

AMENDING THE ROME STATUTE TO INCLUDE ILLEGAL USE OF FORCE AS AN ENUMERATED CRIME AGAINST HUMANITY

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I. INTRODUCTION

Much justice sector discussion regarding Russia's 2022 Ukraine invasion, which has disproportionately targeted civilians,¹ has centered on the inability to charge Russian leaders with the crime of aggression under article 8 *bis* of the Rome Statute.² This article suggests an alternative approach for such civilian-focused aggression going forward—amending the Rome Statute to add illegal use of armed force as an enumerated act under article 7 (the International Criminal Court's (ICC) crimes against humanity (CAH) provision).³ Charging illegal use of force as an enumerated CAH has both practical and theoretical advantages.⁴

From a practical perspective, rather than murder as the operative enumerated CAH act, which requires linking bloody deeds on the ground up through the long chain of command to the leadership cadre, initiating civilian-focused aggressive war as an enumerated offense means the operative criminal conduct takes place in the war-planning chamber, linking liability to the culpable leaders much more directly.⁵ From a theoretical perspective, the direct linkage of CAH to initiating an aggressive war is more effective in terms of philosophy of punishment, better at promoting deterrence, denunciation, and education (satisfying utilitarian concerns), and more effectively meting out just deserts as the focus on aggression as a CAH better frames the broader context of criminality (satisfying retributivist concerns).⁶

1. Joshua Askew, 'Terror Bombing': Why Is Russia Targeting Civilians in Ukraine?, EURONEWS, <https://www.euronews.com/2023/06/01/terror-bombing-why-is-russia-targeting-civilians-in-ukraine> (last updated July 7, 2023, 2:10 PM).

2. See, e.g., Alice Speri, *The Mother Crime: Will Putin Face Prosecution for the Crime of Aggression?*, INTERCEPT (Oct. 8, 2022, 7:00 AM), <https://theintercept.com/2022/10/08/russia-putin-ukraine-war-crimes-accountability> (discussing the Russian invasion and annexation being illegal); Rome Statute of the Int'l Crim. Ct. art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. In the meantime, a multiplicity of possible alternative justice approaches have been advocated. Some would like to create a dedicated tribunal for prosecuting Russian leaders through an agreement between Ukraine and the United Nations. See Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>. Others have urged states to create such a tribunal amongst themselves (a so-called "coalition of the willing"). *Id.* While another group of experts would prefer to see prosecutions (including for the crime of aggression) via a "Ukrainian High War Crimes Court," a specialized body within the domestic Ukrainian judicial system. *Id.*

3. Rome Statute, *supra* note 2, art. 7.

4. See Gregory S. Gordon, *Charging Aggression as Crimes Against Humanity? Revisiting the Proposal After Russia's Invasion of Ukraine*, 57 ISR. L. REV. (forthcoming 2023) [hereinafter *Charging Aggression*] (explaining the difficulty of proving links to higher-tier leaders for crimes committed on the ground through, for example, a CAH-murder charge versus an enumerated act of launching an aggressive war, which links leaders to acts at the seat of power).

5. *Id.*

6. See Gregory S. Gordon, *Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencz?) in an Emerging Field*, 23 INT'L CRIM. L. REV. 239, 281 (2023) [hereinafter *Mapping Out*].

Moreover, this approach helps “humanize” the toll of the relevant criminal conduct, as, even if chargeable, the crime of aggression’s direct victim is the targeted state, not the more important injured parties, the natural persons within it.⁷ And this has practical consequences—unlike CAH charges, an aggression charge deprives human victims of the International Criminal Court’s victim-participation and reparations regime.⁸

Given these considerations, this Article will proceed in four parts. After this Introduction, Part II will examine the antecedents of this proposal to amend the Rome Statute—former Nuremberg prosecutor Benjamin Ferencz’s idea that aggression could be charged as CAH pursuant to the Rome Statute’s CAH residual clause (article 7(1)(k)), which defines as a CAH “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁹ Then, Part II will consider initial critiques of Ferencz’s proposal, including the fact that aggression is typically perceived as a crime perpetrated against a victim state’s military personnel, not its civilians.¹⁰ It will also examine the possibility that the Ferencz proposal could saddle CAH anew with Nuremberg’s anachronistic “war nexus” requirement (i.e., forbidding CAH charges absent a connection to another core crime).¹¹

Part III will then look at the Ferencz proposal in light of more recent developments, including the activation of the ICC’s aggression jurisdiction and Russia’s 2022 full-scale invasion of Ukraine.¹² Although Russia’s war against Ukraine quells some of the initial critiques of the Ferencz proposal, certain problems may remain, which Part III will explore.¹³ These include a potential ex post facto issue, and likely political obstacles given that the proposal may be seen as an attempt to get around the difficult political compromises needed to reach a consensus on the scope of the aggression jurisdiction (and that its fuzzy actus reus parameters might not be perceived as a good fit within the residual clause).¹⁴

With the benefit of such context, Part IV lays out and examines this Article’s proposal—amending the Rome Statute to include illegal use of armed force as a new enumerated CAH.¹⁵ Going forward, this could work as

7. *Id.* at 268.

8. *Id.* at 281.

9. Rome Statute, *supra* note 2, art. 7; see discussion *infra* Part II (laying out the origins of this Article’s proposal to amend the Rome Statute).

10. See discussion *infra* Part II (explaining criticisms of the original proposal).

11. See discussion *infra* Part II (discussing concerns that the Ferencz proposal may revive the “war nexus” requirement).

12. See discussion *infra* Section III.A (considering new developments impacting the crime of aggression).

13. See discussion *infra* Section III.B (detailing the impact of Russia’s war against Ukraine on the perspectives of the Ferencz proposal).

14. See discussion *infra* Sections III.C.1–D (addressing additional concerns in light of Russia’s full-scale invasion of Ukraine).

