50 Geneva

[161] ibid 846. However, citing human rights and humanitarian law principles, as well as the flexible breadth of ICC Rules of Procedure and Evidence (ICC RPE) rule 85, Pobjie argues that aggression charges should confer victim status to natural persons: ibid 817 ('If states support this development, it will be a positive step towards realising the goal of delivering justice for victims of all crimes within the Court's jurisdiction regardless of artificial legal distinctions'). ICC Rules of Procedure and Evidence, Official Records of the ASP to the Rome Statute of the ICC, 1st session, New York, 3–10 September 2002, ICC-ASP/1/3 and Corr.1, Pt II.A.

[162] Pobjie, ibid 817.

[163] James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 114.

[164] Pinzauti and Pizzuti (n 13) 1066–67.

> Convention IV. The 'Russification' of the occupied territories also extends to the use of the Russian language, the replacement of Ukrainian media with pro-Russian broadcasts, and the introduction of the Russian currency, the ruble.

Still, while the rights violation may be clear, Pinzauti and Pizzuti concede that 'this approach has its challenges',[165] the most serious of which arguably stem from the nature of the right itself. In particular, the right to self-determination is a 'group' (or third generation) right belonging to a 'people'. As a result, as Pinzauti and Pizzuti concede, one of the 'difficulties that may arise in assessing the implications of the unlawful use of force for the right to self-determination is identifying the "people" whose self-determination is engaged'.[166] The authors elaborate:[167]

> There is no agreement on the definition of the term 'people' within the self-determination formula. Different approaches have been proposed to identify the holders of the right to self-determination. Some scholars sought to identify the objective characteristics that a 'people' should possess to be defined as such; others argued that the right applies to, inter alia, the population of independent and sovereign states in its entirety (the so-called 'whole people formula').

By way of example, in *Apirana Mahuika v New Zealand* – a dispute among Māori groups, where one group purported to represent the rights of all Māoris in a fisheries dispute with the state – the UN Human Rights Committee (HRC) acknowledged that 'the right of individuals to enjoy their own culture' may be 'in conflict with the exercise of parallel rights by other members of the minority group'.[168] In this case, Pinzauti and Pizzuti acknowledge that, for example, within Ukraine's 'self-determination unit, there may be different collectivities or minorities with different ties and/or political aspirations'.[169] To illustrate, they point to ethnic Russian residents in Ukraine. Although the authors ultimately cite authority indicating that ethnic Russians are not a different 'people' but rather a minority within the larger Ukrainian nation, this does not change the fact that they may have different perceptions of the group's rights and do not accept that non-ethnic Russians should represent them in respect of the right to self-determination.

This might not only affect the viability of such a claim in terms of assessing liability at the ICC but also in terms of how it affects victims there. In

[165] ibid 1061.

[166] ibid 1067. Mégret points to another problem related to breach of the right to self-determination as the residual clause gravamen. To wit, for purposes of the clause's harm threshold, he notes that 'it seems stretched to say that aggression causes "great suffering, or serious injury to body or to mental or physical health" in this way'): Mégret (n 13) 475.

[167] ibid.

[168] UN HRC, *Apirana Mahuika v New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000), para 9.6.

[169] Pinzauti and Pizzuti (n 13) 1068.

particular, a murky picture in terms of the holder(s) of the right at issue could engender problems in terms of identifying the proper victims for purposes of the ICC participation and reparations regimes. Indeed, it could even provoke rancour among competing groups.

Instead, if, as proposed by Ferencz, the residual clause gravamen were killing civilians (and, thus, deprivation of the right to life), identification of the rights holders becomes much easier. That is true also for ascertaining victims (that is, surviving next of kin) for purposes of ICC participation/reparations.

