

Nuremberg Academy Lecture “The Ukraine War and the Crime of Aggression“

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Text of the Lecture

Madam Minister of State,

Mr Lord Mayor,

State Secretary,

Excellencies,

In particular dear Ambassador Korynevych from Ukraine,

Distinguished colleagues,

Ladies and Gentlemen in and outside Courtroom 600,

Dear friends!

Not least, dear Klaus Rackwitz!

It is a special privilege to speak about the crime of aggression at the very place where the all-important precedent on crimes against peace was set. I very much thank the Nuremberg Academy for showing me this honor. I also congratulate the Academy for having chosen this topic for tonight’s lecture.

As a result of Russia’s aggression against Ukraine, the future of the international legal architecture regarding the crime of aggression figures prominently on the international legal policy agenda. Governments will decide about the way forward. But those decisions should be informed by prior public debate. The Nuremberg Academy is ideally suited to provide a forum for such a debate.

If we look back to roughly a century of international public debate about our topic, one discussant stands out for his dedication and his moral authority. This discussant is Benjamin Ferencz. Ben has left us a little while ago. But his powerful inspiration will stay with us. I have certainly felt that way when I worked on the manuscript for tonight. I dedicate this Nuremberg Lecture to Ben’s memory.

I.

My starting points should not be controversial: In 2014, in Crimea, the Russian Federation began to violate, at a minimum, the prohibition of the use of force to the detriment of Ukraine. On 24 February 2022, Russia escalated its course of action into a full-scale war of aggression.

Russia’s ongoing conduct against Ukraine thus constitutes an act of aggression which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations. Hereby, Russia’s conduct fulfils the State conduct element of the international consensus definition of the crime of aggression, enshrined in Article 8 bis of the ICC Statute.

Hence, President Putin and some other members of the Russian leadership are under suspicion of having committed the crime of aggression. Yet, the International Criminal Court cannot presently exercise its jurisdiction over this crime. Such an exercise of jurisdiction would require the UN Security Council to refer the situation of Ukraine to the ICC. But as long as Putin holds power, Russia would subject such a draft resolution to the same kind of abusive veto as it did with the Council's draft resolution of February last year condemning Russia's aggression against Ukraine.

II.

Should we worry about that state of affairs? Some believe that we should not – or at least that there are many far more significant things to worry about. They think that we should be content that the ICC can exercise its jurisdiction in Ukraine over genocide, crimes against humanity and war crimes. Judge Schomburg, to name one, has called the present situation regarding the crime of aggression a “luxury problem”. Together with the President of Ukraine and the Ukrainians, I respectfully beg to differ.

In my view, rather than a luxury problem, Russia's aggression against Ukraine has shone a light on a glaring gap in the existing international legal architecture. Nuremberg is the perfect place to make this point. Yet, I wish to emphasize right away that I am not making the point out of Nuremberg nostalgia. In particular, the statement in the Nuremberg Judgment that waging a crime of aggression is the supreme international crime is not the premise of my argument.

My view is not that the crime of aggression is necessarily more important than genocide, crimes against humanity or war crimes committed on a systematic scale. Already for this reason, I am not belittling for a moment the enormous significance of the ongoing ICC investigation led by Prosecutor Khan which has recently resulted in an arrest warrant of historic importance against President Putin.

But at the same time, I do believe that the crime of aggression is no less significant than the other crimes and that there may be occasions where it is crucial to prosecute the crime of aggression. Russia's war of aggression against Ukraine is such an occasion. This is so for the following reasons:

Certainly, the war of aggression against Ukraine violates that State's sovereignty and territorial integrity as well as the right of self-determination of the Ukrainian people. And certainly, Russia's war of aggression has opened the floodgate for the commission of horrendous war crimes.

But crucially, the legal wrong entailed in Russia's aggression does not end there:

It includes all the damage to fundamental rights of Ukrainians which Russia has caused without violating the international law of armed conflict. The international law of armed conflict, for humanitarian reasons, provides not only the soldiers of the victim State, but also the soldiers fighting on the side of the aggressor, with the liberty to kill enemy combatants. The aggressor is also at liberty, under the law of armed conflict, to accept the possibility of unavoidable, non-excessive civilian deaths or injuries as a result of attacks directed against

military objects. Countless losses of such kind have been inflicted upon Ukrainians by the Russian aggressor and none of those are war crimes, crimes against humanity or genocide.

