

## **Is It Possible to Prevent or Punish Future Aggressive War-Making?**

2011 LI Haopei Lecture  
Judge Dr. jur. h. c. Hans-Peter Kaul





# **Is It Possible to Prevent or Punish Future Aggressive War-Making?**

**2011 LI Haopei Lecture  
Judge Dr. jur. h. c. Hans-Peter Kaul**

**2011  
Torkel Opsahl Academic Epublisher  
Oslo**

This and other papers in the FICHL Occasional Paper Series may be openly accessed and downloaded through the Forum website ([www.fichl.org](http://www.fichl.org)). This paper was published on 8 February 2011.

© **Torkel Opsahl Academic EPublisher, 2011**

All rights are reserved. You may read, print or download this paper or any part of it from [www.fichl.org](http://www.fichl.org) for personal use, but you may not in any way charge for its use by others, directly or by reproducing it, storing it in a retrieval system, transmitting it, or utilizing it in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, in whole or in part, without the prior permission in writing of the copyright holder. Enquiries concerning reproduction outside the scope of the above should be sent to the copyright holder. You must not circulate this paper in any other cover and you must impose the same condition on any acquirer.

**ISBN 978-82-93081-37-1**

## PREFACE

The Forum for International Criminal and Humanitarian Law seeks to contribute to scholarship and practice. To this end, it organizes seminars and other activities and promotes seminar findings and other publications through its publication series. The Occasional Paper Series will release substantial single papers or clusters of shorter texts. The present paper is published as one of the first volumes in the Series. The Torkel Opsahl Academic EPublisher does so as part of the broadening open access platform of the Forum. The paper can be freely read, printed and downloaded from the Forum Internet site ([www.fichl.org](http://www.fichl.org)).

Morten Bergsmo  
*Director, FICHL*



## TABLE OF CONTENTS

1. Main Factors Leading to the Kampala Breakthrough.....	3
2. War and Peace in the World of Today.....	5
3. Conclusion – Seven Suggestions for the Way Forward to Criminalise Aggression.....	9





---

## Is It Possible to Prevent or Punish Future Aggressive War-making?\*

Hans-Peter Kaul\*\*

Let me begin with a question, a question of some importance.

Is it the natural right, the inherent right of States to make war? Is war-making a national right?

When we look at the reality of today's world, it seems quite obvious that certain States, powerful States, continue to reserve for them, openly or more discreetly, also as some kind of hidden agenda, the option to go to war for their interests.

The question, however, is crucial: Is it the natural, the inherent right of States or governments to use military force against other States when they believe it is in their interest?

This is the fundamental question which is at the centre of this paper.

As some may know, on 11 June 2010, something surprising, something unexpected happened: against all odds, against most expectations, the Review Conference of the International Criminal Court (ICC) held in Kampala, Uganda adopted a full and complete package proposal on the crime of aggression. The amendments to the Rome Statute contain a defi-

---

\* This paper is based on the FICHL LI Haopei Lecture given at the University of Oslo on 8 February 2011. The author would like to thank Mr. Morten Bergsmo and all those who helped to organise this event.

\*\* **Hans-Peter Kaul** is Judge and Vice-President of the International Criminal Court. Judge Dr. jur. h. c. Hans-Peter Kaul has been a Judge at the International Criminal Court since 2003. In 2006, he was re-elected for a second term of nine years. He is a member of Pre-Trial Chamber II. From July 2004 to July 2009, he was the first President of the Pre-Trial Division. On 11 March 2009, he was elected Second Vice-President of the International Criminal Court for a period of three years. Formerly, Judge Kaul was a diplomat at the German Federal Foreign Office. From 1996-2003, he was Head of the German delegation and chief negotiator in the process leading to the establishment of the International Criminal Court. Judge Kaul has published extensively on the topic of public international law in general and international criminal law in particular.

dition of the crime of aggression and set out the conditions under which the Court will have, from 2017 onwards, jurisdiction with regard to this crime. This closes in all likelihood the last remaining important lacuna in the substantive law and the jurisdictional regime of the Rome Statute. Until 2017, at least 30 States Parties must have ratified these significant amendments to the Rome Statute and two thirds of the States Parties have to confirm the solution found in Kampala by a further vote. There is little doubt that this treaty, the Rome Statute, will soon have an article 8*bis* and articles 15*bis* and 15*ter* incorporating the crime of aggression.