Significantly, Pinzauti and Pizzuti implicitly endorse this approach by justifying their own proposal 'on the work of those scholars that studied the link between jus ad bellum and human rights in light of the new approach adopted by the [United Nations] Human Rights Committee's General Comment 36'.[170] In that document, the HRC held that '[s]tates parties engaged in acts of aggression as defined in international law, *resulting in deprivation of life*, violate ipso facto article 6 of the Covenant' [protecting the right to life].[171] Overall, then, focusing on deprivation of the right to life (the killing of civilians) as the residual clause gravamen is arguably a more feasible approach.

6. Conclusion

In taking stock of Ferencz's proposal to charge illegal use of force at the ICC as a CAH under the Article 7(1)(k) residual clause, only two of the concerns raised herein remain unresolved: (i) the risk of the Nuremberg CAH 'war nexus' requirement being reimposed; and (ii) potential realpolitik resistance from states that would resent circumventing Kampala's hard-won compromises by the supposed doctrinal sleight of hand of charging illegal use of force as CAH rather than aggression.

Should these concerns give us significant pause at this point? First, with respect to the spectre of CAH generally being saddled with a new 'war nexus' requirement, although Ventura raised it as a possible concern in his 2013 article co-authored with Gillett, by 2018, in his sole-authored piece, he was able to cast it aside. According to Ventura:[172]

> [Granted] from a legal perspective, the illegal use of force as an 'other inhumane act' creates an uncomfortable and serious anomaly. Historically, crimes against humanity required a nexus with armed conflict. Under the IMT Charter, the IMT at Nuremberg held that crimes against humanity could not occur unless they were linked to armed conflict. Although there is judicial and academic disagreement as to whether this requirement was jurisdictional or substantive in nature, the point is that in present times this nexus is no longer required for crimes against

[170] ibid 1063.

[171] UN HRC, General Comment No 36, Article 6: Right to Life (3 September 2019), UN Doc CCPR/C/GC/36, para 70 (emphasis added).

[172] Manuel J Ventura, 'The Illegal Use of Force (Other Inhumane Act) as a Crime Against Humanity: An Assessment of the Case for a New Crime at the International Criminal Court' in Sadat (n 94) 386, 422.

> humanity. Indeed, Article 7(1) of the Rome Statute contains no such element, although the travaux préparatoires reveals that States certainly engaged in spirited discussions and debates on the subject during the process of its drafting. Yet, as proposed by Ben Ferencz, the illegal use of force, as a crime against humanity, inherently requires the existence of armed conflict.

That said, concern regarding the realpolitik hurdle remains. On one hand, there is broad international consensus that Russia is committing grave international crimes, as reflected in the 2 March 2022 General Assembly Resolution condemning the Russian invasion. Moreover, the day after this Resolution, the ICC Prosecutor opened an investigation into the situation in Ukraine, based on referrals from an unprecedented 39 ICC states parties, demonstrating exceptionally broad-based support.[173]

On the other hand, there have been a multiplicity of possible justice approaches advocated. Some wish to create a dedicated tribunal for prosecuting Russian leaders through an agreement between Ukraine and the United Nations.[174] Others (including Ben Ferencz himself) have called on states to create such a tribunal among themselves (a so-called 'coalition of the willing'),[175] while certain experts would prefer to see prosecutions (including for the crime of aggression) via a 'Ukrainian High War Crimes Court', a specialised body within the domestic Ukrainian judicial system.[176] However, through the beginning of 2023, the Ferencz proposal was not among the approaches being debated, and it is certainly possible that, as mentioned by Ventura, this is because of realpolitik resistance at the ICC based on a perceived end run around the Kamapala Amendments.

However, a recent debate in the General Assembly (in April 2023) saw Ferencz's proposal indirectly alluded to when the representative for Sri Lanka called on the international community to recognise aggression as a crime against humanity.[177] So, charging illegal use of force as CAH may have begun to find discursive traction in the international legal sphere. It is hoped that this article's resuscitation of the Ferencz proposal in the context of the ICC's Russian case will allow for greater consideration of this as a potential justice option.

In that regard, it is submitted that Ferencz's 13-year-old proposal is quite timely, even vital, given Russia's aggression, which has shattered civilian life

[173] Einarsen and Rikhof (n 12) 1.