15. See discussion *infra* Part IV (proposing an amendment to the Rome Statute).

a more straightforward way to charge CAH in connection with launching a civilian-focused aggressive war, rather than attempting to seek justice via the residual clause's "back door."¹⁶ Moreover, such an amendment would foreclose the *ex post facto* arguments, permit greater accuracy in describing the crime's *actus reus*, and eliminate political concerns.¹⁷

Having laid out the proposal, Section IV.C will then consider its advantages (ones it shares with Ferencz's original idea, but minus the serious obstacles).¹⁸ These advantages include laying a better evidentiary foundation for the prosecution of top-tier leaders, opening the ICC victim participation and reparation regimes to natural persons (when states that suffer sovereignty violations are typically seen as the victims of aggression) and having prosecution efforts better align with protected legal interests and philosophy of punishment considerations.¹⁹ Finally, a concluding section will reflect on the chances for such a Rome Statute amendment as well as other avenues for closing the impunity gap with respect to the crime of aggression.²⁰

II. THE ORIGINS OF THE PROPOSAL AND INITIAL CRITIQUES

The 2010 ICC Review Conference in Kampala, Uganda, which defined the crime of aggression and its jurisdictional contours,²¹ was coming to a close.²² And Benjamin Ferencz, a former Nuremberg prosecutor who had participated in the Conference and consecrated much of his life to advocating for the criminalization of the illegal use of armed force, could not hide his disappointment.²³

16. See discussion *infra* Section IV.A (discussing the nature and scope of the proposed amendment).

17. *Charging Aggression*, *supra* note 4 (listing advantages of the proposed amendment).

18. See discussion *infra* Section IV.C (discussing the advantages of the proposal).

19. See discussion *infra* Sections IV.C.1–3 (expanding on the advantages of the proposed amendment).

20. See discussion *infra* Part V (discussing the probability of the proposed amendment and alternative ways to diminish impunity for the crime of aggression).

21. Bing Bing Jia, *The Crime of Aggression as Custom and the Mechanism for Determining Acts of Aggression*, 109 AM. J. INT'L L. 569, 569 (2015).

22. In 1998, diplomats in Rome negotiating the ICC treaty (Rome Statute) had included aggression within article 5 as a crime within the court's jurisdiction along with genocide, crimes against humanity, and war crimes (defined in articles 6, 7, and 8 respectively). Rome Statute, *supra* note 2, arts. 5–8. But they offered no definition of aggression nor provided any other details regarding the offence, opting instead to defer hammering out such details at a later mandatory Review Conference, which was ultimately held in Kampala, Uganda, from May 31 to June 11, 2010. Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 512 (2011). At the Conference, delegates adopted a resolution that included a definition of the aggression offense and a regime covering its activation and operationalization. *Id.*

23. NOAH WEISBORD, *THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS* 109 (2019) (recounting the interaction between the author and Ferencz during which the former Nuremberg prosecutor voiced his negative thoughts regarding the so-called "Kampala Compromise").

Yes, he thought, there was a drafted statutory provision and a path to the ICC being able to assert jurisdiction.²⁴ But he believed this “Kampala Compromise” was only a superficial achievement, primarily considering the ICC’s circumscribed jurisdiction.²⁵ In particular, he lamented, unless the Security Council were to refer a matter, the ICC’s jurisdiction would not allow prosecution of those responsible for acts of aggression if the state in question were not an ICC member or, even if the state were, had not opted to submit to the Kampala amendments (likewise, even if the attacked state were not an ICC member and/or had not agreed to submit to the Kampala amendments, jurisdiction would not lie).²⁶ Besides, the Court could not even exercise this narrow jurisdiction until, at the earliest, 2017, conditioned on a minimum of thirty state ratifications and adoption by consensus or by a two-thirds majority of the state parties deciding to activate the jurisdiction.²⁷

But Ferencz, by then a frustrated nonagenarian who had frustratingly worked for decades on this issue, was keen to see the international community finally redeem Nuremberg’s implicit pledge of meaningful justice for aggression perpetrators.²⁸ And then he had a eureka moment. Liability for illegal use of armed force, he reflected, could be achieved via CAH charges under Rome Statute article 7(1)(k).²⁹ This so-called “residual clause” provision permits prosecution of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”³⁰ Ferencz felt strongly that launching an aggressive war, which inevitably leads to large-scale civilian casualties, should slot into this residual clause.³¹

So he started floating this idea among experts in the field.³² The response was mixed, though. M. Cherif Bassiouni, one of ICL’s most respected cognoscenti, opined that “it was a brilliant idea to think of inserting ‘aggression’ as part of CAH.”³³ But others, such as his own son Donald Ferencz, an aggression expert in his own right, doubted the proposal’s

24. *Mapping Out*, *supra* note 6, at 259.

25. *Id.*

26. *Id.* at 259–60.

27. *Id.*

28. *Id.* at 260.

29. *Id.*

30. Rome Statute, *supra* note 2, art. 7(1)(k).

31. Benjamin B. Ferencz, *A New Approach to Deterring Illegal Wars*, BEN FERENCZ.ORG (Aug. 2011) [hereinafter *New Approach*], <https://benferencz.org/articles/2010-present/a-new-approach-to-deterring-illegal-wars/>, reprinted in Donald M. Ferencz, *Aggression in Legal Limbo: A Gap in the Law That Needs Closing*, 12 WASH. U. GLOB. STUD. L. REV. 507 app. At 518–22 (2013) [hereinafter *Legal Limbo*] (describing the gravamen of residual clause injury as “mass killing of innocents” and “large-scale civilian casualties”).

32. See, e.g., *New Approach*, *supra* note 31 (arguing that large scale civilian casualties that are foreseen and inevitable warrant the same condemnation as murder or similar atrocities included in the ICC Statute); see also Benjamin B. Ferencz, *The Illegal Use of Armed Force as a Crime Against Humanity*, 2 J. ON USE FORCE & INT’L L. 187, 189 (2015) [hereinafter *Illegal Use*].

33. Email from M. Cherif Bassiouni to Donald Ferencz (Apr. 6, 2012) (on file with author).

viability, primarily because of aggression's purported immediate focus on military, as opposed to civilian objectives.³⁴ In his article, *Punishing Aggression as a Crime Against Humanity: A Noble and Inadequate Measure to Safeguard International Peace and Security*,³⁵ Chet Tan elaborated on this, while voicing other concerns:

- (1) in recent times, most deployments of armed force are limited in scope and therefore would fail to satisfy the chapeau's "widespread or systematic" requirement;
- (2) various conduct specified in the Kampala Amendments' definition of aggression (i.e., what is codified at article 8 *bis* of the Rome Statute), such as targeting civilian objects (as opposed to persons) or using armed forces in another State's territory in contravention of an agreement) are not "heinous" enough to be the basis for CAH charges under Rome Statute article 7;
- (3) prosecuting comparatively marginal aggressive acts as CAH, such as destroying a nuclear reactor complex with F-16s, could dilute article 8*bis*'s mandate that aggressive acts constitute a "manifest" UN Charter violation; and
- (4) aggressive acts generally fail to meet "the standard of depravity" that characterize CAH and thus would serve to water down what should be perceived as strictly a heinous crime.³⁶

In addition, Manuel J. Ventura and Matthew Gillett, in their article *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*,³⁷ pointed out yet a different trepidation concerning the Ferencz proposal.³⁸ They explained that, with respect to the International Military Tribunal's 1945–1946 trial of the major Nazi war criminals, CAH was not chargeable if not connected to one of the Tribunal Charter's other core crimes (crimes against peace or war crimes).³⁹ This limitation, imposed in deference to state sovereignty, was later dubbed the "war nexus."⁴⁰ Further, as the ICL project was being resurrected after the Cold War, the International Criminal Tribunal for the Former Yugoslavia (ICTY) revived the war nexus

34. *Legal Limbo*, *supra* note 31, at 515.