Now, what are, what will be the implications, the consequences of the criminalisation of aggression? I will deal with this fundamental issue by three sets of questions:

First: what were the main factors leading to this outcome of Kampala and to the current situation?

Second: what are some of the most critical aspects of today's reality regarding armed conflicts and the use of force for power-political objectives?

Third: what are the conclusions, what needs to be done to make the criminalisation of aggression as strong and effective as possible?

In this last part, I will submit some legal policy suggestions for the way forward.

I am grateful to honour late Judge LI Haopei, the distinguished Chinese jurist, diplomat and academic by presenting the first FICHL LI Haopei Lecture. Judge LI Haopei was a young law professor when Japan invaded and occupied large parts of China from 1936 to 1945 in a series of aggressive military campaigns. Throughout his life, Judge Li Haopei was an advocate for the rule of law and peaceful settlement of disputes. He has been for thirty years, from 1963 to 1993, Legal Adviser to the Chinese Ministry of Foreign Affairs, the highest position for international law existing in the Chinese Government. I am pleased that my colleague Judge LIU Daqun from the International Criminal Tribunal of Former Yugoslavia (ICTY) has agreed to be with me here today and to comment on my contribution. As you are aware, Judge LIU Daqun is a successor of Judge LI Haopei and has also held the prestigious position of Legal Adviser in the Chinese Foreign Ministry.

Furthermore, I devote this contribution to the hope that China, the emerging leading power of the world, will continue to pursue a policy of peace and peaceful relations in this unruly world. Finally, I would also

like to pay tribute to the lifelong commitment of Professor Benjamin Ferencz, the legendary American Nuremberg Prosecutor, to outlaw the crime of aggression.

### **1. Main Factors Leading to the Kampala Breakthrough**

This is not the place for a presentation on legal history with regard to the crime of aggression. It may suffice that I simply recall that it was essentially the intolerable phenomenon of multiple aggressive wars waged by Nazi Germany against many States which led to the development of the concept of crimes against peace in the London Charter, also known as the Nuremberg Charter. Already during the ICC negotiations at the UN in New York, I have often stated that the attack on Poland on 1 September 1939, greatly facilitated by the infamous Hitler – Stalin Pact signed on 23 August 1939, may be regarded as a classical case, a text-book case of the crime of aggression. Similar crimes followed, including the invasion of Norway on 9 April 1940, codenamed “Operation Weserübung”, or the devastating attack on the Soviet Union on 21 June 1941.

It was the vision of in particular Robert H. Jackson which led to the development of the concept of crimes against peace in article 6(a) of the Nuremberg Charter. The judgement of the International Military Tribunal at Nuremberg in 1946 qualified this concept in the following terms:

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.

One can safely assume that also the prohibition of the threat or use of force set out in Article 2(4) of the UN Charter adopted in San Francisco in October 1945 is another consequence and lesson of the horrors of war. As known, the preamble of the UN Charter underlines as a purpose of the Organisation of the United Nations “... to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...”. There is no doubt that the prohibition of force in Article 2(4) of the Charter is one of the most important, most vital acquisitions of mankind, this despite the fact that there continue to be forces in the international community who persistently want to downplay or gradually undermine the importance of this fundamental prohibition.

We know that Article 6 of the Nuremberg Principles on crimes against peace remained for a long time a promise which was not fulfilled in reality. The question to criminalise aggression came to the forefront again at the Rome Conference in 1998. While consensus on the crime of aggression was out of reach, it was possible to recognise the crime of aggression at least with a placeholder provision in Article 5 of the Statute. The crime of aggression concludes the list of the most serious crimes of concern to the international community as a whole, as provided by article 5(1) of the Rome Statute.

It is also widely accepted, if not common knowledge, that without Germany, the crime of aggression would not have been incorporated in article 5 of the Rome Statute, our founding treaty. The German proposal, which was the last on the table in Rome, at least made sure that the crime of aggression was reaffirmed as an international crime, once and for all in article 5 of the Statute.

