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FOREWORD AND DEDICATION

Michael P. Scharf & Philip S. Hadji†*

Sixty-one years ago, the Nuremberg Tribunal convicted the Nazi leaders of waging a war of aggression, prompting Nuremberg Prosecutor Robert Jackson to declare that this was the most important contribution of the historic trial. During the Cold War era, however, when the United States and Soviet Union and their proxies were involved in numerous armed conflicts around the globe, the idea of prosecuting the crime of aggression fell out of favor. Thus, none of the modern ad hoc international war crimes tribunals (the Yugoslavia Tribunal, the Rwanda Tribunal, the Special Court for Sierra Leone, and the Cambodia Tribunal) were given jurisdiction over the crime of aggression.

At the 1988 Rome Diplomatic Conference to establish the International Criminal Court (ICC), former Nuremberg Prosecutors Henry King, Ben Ferencz, and Whitney Harris, used their unique moral authority, dogged persistence, and formidable skills of persuasion to convince the delegates to include the crime of aggression in the Court's statute. But, in a compromise, the ICC Statute stipulates that before the Court can exercise jurisdiction over this crime, the States Parties must adopt a provision at the Review Conference (scheduled for 2010 in Kampala, Uganda) setting forth a definition of aggression and the conditions under which the Court could exercise its jurisdiction over it.

The question of where (and how) the line should be drawn between "just war" and "war crime" turned out to be an extremely difficult one for the ICC Assembly of State Parties, whose Special Working Group wrestled with the issue for several years. In coordination with Christian Wenaweser, President of the ICC Assembly of State Parties, and supported by funding from the Wolf Family Foundation, the Planethood Foundation, and the Frederick K. Cox International Law Center, on September 25 and 26, 2008, Case Western Reserve University School of Law hosted a symposium and experts meeting to help advance the project of defining aggression and ar-

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riving at an appropriate trigger mechanism for the International Criminal Court to exercise jurisdiction over that crime. This issue of the *Case Western Journal of International Law* features the nine articles generated from the symposium and the Report of the Cleveland Experts Meeting.

OVERVIEW OF ARTICLE SUBMISSIONS AND THE CLEVELAND EXPERTS
MEETING

The issue begins with contributions from two former Nuremberg prosecutors that put the crime of aggression in historic perspective. In *Nuremberg and Crimes Against Peace*,¹ Professor King reviews the origin of the Nuremberg aggressive-war charge—a crime against peace—and traces the role the charge played through the twelve subsequent proceedings at Nuremberg. The evaluation of the “checkered success” of the aggression charge provides context for the present effort to define aggression. Former Nuremberg Prosecutor Benjamin B. Ferencz, in an article entitled *Ending Impunity for the Crime of Aggression*,² details the history of the crime of aggression from Nuremberg to the adoption of the Rome Statute in 1998. He maintains that the crime of aggression has already been adequately defined and that arguments against providing the ICC jurisdiction over the crime are not compelling.

The next group of submissions address the definition of the crime of aggression and how it has evolved over time. In *The Push to Criminalize Aggression: Something Lost Amid the Gains?*,³ Professor Mark Drumbl argues against the emerging consensus that favors a narrow definition of the crime of aggression. He maintains that expanding the scope of the crime of aggression would better reflect the diversity of contemporary threats to stability, security, sovereignty, and human rights interests. Professor Larry May, in *Aggression, Humanitarian Intervention, and Terrorism*,⁴ addresses the definition of aggression from a historical and philosophical perspective. Recognizing that philosophers, diplomats, and lawyers have debated this topic for hundreds of years with little agreement, he attempts to find broad moral consensus on humanitarian interventions and the treatment of terrorists. Professor Sean Murphy in turn addresses the legality of humanitarian intervention in the event that the Rome Statute was to be amended to in-

¹ Henry King, *Transcript: Nuremberg and Crimes Against Peace*, 41 CASE W. RES. J. INT'L L. 273 (2009).

² Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281 (2009).

³ Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE W. RES. J. INT'L L. 291 (2009).

⁴ Larry May, *Aggression, Humanitarian Intervention, and Terrorism*, 41 CASE W. RES. J. INT'L L. 321 (2009).

clude the crime of aggression in *Criminalizing Humanitarian Intervention*.⁵ He argues that an unwillingness on the part of the ICC to indict and prosecute leaders that undertook humanitarian intervention without Security Council approval—an outcome that seems likely for incidents of true humanitarian intervention—may lend considerable credence to the view that such intervention is lawful, as well as define the conditions that characterize such intervention. Elise Leclerc-Gagné and Professor Michael Byers maintain that that an exception for those engaged in a bona fide unilateral humanitarian intervention should be included in the crime of aggression in their article.⁶

The final group of articles address jurisdiction and process issues. Mark Ellis, Executive Director of the International Bar Association, outlines jurisdictional and trigger mechanisms for the crime of aggression.⁷ In an effort to bridge competing visions of how to incorporate the crime of aggression in the Rome Statute, former U.S. Ambassador at Large for War Crimes Issues and head of the U.S. Delegation during the Rome Diplomatic Conference for the International Criminal Court, David Scheffer proposes two options for negotiators to consider in the event there is no Security Council determination of aggression or referral of aggression to the Prosecutor in his article.⁸ Professor Roger Clark addresses the implications of certain ambiguities in the Rome Statute's provisions dealing with entry into force of the provision on aggression in his article, *Ambiguities in Articles 5(2), 121 And 123 of the Rome Statute*.⁹

The issue concludes with the Report of the Cleveland Experts Meeting.¹⁰ The Cleveland Experts Meeting was chaired by Ambassador David Scheffer and included a mix of delegates and NGO representatives who had participated in the work of the Special Working Group on the Crime of Aggression (Christian Wenaweser, Stefan Barriga, Roger Clark, Don Ferencz, Robbie Manson), former government, international organization, and NGO representatives who had taken part in the negotiations of the Rome Statute

⁵ Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341 (2009).