35. Chet Tan, *Punishing Aggression as a Crime Against Humanity: A Noble but Inadequate Measure to Safeguard International Peace and Security*, 29 AM. U. INT'L L. REV. 145 (2013).

36. *Id.* at 159–64.

37. Manuel J. Ventura & Matthew Gillett, *The Fog of War: Prosecuting the Illegal Uses of Force as Crimes Against Humanity*, 12 WASH. U. GLOB. STUD. L. REV. 523, 524–25 (2013).

38. *Id.*

39. *Id.* at 525.

40. Gregory S. Gordon, *Hate Speech and Persecution: A Contextual Approach*, 46 VAND. J. TRANSNAT'L L. 303, 309 (2013).

requirement but interpreted it to be jurisdictional only at the ICTY, rather than a substantive *prima facie* element.⁴¹

Ventura and Gillett expressed concern that so blatantly reinserting armed conflict into CAH indictments might create an unintended collateral problem—opening the door to a reimposition of the CAH war nexus.⁴² Put differently, “re-linking the notion of war . . . to the antiquated notion that the interests of the international community are coterminous with the existence of inter-State conflict,” could mean that CAH conduct “committed outside [the] context [of armed conflict is] beyond the reach of international law.”⁴³

III. RECENT DEVELOPMENTS AND REASSESSMENT OF THE PROPOSAL

A. Activation of the ICC’s Aggression Jurisdiction and the Russian Full-Scale Invasion

When initial scholarly reactions to Ferencz’s proposal were first being published in the wake of the Kampala Review Conference, the ICC’s aggression jurisdiction had yet to be activated. But a new phase in criminalizing aggression began during the early morning hours of December 15, 2017, as the Assembly of States Parties opted to activate the Court’s jurisdiction pursuant to the Kampala understandings.⁴⁴ And the jurisdiction became effective on July 17, 2018.⁴⁵

Equally important, for purposes of this Article, on February 24, 2022, Russia launched a full-scale invasion of Ukraine, after smaller-scale 2014 armed incursions in the Crimea and Donbas regions (with the later Russian annexation of Crimea).⁴⁶ The 2022 mass assault constituted “the biggest land conflict in Europe since World War II” with Russian troops appearing to focus on inflicting massive “civilian casualties, [damaging and destroying] civilian infrastructure and . . . accelerating [an] exodus of refugees”⁴⁷ In effect, Russia’s aggression brought back large-scale interstate near-peer warfare for the first time since the Rome Statute went into effect.⁴⁸

41. Prosecutor v. Kunarac, Case No. IT-96-23, Appeals Judgment, ¶ 83 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

42. Ventura & Gillett, *supra* note 37, at 525.

43. *Id.*

44. Claus Kieß, *On the Activation of ICL Jurisdiction over the Crime of Aggression*, 16 J. INT’L CRIM. JUST. 1, 1 (2018).

45. *Id.*

46. Amy Mackinnon, *The Other Ukraine War*, FOREIGN POL’Y (Feb. 12, 2023, 7:00 AM), <https://foreignpolicy.com/2023/02/12/the-other-ukraine-war-crimea-invasion-2014-putin/>.

47. Robert Burns & Lolita C. Baldor, *Ukraine War at 2-Week Mark: Russians Slowed but Not Stopped*, AP (Mar. 9, 2022, 1:03 PM), <https://apnews.com/article/russia-ukraine-kyiv-europe-moscow-world-war-ii-81b2f12c177810ee8fef7c4ce832fd6f>.

48. Lauren Baillie, *Will the Ukraine War Renew Global Commitments to the International Criminal Court?*, U.S. INST. PEACE (Apr. 28, 2022), <https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court>.

B. The ICC's Current Case

Based on a referral of forty-three state parties to the Rome Statute, the ICC Prosecutor has initiated an investigation concerning Russian commission of CAH and war crimes related to the Russian invasion.⁴⁹ And, despite Russian President Vladimir Putin (along with Children's Rights Commissioner Maria Lvova-Belova) being the object of a March 2023 ICC arrest warrant alleging the war crime of unlawful deportation and transfer of children, Putin's individual criminal responsibility for lethal violence inflicted on Ukrainian civilians is not within the ambit of the warrant.⁵⁰ Indeed, issuance of the warrant has been characterized as "largely symbolic" with commentators and rights advocates urging that 'top Russian officials [be] prosecuted for crimes against humanity' too.⁵¹

And aside from Putin and Lvova-Belova, the ICC has not issued arrest warrants in relation to other top-tier leaders, such as Generals Valery Gerasimov and Sergei Surovikin.⁵² Rather, at this comparatively nascent phase of a conventional CAH inquest, the focus on CAH-connected offenses seems to be on lower-level actors carrying out Russian aggression at the ground level, not individuals in the upper-level Kremlin leadership cadre.⁵³ Further, given the ICC's aggression jurisdictional constraints, charges against Putin and his generals for illegal use of armed force would not be available either, as Russia is not an ICC member state and, with its P5 status, would veto any attempted Security Council referral.⁵⁴

At first blush, then, Ferencz's charging CAH-for-aggression proposal would appear ideal for re-examination, given the outbreak of large-scale inter-state armed conflict and aggression seemingly targeting civilians—this seems to address the concerns voiced when Ferencz first floated his idea. And

49. *Id.*; see also Dr. Ewelina U. Ochab, *Experts Call for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, FORBES (Mar. 4, 2022, 8:27 AM), <https://www.Forbes.com/sites/ewelinaochab/2022/03/04/experts-call-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/>.

50. Marlise Simons & Anushka Patil, *The International Criminal Court Issues an Arrest Warrant for Putin*, N.Y. TIMES (Mar. 17, 2023), <https://www.nytimes.com/live/2023/03/17/world/russia-ukraine-putin-news#the-international-criminal-court-issues-an-arrest-warrant-for-putin>.