Only by prosecuting the crime of aggression can Russia's leadership be held criminally responsible for that vast part of the war's violence. This point is so important that I wish to make it also in general terms:

Here I build on one of the most thoughtful texts that have been written on the subject – Frédéric Mégret's essay entitled "What is the Specific Evil of Aggression". Mégret reminds us of the basic fact, that, for humanitarian reasons, the law on the conduct of hostilities launders a very significant part of the violence in war. This means, and here I quote Mégret, that "war represents a monstrous exception to the notion that all human beings have an inalienable right to life, security, bodily and psychological integrity, freedom of movement etc." The crime of aggression and only the crime of aggression ensures the individual criminal responsibility of the leadership of the aggressor State for opening the floodgate for this monstrous exception.

For this reason, it is deeply misleading to divide the four crimes under international law into three atrocity crimes on the one hand and the crime of aggression on the other. To the contrary, the crime of aggression is as much an atrocity crime as the other international crimes. The prohibition of aggression does not only protect the rather abstract value of State sovereignty. It also protects very concrete fundamental human rights of potentially countless human beings who may suffer and die in a war of aggression. All this is under threat when the international legal prohibition of aggression is at risk of erosion.

This is why a "negative precedent" regarding the prosecution of the crime of aggression after Russia's aggression against Ukraine, rather than being a luxury problem, would be fundamentally detrimental to the international legal order.

Robert Jackson, the U.S. chief prosecutor at Nuremberg, had identified the danger of norm erosion after Germany's wars of aggression in all clarity. Hence, Jackson saw the acute need to activate what we would today call the expressive function of international criminal law. Here, in this room, Jackson made an historic promise and President Zelensky has reminded the world of this promise just today in The Hague. This is what Jackson had to say:

"The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment."

The pronouncement of this Nuremberg promise constitutes a shining moment of true United States leadership in international criminal justice – and please remember that the Soviet Union had emphatically chosen to sit in judgment in Nuremberg, too.

Jackson's promise remains at the core of Nuremberg's legacy. In view of Russia's war of aggression against Ukraine, it should resonate more loudly and strongly than ever since the entry into force of the UN Charter.

III.

The question is then: How has it come that despite this powerful Nuremberg legacy on crimes against peace we are left today with a glaring gap in the international legal architecture concerning the crime of aggression?

Or, to borrow again Mégret's words: Why has aggression experienced a decline from the leading and central crime at Nuremberg and Tokyo to one that only barely made it into the Rome Statute?

One important reason is that the prohibition of the use of force soon turned out to be surrounded by a grey area of genuine legal uncertainty which is reflective of deep-seated policy differences among States. This made it a real challenge to generalize the precedents of Nuremberg and Tokyo.

But another part of the truth is this: The governments of those nations that sat in judgment in Nuremberg have in the meantime turned away from the daunting task of delivering on their Nuremberg promise.

As Yale historian Samuel Moyn has recently written about the United States in his important book "Humane": "We fight war crimes, but have forgotten the crime of war".

When it comes to the question of independent legal scrutiny of the decision to use military force, not only the Soviet Union and now Russia, but also the three Western powers that sat in judgment in Nuremberg have adopted a position of resistance that Gerry Simpson has aptly called sovereigntist.

Ben Ferencz has described this sovereigntist mindset in the following way: "The vital ingredient that was really lacking was the political will of a few major powers that persisted in their refusal to accept rational international controls over the use of military force." In the course of the negotiations, this lack of political will was mostly veiled by legal arguments.

The two most important arguments, neither of which are convincing, were to allege a Security Council monopoly over the initiation of proceedings for the crime of aggression, and to treat the crime of aggression like a new crime in the ICC Statute for the purposes of setting out the conditions for the ICC's exercise of jurisdiction over it.

As the Coalition for International Criminal Justice recalled in a statement of last week: "The majority of State Parties from Africa, Latin America and Europe opposed this position. Nevertheless, the Kampala Conference ultimately gave way to the debilitating conditions regarding the crime of aggression, although they were undoubtedly understood as being driven by self-interest of larger powers."

The sidelining of the crime of aggression by the major powers during the ICC negotiations was significantly facilitated by the posture that an important part of the international human rights movement had long taken regarding the question of war. By and large, this movement had abdicated vis-à-vis the *ius in bello* and accepted the idea that the killing by an aggressor during the conduct of hostilities is no violation of human rights and not the business of human rights organizations if in conformity with the permissive rules of the law of international armed conflict.

