

US Leaders Can Now Be Prosecuted For Illegal War



Noah Weisbord — Associate professor of law at Queen's University

War is gathering around the world, and autocratic leaders are undermining the legal checks on their discretion to launch attacks abroad. With the rule of law under threat, the International Criminal Court recently defined and [activated for prosecution](#) a new crime called the “crime of aggression.” The crime of aggression — leadership responsibility for planning, preparing, initiating or waging illegal war — has begun to permeate international, regional and national legal systems around the world. But in an age of drones, cyberattacks, insurgents and autocrats, is it too little, too late?

Noah Weisbord — an associate professor of law at Queen's University and the author of [The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats](#) — served on the International Criminal Court's working group that drafted the crime of aggression.

In the exclusive *Truthout* interview that follows, Weisbord discusses the legacy of the Nuremberg trials and the ways in which Donald Trump may have already violated international law by engaging in crimes of aggression.

C.J. Polychroniou: The Nuremberg trials, held between 1945 and 1949, represent

a milestone in the development of international law. Yet, while many serious war crimes have been committed since the end of World War II, we have not seen war crimes tribunals taking place under similar ideal circumstances as those held in the Bavarian city of Nuremberg. In that context, what has been the legacy of the Nuremberg trials?

Noah Weisbord: The Nuremberg legacy is really about subjecting individual leaders to the rule of law in international affairs. Individual criminal responsibility is a grave threat to authoritarian leaders, which is why they do all they can to weaken and delegitimize the International Criminal Court [ICC].

Nuremberg prosecutor Robert Jackson was handpicked from the United States Supreme Court to work with English, French and Soviet counterparts to design the Nuremberg Tribunal and serve as its lead prosecutor. Jackson intended Nuremberg to serve as a model for a permanent international criminal court with worldwide jurisdiction, including over U.S. leaders. But the Cold War set in. The U.S. and the Soviet Union couldn't agree on the design of an international criminal court, nor a prosecutable definition of Nuremberg's "supreme crime," the crime against peace — i.e., planning, preparing, initiating or waging a war of aggression — which is called the crime of aggression today.

The superpowers vied to design international laws that would serve as weapons against each other, stymying each other's military advantages. During the Cold War, Nuremberg prosecutor Ben Ferencz, a key character in my new book, kept the dream alive. Ferencz advocated for an international criminal court and a prosecutable crime of aggression. Ferencz was wrongly overlooked as naïve and idealistic during this period.

But the end of the Cold War saw the rebirth of the Nuremberg idea, which began to spread worldwide: in the Yugoslav Tribunal; Rwanda Tribunal; Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; Special Tribunal for Lebanon; Special Panels of the Dili District Court; War Crimes Chamber of the Court of Bosnia and Herzegovina; Special Jurisdiction for Peace in Colombia; the Canadian, German, Belgian and French criminal courts; and grassroots "gacaca" justice in Rwanda.

In 1998, Jackson's dream was realized when states convened a multilateral conference in Rome and created an international criminal court with worldwide

jurisdiction. The U.S. tried to insulate its military and political leaders from prosecution and was only partially successful, leaving avenues open for the prosecution of U.S. leaders who commit genocide, crimes against humanity or war crimes on the territory of ICC states.

International criminal justice is not located in one institution in The Hague that can be toppled like the League of Nations. The Nuremberg precedent has permeated international, regional and domestic institutions and is buttressed by civil society groups. Specialized private organizations such as the Commission for International Justice and Accountability, founded by Canadian soldier and war crimes investigator Bill Wiley, have been successfully smuggling evidence of atrocities out of Syria, and leakers and hackers around the world have sophisticated tools to gather evidence of aggressive plans by warmongers in the U.S., Iran, and elsewhere.

Nuremberg's larger legacy is an international "justice cascade," as human rights scholar Kathryn Sikkink, calls it. International justice is better conceived of as a social movement than a courthouse like the one in Nuremberg where the top Nazis were tried after World War II.

Why have international legal systems since Nuremberg been disproportionately used to indict leaders outside of the U.S. and Europe, and what problems does this raise for creating a truly just global legal system?

The argument that international justice is another imperialist institution is self-defeating. Certainly, it has proven to be frustratingly difficult to prosecute leaders of powerful North American and European states suspected of international crimes, such as U.S. leaders implicated in the deliberate, systematic torture of detainees in Afghanistan....

The answer is not to attack the law as illegitimate — this further undermines existing checks and balances on the powerful — but to strengthen international and domestic law so that powerful people are held to account. International justice is not a courthouse in The Hague, it's a social movement dedicated to strengthening the law and holding powerful leaders to account for crimes against the most vulnerable.

I think it's likely that the first aggression cases of powerful Western leaders will be self-referrals, like the first ICC cases for war crimes and crimes against

humanity were. The government of the Democratic Republic of Congo and Uganda referred their own territories to the ICC to investigate crimes by all sides in an effort to forestall endless cycles of violence and reprisals. Imagine President Cory Booker, Kamala Harris, Bernie Sanders or Elizabeth Warren referring crimes by the Trump administration to the ICC. Perhaps even better, imagine Congress incorporating these crimes into domestic U.S. law and U.S. courts prosecuting U.S. leaders for violations.

In your book, The Crime of Aggression, you argue that recent US presidents, from George H. W. Bush to Donald Trump, had to take into account, although in their own way, the post-World War II international legal order in deploying force abroad. But there is evidence that all of the abovementioned U.S. leaders and their armed forces have committed international crimes as defined by the Charter of the International Military Tribunal at Nuremberg in 1945. Doesn't this challenge the relevance of international law?