51. Claire Parker & Robyn Dixon, *ICC Issues Arrest Warrant for Putin over War Crimes in Ukraine*, WASH. POST (Mar. 17, 2023, 4:20 PM), <https://www.washingtonpost.com/world/2023/03/17/icc-hague-arrest-warrants-putin-russia-ukraine/>.

52. Peter Beaumont, *What Does the ICC Arrest Warrant for Vladimir Putin Mean in Reality?*, GUARDIAN (Mar. 17, 2023, 02:08 PM), <https://www.theguardian.com/world/2023/mar/17/icc-arrest-warrant-vladimir-putin-explainer2>.

53. Jeff Neil & HLS News Staff, *The International Criminal Court: Explaining War Crimes Investigations*, HARV. L. TODAY (Mar. 4, 2022), <https://hls.harvard.edu/today/the-international-criminal-court-explaining-war-crimes-investigations/> (quoting ICL veteran, Alex Whiting, who states that "mid-level commanders who are operating in Ukraine" are the likely initial focus of the ICC investigation).

54. See Ochab, *supra* note 49 ("On March 4, 2022, experts from all over the world, including . . . Benjamin Ferencz, former Prosecutor at the Nuremberg Military Tribunal, issued a joint statement calling for the creation of a special tribunal for the punishment of the crime of aggressions against Ukraine.").

ICC prosecutors could focus on directly prosecuting Putin and his associates for CAH if charges could include illegal use of force within their ambit. Further, more recent scholarship has dismissed the concern that the Ferencz proposal could resuscitate the old Nuremberg war nexus requirement for crimes against humanity.⁵⁵ In a later sole-authored piece, Manuel Ventura opined:

[Granted] from a legal perspective, the illegal use of force as an “other inhumane act” creates an uncomfortable and serious anomaly. Historically, crimes against humanity required a nexus with armed conflict. Under the IMT Charter, the IMT at Nuremberg held that crimes against humanity could not occur unless they were linked to armed conflict. Although there is judicial and academic disagreement as to whether this requirement was jurisdictional or substantive in nature, the point is that in present times this nexus is no longer required for crimes against humanity. Indeed, [a]rticle 7(1) of the Rome Statute contains no such element, although the travaux préparatoires reveals that States certainly engaged in spirited discussions and debates on the subject during the process of its drafting.⁵⁶

C. Additional Possible Problems in Applying the Ferencz Proposal

1. The Principle of Nulum Crimen Sine Lege

Now that Ferencz’s proposal is out of the realm of the strictly hypothetical and being considered in the context of an actual aggressive war (i.e., Russia’s full-scale invasion of Ukraine), other concerns may come into play.⁵⁷ For instance, if Putin were charged under the CAH residual clause with launching an aggressive war as the gravamen, one can imagine Putin’s lawyers raising the question of legality.⁵⁸ In other words, as the illegal use of armed force has never before been charged as a CAH, it could violate the bedrock principle of “*nullum crimen sine lege*” (i.e., no crime without law, the legality principle as expressed in Latin).⁵⁹

But expert opinion, while noting the risk, has offered sanguine assessments regarding the prosecution’s prospects.⁶⁰ First, on a very general

55. *Crimes Against Humanity*, U.N. OFF. ON GENOCIDE PREVENTION & THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited Sept. 12, 2023).

56. Manuel J. Ventura, *The Illegal Use of Force (Other Inhumane Act) as a Crime Against Humanity: An Assessment of the Case for a New Crime at the International Criminal Court*, in *SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE* 422 (Leila Nadya Sadat ed., 2018).

57. Marlise Simmons et al., *Here’s What to Know About the ICC’s Arrest Warrant for Putin*, N.Y. TIMES (Mar. 17, 2023), <http://nytimes.com/2023/03/17/world/europe/putin-icc-arrest-warrant-war-crimes.html>.

58. Assuming, of course, that Putin could be taken into custody in the first place. This would be no easy feat given current geopolitical law enforcement realities.

59. Ventura & Gillett, *supra* note 37, at 526.

60. Simmons et al., *supra* note 57.

level, launching an aggressive war contravenes customary law norms—thus, regardless of the exact nature of the charge, a prosecution based on such conduct should not violate the legality principle.⁶¹ Ventura and Gillett grappled with this question in their article and cited the International Court of Justice’s 1986 merits judgment in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*.⁶² In that case, the Court confirmed “the validity as customary international law of the principle of the prohibition of the use of force expressed in [a]rticle 2, paragraph 4, of the Charter of the United Nations”⁶³ Thus, any leader launching an aggressive attack against another state should be aware of its illegal nature, regardless of the exact manner in which the charge is framed (i.e., directly as aggression or less directly as CAH).⁶⁴

In his piece *Prosecuting Aggression Through Other Universal Core Crimes at the International Criminal Court*, Terje Einarsen confirms this point from the perspective of the residual clause itself:

The wide range of acts presumably falling within the term “other inhumane acts,” and the purpose of [a]rticle 7 to protect civilians from severe violence and suffering, jointly support the view that the illegal use of armed force may not be categorically excluded from its scope. Serious suffering inflicted upon civilians is a regular and often inevitable consequence of the illegal use of armed force.⁶⁵

And this comports with ICL precedent, which indicates that a broad range of conduct fits within the CAH residual clause, including physical or mental injuries short of murder,⁶⁶ forced undressing of women and marching them in public, beatings, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.⁶⁷ Moreover, the well-respected ICL expert (and former ICTY judge) Antonio Cassese conjectured that acts of terrorism, seemingly parallel in their wider scale and scope to aggressive acts, could comfortably be placed under the large doctrinal tent of the Rome Statute’s CAH residual clause.⁶⁸

61. Ventura & Gillett, *supra* note 37, at 526, 536; *see also* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 190 (June 27).

62. Ventura & Gillett, *supra* note 37, at 526, 536; *see also* *Nicar. V. U.S.*, 1986 I.C.J. Rep. 14, at ¶ 190.

63. *Nicar. V. U.S.*, 1986 I.C.J. Rep. 14, at ¶ 190.

64. Ventura & Gillett, *supra* note 37, at 528–29. The authors also opine that the legality principle would not be violated in reference to the CAH chapeau elements. *Id.*

65. Terje Einarsen, *Prosecuting Aggression Through Other Universal Core Crimes at the International Criminal Court*, in *SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE*, *supra* note 56, at 366.

66. *Prosecutor v. Blaškić*, Case No. ICTY-95-14-T, Trial Judgment, ¶ 239 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000).

67. *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 184 (Feb. 22, 2008).

68. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 98, 157–58 (3d ed. 2013).