And now, we have, against the expectations of so many, a complete package proposal to criminalise aggression in the Statute of the International Criminal Court. As Professor William Schabas has said, “The message that the amendments help to deliver is that war is the supreme evil, lying at the heart of the human rights violations set out in the provisions on genocide, crime against humanity and war crimes”.

Over time, it will become clear how much appreciation is owed to some of the key negotiators, in particular Christian Wenaweser, President of the Assembly of States Parties and Stefan Barriga, his highly effective adviser; Prince Zeid Al-Hussein from Jordan and also Claus Kress from Cologne for their determination and commitment to make Kampala a success.

But as I see it, there was another driving force behind this outcome in Kampala. What I mean is the power, the overwhelming power of the great idea that crimes against peace are the evil *per se*. Great ideas, great concepts – we know that – have the habit of raising great expectations and inspiring people to act.

It remains my view that there has always been an elemental force, which frequently goes unseen and unheard – namely the yearning of the people of the world to live in peace. But even if this voice is often drowned by the drums of war, the permanent buzz of CNN and the media, and buried under an avalanche of bad news, under the surface this voice is extraordinarily strong.

People around the world, men and women in every country, share a desire for peace and justice. People around the world agree that the highest value and best protection for human dignity and human rights is the absence of war. The pivotal force which, in my view, ultimately gave rise to the enormous progress achieved in Kampala is this universal yearning, this hope for peace. There continues to be a worldwide “*colère publique*” against aggressive war-making.

## **2. War and Peace in the World of Today**

What are some of the most critical aspects of today’s reality regarding armed conflicts and the use of force for power-political objectives?

Europe has had since 1945 a quite long period – 65 years – of peace and stability, with the frightening exception of the war in former Yugoslavia in the 1990s.

People tend to forget – but it must not be forgotten, it must remain in our collective memory – that the Second World War, brought about essentially by the aggressive gamble of Adolf Hitler and his followers, was the deadliest war ever, with more than 50 million victims and untold suffering for so many all over the world.

In response, the prohibition of the use of force was solemnly reaffirmed in article 2(4) of the Charter of the newly-founded United Nations. As a further reaction to crimes committed during the Second World War, until then without parallel or precedent, the International Military Tribunal was set up in Nuremberg to try German leaders responsible for crimes against peace (aggression), crimes against humanity and war crimes. The development of the concept of crimes against peace as a new principle of international law was accepted thanks to the untiring efforts and vision of in particular Robert H. Jackson. Article 6(a) of the London Charter was an expression of hope that future illegal war-making might be deterred. It was indeed the conviction of Jackson – and this is well established both by legal historians like Professor John Q. Barrett, his biographer and by the own writings of Jackson – that the crime of aggressive war was the fundamental crime dealt with in Nuremberg.

Before the Nuremberg Trial, he wrote to President Truman: “It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal. ... We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow”. On 7 October 1946, a week after the Nuremberg

Judgement, Jackson reported to President Truman: “These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them. ... By the Agreement and this trial, we have put International Law squarely on the side of peace as against aggressive warfare”.

It is further proof of the outstanding vision and influence of Jackson that his ideas and legacy were later taken up all over the world. His vision was shared by the United States itself, in particular by other famous US Nuremberg Prosecutors, such as the late Telford Taylor, Whitney R. Harris, Henry T. King and also by Benjamin Ferencz, who today, at the age of 91, is the last living US Prosecutor from Nuremberg. As many will know, Ferencz was the US Chief Prosecutor in the notorious *Einsatzgruppen* case, and has been a life-time advocate for the rule of law and the idea to criminalise aggressive war-making.

There is, however, a reality which we are all painfully aware of, a reality which we cannot and must not ignore. Neither the Nuremberg Principles nor the prohibition on the use of force as enshrined in Article 2(4) of the UN Charter has had the consequence of preventing further wars. Today, in February 2011, we may still regard these principles as promises which yet have to be fulfilled.

