The New York Times

Aggression Is Now a Crime

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July 1, 2010

CHICAGO — Not since the Nuremberg and Tokyo tribunals of World War II has any political or military leader stood trial before an international court for the crime of aggression.

Those days of impunity are coming to an end. Following years of talks and two weeks of intensive negotiations in Kampala last month, diplomats and international lawyers from almost 100 nations have agreed to empower the International Criminal Court to prosecute the authors of aggression.

I waited 17 years for this moment to arrive. As a Clinton administration lawyer in 1993, I wrote my first memorandum on the merits of criminalizing aggression for prosecution by a permanent international criminal court.

By 1997, when I became the U.S. Ambassador at Large for War Crimes Issues and led the American delegation in negotiations to create such a court, I struggled over how armed aggression could be defined and investigated alongside the U.N. Security Council's primary power to determine acts of aggression.

There seemed to be no pathway to defining or prosecuting the crime of aggression. After all, to try leaders for aggression is to prosecute a nation's military policies in a court of law. Few governments want to expose themselves to that liability.

However, aggression was the weapon of choice in the hands of Saddam Hussein against Iran and Kuwait, repeatedly in the turmoil of the Middle East, on the Indian sub-continent and the Korean peninsula, and against the Falkland Islands. How could we prosecute leaders for genocide but absolve them of aggression?

I always reasoned that the International Criminal Court, which investigates genocide, crimes against humanity and serious war crimes, also should investigate aggression provided its definition, and how the Court exercises jurisdiction over the crime, are settled.

Aggression had to be more sharply defined than the U.N. Charter's prohibition of "the threat or use of force against the territorial integrity or political independence of any state," which describes everything from pinprick attacks to massive invasions.

The definition for aggression agreed to in Kampala is imperfect and doubtless will invite criticism. But it is manageable and sharpens the Court's focus on political and military leaders who plot aggression and use armed force boldly for that purpose. During the George W. Bush years, the United States foolishly boycotted the negotiations on the crime of aggression. But the Obama administration's team in Kampala garnered support for language that helps clarify the definition.

States party to the Rome Statute agreed that no sooner than 2017, the U.N. Security Council may refer aggression to the Court for prosecution of aggressive leaders from any nation, regardless of whether it has joined the Court. Alternatively, if a state party or the Court's prosecutor refers aggression to the Court, then the prosecutor must see if the Security Council has determined that an act of aggression by the accused nation has occurred. If so, then full steam ahead.

The Security Council, however, rarely determines that an act of aggression has occurred. There are few more toxic terms in global diplomacy. It is much easier for the Council simply to determine a threat to or violation of international peace and security. Most governments wanted some means for the Court to proceed in the absence of an explicit Council decision on aggression.

So, if the Security Council fails to reach any such decision after six months, the Court's pre-trial judges can deliberate the issue. If they authorize the prosecutor to investigate aggression, the Council can still block the inquiry by adopting a mandatory resolution.

This ultimate "check" by the Security Council was essential to bring Britain and France, as permanent members of the body, on board in Kampala. It also mollified the American observer delegation, which exerted influence despite the fact that Washington is not a party to the I.C.C.

Any state party can declare itself in advance exempt from liability for aggression, since it is essentially a "new" crime to be prosecuted under the Rome Statute. Also, the nationals of non-party states are excluded automatically from liability. But if aggression occurs on the territory of any of these shielded nations, they sacrifice access to the Court.

The Pentagon should appreciate the non-party privilege, which retains latitude for U.S.-led humanitarian interventions and counter-terrorism actions.

The chief negotiators — Christian Wenaweser of Liechtenstein and Prince Zeid Ra'ad Zeid al-Hussein of Jordan — brilliantly achieved consensus on the definition of aggression and its jurisdictional "trigger." They wrote a new chapter in the history of armed conflict and the rule of law.

There remain enormous challenges for peacemakers and for governments wary of constraints on policies designed to unleash deadly firepower on foreign territory.

But the die is cast with enough lead time to put political leaders and military commanders on notice that aggression can land them in prison.

David Scheffer, a professor at Northwestern University School of Law, attended the Kampala conference on the International Criminal Court.