In addition, organizations with a moral authority as important as Amnesty International and Human Rights Watch, had adopted the policy not to comment on the conformity of military action with the *ius contra bellum*. Instead of fully recognizing that aggression opens the floodgate to a monstrous exception to fundamental human rights irrespective of the commission of war crimes, the international human rights movement had come to see aggression primarily as an offense against State sovereignty as such. This has paved the way for a mindset that scholars would later conceptualize through a notion of atrocity crime that embraces genocide, crimes against humanity and war crimes, but excludes the crime of aggression.

When international criminal justice experienced its revival in the 1990s, this approach took a firm hold in much of the non-governmental discourse community – and this had tangible consequences: While civil society played a decisive role in the creation of the Rome Statute, the same society did not exert sufficient public pressure to remind the major powers of Jackson’s Nuremberg promise. Rather, as William Schabas has observed, many of the Non-Governmental Organizations were “quite indifferent to the issue of the crime of aggression”. And in the meantime, France, Great Britain and the U.S. had happily embraced the concept of atrocity crime as a most welcome rhetorical device to continue sidelining the crime of aggression.

As a result, even after 17 July 2018, when the ICC’s jurisdiction over the crime of aggression got activated, the prevailing concern with respect to war was with its humanization rather than with its outlawry.

Here are five examples that reflect this persistently prevailing mindset:

In 2019, Turkey conducted its massive military operation “Peace Spring” in Syria: Although there was a very serious possibility that this use of force fulfilled the State conduct element of the crime of aggression, this crime was not a salient issue in the discourse among governments.

Second, in 2021, that is three years after the activation of the ICC’s jurisdiction over the crime of aggression, the European Union chose to simply ignore that crime on the day of international criminal justice.

High Representative Borrell stated as follows: “Every 17th of July we commemorate the historic adoption of the Rome Statute of the International Criminal Court in 1998, as an important moment to reflect on the importance of fighting impunity and bringing justice to the victims of the most serious crimes: genocide, war crimes and crimes against humanity” – full stop.

Third, in May 2022, the European Union adopted an amendment of its Regulation on Eurojust. This amendment extended Eurojust’s scope of action with respect to genocide, crimes against humanity and war crimes. The crime of aggression, however, was left out – left out still at this moment in time!

Fourth, in August 2022, the International Law Commission adopted, on first reading, its Draft Articles on immunity of State officials from foreign criminal jurisdiction. Correctly, draft article 7, denies functional immunity in proceedings for genocide, crimes against humanity

and war crimes. The crime of aggression, however, has been left out – against the vigorous opposition, by the way, of the distinguished African Commission members Charles Jalloh and Dire Tladi.

And fifth, most governments, apart from Ukraine kept silent about the crime of aggression throughout the lead-up to 24 February 2022 as well as for months thereafter.

In view of all this, it was difficult, even in the summer of 2022, to disagree with Mégret's assessment that "aggression belongs to, but is hanging by a thread in the firmament of international offences".

IV.

In the meantime, however, there are numerous indications that the picture may have begun to change:

Already in 2018, the UN Human Rights Committee had laid an important doctrinal ground for such a change:

In its General Comment 36, it stated: "State Parties engaged in acts of aggression as defined in international law resulting in deprivation of life, violate ipso facto article 6 – that is the right to life – of the covenant."

The significance of this statement can hardly be overstated: Hereby, the Human Rights Committee has rightly claimed a space for the human rights conscience to address by its own distinct normative voice all the war violence inflicted by an aggressor State.

After 24 February 2022, Philippe Sands was the first to raise the issue of the crime of aggression in public. "Why not create a dedicated international criminal tribunal to investigate Putin and his acolytes for the crime of aggression?", he asked. And he recalled: "After all, it was a Soviet jurist, Aaron Trainin, who did much of the legwork to bring crimes against peace into international law. [...] Let Putin reap the legacy of Nuremberg", so Professor Sands concluded. His call resonated powerfully with the victims of Russia's aggression and was immediately taken up by the head of Ukraine's diplomacy.