⁶ Elise Leclerc-Gagné & Professor Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 373 (2009).

⁷ Mark S. Ellis, *Transcript: Jurisdictional and Trigger Mechanisms*, 41 CASE W. RES. J. INT'L L. 385 (2009).

⁸ David Scheffer, *A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in The Rome Statute*, 41 CASE W. RES. J. INT'L L. 391 (2009).

⁹ Roger S. Clark, *Ambiguities in Articles 5(2), 121 And 123 of the Rome Statute*, 41 CASE W. RES. J. INT'L L. 407 (2009).

¹⁰ *Report of the Cleveland Experts Meeting: The International Criminal Court And The Crime Of Aggression*, 41 CASE W. RES. J. INT'L L. 423 (2009).

and/or its supplemental instruments (Cherif Bassiouni, Ben Ferencz, Henry King, Michael Newton, Elizabeth Wilmshurst), and leading academic experts on the ICC and international criminal law practitioners from across the globe (Astrid Reisinger Coracini, Mark Drumbl, Mark Ellis, Elise Leclerc-Gagne, Larry May, Sean Murphy, Laura Olson, Keith Petty, Christopher Rassi, Leila Sadat, Bill Schabas, Michael Scharf, Benn Schiff, Oscar Solera, Noah Weisbord). We hoped that by holding the session away from the United Nations and involving a wide range of outside expertise and experience, new proposals could be developed and explored for the Assembly of State Parties' consideration. These proposals were included in a report that was circulated by President Wenaweser to the members of the Working Group on the Crime of Aggression. By all accounts, the Report of the Cleveland Experts Meeting ended up playing an influential role in the proceedings of the Working Group. The Report was accompanied by the "Cleveland Declaration" in which the participating experts recommended the adoption of a definition of aggression and triggering mechanism and their submission to the 2010 Review Conference, so that they may be made part of the ICC Statute.

All together, we believe, the nine articles featured in this issue, and the Report of the Cleveland Experts Meeting, make a timely and significant scholarly contribution to the question of prosecuting the crime of aggression. We are extremely grateful to the participants in this project, to the foundations whose generous support made it possible, and to the student editors of this issue who worked diligently on the preparation of this publication.

DEDICATION TO PROFESSOR HENRY T. KING, JR.

The ICC and the Crime of Aggression Symposium/Experts meeting was the brainchild of Ben Ferencz and Henry King, who had been colleagues at Nuremberg. Sadly, while this issue was going to press, we learned that Henry King had succumbed to cancer, just a few weeks before his ninetieth birthday. It is therefore appropriate that we begin with some remarks about the extraordinary accomplishments of the passionate former Nuremberg Prosecutor.

For the past thirty years, Henry King served as a Case Western Reserve University School of Law Professor and Chair of our Canada-United States Law Institute. Right up to the end, he was energetically teaching, publishing, and organizing conferences. Professor King was Case's version of the Dalai Lama; our students flocked to his classes to soak up the wisdom gained over a truly extraordinary legal career.

At the age of twenty-five, fresh out of Yale Law School, Professor King was hired as the youngest Prosecutor at the Nuremberg Trial. At Nuremberg, he worked on the Justice and Ministries cases, led the prosecution of Field Marshall Erhard Milch in the High Command trial, and prepared an

early draft of Robert Jackson's stirring closing statement. He interrogated many of the major Nuremberg defendants, including Albert Speer, who he later chronicled in a critically acclaimed book, *The Two Worlds of Albert Speer: Reflections of a Nuremberg Prosecutor*.

Upon returning to the United States, Professor King served at the Agency for International Development during the Eisenhower Administration, and worked as a chief corporate international counsel for more than twenty years with TRW Inc., and later was of counsel at Squire, Sanders & Dempsey LLP. He then joined the faculty of Case Western Reserve, where he taught International Business and International Arbitration, both favorites of our students that consistently had long wait lists.

Professor King was an influential leader of the American Bar Association, serving in the 1950s as Chair of the International Law Section, and later as a member of the ABA's special task force on war crimes in the former Yugoslavia. In addition he was the U.S. chairman of a joint working group, organized by the American, Canadian, and Mexican bar associations, on the settlement of international disputes. Professor King also founded the 200-member Greater Cleveland International Lawyers Group.

Professor King spent a lifetime trying to make the words "Never Again" come true, and over the course of his career, he was a resolute advocate of international tribunals and the permanent international criminal court. In 2004, Professor King was appointed Canada's Honorary Consul General for Cleveland and Northeast Ohio. The Canadian Government, U.S. Department of Justice Office of Special Investigations, Robert H. Jackson Center, and Case Western Reserve University President Barbara Snyder, among others, paid tribute to Professor King at an event in November 2008 honoring his sixty-five years of accomplishments and public service.

We dedicate this issue to Henry T. King Jr., an inspiring teacher, supportive colleague, and tenacious advocate for international justice.



Henry T. King Jr., 1919-2009