

THE BLANK-PROSE CRIME OF AGGRESSION

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ABSTRACT

On February 13, 2009, a panel set up under the treaty establishing the International Criminal Court announced that it had finally reached agreement on a draft definition of the crime of aggression. I suggest in this article that the proposed definition would constitute a crime in blank prose, one that would, in its disregard of the international principle of legality and related constitutional prohibitions against vague and retroactive criminal punishment, run afoul of basic international human rights norms and U.S. domestic guarantees of due process.

Repeated efforts to define aggression have foundered throughout the 20th century, and for good reason: no consensus existed then or now as to what the term means, at least not at the level of specificity needed to impose individual criminal liability. Prosecution under the ambiguous definition that is proposed would turn upon factors that the law does not delineate, rendering criminal liability unpredictable and undermining the law's integrity. The definition is, moreover, so broad in its potential reach that, had it been effect for the last several decades, every U.S. president since John F. Kennedy, hundreds of American legislators and military leaders, as well as innumerable foreign military and political leaders could have been subjected to prosecution. These difficulties would be magnified by including the roulette wheel that is the United Nations Security Council in the decision to prosecute, as some have urged.

Given prevailing legal standards and enduring political realities, the effort to criminalize aggression along the proposed lines should be therefore dropped.