After all, as a post-doctoral fellow at the University of Kviv, Dmytro Kuleba, now Ukraine's Minister of Foreign Affairs, who is an international lawyer, had written a paper on the Declaration of St James, of January 1942, a catalyst for Nuremberg. Leading voices of Ukraine's civil society soon lent their emphatic support: Among them Oleksandra Matviychuk from the Centre for Civil Liberties, one of the recipients of the Nobel Peace Prize.

Soon thereafter Parliamentarians worldwide began to raise their voices. One Parliamentary Assembly after the other including Parliamentarians for Global Action addressed the issue of the crime of aggression. The culmination point of this series of public pronouncements was Resolution 2482 of the Council of Europe's Parliamentary Assembly. This impressive resolution, adopted by unanimity, demands that the Russian and Belarusian political and military leaders concerned "should be identified and prosecuted for the crime of aggression".

The Assembly cited General Comment 36 of the UN Human Rights Committee and stated as follows: "Without their decision to wage this war of aggression against Ukraine, the atrocities

that flow from it as well as all the destruction, death and damage resulting from lawful acts of war would not have occurred.”

The UN Independent International Commission of Inquiry on Ukraine also included an important reference to the crime of aggression in its report of March 2023. Now, there also seems to be a growing interest in ensuring accountability for the crime of aggression within the NGO Coalition for the ICC. By way of example, I just mention the very active participation of the Open Society Justice Initiative in the ongoing debate.

All this taken together, indicates a shift in world public opinion in the direction of a renewed determination to live up to Nuremberg’s legacy on crimes against peace. The “new momentum”, as Prosecutor Khan has called it, was powerful enough to spill over to the governmental level. Liechtenstein and the Baltic States took the lead and then more and more governments took up the issue of the crime of aggression.

In November last year, the UN General Assembly for the first time explicitly mentioned the activation of the ICC’s jurisdiction over the crime of aggression. One month later, the European Council declared that the prosecution of the crime of aggression is of concern to the international community as a whole. In February this year, the European Council followed up and endorsed the setting up of the International Center for the Prosecution of the Crime of Aggression against Ukraine. And in March, the U.S. has added its voice to the growing chorus. In an address delivered in Washington, Ambassador Beth van Schaack recalled the United States’ “leading role in prosecuting the crime of aggression at Nuremberg”. She recognized “a critical moment in history” and she confirmed that “there are compelling reasons for why the crime of aggression must be prosecuted”.

With the U.S. appearance on the public scene, it has become abundantly clear that the new momentum concerning the crime of aggression has had an effect on the posture even of some of those governments that had for decades adopted a position of sovereigntist resistance. But one key question remains: Are we witnessing a genuine change of position, one that genuinely embraces Jackson’s call for a consistent, non-selective application the Nuremberg precedent on crimes against peace?

V.

With this question in mind, let’s now turn to the options available to close the accountability gap regarding the crime of aggression: As a matter of principle, the best option would be to amend the ICC Statute as proposed, for example, by Prosecutor Khan. The ICC, the only permanent international criminal court and one with a credible universal orientation, is the most legitimate judicial institution to deliver on Nuremberg’s fundamental promise.

Yet, as Astrid Reisinger Coracini has recently shown, the necessary reform of the ICC Statute raises a number of legal and policy issues which cannot be decided overnight. For that reason, decision makers do not see an amendment of the ICC Statute as a practicable solution to the immediate challenge: the war of aggression against Ukraine. This is understandable, but it should go without saying that it is no justification for delaying the necessary diplomatic process in support of reforming the ICC Statute for the future. I shall

return to the latter point, but let's first look at the other options concerning the ongoing war of aggression against Ukraine.

1.

By now, 36 States have joined the so-called core group in support of Ukraine's call for the establishment of a special tribunal on the crime of aggression.

a)

Before turning to the question of institutional design, I wish to address two arguments which challenge the very idea of a special tribunal: The first argument is that a special tribunal could weaken the ICC. I respectfully beg to differ.

The ICC would continue to carry out its important work with respect to allegations of war crimes, crimes against humanity and genocide. A special tribunal would do no more than to complement this work with respect to the crime of aggression. The special tribunal would serve precisely the same overarching goal as the ICC, that is to ensure the most comprehensive accountability possible for crimes under international law. Experienced practitioners have long suggested ways, such as the establishment of a liaison office, to allow the ICC and a special tribunal to coordinate their work and to thereby create useful synergies instead of causing friction. One could even explicitly recognize the primacy of the ICC's exercise of jurisdiction vis-à-vis the special tribunal.