Still, this is all surmise and one can never be sure how an ICC Pre-Trial Chamber might rule. As Ventura and Gillett point out: “This axiomatic requirement [*nullum crimen sine lege*] cannot be deviated from, no matter how manifestly illegal the use of force happens to be.”⁶⁹ Thus, going forward, as it would always be a case of first impression, the legality principle represents a potential stumbling block for any initial CAH residual clause prosecution whose operative conduct is the launch of acts of aggression.

2. *The Specter of Realpolitik*

Even assuming, *arguendo*, that the legality principle were satisfied, another significant obstacle could remain—realpolitik. As Manuel Ventura warns in a more recent sole-authored piece, charging aggression as CAH could be perceived as a sort of legal legerdemain, circumventing the Kampala Conference’s hard-earned concessions.⁷⁰ In his view:

States would be more than a little surprised (to say the least) to discover overnight that acts that overlap significantly (though not entirely) with aggression could have been prosecuted the whole time at the ICC as a crime against humanity without the need for the Kampala Amendments of 2010. States will (and justifiably) wonder why they wasted their time, energy and political capital in coming up with a definition for the crime of aggression only to have the rug pulled from under them a few years later via the recognition of the illegal use of force (other inhuman act) as a crime against humanity.⁷¹

And this could result in negative third or fourth order effects.⁷² For example, from a CAH doctrinal point of view, various stakeholders (especially states parties) could interpret the Rome Statute article 7(1)(k) residual clause as a sort of capricious Pandora’s box, if a phenomenon so large-scale and normatively freestanding as aggression could be shoehorned within it.⁷³ Teasing this out further, and possibly deleteriously affecting the general perception of all the Rome Statute’s core crimes, the ripple effects of such a possible perceived overreach could undermine confidence in international criminal law overall.⁷⁴

69. Ventura & Gillett, *supra* note 37, at 526.

70. Ventura, *supra* note 56.

71. *Id.* at 421.

72. *Id.*

73. *Id.* at 422.

74. *Id.* (pointing out that, “from a legal perspective, the illegal use of force as an other [sic] inhumane act creates an uncomfortable and serious anomaly”).

IV. THE PROPOSAL

A. Nature and Scope of the Proposal

But looking beyond the current case of Russian aggression against Ukraine, these problems could be avoided through a very simple and elegant solution—amending article 7 of the Rome Statute to include the illegal use of armed force as an enumerated act. And this is not necessarily an unrealistic prospect.

Since the February 2022 Russian invasion, there have been calls for amending the ICC’s founding document, specifically with respect to the aggression jurisdiction. In particular, some have urged removing the clause in article 15 *bis* (5) that bars the ICC from exercising jurisdiction over non-state parties.⁷⁵ Others have called for the Rome Statute to be amended to allow for referrals by the UN General Assembly.⁷⁶ As noted by aggression expert Carrie McDougall:

It would, at least in theory, be possible, indeed desirable, to amend the Rome Statute to remove at least some of the jurisdictional limitations that are unique to aggression. Indeed, ICC States Parties have already committed to reviewing the aggression amendments 7 years after the beginning of the Court’s exercise of jurisdiction (i.e., 2025).⁷⁷

B. Statutory Details of the Proposal

Thus, assuming an upcoming ICC review conference to consider amendments to the aggression jurisdiction, state parties could easily take up the issue of amending article 7 to include illegal use of armed force as an enumerated CAH act. What might the amendment look like? It is submitted that the chapeau would need no modification—the key would be creating a new subsection (k) under article 7(1). Thus, with the chapeau, it would read:

75. See, e.g., Luis Moreno Ocampo, *Ending Selective Justice for the International Crime of Aggression*, JUST SEC. (Jan. 31, 2023), <https://www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/> (asserting that ICC does not have the authority to investigate Russian nationals for the crime of aggression against Ukraine because Russia is not a state party to the ICC).

76. See, e.g., Jennifer Trahan, *The Need to Reexamine the Crime of Aggression’s Jurisdictional Regime*, JUST SEC. (Apr. 4, 2022), <https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/> (calling states to ratify the crime of aggression amendment in order to support the rule of law and enforce the crime of aggression, as Ukraine has done by initiating proceedings against Russia at the ICJ).

77. Carrie McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine*, 28 J. CONFLICT & SEC. L. 203, 213 (2023).

Article 7
Crimes against Humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (k) The illegal use of armed force;⁷⁸

The current subsection (1)(k), the residual clause, would become subsection (l). Moreover, a section (2)(j) would be added that would read:

“Illegal use of armed force” means the planning, preparation, initiation, or execution, by persons defined in [a]rticle 8 *bis*, of an act of aggression against the sovereignty, territorial integrity or political independence of another State, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, including those illustrative acts enumerated in [a]rticle 8 *bis*.⁷⁹

By way of clarification, the relevant corresponding new section of the ICC Elements of Crime would specify that, in addition to the mens rea criteria required for the CAH chapeau, the mental elements for the “illegal use of armed force” would include those required for article 8 *bis*.⁸⁰ In other words, the perpetrator: (1) “was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations”; and (2) “was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.”⁸¹

It is submitted that, given the high mens rea threshold for the chapeau (i.e., knowledge related to the nature of the widespread or systematic attack), the article 8 *bis* mens rea elements should be easy to satisfy.⁸² With regard to the CAH chapeau mens rea, Robert Dubler and Matthew Kalyk refer to it as “special” because of the high “degree of moral turpitude that attaches to

78. “Aggression” has been defined as the “illegal use of armed force”—in a strictly legal sense, the two terms are often used synonymously. See Benjamin B. Ferencz, *The Illegal Use of Armed Force Is a Crime Against Humanity*, YOUTUBE (Mar. 5, 2017), <https://www.youtube.com/watch?v=jD5r4NPEEJw> (noting that crime of aggression is tantamount to “the illegal use of armed force”).

79. This provides a structure for the new enumerated act that is similar to the other enumerated acts listed in article 7(1). See Rome Statute, *supra* note 2, art. 7(1). In other words, after being set out in article 7(1), they are then defined in greater detail in article 7(2). *Id.* art 7(2). See for example article 7(2)(h) of the Rome Statute: “‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” *Id.* art. 7(2)(h).

80. See *Elements of Crimes*, INT’L CRIM. CT. 30 (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

81. *Id.* (citing elements (4) & (6)).