All world leaders, including these, acknowledge the post-World War II legal basis for waging war. They direct their lawyers to justify military action by its terms. What differs among leaders are their strategies in contending with the law, which is as distinct and demanding a battlefield as are desert, jungle or urban terrains.

Leaders, powerful or not, must negotiate the legal terrain in order to wage war, including persuading the population of the justice of the war, persuading allies, persuading domestic and international courts, purchasing weapons, negotiating leases on foreign bases. Law is not simply an effective formal constraint on power. It can slow leaders or assist their military goals.

Presidents Bush, Obama and Trump have each deployed military force abroad, killing men, women and [children](#). The military operations they ordered have maimed and crippled innocent people and destroyed entire communities abroad; then they have been celebrated at home for their patriotism. They have authorized torture in a vast network of secret interrogation prisons, OK'd the bombing of weddings by remote control drone from air-conditioned offices in the U.S., and armed foreign despots subjugating their own people.

It is easy to forget that international law is deeply conservative, based on the agreements national leaders strike to restrict their own uses of military force at home and abroad. A number of the killings committed by Presidents Bush, Obama

and Trump do not amount to violations of international law, since they would qualify under the laws of war as “military necessity” and the victims as “collateral damage.” A great deal of abhorrent wartime violence is permissible under international law. In a global system where world leaders were not regulating themselves and each other, much of this violence would surely be defined as criminal.

There is publicly available evidence that Bush administration leaders, especially, were implicated in international crimes, including in [an important report by the U.S. Senate](#). President Obama’s drone war outside existing battlefields was [legally dubious](#). We have yet to learn about the excesses of the Trump administration, but there is evidence that Trump is undermining important checks and balances on drone strikes put in place by Obama in his second term. It is wrong to draw a false equivalency among these leaders. If all the evidence were unearthed, I suspect we would see important differences when it comes to the commission of international crimes.

Can you specify in what ways Donald Trump has already violated international law by engaging in crimes of aggression?

Trump almost brought the U.S. to war against Iran last month when he ordered U.S. jets to bomb sites in Iran in response to Iran’s Revolutionary Guard Corps shooting down an unmanned U.S. surveillance drone. Trump called off the strike 10 minutes before impact because he decided last minute that an estimated 150 deaths were not proportional to the downing of an unmanned drone. He failed to mention the carnage that Iranian Supreme Leader Ali Khamenei and President Hassan Rouhani, along with Hezbollah, Hamas and other proxies would unleash on U.S. forces, allies and perceived enemies worldwide had he bombed Iran.

In April 2017, in response to a brutal chemical attack against civilians in Syria, Trump ordered the launch of a barrage of 59 Tomahawk cruise missiles from warships at Syria’s al-Shayrat airfield, the apparent origin of the attack. This was a hasty unilateral decision without proper interagency process, or congressional approval, or consultation with allies, or Security Council authorization, or any legal rationale. Trump opted not only to ignore international law, but to ignore Congress as well and rely solely on presidential power.

Republican critics praised him. Democratic adversaries backed his actions. The

United Kingdom, Canada, Israel, Turkey and Jordan were on [its] side. Trump's attacks on international law caused blowback, but Trump learned that when he advanced their agendas, allies and enemies alike applauded his onslaught on the rule of law and praised his accumulation of authoritarian power.

To make a successful aggression case, the ICC prosecutor must prove a number of things. He or she needs to prove that there was an armed attack by one state against another — for example, bombardment, blockade, attacking the armed forces of another state, sending proxies to attack another state. The attack must amount to a “manifest” violation of the U.N. Charter. For the violation to be “manifest,” its character, gravity and scale must surpass legal thresholds — a single shot over a border would not qualify, but the 2003 U.S.-led invasion of Iraq would. Next, the defendant must be a leader — a person with effective control over the military or political action of a state. U.N. Security Council-authorized military operations, such as U.S. action in Afghanistan after 9/11, don't qualify as aggression. Nor do defensive operations in response to an armed attack that are necessary and proportional.

Trump's Tomahawk barrage in Syria was neither authorized nor defensive; it was a reprisal, and therefore illegal under international law.

In general, are you optimistic about the quest of justice in an age of drones and political authoritarianism?

As always, cynics continue to deride the attempts of “dreamers” to make international law more just and effective, confidently declaring these naïve efforts will accomplish nothing or make matters worse. As Rebecca Solnit, anthropologist of cynicism, observes, cynics take pride “in not being fooled and not being foolish,” but their dismissive attitude that it's all corrupt “pretends to excoriate what it ultimately excuses.”

My hope is that the post-Cold War modifications to the international order that refocus international law on leaders instead of entire states and strengthen judicial oversight of executive power will help make the law more just and effective. My worry is that these changes to the status quo are too little, too late and that autocratic leaders will successfully turn frightened populations against judicial checks and balances.

The recently activated crime of aggression, for example, has the potential to

promote peace and the rule of law, protect human rights and prevent suffering, protect soldiers from being killed or maimed in illegal wars, provide protection against aggression by another state, signal a renewed commitment to peaceful resolution of disputes, complete the ICC Statute and make the ICC Statute fully compatible with the UN Charter.

The major problem is enforcement, but the end of the Cold War has led to new potential for arrests. Specifically, the proliferation of overlapping spheres of local, national, regional, international and transnational police authority. New purveyors of nonstate military force such as private contractors have created new enforcement possibilities. States can arrest perpetrators on their territory, peacekeepers can arrest, and private contractors have made spectacular arrests of war criminals abroad. I have an exciting chapter on the successful arrest of leaders for international crimes in my new book.

The crime of aggression will not put an end to war. It is something more modest: a sensible step in the right direction, a memorial to the victims of a violent century and a reminder of humanity's higher aspiration that only our reason can save us from ourselves.

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