Again, the ICC is the most important pillar of the existing global system for the prosecution of crimes under international law. But the work of the ICC will invariably need to be complemented by additional judicial activity. Which kind of additional activity will differ from situation to situation.

As Judges Higgins, Kooijmans, and Buergenthal, wrote in their memorable separate opinion they appended to the ICJ's 2002 judgment in the Arrest Warrant Case: "The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play."

The second counter-argument is that proceedings before a special tribunal for the situation of Ukraine would constitute selective justice. This argument is central: Selectivity in international criminal justice constitutes a burden for its legitimacy. By all means, selectivity must therefore be reduced.

With respect to the special tribunal, the argument of selectivity has been made with respect both to the past and to the future. It carries far lesser weight with respect to the past: Yes, and most regrettably, there were a number of serious violations of the prohibition of the use of force in the past where investigations for crimes of aggression would have been warranted.

I name Iraq's use of force against Kuwait in 1990, Uganda's use of force against the Democratic Republic of Congo as from September 1998, the use of force by the United States

and United Kingdom-led Coalition of the Willing against Iraq in 2003 and Turkey's use of force in Syria in 2019.

Yet, at every historic turning point in the evolution of international criminal justice so far, decision makers were faced with past failures. Had those failures of the past posed an insurmountable obstacle to taking action for the future, there would have been neither Nuremberg and Tokyo nor the ICTY and the ICTR, nor the ICC. Failures of the past with respect to the crime of aggression should therefore not prevent us from doing the right thing today for the future. And even less so in view of Russia's aggression against Ukraine, which, taking all relevant factors together, constitutes a violation of the prohibition of the use of force of unprecedented seriousness.

The issue of selectivity weighs heavily, however, if one looks to the future. Today, Russia's leadership benefits from jurisdictional constraints that have resulted not only from its own, but also from the sovereigntist resistance of three major Western powers to a principled jurisdictional regime in the ICC Statute.

This begs the following question: Could it be that the creation of a special tribunal for the war of aggression against Ukraine is meant by those powers to remain an event as isolated as Nuremberg and Tokyo have remained to date? This is the most burning question of legitimacy. But asking this burning question should not be the end of the matter. It should rather embolden decision makers to show true leadership: They should conceive the special tribunal as a necessary, but imperfect instrument of transition, as a stepping stone towards a genuine embrace of Nuremberg's promise through a more principled jurisdictional regime in the ICC Statute.

Such an effect would certainly not be without precedent – just remember how the ICTY and the ICTR, both special international criminal tribunals, helped preparing the ground for the ICC's jurisdiction over genocide, crimes against humanity and war crimes.

Germany's Foreign Minister Annalena Baerbock publicly recognized the need for principled action in her important speech delivered at the Hague Academy of International Law in January this year. Minister Baerbock was as sensitive to the question of selectivity in international criminal justice as one should be. But she did not therefore rule out a special tribunal for the war of aggression against Ukraine. Instead, she suggested that the establishment of such a tribunal should be the first track of a strategy of two: The second and more time-consuming track would have to be, she said, the amendment of the ICC Statute with respect to the crime of aggression. I wholeheartedly agree.

b)

Now to the right format for the special tribunal.

Just a few weeks ago, the Foreign Ministers of the G7 have come forward in favor of an internationalized Ukrainian tribunal. "We support", they said, "the creation of an internationalized tribunal based in Ukraine's judicial system". Almost at the same time,

thirteen European and non-European States issued a joint statement in favor of an international tribunal. This is in line with the unanimous call of the Parliamentary Assembly of the Council of Europe.

To begin with, none of the two formats is inherently superior over the other – the choice must be made in light of the circumstances and needs of the given situation. In her Washington address, Ambassador van Schaack has given essentially two reasons why the U.S. favors a tribunal based in Ukraine’s judicial system. She said that such a court would provide the “clearest path to establishing a new Tribunal, maximizing our chances of achieving meaningful accountability”. I am not convinced by either of these arguments. In fact, both of them I find rather astonishing.

First of all, creating an internationalized tribunal in Ukraine’s legal system is by no means the clearest path available. To the contrary, it remains unclear to date, what precisely should be the international elements of a Ukrainian tribunal. The only thing that is reasonably clear is that the internationalization of a Ukrainian tribunal would have to be meaningful. Otherwise, such a tribunal would become an all too easy target of charges of politicization.