[174] Oona A Hathaway, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)', *Just Security*, 20 September 2022, https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine.

[175] ibid.

[176] ibid.

[177] United Nations Meetings Coverage and Press Releases, 6th Committee of the General Assembly, Delegates Grapple with Definition of Crimes against Humanity that Supports Future Development, Has Legal Certainty, as Sixth Committee Continues Resumed Session (11 April 2023), UN Doc GA/L/3680.

in Ukraine, frequently as the result of direct targeting of civilians. It is the widespread victimisation of natural persons that requires us to look beyond mere aggression, a state-centric crime. As unpeeling the various layers of its consideration over time has revealed in this article, Ferencz's proposal suggests the way forward now. The CAH chapeau elements can be met, as can the requirements for the Article 7(1)(k) residual clause, and the principle of legality would likely not be violated.

For the reasons detailed above, and considering the various challenges involved, the ICC Prosecutor should not be satisfied with merely integrating the 'factual matrix of aggression' into his existing case. He should embrace charging Russian leaders with CAH under the residual clause, which – against charging murder, for example – would give him greater latitude in terms of pursuing various modes of liability and better prospects for presenting a solid evidentiary chain proving liability (and would better align with victim interests and philosophy of punishment considerations).

Moreover, as it could cause confusion in terms of identifying the proper rights holder(s) (and, thus, potential problems in administering the ICC victim participation and reparations regimes), breach of the self-determination right would not be recommended as the residual clause gravamen. Rather, as we have seen, deprivation of the right to life is a better option for the charged residual clause harm – and it squares with the UN Human Rights Committee's General Comment 36. (That said, if otherwise feasible, it would certainly be possible to allege deprivation of the right to self-determination as a separate residual clause charge.)

This is not to say that CAH charges under the other enumerated acts, such as murder under Article 7(1)(a), might not be viable.[178] Rather, charging CAH as planning/initiating an aggressive war under the residual clause posits that the relevant crime scene is at the seat of power, such as the Kremlin, where the planning and launching take place, and not on a distant field where subsequent crimes occur. This permits a much more linear evidentiary connection between the leaders and the enumerated instances of charged conduct.

That said, it should not be supposed that this article discourages further research on charging other enumerated crimes – such as, inter alia, murder, extermination, rape, or torture – in cases such as this. To the contrary, further scholarly activity in this regard should be encouraged. Similarly, in the light of Russia's invasion of Ukraine, experts should also explore whether Article 7 of the Rome Statute should be amended to include planning/launching an aggressive war as a separate enumerated act.

So, this article should be seen as only a starting point in the post-Russian invasion literature on this topic. It is meant to be a dual examination of legal history from the perspective of one of ICL's great pioneers, Ben Ferencz, and a normative analysis of his 2010 proposal in the wake of Russia's 2022 invasion of Ukraine. Ferencz's history shows how his trailblazing

[178] This is the approach seemingly preferred by Mégret, who opines that 'the case for counting civilian deaths as ipso facto unlawful murder is relatively stronger when arising during what is characterized as a cross between aggression and a crime against humanity': Mégret (n 13) 494.

efforts in two realms – recognising atrocity victims as key actors in international criminal justice and criminalising aggression under the jurisdiction of a permanent international criminal court – came together in his proposal to charge illegal use of force as CAH under the Rome Statute's residual clause.

As this article has demonstrated, that proposal looked different in 2010, in the immediate wake of Kampala, and different as well after the ICC activated its aggression jurisdiction in 2018. Now, with the Russian invasion of Ukraine, which is just the latest example of aggressive warfare disproportionately and directly targeting civilians, Ferencz's proposal should find new life once again. Those responsible for this brutal armed conflict need to be prosecuted in a way that effectively valorises the interests of the war's human victims and finds creative ways to help to close the impunity gap with regard to the illegal use of armed force. Ferencz's proposal does both – it is high time to put it to use.

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