To illustrate this sobering, if not terrible reality, just one example: in March 2010, Professor Cherif Bassiouni, the eminent international lawyer teaching in Chicago and Italy, submitted “*A World Study on Conflicts, Victimisation and Post-Conflict Justice*”. This unprecedented historical survey of world conflicts established that, between 1945 and 2008, some 313 conflicts took place, causing an estimated 92 to 100 million people killed – twice the number of victims in World Wars I and II combined. These conflicts were of an international and non-international character, as defined in international humanitarian law, as well as purely internal conflicts, civil wars, and regime victimisation. Among the international armed conflicts with the highest casualties, there are, *inter alia*, the war in Korea, the Vietnam War, and also the American-British invasion of Iraq in 2003. Among the many uses of military force against other States, the invasion of Kuwait on 2 August 1990 by Saddam Hussein is almost universally regarded as yet another classical case of a crime of aggression.

We must also be aware that the existence of the prohibition of the use of force against other States as reaffirmed in Article 2(4) of the UN Charter has led to a new political phenomenon. What is meant by this?

Well, since 1945, the use of military force is regularly accompanied by an official legal justification, quite often with a far-fetched interpretation of the right to self-defence against an armed attack as provided by Article 51 of the UN Charter. Well-known examples are the Tonkin Incident in the case of the Vietnam War; an alleged invitation or call for military assistance by another State, such as the “justification” used for example by the Soviet Union when they invaded Afghanistan in 1979; quite recently, the alleged existence of weapons of mass destruction, or alleged co-operation of Iraq with Al Qaeda.

Everybody may have his or her own opinion about these so-called “justifications” for war-making.

There is, however, a great risk and danger which cannot be overlooked. If these “justifications”, which often are the subject of massive propaganda campaigns, are indeed accepted by the international community, this acquiescence undermines the respect for the general prohibition of the use of military force under international law pursuant to Article 2(4) of the UN Charter – one of the indispensable fundamentals of international peace and justice. Factual acceptance of all kinds of questionable arguments to justify war-making plays into the hands of those who, anyhow, have a tendency to reserve to them the option to go to war for their interests. These forces seemingly continue to act according to the notorious saying, “*Krieg ist die Fortsetzung der Politik mit anderen Mitteln*”.

No, war is not the pursuit of politics through other means – no, no, no! As Benjamin Ferencz has said: “The most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, was henceforth going to be punished as an international crime”. And the late Whitney R. Harris, the other outstanding US Nuremberg Prosecutor in the case against Ernst Kaltenbrunner, the Head of the Nazi Secret Police, the Gestapo, wrote in 2004 in his book, “The Tragedy of War”, the following:

The crime of aggressive war must be recognised and punished, when it occurs, for war is the greatest threat for the survival of civilisation.

It is encouraging that there are almost countless other eminent personalities, political leaders, international lawyers, philosophers and publi-

cists who have also taken similar strong positions against war-making. They include for example President Eisenhower, Robert McNamara, Bertrand Russell, Mahatma Ghandi, and many Nobel Peace Prize winners. I agree with all of them.

Germany's Carl von Ossietzky, who was awarded the Nobel Peace Prize in 1936, stated already in 1932, seven years before the outbreak of the Second World War, farsighted like a modern Cassandra:

We adherents of peace have the duty to constantly prove anew that war is not heroic and that it brings mankind nothing but fear and terror.

He was ruthlessly persecuted by the Nazi Regime and died as a prisoner in 1938. President Eisenhower, the old warrior and victorious Supreme Allied Commander of WWII, warned the United States and the world in his famous farewell address of 17 January 1961, almost exactly 50 years ago:

... We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex.

Today, we know that this phenomenon of a military-industrial complex and tendencies to a permanent war economy with related interests continue to exist not only in the US, but also in other powerful states. According to SIPRI, the Stockholm International Peace Research Institute, the total world spending on military expenses in 2009 was 1.531 trillion US Dollars, out of which roughly 712 billion US Dollars was spent by the United States. The armament industry and its agents, not only in the United States but also in other countries including Germany, are restlessly active to develop and sell new deadly means of war-making. As a normal human being, you do not notice these "merchants of death" as they always fly first class, and their deals are made in darkness and secrecy.