82. See *id.*

crimes against humanity.”⁸³ Thus, in that regard, given the leadership requirement for aggression (baked into the new proposed enumerated CAH), establishing knowledge of “inconsistency” with the UN Charter and the “factual circumstances” giving rise to the required violation of the Charter should not prove very onerous.⁸⁴

C. Advantages of the Proposal

Once the potential roadblocks of the legality principle and *realpolitik* are taken out of the equation, and beyond merely expanding the prosecutor’s toolbox with another potential charge, one can see three other important benefits of being able to charge illegal use of armed force as CAH: (1) providing an evidentiary advantage; (2) enhancing justice for victims; and (3) targeting legally protected interests and satisfying philosophy of punishment concerns.⁸⁵ Each of these shall be treated in turn.

1. The Evidentiary Advantage

Within the aggression context discussed herein (i.e., civilian targeting and high civilian casualties), perhaps the necessity of the proposed amendment would be obviated if prosecutors could just charge existing enumerated CAH acts, such as murder or extermination carried out by troops in the field, and then simply link those to the aggression architects.

But proving that linkage from the scene of the crime, up through the typically long chain of command to the seat of power, can often prove quite difficult.⁸⁶ As noted by Terje Einarsen:

Underlying crimes of crimes against humanity are often committed by personnel at the intermediate and low levels of the relevant power structure. This creates a possible lacuna in the suggested strategy to prosecute aggression through crimes against humanity. It will often be difficult to prove sufficient involvement of the high-ranking leaders in various crimes against humanity, each committed at a particular crime scene.⁸⁷

83. ROBERT DUBLER & MATTHEW KALYK, *CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE, AND THREATS TO INTERNATIONAL PEACE AND SECURITY* 1061 (2018).

84. Rome Statute, *supra* note 2, art. 8 *bis*.

85. It should be noted that these are also advantages that apply to Ferencz’s proposal of charging the aggression as a CAH via the residual clause. However, given the potential roadblocks described herein, they may not be realized. With this Article’s proposal to amend the Rome Statute to add illegal use of armed force as a new enumerated CAH act, these benefits are more likely to be realized for cases post-amendment.

86. See Einarsen, *supra* note 65, at 374.

87. *Id.*

On the other hand, if the enumerated CAH act, via the proposed new illegal use of armed force clause, is planning and preparing (or even initiating and executing) an aggressive war, this problem is presumably eliminated.⁸⁸ In other words, the target offense is carried out not in a location physically far removed from the state's top leaders, but rather within their midst (such as in the Kremlin, in the case of Russia's invasion of Ukraine).⁸⁹

2. *The Benefits for Victims*

But there is another noteworthy benefit to charging illegal use of armed force as a CAH—the way it ministers to victims' needs and increases their visibility in the prosecution of the crime. Chiara Redaelli notes that charging aggression as a CAH invests the justice process with “meaningful impact” because it recasts it “in terms of human rights.”⁹⁰

Others have also conceived of reconceptualizing illegal use of armed force as a crime against humanity by emphasizing its effect on natural persons, not states, as its victims.⁹¹ For example, Tom Dannenbaum pinpoints the ‘widespread killing and the infliction of human suffering without justification’ as the most compelling basis for criminalizing aggression.⁹² Likewise, Frédéric Mégret criticizes classifying illegal use of armed force as a crime against sovereignty as “out of tune with contemporary human sensitivities”⁹³ and contends that the international legal imagination should reframe aggression as chiefly a human rights offense.⁹⁴

88. See *Charging Aggression*, *supra* note 4.

89. Einarsen has argued that this might not be a problem in the ordinary CAH-murder/extermination case if making use “of the common plan element in co-perpetration might enable the Prosecutor to move the relevant time frame backward even to the early [aggression] planning stages, thereby extending provable liability . . . to the leadership level for clearly foreseeable crimes against humanity occurring in the ordinary course of executing the common plan to wage aggression.” Einarsen, *supra* note 65, at 374. But as I have argued elsewhere, this argument seems flawed. *Charging Aggression*, *supra* note 4. In particular, co-perpetration's *actus reus* mandates an agreement or common plan within a duo/group, and a coordinated “essential contribution” by each co-perpetrator resulting in the crime's commission. *Id.* And this means, per ICC case law, that the crime's physical commission must be carried out by at least one of the accused's co-perpetrators. Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 346 (Jan. 29, 2007) (setting out what the prosecution must prove in relation to a defendant charged with a crime under the Rome Statute when acting pursuant to a common plan and charged as a co-perpetrator under article 25(3)(a)). From this, we can infer that a link between the crime on the ground and the common plan must be demonstrated. See *Charging Aggression*, *supra* note 4 (citing LACHEZAR D. YANEV, THEORIES OF CO-PERPETRATION IN INTERNATIONAL CRIMINAL LAW 435 (2018)).

90. Chiara Redaelli, *The Human Dimension of Peace and Aggression*, 96 INT'L L. STUD. 603, 617 (2020).

91. See Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242, 1263 (2017).

92. *Id.*

93. Frédéric Mégret, *What Is the Specific Evil of Aggression? A Three-Way Typology*, in THE CRIME OF AGGRESSION: A COMMENTARY 1444–45 (Claus Kreß & Stefan Barriga eds., 2017).

94. *Id.* at 1437.

And what is at stake in terms of according “victim” status to natural persons is not strictly within the realm of the hypothetical—real world procedural impacts are implicated.⁹⁵ In particular, Rome Statute article 68(3) declares that when “personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court . . .”⁹⁶ Additionally, victims assume a key role at the criminal proceeding’s end phase, as Rome Statute article 75 provides for victim reparations, “including restitution, compensation and rehabilitation.”⁹⁷

Under customary international law, though, states, not natural persons, are recognized as the victims of aggression.⁹⁸ And while it is true that, in principle, natural persons could qualify as victims under the Rome Statute, it is doubtful that the ICC would open its participation and reparations regime to them because “it was not States’ intention to create new rights for individuals suffering harm from the crime of aggression.”⁹⁹

3. *Better Aligning Prosecution Goals with Legally Protected Interests and Philosophy of Punishment*

Even if there were no tangible benefits for victims, an additional advantage of this Article’s proposal lies in its alignment of the criminal charges with the proper legally protected interests and attendant philosophy of punishment considerations.¹⁰⁰ More specifically, article 7(1)’s chapeau covers acts “committed as part of a widespread or systematic attack directed against any *civilian* population”¹⁰¹—and aggressive wars, like Russia’s

95. See Rome Statute, *supra* note 2, art. 68 (3).

96. *Id.*

97. *Id.* art. 75(1), at 134. Although victims in the aggression context could benefit from these provisions if ordinary CAH-murder were charged, persons going through the process as victims of the illegal use of armed force will undoubtedly perceive themselves and their role in the justice process differently as victims of an aggressive war (versus the other, more specific enumerated acts, such as murder). The value of the process for victims as a properly focused catharsis should not be discounted. See Rudina Jasini & Gregory Townsend, *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, U.K. ECON. & SOC. RSCH. COUNCIL 34 (Nov. 30, 2020), https://www.law.ox.ac.uk/sites/default/files/migrated/iccba_-_oxford_publication_30_november_2020.pdf.