But precisely the meaningful internationalization of a Ukrainian tribunal would require Ukraine to change its constitution. Even if somehow practicable despite the imposition of martial law, this approach would cost a lot of precious time in a situation where time is of the essence. This is one important reason why Ukraine disfavors the option of an internationalized Ukrainian tribunal. It is rather odd to speak of a “clearest path” under such circumstances.

But would an internationalized Ukrainian tribunal at least maximize the chances for meaningful accountability? This is also not the case: Accountability will be the more meaningful both for the Ukrainians and for the defence of the essence of the international legal order, the more comprehensively it reaches up to those allegedly most responsible.

But, to put it cautiously, the chances that the judges will pierce the veil of personal immunities with respect to President Putin and the other members of the Russian troika will be far greater before an international tribunal than before an internationalized Ukrainian tribunal. With the ICC’s arrest warrant against President Putin this should have become abundantly clear to everyone.

What is worse, the International Law Commission’s deplorable exclusion of the crime of aggression from the list of crimes in Draft Article 7 of its immunity project has created the risk that judges of a tribunal based in Ukraine’s legal system could feel compelled to grant functional immunity. This would reduce the chances for meaningful accountability to zero. But the immunity challenge is not even the most serious problem associated with an internationalized Ukrainian tribunal.

Please do recall the warning mentioned earlier that the crime of aggression, because of its distinct history, today only hangs by a thread in the firmament of international crimes. Hence, at this historic juncture, the strongest possible message is needed to confirm that the crime of aggression is an international crime. An international crime, as much as genocide, crimes against humanity and war crimes. An international crime in the prosecution of which

the international community as a whole does not take a lesser interest than in that of the other three crimes under international law.

The establishment of an internationalized Ukrainian tribunal would fail to send out this message: The institutional design would not clearly convey the international character of the crime of aggression and would emphasize Ukraine's national interest as the immediate victim rather than that of the international community as a whole.

To heed Ukraine's call for the establishment of a truly international tribunal for the crime of aggression would be a – most welcome – deference to Ukraine's democratic choice, as powerfully restated by its President just today. But it would be far more than that: It would also be the most plausible way to translate into institutional design what also the G7 themselves have explicitly recognized: that proceedings for the crime of aggression are in the interest of the international community as a whole.

The preferable path to establish a truly international tribunal has been laid out in all clarity: The tribunal would be set up on the basis of an agreement between the UN and Ukraine, negotiated for the UN by its Secretary-General and at the request of the General Assembly.

Is there a compelling argument against pursuing this path despite the advantages of an international solution that I have just mentioned? Doubts have been expressed about the power of the General Assembly to get involved.

These doubts are however ill-founded: In its 1962 Advisory Opinion in *Certain Expenses*, in particular, the International Court of Justice has elaborated on the functions and powers conferred on the General Assembly to exercise its secondary responsibility for the maintenance of international peace and security. The Court explicitly recognized that those functions and powers are not confined to the making of recommendations, that they are not merely hortatory. The Court found that only coercive action is within the exclusive realm of the Security Council. But the request to the Secretary-General to conclude an agreement with a State on the establishment of an international tribunal for the exercise of jurisdiction over crimes under international law does not involve coercive action. That was confirmed by no lesser body than the Security Council itself in the case of the Special Court for Sierra Leone. For in that case, the Council acted under Chapter VI, rather than Chapter VII, when it requested the Secretary-General to conclude the relevant agreement with Sierra Leone to establish a special international criminal tribunal exercising jurisdiction over crimes under international law.

Are we perhaps yet again confronted with the old strategy that a lack of political will is clouded behind a veil of legal doubt? Please recall how differently it sounded here in Nuremberg in 1946 when the precedent in question did involve a strong element of novelty. Then, Sir Hartley Shawcross, the British Chief Prosecutor, confidently exclaimed: "If this be an innovation, it is an innovation which we are prepared to defend and justify."

The second argument against an international tribunal refers to an alleged skepticism in the Global South. Because of this skepticism, so the argument goes, the necessary majority in the General Assembly is unlikely. At first sight, this argument sounds benign because it

indicates a concern for the position of States belonging to the Global South. But suspicion sets in when this argument is advanced by major powers from the Global North, and this before a serious and sincere engagement with the Global South on the issue has taken place.

