

Champions of the ICC and the Rule of Law

When William Pace appeared at the College of Law on March 30 to receive the Cox Price Human Rights Award, the audience heard from a modern human rights champion who had played a major role toward the establishment of the International Criminal Court through his coordination of hundreds of nongovernmental organizations into the NGO Coalition for the ICC. Now on September 1, Don Ferencz, chair of Planethood Foundation and Convener of the Global Institute for the Prevention of Aggression, will visit Sturm to speak on the critically important issue of the crime of aggression and its slow incorporation into the crimes prohibited by the statute of the Court.

Don was born in Nuremberg, Germany, shortly after his father, Benjamin Ferencz, had served as the Chief Prosecutor at one of the trials in which Nazi leaders were held to account for war crimes, crimes against peace, and crimes against humanity. The elder Ferencz was a distinguished jurist who had addressed the faculty and students at DU Law School as a guest of the International Legal Studies Program in 1988. Ben was a member of the prosecution team in the Einsatzgruppen Trial at Nuremberg in his first job after graduating Harvard Law School and became a life-long crusader for developing effective international mechanisms to hold international criminals accountable. He said in a recent interview, "I still have flashbacks," he said. "What I saw is incomprehensible to the human mind. I cannot describe the scenes in terms that anyone who was not there can understand. The smell, the sickness, the disease, the people dying. I've stepped over people I was sure were dead and then I'd see the movement of an arm. These are scenes that I have difficulty describing. This was not a Hollywood scene. This was real life." [International War & Peace Reporter, *Shaky Deal on Crimes of Aggression*, 6/18/10, <http://iwpr.net/report-news/shaky-deal-crimes-aggression>].

Don Ferencz states that he was "quite literally born into an awareness that law is better than war." Having grown up in a home so dedicated to the advancement of justice and human rights, after a successful career as a corporate attorney, he later took up the cause of the International Criminal Court and was likewise a major force in the negotiation of the Rome Statute creating the Court. The negotiations culminated in the adoption of the statute in Rome in the summer of 1998. The Rome Statute came into force on July 1, 2002, so the Court's jurisdiction covers crimes committed after that time.

Ben Ferencz was actively involved there behind the scenes, as were Don Ferencz, Bill Pace, and also Professor Ved Nanda. The United States practically led the negotiations to create the Court, but did not sign the statute in Rome. The Clinton administration did, however, eventually sign it, but President George W. Bush "de-signed" the Treaty and thus the US is not an ICC member state.

To date, the Court has opened investigations into "situations" in Northern Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur (Sudan), and the Republic of Kenya and issued indictments against 23 individuals. In March the Court opened an investigation into the situation in Libya on referral from the Security Council and recently (June 27, 2011) indicted Muammar Gadhafi and his son and brother-in-law. Two trials of individuals from the Congo and one from the Central African Republic are presently ongoing. Other trials will begin later in the summer, including prosecutions of two defendants in the Darfur case.

The jurisdiction of the Court covers "the most serious crimes of concern to the international community as a whole" -- these are specified as genocide, crimes against humanity, war crimes, and the crime of aggression. But there was no consensus on the definition of aggression, so this issue was deferred to a later date. However, many consider aggression to be the most serious of all

international crimes, as the Judgment of the International Military Tribunal at Nuremberg stated, calling it “the supreme international crime”:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, 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.* [Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945 - 1 October 1946 (1947-1949), Vol. XXII International Military Tribunal 427 (1948), at < www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html > (emphasis added).]

Now the parties to the Court have indeed turned their attention to the definition of the crime of international aggression and moved in 2010 to more effectively include aggression in the ICC’s prohibited acts. At the First Review Conference of the Parties of the ICC at Kampala, Uganda, the definition of aggression was the principal focus of the discussion. Eventually, in the course of negotiations, amendments, prepared by the Special Working Group on the Crime of Aggression were agreed, defining aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” However, as this language is imprecise, and the provisions contain several opt-out terms, many observers content that the achievement of the Kampala Review Conference is mostly symbolic. Furthermore, the actual jurisdiction over aggression will not be authorized until a subsequent time when “the states parties agree on a definition of the crime and set out the conditions under which it may be prosecuted,” and not before January 1, 2017.

According to Bill Pace, while the result of the Kampala Conference may be less than what was hoped for, it had some features that made it an historic event: it was the largest gathering ever of experts on international justice, including judges and prosecutors of the ad hoc tribunals for Cambodia, Sierra Leone, Lebanon, and Rwanda, together with the ICC. By the time of the next such meeting, most of the ad hoc and special tribunals will have closed. The sessions preceding the actual meetings on aggression allowed the parties to take stock of many aspects of international justice that are implicated in the ICC’s purview -- international cooperation, justice, victims, communities, and complementarity with national legal systems’ prosecution functions. Thus, Pace asserts, while the advocates of an agreement on aggression may have felt the preliminary meetings detracted from that mission, they actually helped, because they provided a basis for the parties to reach a consensus, many of whom had arrived at Kampala as strong detractors and skeptics.

Also, Pace says, for the first time the Security Council has given to an independent body the right to make a substantive decision that will trigger international cooperative action. While the UN Charter has prohibited acts of aggression since 1945, and although the Kampala Conference has not yet effectuated a regime of enforcing the prohibition, it is now more a reality than ever.

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