98. Erin Pobjie, *Victims of the Crime of Aggression*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 824 (Claus Kreß & Stefan Barriga eds., 2017).

99. *Id.* at 846. That said, Pobjie refers to human rights and humanitarian law principles, as well as the flexible breadth of ICC Rules of Procedure and Evidence Rule 85, which broadly defines “victim” and contends that aggression charges should result in victim status being conferred on natural persons. *Id.* at 817. Per Pobjie, “If [s]tates support this development, it will be a positive step towards realizing the goal of delivering justice for victims of all crimes within the Court’s jurisdiction regardless of artificial legal distinctions.” *Id.*

100. See Morten Bergsmo, *On Legally Protected Interests in International Criminal Law*, *CTR. FOR INT’L L. RSCH. & POL’Y* (Aug. 26, 2017), <https://www.cilrap.org/cilrap-film/170826-bergsmo/> (describing the high value in identifying and correlating legally protected interests in ICL).

101. Rome Statute, *supra* note 2, art. 7(1) (emphasis added).

civilian-focused 2022 invasion of Ukraine, seem to satisfy this requirement.¹⁰² Moreover, in terms of this Article’s proposal, the contemplated new CAH clause (i.e., use of illegal armed force) would permit charges that go to the essence of Russian criminality—again, launching an aggressive war that disproportionality involves direct and intentional civilian attacks and casualties.¹⁰³

As a result, even if ICC jurisdiction were available to charge the crime of aggression in future cases similar to the Russian full-scale invasion of Ukraine, such a prosecution would fail to capture the legally protected interests of natural persons being affected and/or targeted.¹⁰⁴ This is so because the key legal interest protected, vis-à-vis the crime of aggression, is state sovereignty and territorial integrity,¹⁰⁵ and not the security or wellbeing of natural persons, which reflects “a human rights perspective” that is CAH’s central concern.¹⁰⁶

Along the same lines, enumerated acts such as murder (article 7(1)(a)), extermination (article 7(1)(b)), torture (article 7(1)(f)), and rape (article 7(1)(g)) fail to capture the full criminal enterprise of initiating an aggressive war, only pieces of it.¹⁰⁷ But a charge pursuant to the illegal use of armed force clause recommended in this Article would cover the overarching aggressive scheme. Put another way, the CAH charge allows prosecuting the *natural-persons-as victims* aspect of the illegal use of force, i.e., a key aspect of the sort of aggressive war being pursued by Russia in Ukraine (and the kind of future campaign of aggression that this Article’s proposal is meant to cover).

But different charges are not mutually exclusive—one need not exclude the other.¹⁰⁸ For instance, a 7(1)(a) murder charge would narrowly focus on the on-site killing act (later to be linked to a leader, such as Putin, at the seat of power (e.g., the Kremlin) via other complicit actors going progressively higher up through the chain of command. But even if this linkage can be established, only a “mode” of liability is at issue—while at the same time the gravamen of the *substantive* offense is the taking of the life on the ground.¹⁰⁹ By comparison, if the charged crime’s gravamen is initiating an aggressive war that results in civilian deaths (i.e., this Article’s proposal), then the focus is on the legally protected interest of the security of natural persons in terms of not having their homeland attacked for illicit objectives. It is self-evident

102. See *UN Resolution Against Ukraine Invasion: Full Text*, ALJAZEERA (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/unga-resolution-against-ukraine-invasion-full-text>.

103. See *supra* Section IV.B (explaining the modifications in the statutory proposal).

104. See Pobjie, *supra* note 98, at 5.

105. *Id.* at 826; see also Einarsen, *supra* note 65, at 364.

106. Einarsen, *supra* note 65, at 364.

107. Rome Statute, *supra* note 2, art. 7(1)(a), (b), (f), (g).

108. *Id.* art. 7(1).

109. *Id.*

that this legal interest is more expansive than, and ultimately quite different from, that of the narrower right to life.

And this has significant philosophy of punishment consequences, both deontological and teleological. From a deontological standpoint, in this context, retributivism would seek to adequately account for the human toll of illegal use of force.¹¹⁰ Capturing and communicating the heinousness of the transgressions in effectuating just deserts—retributivism’s main concerns—would be satisfied.¹¹¹ Per the ICTY in the *Nikolić* judgment:

[In the context of international criminal justice], retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. Furthermore, within [this context], retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.¹¹²

From a teleological point of view, even if ICL’s deterrence value is marginal since, as often perceived, its fundamental utilitarian postulation of “rational calculators” seldom applies given ideological distortions within its radical realm (e.g., deep-seated racial, ethnic, religious hatreds), punishing ICL offenders might still cause would-be future criminals to think twice before perpetrating offenses.¹¹³ Ben Ferencz, in introducing his proposal to charge aggression as a CAH, stressed that the “basic goal is to *deter* the unlawful use of armed force.”¹¹⁴ He also emphasized that, even if such force is deterred only “to a slight extent,” this would be of great value as an “effort to save human lives.”¹¹⁵

Additionally, the utilitarian objective of incapacitation also applies, not only since arrest warrants could be issued for CAH (illegal use of armed force), but also via the totemic power of that evocative transgression casting

110. See Theo van Willigenburg & Eduardus Van der Borgh, *Attacking Punitive Retribution at Its Heart—A Restorative Justice Thrust*, 15 INT’L J. PUB. THEOLOGY 401, 412–13 (2021) (indicating that, in general, retributivism focuses on each victim being made whole vis-à-vis the perpetrator).

111. MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 153–57 (2010). In the case of the Russian full-scale invasion of Ukraine, this would resonate for the global community as it has expressed its outrage regarding Putin’s aggression (as reflected in the March 2, 2022 140-nation UN General Assembly Resolution condemning the invasion) in light of its concern for adherence to fundamental human rights norms. See *UN Resolution Against Ukraine Invasion: Full Text*, *supra* note 102 (noting that the vote was 141 to five with thirty-five abstentions and quoting the resolution as condemning “all violations of international humanitarian law and violations and abuses of human rights”).