I am certainly not in a position to speak for anybody in the Global South. I just wish to recall four points:

First, States from the Global South were driving forces for the inclusion of the crime of aggression in the ICC Statute in Rome and an overwhelming majority of States from the Global South supported the activation of the ICC's jurisdiction over the crime of aggression on the basis of a stronger and more principled jurisdictional regime in Kampala.

Second, on 23 February this year, 141 UN Member States recognized the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine.

Third, among the thirteen States that have issued a joint statement in support of an international criminal tribunal there are three States from the Global South.

And fourth, eminent personalities from the Global South, such as former UN General Secretary Ban-Ki Moon, former ICC President Eboe Osuji and Chief Prosecutor Richard Goldstone, do support the establishment of an international tribunal.

Can it be that the negative speculations regarding the Global South's position are designed to preempt a serious and sincere engagement with the States concerned? After all, those who have started to reach out in good faith to States from the Global South have not heard outright rejection. They do hear, however, the question that not only the Global South but all of us should ask: the burning question about consistency and non-selectivity. I submit that an engagement with the Global South in earnest about the establishment of a special international tribunal is absolutely worth pursuing. But it requires a credible answer to the one question how those who now plead for the establishment of such a tribunal for the war of aggression against Ukraine intend to deal with a similar aggression in the future?

2.

Those thirteen States that have issued the joint statement in support of the establishment of a special international criminal tribunal have given the right answer: They have reaffirmed "their commitment to harmonize the jurisdiction of the Rome Statute over its four crimes in order to allow the International Criminal Court to prosecute the crime of aggression in similar future situations". The same commitment by the G7 is conspicuously missing.

This suggests that France, Great Britain, and the U.S. have not yet left their comfort zone, their comfort zone of sovereigntist resistance against a principled jurisdictional regime for the crime of aggression in the ICC Statute.

What would it take for those States to make that decisive move? It would certainly mean a renewed commitment to the prohibition of the use of force, one which should involve abstaining in the future from an unlawful invasion such as that in 2003 in Iraq. But it would not require to refrain from the use of force wherever its legality is genuinely controversial.

The international consensus definition in Article 8 bis of the ICC Statute is as modest as the definition of a crime under international law should be. It avoids overambition and accepts the undeniable fact that the prohibition of the use of force is surrounded by a grey area of genuine legal uncertainty, one which is reflective of long-standing and deep-seated policy differences among States.

Accordingly, the wording and the travaux préparatoires of Article 8 bis of the ICC Statute and a due regard to the underlying customary international law require the prosecutor and the judges to keep clear from that grey area. To give a watertight guarantee beforehand that the prosecutor and the judges will in fact respect the modesty of Article 8 bis of the ICC Statute is impossible. This is why leaving the comfort zone of sovereigntist resistance above all requires the investment of a measure of trust – a measure of trust in the international judiciary.

Is this too much to ask for such an investment in the interest of the establishment of a principled international legal architecture against aggression? I don't think so, all the more because I agree with Ambassador Beth van Schaack: We are at a critical moment in history.

VI.

In one of his last writings, Ben Ferencz mentioned that he had taken inspiration from Thomas Paine saying that the duty of a patriot is not to follow his country right or wrong, but to uphold it when it was right and to try to correct it when it has gone astray.

In this spirit, I wish to end this Nuremberg Lecture with a plea to my government. Such an end note seems all the more fitting as State Minister Keul is giving us the honor of her presence tonight.

I certainly recognize how precious G7 solidarity is. But it should not be the last word where important principles of international criminal justice are at stake. I therefore wish to encourage Germany's government to do the following: To recognize the merits and the feasibility of a special international tribunal for the crime of aggression. And to join forces with the group of thirteen to sincerely and seriously explore this option with States from all world regions on the basis of the firmly declared intent not to stop there, but to also become a leading force with a view to harmonizing the jurisdictional regime for all four crimes in the ICC Statute. This would not even require a major change of position. For Germany has already embraced the Nuremberg promise on crimes against peace – as an important lesson from its own wars of aggression.

Ben Ferencz' friendship with Germany's ICC delegations and with the late Judge Hans-Peter Kaul in particular grew on this basis. I am therefore hopeful that Ben agrees with my endnote. How sad, none of us can get his advice on our manuscripts, this one included.

I thank you.