When we re-assess today the perspective of preventing or punishing future crimes against peace, let me re-affirm what I said, two years ago, in Cologne, another 2000 year old treasure founded by the Romans, and totally destroyed as a consequence of Hitler's aggressive gamble:

War: this is the ultimate threat to all human values. War is sheer nihilism; it is the total negation of hope and justice. Experience shows that war, the injustice of war in itself, begets massive war crimes and crimes against humanity. And once again, in my own words, this time as blunt and un-



pleasantly as reality itself: war crimes are the excrement of war – they are an odious, an inevitable, an inescapable consequence of war. We have seen this time and again, in World War II, in Vietnam, in the former Yugoslavia, in Iraq, also in practically all African situation States, with which the ICC is currently seized. As in the past century, a terrible law seems to hold true: war, the ruthless readiness to use military force, to use military power for political interests, regularly begets massive and grievous crimes of all kinds.

Recently, Michael Bohlander, a German professor now teaching in Durham, United Kingdom, has reminded me about a further appalling aspect of this evil: even nowadays, in modern warfare, in the time of so-called surgical strikes, 80% to 90% of war casualties are regularly civilians, mostly children and women. This is an ongoing scandal, a shame for all concerned.

On the other side, as I have the chance to speak to you today as a German citizen, brought up in the aftermath of the Second World War, let me mention one experience from the year 2003 which I observed as an international lawyer working for the German Government and which gave me personally great hope and encouragement.

It was, in my opinion, a great moment, one of the finest hours of Germany in recent history when the Government under Federal Chancellor Schröder and Foreign Minister Fischer refused to participate in the American-British war against Iraq. This was an auspicious and just decision, in full conformity with international law. By not participating in the invasion of Iraq in 2003, the Federal Government to my mind set a clear and significant standard. I hope that this standard will be applied in full if, in the future, another attempt should be made – by whomever – to embroil Germany in a war that conflicts with international law.

### **3. Conclusion – Seven Suggestions for the Way Forward to Criminalise Aggression**

And now, to the surprise of so many, we have since 11 June 2010 a full and agreed package proposal on the crime of aggression. A comprehensive definition of the crime of aggression was adopted; it clarified the distinction between an act of aggression by a State in manifest violation of the UN Charter as the indispensable pre-condition of such a crime and the necessary and required conduct by a leader who consequently can be held criminally responsible for the crime. Most important, a compromise

was adopted by consensus which establishes a viable balance between the Security Council and the jurisdiction of the International Criminal Court. The additional hurdles which need to be overcome, ratification of the amendments by at least 30 States Parties and the approval by at least two-thirds of all States Parties in a further vote after 1 January 2017, are not very difficult. This opens the door for the concrete possibility that those responsible for a future crime of aggression may be held criminally responsible before the International Criminal Court after 2017.

Please permit me to recall also what President Obama said in Oslo on 10 December 2009 in his remarkable if not historic speech, when he accepted the Nobel Peace Prize 2009. In this address, the US President explained and emphasised the difficult choices and challenges that statesmen have to face in their task of maintaining peace. But he also said that in exceptional circumstances, “war is sometimes necessary”. This view, this realism of the President is in full conformity with the letter and spirit of the Kampala amendments to the Rome Statute. The Kampala text requires “an act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. The three components “character, gravity and scale” of the act of aggression – not only one or two of them – must cumulatively be present to satisfy the manifest standard by itself. This high threshold characterises the realism of the Kampala text. Needless to say, this text cannot be denounced as the product of “naïve or pacifist dreamers”.

What does this mean for the criminalisation of aggression? It means that, for the future, the previously dominating excuses against the criminalisation of aggression – namely the absence of an accepted definition of this crime and the alleged impossibility to regulate the relationship between the Security Council and the ICC – have been eliminated. All in all, it is difficult not to acknowledge the consensus decision of Kampala as a great, if not historic breakthrough in international law. For the first time, we now have international criminal law defining clear limits for the *jus ad bellum*. For the first time in the history of mankind, this opens up a concrete perspective, a unique chance, if sustained and fully implemented, to criminalise aggression and illegal war-making.

One must, however, remain realistic and sober. It would be irresponsible to overlook certain difficulties or even risks. The first difficulty is that the amendment proposals on the crime of aggression will not enter into force before 2017. Since last year, it has already become obvious that this waiting period of seven years has positive, but also negative sides.