112. Prosecutor v. Nikolić, Case No. IT-02-60/1-5, Sentencing Judgment, ¶¶ 86–87 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003) (emphasis added).

113. ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 32 (2d ed. 2010).

114. *New Approach*, *supra* note 31 (emphasis added).

115. *Illegal Use*, *supra* note 32, at 197.

a pall on the international stage over at-large warmongers, such as Vladimir Putin, and thereby potentially reining in their kinetic tactical moves targeting civilians.¹¹⁶

Regardless, charging such an offence also has independent utilitarian value with regard to expressing denunciation and promoting education.¹¹⁷ ICL denunciatory and educative strategies view prosecutions as “an opportunity for communicating with the offender, the victim and wider society the nature of the wrong done.”¹¹⁸ Put differently, they apprise suspects as to the “wrong . . . they have done” while also “educating society about the unacceptable nature of the conduct condemned.”¹¹⁹ Further, labeling and condemning the initiation of a civilian-focused aggressive war as a CAH would meet a critical hortatory need.¹²⁰ Ferencz was well aware of this, describing CAH charges for aggression as an imperative part of effecting “‘a change of heart and mind among our fellow human beings’ by using an ‘educational tool.’”¹²¹

V. CONCLUSION

In a string of speeches in the latter part of the 1950s and the beginning of the 1960s, retired U.S. General Douglas MacArthur plainly declared that, in the modern world, civilians are the main target of war.¹²² And this is supported statistically.¹²³ In the twentieth century, approximately 43 million to 54 million noncombatants lost their lives as a result of warfare, constituting up to sixty-two percent of all fatalities in armed conflict over that period.¹²⁴ This is especially true when aggressive war is perpetrated,¹²⁵ as we have illustratively seen in connection with the disproportionate civilian casualties resulting from Russia’s full-scale invasion of Ukraine.¹²⁶

And yet, given the circumscribed reach of the ICC’s aggression jurisdiction, it may not be possible to prosecute leaders responsible for

116. CRYER ET AL., *supra* note 113, at 35 (discussing ICL’s shame game deterrence utility).

117. See LUCIA ZEDNER, *CRIMINAL JUSTICE* 109 (2004).

118. *Id.*

119. CRYER ET AL., *supra* note 113, at 36 (discussing educating others of wrongs).

120. *See id.*

121. *Illegal Use*, *supra* note 32, at 197 (arguing to resolve difficulties without physically harming adversaries).

122. EDWARD T. IMPARATO, *GENERAL MACARTHUR SPEECHES AND REPORTS 1908–1964* 233, 235, 238, 247 (Turner Publ’g Co., 2000).

123. See ALEXANDER B. DOWNES, *TARGETING CIVILIANS IN WAR I* (Robert J. Art et al. eds., 2008).

124. *Id.*

125. *Id.* at 4–5 (considering various modern aggressive wars, such as Nazi Germany’s invasion of Poland and Saddam Hussein’s invasion of Kuwait, and providing the reasons why aggressive war brings about such high civilian casualty rates, including eliminating “fifth columns,” heading off future local uprisings and, in cases of annexation, changing local population ratios to include a greater number of citizens of the attacking state).

126. See, e.g., Burns & Baldor, *supra* note 47 (regarding civilian casualties).

launching these kinds of armed conflicts.¹²⁷ Even if it were, a hypothetical aggression prosecution would not properly capture the most heinous aspect of the criminal conduct implicated in initiating an aggressive war—its terrible effects on civilians. Ben Ferencz’s 2010 post-Kampala proposal to charge aggression as a crime against humanity via the Rome Statute’s article 7 residual clause went a long way toward potentially closing the impunity gap and addressing the disproportionate and foreseeable harm suffered by civilians as a result of such belligerent operations.¹²⁸ But, it possibly came with fatal weaknesses—apart from the possibility of reviving Nuremberg’s war nexus requirement for crimes against humanity (a concern now largely dismissed), the proposal was potentially vulnerable in terms of the legality principle (as initiating acts of aggression has never been charged via the residual clause) and realpolitik (with states liable to frown on what could be seen as a Kampala Compromise end around).¹²⁹

However, in advance of any future inter-state aggressive wars, this Article has embraced an alternative to the Ferencz proposal—amending article 7 of the Rome Statute to add illegal use of armed force as an enumerated CAH (along with conforming amendments to other related ICC legal instruments).¹³⁰ This would obviate the need for arguing about the application of *nullum crimen sine lege* and it assumes that a new set of diplomatic or legal compromises would have been forged at a future review conference, eliminating the realpolitik barrier.¹³¹ At the same time, it would preserve all the advantages of the Ferencz proposal—a more linear evidentiary connection to aggression perpetrators, the opening of the victim participation and reparations features of the ICC to natural persons (the true victims of aggression), and, given the civilian-focused aggression at issue, a better alignment between desired prosecutorial outcomes with protected legal interests, as well as retributive and utilitarian goals.¹³² At the same time, it would not create a “zero-sum game” as both CAH under the new enumerated clause and the crime of aggression itself could be charged together in the same case.¹³³

Of course, all this assumes that this Article’s proposed amendment of Rome Statute article 7 could ever see the light of day. Experts like Carrie McDougall are not so sanguine.¹³⁴ She has expressed concern that, even were the ICC to convene a review conference in 2025 to consider amendments in reference to the Rome Statute’s aggression-related provisions, “[e]xperience suggests . . . that securing the necessary support” for any such amendments

127. *Illegal Use*, *supra* note 32, at 190 (discussing the ICC’s inability to reach leaders).

128. *Id.* at 194.

129. *See id.* at 192.

130. *Id.* at 195.

131. *Id.* at 197.

132. *See id.*

133. *See id.*

134. McDougall, *supra* note 77 (discussing support, or lack thereof, for amendments).

would be “exceeding[ly] difficult.”¹³⁵ Even if the necessary support were to materialize for any such amendments, she adds, under article 121(4), they would “have to be ratified by seven-eighths of States Parties to enter into force.”¹³⁶ Although her pessimistic comments were more specifically focused on expanding aggression’s jurisdictional regime, it is not a stretch to imagine they would apply with equal force regarding the prospects for this Article’s CAH amendment proposal, which also, in the end, impliedly envisages restrictions on state sovereignty prerogatives.¹³⁷ Then again, with the civilian death toll in Ukraine steadily mounting, perhaps the doctrinal and jurisdictional changes needed for the international community to effectively deal with the use of illegal armed force at the ICC will soon be within reach.

135. *Id.*

136. *Id.*

137. *Id.*