

The Crime of Aggression before the International Criminal Court: Introduction to the Symposium

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On 17 July 2018,¹ on the 20th anniversary of the adoption of its Statute, the jurisdiction of International Criminal Court (ICC) over the crime of aggression became operational. This was the first time in 70 years, since the Nuremberg and Tokyo Tribunals, that an international tribunal would possess the possibility of prosecuting leaders for the ‘supreme international crime’, the crime against peace. Leaders allegedly responsible for planning or executing an act of aggression that by its character, gravity and scale constitutes a manifest violation of the United Nations Charter are to be called to account before an international criminal jurisdiction. It took a long time to get there, for sure, and it also took quite a lot of work. The decision to include aggression among the crimes within the jurisdiction of the ICC was taken in Rome in 1998 but that decision amounted to nothing more than a placeholder for more difficult decisions to come regarding the definition of the crime and the conditions for the exercise of jurisdiction over it. Amazingly, those decisions were made in the early years of the Court, in Princeton, and then momentarily late in the night, in June 2010 in Kampala at the first Review Conference of the Statute of the ICC. However, states again got cold feet and postponed activation of ICC jurisdiction for at least seven years. Eventually, the decision was made, again late at night and after marathon negotiations, in New York in December 2017, to activate the Court’s jurisdiction over the crime of aggression, with one final delay of just a few months, and this time without requiring a further decision by states.²

And now that we are there, it is time to consider the implications of the addition of the crime of aggression to the active jurisdiction of the Court. In 2010, around the time when the parties to the ICC Statute met in Kampala to adopt amendments to the Statute regarding ICC jurisdiction over the crime, this Journal published a symposium issue dealing with the definition of the crime.³ That symposium featured four articles examining the impact of the codification of the crime of aggression on the international legal system and on the International Criminal Court itself.

In the present symposium all the contributions examine the underlying reason for the criminalization of aggression, with some questioning its wisdom. They then, variously, consider some historical, conceptual, political, and doctrinal implications of criminalization of aggression at the ICC. The contributions seek to understand the implications of that essential rationale of the crime for the evolving understanding of project of international criminal justice; for the soldiers and victim’s rights; for the transposition of contested political

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¹ The very day on which this Introduction was finalized for the Journal.

² For a masterful overview of the story of how the ICC came to acquire jurisdiction over the crime of aggression, see Kreß, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’, (2018) 16 *Journal of Int. Crim. Just.* 1.

³ (2010) *EJIL* Vol. 20, no. 4

arguments into legal and judicial claims; and for jurisdiction over nationals of states that do not accept the Kampala amendments.

Mégret situates the discussion by taking us through the historical oscillation between peace and justice.⁴ He shows convincingly how the original focus on crimes against peace of the interwar period, which reached its apogee with the IMT after the end of World War II, almost immediately subsided to eventually give way to an almost 'relentless' focus on atrocity crimes and the rise of criminal judicial institutions to deal with them. A clear shift then from peace through justice to no peace without justice. The criminalisation of aggression could be seen as re-shifting the focus back to peace—but does it? Mégret provocatively argues that the whole project of international criminal justice, with its relentless focus on atrocity crimes, might in fact need a lack of peace, it might need war, aggression, to operate effectively, so that the criminalisation of aggression does not re-shift the focus but rather demonstrates, with its pernicious debate on the wisdom and the exact parameters of criminalisation, how difficult it may be to bring crimes against peace back into the frame. As he notes, there may well be atrocities without aggression, but 'aggression' can also be resorted to to stop atrocities. With atrocity crimes clearly within the *jus in bello*, aggression steps into the murky waters of the *jus ad bellum*, even if in a limited manner, and threatens to undermine the prohibition of the use of force, as much as it demonstrates our re-conceptualisation of international peace and security.

Dannenbaum picks up the baton, in a way, by questioning to some extent the actual *jus ad bellum* 'credentials' of the crime of aggression.⁵ He urges a shift from the macro to the micro level, so as to understand properly what the core wrong, and the core victims, of the crime of aggression actually are. Dannenbaum describes a proper understanding of the core wrong of the crime aggression (as opposed to the act of aggression) not as the interstate macro-wrong against sovereignty, but rather as the accumulated micro-wrongs of the unlawful killing and maiming that aggression entails. He thus correspondingly identifies those combatants and civilians not protected by the *jus in bello* in the victim state as the core victims of the crime of aggression. While this has implications for a right of soldiers to disobey orders to violate the *jus ad bellum*, as well as for participation of victims in the proceedings before the ICC, which Dannenbaum expertly sets out, one may even argue that the implications run deeper. Indeed, it may be thought that only such a reimagining (or proper imagining) of the crime of aggression will allow the crime to be properly prosecuted before the Court. Focus on the macro-wrong regarding sovereignty is not a proper focus for an international criminal court, and it is properly situated within the area of state responsibility.