Both political leaders and the media tend to overlook the breakthrough in Kampala. They continue to do business as usual. There is no real focus, no real political attention for the unique chance to criminalise illegal war-making. There is, secondly, the further risk that some, who continue to oppose the criminalisation of aggression may reflect about ways and means to challenge or to re-open the Kampala compromise. Precedents of political attempts to alter compromise solutions in international law previously agreed upon do exist.

It is, therefore, even more important – and I will come back to this point – that many States start the ratification procedures of the treaty amendments agreed in Kampala as soon as possible. Germany, for example, has announced that it will formally start ratification proceedings quite soon.

Now, where do we go from here? What are the conclusions, what needs to be done to make the criminalisation of aggression as strong and effective as possible?

Needless to say, time will tell. It is not easy to answer these questions. I am, however, grateful for the opportunity to share some personal thoughts with you. I would like to point at some possible fields of action or necessities to indeed achieve the criminalisation of aggression after 2017. After my previous remarks, you will not be surprised about my premise that all possible ways and means must be exhausted to achieve this objective.

With this in mind, I would like to submit the following seven legal policy suggestions for the way forward:

First: We need, at least in principle, sustained efforts or an international awareness campaign to draw public attention of all concerned on the Kampala compromise and the necessity to criminalise aggression. What is needed in the months and years to come is a meaningful and comprehensive dialogue on the implications and consequences of this major step in the development of international criminal law. Even this seminar held today in Oslo is part of this necessary international discourse. Leaders all over the world must understand that we now have carefully defined limitations for the *jus ad bellum*. Political and military leaders but also others, including civil society, are called upon to discuss and reflect which conclusions they may draw from the adoption of the amendments to

- the Rome Statute on the crime of aggression by consensus. They may reflect on which policy should henceforth be followed in the field of the use of military force against other States.
- Second: There is a necessity to explain to the world at large, that we have now, through the Kampala package, a yardstick, a measurement, an agreed standard to determine whether a crime of aggression was committed or not. In this context, it seems important to emphasise the following: if, in a future concrete case of possible aggression committed after 2017, the ICC should have no jurisdiction because, for example, the aggression was committed by a non-State Party or against a non-State Party, this agreed international standard will probably and hopefully remain relevant. Why? Because there are reasonable grounds to hope or to expect that international public opinion, including the media, will use the standards of the Rome Statute on aggression to evaluate the use of military force, which has taken place. They will probably use this standard in order to determine whether a crime of aggression has taken place or not.
- Third: There is an obvious necessity for a comprehensive ratification campaign with the objective that not only the 30 States Parties required but if possible, all or the largest possible existing number of States Parties will have ratified before 2017 the agreed amendment proposals for the crime of aggression in the Rome Statute. We must hope that when the time comes, also for example France and the United Kingdom, both permanent members of the Security Council, will ratify these amendments. Permanent members of the Security Council should understand that the amendments agreed in Kampala are no infringement on the powers of the Security Council but a further strengthening of its authority: the Security Council will, in the future, have the power to refer aggressions as a crime to the International Criminal Court.
- Fourth: It would be positive and welcome if Non-Governmental Organisations (NGOs) and human rights organisations (such as Human Rights Watch, Amnesty International and others) would reconsider, after the Kampala breakthrough, their posi-

- tion. They should henceforth support the incorporation of the crime of aggression in the Statute. It seems evident that aggressive war-making has led in the last century to the most serious violations of human rights through crimes of genocide, crimes against humanity, and war crimes. The absence of war is, in all likelihood, the best guarantee for a life in “freedom of fear” as envisaged by the Universal Declaration of Human Rights.
- Fifth: In general, it seems also to be a worthwhile proposal that civil society may establish a new international NGO or a new international network for the special purpose of making the criminalisation of aggression through the Rome Statute as strong, efficient and credible as possible.
- Sixth: Parliamentarians, public opinion and civil society, in the last instance the citizens of the world, could also assume a quite positive responsibility to prevent, as far as possible, that States Parties to the Rome Statute submit an opt-out declaration pursuant to future article 15*bis* of the Statute. One must hope that to submit such an opt-out declaration will not be too easy, but will mean a high political price for those who want to eliminate ICC jurisdiction over the crime of aggression for the State concerned.
- Seventh: *And last*, the world should use the current chance, this historic opportunity for a new impetus to promote a culture of peace and non-use of force in international relations. As Benjamin Ferencz has often said, “you have to begin very early to educate young minds that war is not glorious. War is an abominable crime, no matter what the cause”. One way of achieving this is to incorporate the reasons and necessity of the common task to repress the waging of aggressive war in the curricula of schools, universities and all kinds of educational institutions.

