Hon Christopher Finlayson
Making aggression a leadership crime in 2017
11 July 2016

Introduction

Thank you, Professor Clark, for your interesting and informative presentation. Your contribution to international law—and international criminal law in particular—is well-known by international scholars and practitioners alike. It has been our pleasure to have you here in Wellington to address a New Zealand audience on the crime of aggression.

I will provide some remarks by way of reply before we open the floor for questions.

Crime of aggression – brief history

For centuries, humankind has grappled with questions about war: whether or in what circumstances it can be justified, to what is permissible on the battlefield and how to protect civilians and civilian objects. From the foundational work of Grotius, von Martens and Lieber, to the more recent Geneva Conventions and the Additional Protocols, the law in war (*jus in bello*) and the law of war (*jus ad bellum*) have evolved over time. The International Military Tribunal at Nuremberg signalled the start of a new era of accountability. It held, in a poignant and well-known passage of its judgment:[1]

> To initiate a war of aggression … is not only an international crime; it is the **supreme international crime** differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

Robert H Jackson, Chief of Counsel for the United States at Nuremberg, stated in his June 1945 report to the President that "[w]e must not permit it [that is, the US legal position] to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable." He went further to state: "[d]oubtless what appeals to men—of good will and common sense—

[1] http://avalon.law.yale.edu/imt/judnazi.asp#common ("The common plan or conspiracy and aggressive war").

as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war."[2]

Following the Nuremberg and Tokyo trials, the international community continued to debate, in different fora, how aggression should be defined and how to respond, both legally and politically, when it occurred. It would be decades before the international community would create a criminal court with permanent jurisdiction over core crimes in 1998. It would be 12 years again before states would gather in Uganda in May 2010, to negotiate the definition and jurisdictional provisions of the crime of aggression. Today, in 2016, we are on the cusp of a further, and possibly final, gathering of states – to determine whether to activate the Court's jurisdiction.

The ICC today

The ICC is now a fully-fledged international treaty-based institution. 124 countries are states parties and two have accepted the court's jurisdiction on an ad hoc basis. The court has opened investigations into ten situations – all but one (Georgia) is in Africa.[3] Of the nine African investigations, six were referred to the Court by the state concerned.[4] Two were referred to the Court by the UN Security Council[5] and one was an own motion investigation by the Prosecutor.[6] Preliminary examinations by the Prosecutor are ongoing in respect of: Afghanistan; Burundi, Colombia; Guinea; the UK in Iraq; Nigeria; Registered Vessels of Comoros, Greece and Cambodia; Palestine; and the Ukraine.

From this brief snapshot it is clear that the ICC is an extraordinarily busy court with subject-matter jurisdiction over the world's most serious crimes. It must operate independently and efficiently, all the while responding to an ever-changing global political environment.

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[2] http://www.ibiblio.org/pha/war.term/trib_07.html ("The Legal Position of the United States").

[3] Democratic Republic of the Congo (DRC), Uganda. Central African Republic (CAR) (two investigations, the first for acts in 2002-2003, the second for the escalation of violence in 2012), Sudan (Darfur), Kenya, Libya, Côte d'Ivoire, and Mali.

[4] DRC, Uganda, CAR I and II, Côte d'Ivoire, and Mali.

[5] Sudan (Darfur) and Libya.

[6] Kenya.

New Zealand and the ICC

New Zealand has been a supporter of international justice efforts for many years. We took part in the multilateral negotiations which led to the creation of the Rome Statute in 1998—without doubt a landmark achievement for international law—and we have been an active participant in the Assembly of States Parties ever since. We look for practical solutions and support free and frank dialogue on matters within the Assembly's mandate.

New Zealand's Rome Statute obligations were implemented by the entry into force of the International Crimes and International Criminal Court Act 2000. The Act draws directly on Rome Statute provisions and confers jurisdiction over genocide, war crimes and crimes against humanity. Importantly, it also provides for New Zealand's cooperation with the Court.

Turning to the Kampala Amendments, in September 2013 the Foreign Affairs Defence and Trade Committee tabled its report and recommended ratification. The House had previously agreed a motion on the Amendments. This Government, noting the motion and the report, responded that it would take a formal decision[7] in this regard. New Zealand's experience as a non-permanent member of the United Nations Security Council has reinforced the importance of an international rules-based system, as well as institutions and processes that are credible and effective in practice. New Zealand officials, both here and overseas, follow international developments closely and are undertaking the necessary preparatory steps to enable the Government to take its formal decision in the near future. When a decision is taken by Cabinet, as with any binding treaty action[8], it will be carefully considered and consistent with New Zealand values.

The Kampala Amendments (issues)

There is a range of arguments in favour of ratification:

[7] Some in the audience may wonder why no action has been taken despite the recommendation. What follows in this paragraph is a partial response to that. It also reaffirms that NZ is serious about the task (it isn't simply ignoring the issue).

[8] To neutralise the suggestion that NZ should have ratified earlier.

- The amendments complement the United Nations Charter which, while it prohibits the illegal use of force, is silent on individual criminal responsibility.

- It would also act as a deterrent to the commission of crime. Moreover, it would ensure that criminal liability is not confined to troops on the battlefield, but extends to the architects of unlawful use of force.

- The amendments were not designed to prevent the legitimate exercise of self-defence by states, nor to replace the Security Council's role in acting under Chapter VII of the Charter.

- As compared to other possible amendments, the Kampala text is regarded by many as the 'unfinished businesses from Rome'. Ratification and implementation, in this sense, fills a notable statutory gap.

Despite the arguments in favour, some states have expressed concerns about the Kampala Amendments. [Professor Clark has addressed some of these in his presentation].

- Some consider the ICC would become politicised (or further politicised) if a situation were referred or initiated involving an allegation of aggression.

- Others say the definition of aggression requires further clarity, particularly as to what constitutes a "manifest" violation of the UN charter and what impact, if any, interpretive understandings agreed at Kampala may have on future judicial determinations.

- Some forecast a 'chilling effect' on states' willingness to contribute to multilateral humanitarian efforts involving the use of force; and

- Some question the court's jurisdiction over states that have not, or are unlikely to, ratify the Amendments. This issue was the subject of substantial debate at Kampala.

These issues are not a reflection of the quality of the work undertaken by negotiators and drafters to date: they simply reflect the significance and complexity of the issues under consideration. In fact, when one considers the long history and evolution of international criminal law, it is perhaps no surprise that aggression remains one of the more difficult issues on the international agenda.

Conclusion / reflections

Looking ahead, it remains to be seen what will happen over the course of the next twelve months. Twelve months is a long time in international relations. As 30 states have now ratified the Amendments—this being the minimum required to prompt a further decision by the Assembly—states will continue to discuss the issues I've mentioned today.

It is essential that we engage constructively with each other, to achieve outcome that is effective, credible, and stands the test of time. As the Nuremberg Tribunal observed in the aftermath of WWII, "this law is not static, but by continual adaptation follows the needs of a changing world". The world has undoubtedly changed in many ways since the late-1940s. What has not changed, however, is the need for appropriate action by relevant actors to ensure international peace and security. In spite of our differences, states need to work with—rather than against—each other in the pursuit of transparency, accountability and the rule of law. For our part, New Zealand remains committed to working with others towards this common goal.

The ICC has the potential to become one of the most important international institutions of the 21st century – admired and supported by all peace loving peoples of Earth, and feared by its tyrants. May the words of Primo Levi, author of Adolf Eichmann in 1960, be directed at the monsters of today who crush the spirit and hopes of their peoples:

> And you have come, our precious enemy,
> Forsaken creature, man ringed by death.
> What can you say now, before our assembly?