Tom Ruys⁶ and Marieke de Hoon,⁷ in their separate ways, reinforce this fundamental anxiety of Dannenbaum. Ruys focuses on the potential impact of litigation on the crime of aggression before the International Criminal Court on the primary norms regarding the prohibition of recourse to force in international law. Much less than having a chilling effect on unilateral recourses to force, in particular 'humanitarian' intervention, Ruys argues that the requirement

⁴ Mégret, 'International Criminal Justice as a Peace Project', in this issue at XX.

⁵ Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights', in this issue at XX.

⁶ Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC', in this issue at XX.

⁷ De Hoon, 'The Crime of Aggression's Show Trial Catch-22', in this issue at XX.

to qualify an act of aggression as a 'manifest' violation of the UN Charter for the purposes of establishing the crime of aggression will have the effect of undermining the majority position regarding illegality of such interventions, whether 'genuinely' humanitarian or otherwise. He notes that, for the general public, the fact that a unilateral use of force is not a manifest violation and thus does not render individuals criminally responsible will translate as if it were no violation at all—no matter that the use of force will even then remain illegal, and engage state responsibility. As if to corroborate this position, de Hoon in fact takes exactly this position in her contribution by considering uses of force that do not amount to aggression as potentially illegal but 'legitimate'. Ruys demonstrates how the ICC Judges and Prosecutor will have to enter very difficult debates about extra-Charter criteria of 'genuineness' of a 'humanitarian' intervention and will have to make decisions that affect the scope of primary obligations of states with respect to the use of force. And indeed not only with respect to humanitarian intervention but also with respect to other difficult areas, such as anticipatory or pre-emptive use of force, protection of nationals abroad and self-defence against non-state actors; matters that even the principal judicial organ of the United Nations, the International Court of Justice, has broached only tangentially, and with extreme caution.

In her contribution de Hoon picks up this line of thought, by taking it to its logical conclusion from the perspective of actual criminal trials on aggression. The fact that such hotly contested matters of the scope and application of primary obligations enter the fray of an international criminal court will inevitably lead to the danger of show trials – or at least to the threat of relevant trials being characterised by some as show trials. She explains how the only option for leaders accused of aggression before the ICC will be to engage in a trial of rupture, not responding to the accusation but accusing the Court and the whole framework of international criminal justice for politicisation and unfairness. It is not that the ICC has not suffered from such accusations already. Imagine what will happen when it will have to clarify matters on which states so fundamentally disagree in the context of a criminal trial of leaders for aggression.

Our own modest contribution seeks to determine the scope of jurisdiction of the International Criminal Court over the crime of aggression.⁸ It is a technical contribution discussing whether the ICC will have jurisdiction over nationals of ICC parties who have not ratified the Kampala Amendments on Aggression, for a crime of aggression allegedly committed in the territory of an ICC party that has ratified the relevant Amendments. That 'camp consent', adopting a narrow view of the jurisdiction of the Court, prevailed over 'camp protection', which espoused the wide/broad view, in the final stages of decision-making regarding activation of the crime of aggression, is indicative of the concerns with the powers now resting with the International Criminal Court. In our contribution we explain why we think the narrow position is the correct position in the law as it stands, particularly by application of the general international law of treaties. But what the contribution also highlights, even if implicitly, is the quintessentially crucial aspect of consensual jurisdiction, in particular where the matter can be seen as part of an interstate dispute regarding the legality of the use of force. It is noteworthy that while the ICC may assume jurisdiction over a national of a non-party to the Statute for crimes allegedly committed in the territory of a party to the Statute, when the crimes alleged are war crimes, crimes against humanity, or genocide, it may not, we argue, do so when it comes to allegations

⁸ Akande & Tzanakopoulos, 'Treaty Law and ICC Jurisdiction Over the Crime of Aggression', in this issue at XX.

of the crime of aggression. And indeed it may not even do so as between parties to the Statute, unless both have ratified the Kampala Amendments on Aggression and have thus opted into its jurisdiction. This would bring the situation closer to the jurisdictional requirements prevalent in the ICJ and other courts entrusted with resolving interstate disputes.

These contributions, much more elaborately, though at times only implicitly, express some of the anxieties of international lawyers of all ilks over the criminalisation of aggression and the activation of the jurisdiction of the International Criminal Court over it. What will, and what should, the Court do when the crime of aggression finally comes before it? However, they also deal with the question of over whom the Court will have jurisdiction with regard to aggression. Finally, they address the implications that the criminalization of aggression will have for other areas of international law even if the crime is never prosecuted by the Court. Perhaps the whole point of criminalising aggression was precisely to enhance deterrence rather than to guarantee punishment. Nevertheless, the contributions show that the deterrence, even if achieved, will not be the only consequence of having the crime of aggression on the books.

The papers included in this symposium were first presented at a workshop convened in Oxford in July 2016 by the Individualisation of War Project (a European Research Council funded project of the European University Institute and the Oxford Institute for Ethics, Law and Armed Conflict) and the Oxford Martin Human Rights for Future Generations Programme. Thus, the bulk of papers were written and finalized before the decision was made, in December 2017, by the ICC Assembly of States to activate the ICC jurisdiction over the crime of aggression.