As Benjamin Ferencz has reminded us: to be sure, criminalising and punishing aggression will not by itself eliminate further wars. In any case, one must hope that after 2017, there will be no necessity to refer possible crimes of aggression to the International Criminal Court. Also, we may never be able to properly assess the deterrent effect of the crimi-

nalisation of aggression. But this is absolutely no reason not to acknowledge the huge step forward made in the *jus ad bellum* domain.

To conclude, let me recall a programmatic announcement which Jackson made in his opening statement before the International Military Tribunal on 21 November 1945 in Nuremberg. In my view, this announcement continues to be of fundamental importance for the crime of aggression even today. You will probably recognise again these well-known sentences, when I quote the following words of Jackson:

But 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 law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.

Now, why are these programmatic, these farsighted sentences even nowadays of such a tremendous importance? Well, because they set out the vision, they set out the promise that international law relating to crimes against peace will be applied in the future in an equal manner *vis-à-vis* all possible aggressors; because they set out the vision and the principle of “Equal law for all, Equality before the Law” with regard to crimes against peace.

The principle of “Equal law for all, Equality before the Law” is a general principle of law recognised by civilized nations within the meaning of article 38(1)(c) of the Statute of the International Court of Justice. Yes, law must apply to everyone equally.

Well, while there are some in this world who want to ignore this principle, who want to push it back, there is, however, the overwhelming majority of men and women throughout this world who actively support and work for full respect of the principle of “Equal law for all, Equality before the Law”.

This gives hope, much hope and encouragement.

As I see it, I have made these remarks not so much as a Judge of the International Criminal Court. I am a citizen of Germany, born during the Second World War, who had the chance to see and understand, myself, the destruction and terrible consequences of the aggressive wars brought about by Adolf Hitler. I also had the chance to understand the messages emanating from Robert H. Jackson and Nuremberg. I believe profoundly

that we are closer than ever to bringing Jackson's promise and wishes to reality in today's world – not only for ourselves, but for future generations.

This day must come. It will. If I may, I would like to work a little bit longer for this hope.





## FICHL PUBLICATION SERIES

### *Publication Series Co-Editors*

Mr. Morten Bergsmo  
Mr. Nobuo Hayashi

### *Editor*

Ms. Wui Ling Cheah

### *Editorial Assistants*

Mr. Alf Butenschøn Skre, Senior Editorial Assistant  
Mr. Mats Benestad  
Ms. Annika Jones  
Ms. Aleksandra Sidorenko  
Ms. Audrey Wong

### *Principal Scientific Advisers of the Torkel Opsahl Academic EPublisher*

Professor Andreas Zimmermann, Principal Scientific Adviser for Public International Law  
Professor Kai Ambos, Principal Scientific Adviser for International Criminal Law  
Dr.h.c. Asbjørn Eide, Principal Scientific Adviser for International Human Rights Law

### *Editorial Board*

Dr. Xabier Agirre, International Criminal Court  
Dr. Claudia Angermaier, Austrian judiciary  
Dr. Markus Benzing, Freshfields Bruckhaus Deringer, Frankfurt  
Ms. Margaret deGuzman, Temple University  
Ms. Cecilie Hellestveit, Norwegian Centre for Human Rights  
Dr. Pablo Kalmanovitz, Columbia University  
Mr. Sangkul Kim, Korea University  
Dr. Jann K. Kleffner, Swedish National Defence College  
Mr. Kjetil Mujezinovic Larsen, Norwegian Centre for Human Rights  
Mr. Salím A. Nakhjavání, University of Cape Town  
Dr. Hector Olasolo, University of Utrecht  
Ms. Maria Paula Saffon, Columbia University  
Ms. Torunn Salomonsen, Norwegian Ministry of Justice  
Dr. Carsten Stahn, Leiden University  
Dr. Jo Stigen, University of Oslo  
Ms. Philippa Webb, Legal Consultant

### *Advisory Board*

Mr. Hiram Abtahi, Legal Adviser of the Presidency of the International Criminal Court  
Professor Kai Ambos, Georg-August-Universität Göttingen and State Court Göttingen  
Professor Emeritus M. Cherif Bassiouni, DePaul University  
Professor Jon Bing, University of Oslo

## Is It Possible to Prevent or Punish Future Aggressive War-Making?

---

Mr. Gilbert Bitti, International Criminal Court  
Research Professor J. Peter Burgess, PRIO  
Judge Advocate General Arne Willy Dahl, Norway  
Professor Emeritus Yoram Dinstein, Tel Aviv University  
Professor Jon Elster, Columbia University and Collège de France  
Mr. James A. Goldston, Open Society Institute Justice Initiative  
Mr. Richard Goldstone, former Chief Prosecutor,  
International Criminal Tribunal for the former Yugoslavia  
Judge Hanne Sophie Greve, Gulating Court of Appeal, formerly  
European Court of Human Rights  
Dr. Fabricio Guarigli, Senior Appeals Counsel, Office of the Prosecutor,  
International Criminal Court  
Dr. Franz Guenther, Ludwig-Maximilians-Universität  
Mr. Christopher Keith Hall, Amnesty International  
Professor Emeritus Frits Kalshoven, Leiden University  
Judge Hans-Peter Kaul, International Criminal Court  
Judge Erkki Kourula, International Criminal Court  
Dr. Claus Kress, Director of the Institute for Criminal Law and Criminal Procedure,  
Cologne University  
Professor David Luban, Georgetown University  
Mr. Juan E. Méndez, Special Adviser to the ICC Prosecutor on Crime Prevention, former  
President, ICTJ  
Dr. Alexander Muller, Director, The Hague Institute for the Internationalisation of Law  
Judge Erik Møse, Norwegian Supreme Court, former President,  
International Criminal Tribunal for Rwanda  
Dr. Gro Nystuen, University of Oslo and Norwegian Defence Command and Staff College  
Mr. William Pace, Convener, Coalition for the International Criminal Court  
Ms. Jelena Pejić, International Committee of the Red Cross  
Mr. Robert Petit, former International Co-Prosecutor,  
Extraordinary Chambers in the Courts of Cambodia  
Maj-Gen (ret'd) Anthony P.V. Rogers, Cambridge University  
Professor William A. Schabas, National University of Ireland, Galway  
Professor James Silk, Yale Law School  
Professor Emeritus Otto Triffterer, Salzburg University  
Professor Marcos Zilli, University of Sao Paulo



FICHL Occasional Paper Series No. 1 (2011)

## **Is It Possible to Prevent or Punish Future Aggressive War-Making?**

2011 LI Haopei Lecture

Judge Dr. jur. h. c. Hans-Peter Kaul

The FICHL has established the LI Haopei Lecture Series to honour the service to international law of the late Judge LI Haopei (1906-1997), a distinguished Chinese jurist, diplomat and academic. He was a leading authority on international law. From 1963 to 1993, he was concurrently Professor of International Law at Peking University and Legal Advisor to the Ministry of Foreign Affairs of China. From 1993 to 1997, he was a Member of the Permanent Court of Arbitration. In the same period, he served as Judge at the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia (ICTY).

Judge Dr. jur. h. c. Hans-Peter Kaul presented the 2011 LI Haopei Lecture in Oslo, followed by comments by Judge LIU Daqun. This Occasional Paper reproduces Judge Kaul's lecture. Speaking on the topic 'Is It Possible to Prevent or Punish Future Aggressive War-Making?', Judge Kaul addresses three main issues in his paper: (1) the main factors leading to the breakthrough in the negotiations on the criminalization of aggression at the ICC Review Conference in Kampala in 2010; (2) war and peace in the world of 2011; and (3) seven suggestions for the way forward to criminalize aggression.

ISBN 978-82-93081-37-1

**FICHL**



Forum for  
International Criminal  
and Humanitarian Law

**Forum for International Criminal and Humanitarian Law**

E-mail: [info@fichl.org](mailto:info@fichl.org)

[www.fichl.org](http://www.fichl.org)